May 11, 2022

Ms. Jacqueline Stevens
601 University Place, Political Science, 2nd Floor
Evanston IL, 60208
Dear Ms. Stevens:
This letter is in response to your U.S. General Services Administration (GSA) Freedom of Information Act (FOIA) request number (GSA-2021-001513), submitted on August 16, 2021, in which you requested the following:
"I am seeking all public comments and respective agency responses to FAR 15.404-4 Profits (https://www.acquisition.gov/far/15.404-4) and the following relevant Federal Acquisition Regulation (FAR) amendments.

The public comments and agency responses I am seeking are for the following:

1. 61 FR 48380 (https://www.govinfo.gov/content/pkg/FR-1996-09-12/pdf/96-23392.pdf) from September 12, 1996.
2. 61 FR 52998 (https://www.govinfo.gov/content/pkg/FR-1996-10-09/pdf/96-25941.pdf) from October 9, 1996.
3. 61 FR 57622 (https://www.govinfo.gov/content/pkg/FR-1996-11-07/pdf/96-28635.pdf) from November 7, 1996.
4. 62 FR 26640 (https://www.govinfo.gov/content/pkg/FR-1997-05-14/pdf/97-12337.pdf) from May 15, 1997.
5. 62 FR 51224 (https://www.govinfo.gov/content/pkg/FR-1997-09-30/pdf/97-25666.pdf) from September 30, 1997.
6. 69 FR 25274 (https://www.govinfo.gov/content/pkg/FR-2004-05-05/pdf/04-9752.pdf) from May 5, 2004.
7. 74 FR 39262 (https://www.govinfo.gov/content/pkg/FR-2009-08-06/pdf/E9-18799.pdf) from August 6, 2009.
8. 77 FR 57949 (https://www.govinfo.gov/content/pkg/FR-2012-09-18/pdf/2012-21874.pdf) from September 18, 2012.
9. 77 FR 60343 (https://www.govinfo.gov/content/pkg/FR-2012-10-03/pdf/C1-2012-21874.pdf) from October 3, 2012.

Please note that I submitted a separate and distinct request for similar documents. These requests should be processed independently."

Enclosed please find the documents responsive to your request. Provided below is a table identifying what responsive document(s) applies to each item of your request.

Also, please note, after a thorough search, no comment documents could be found for 69 FR 25274.

| Request <br> Item \# | Request Item | File Name |
| :---: | :--- | :--- |
| 1 | 61 FR 48380 from September 12, 1996. | FAR Case 95-029 |
| 2 | 61 FR 52998 from October 9, 1996. | FAR Case 95-029 <br> FAR Case 96-303 |
| 3 | 61 FR 57622 from November 7, 1996. | FAR Case 95-029 |
| 4 | 62 FR 26640 from May 15, 1997. | FAR Case 95-029 |
| 5 | 62 FR 51224 from September 30, 1997. | FAR Case 95-029 |
| 6 | 69 FR 25274 from May 5, 2004. | No comment documents found |
| 7 | 74 FR 39262 from August 6, 2009. | FAR Case 2008-011 |
| 8 | 77 FR 57949 from September 18, 2012. | FAR Case 2011-018 |
| 9 | 77 FR 60343 from October 3, 2012. | FAR Case 2011-018 |
| 7 |  |  |

In processing your request, GSA has withheld the cell phone numbers, email addresses and signatures of private individuals and sensitive email addresses pursuant to the FOIA, 5 U.S.C. §552(b)(6). This was done because public disclosure of this information would constitute a clearly unwarranted invasion of personal privacy.

As we have redacted information referenced in the above paragraph(s) with the aforementioned FOIA exemption, this technically constitutes a partial denial of your FOIA request. You have the right to appeal the denial of the information being withheld. You may submit an appeal online at the following link (https://www.foiaonline.gov/foiaonline/action/public/home) or in writing to the following address:

> U.S. General Services Administration
> FOIA Requester Service Center (LG)
> 1800 F Street, NW Washington, DC 20405

Your appeal must be postmarked or electronically transmitted within 90 days of the date of the response to your request. In addition, your appeal must contain a brief statement of the reasons why the requested information should be released. Please enclose a copy of your initial request and this denial. Both the appeal letter and envelope or
online appeal submission should be prominently marked, "Freedom of Information Act Appeal."

This completes our action on this FOIA request. Should you have any questions, please contact the Regulatory Secretariat by email at GSARegSec@gsa.gov. You may also contact the GSA FOIA Public Liaison, Mr. Seth Greenfeld at (202) 501-4560 or by email at seth.greenfeld@gsa.gov for any additional assistance.

Additionally, you may contact the Office of Government Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, email at ogis@nara.gov; telephone at (202) 7415770; toll free at (877) 684-6448; or facsimile at (202) 741-5769.

Sincerely,

## Tracis Lewis

Travis Lewis
FOIA Program Manager
Office of the General Counsel
General Services Administration
Enclosure(s)


## Part IV

## Department of Defense General Services Administration <br> National Aeronautics and Space Administration

48 CFR Chapter 1
Federal Acquisition Regulations (FAR); Final Rules

## DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 12, 15, 19, 52, and 53
[FAC 97-07; FAR Case 97-004B]

## RIN 9000-AH59

Federal Acquisition Regulation; Reform of Affirmative Action in Federal Procurement
agency: Department of Defense (DoD). General Services Administration (GSA). and National Aeronautics and Space Administration (NASA).
ACTION: Interim rule with request for cornment.
summary: The Department of Defense. the General Services Administration. and the National Aeronautics and Space Administration have agreed to issue Federal Acquisition Circular 97-07, as an interim rule to make amendments to the Federal Acquisition Regulation (FAR) concerning programs for small disadvantaged business (SDB) concerns. These amendments conform to a Department of Justice (DoJ) proposal to reform affirmative action in Federal procurement. Doj's proposal is designed to ensure compliance with the constitutional standards established by the Supreme Court in Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995). This regulatory action was subject to Office of Management and Budget review under Executive Order 12866, dated September 30. 1993. This is a major rule under 5 U.S.C. 804. DATES: Effective Date: January 1, 1999.

Applicability Date: The policies, provisions, and clauses of this interim rule are effective for all solicitations issued on or after January 1. 1999.

Comment Date: Comments should be submitted to the FAR Secretariat at the address shown below on or before August 31, 1998 to be considered in the formulation of a final rule.
ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR
Secretariat (MVR), 1800 F Street. NW. Room 4035, Attn: Ms. Laurie Duarte. Washington, DC 20405.

E-Mail comments submitted over the Internet should be addressed to: farcase.97-004B@gsa.gov.

Please cite FAC 97-07, FAR case 97004 B in all correspondence related to this case.

## FOR FURTHER INFORMATION CONTACT:

Ms. Victoria Moss, Procurement Analyst, Federal Acquisition Policy Division, General Services
Administration. 1800 F Street NW. Washington DC 20405. Telephone: (202) 501-4764, or Mr. Mike Sipple. Procurement Analyst, Contract Policy and Administration, Director, Defense Procurement. Department of Defense, 3060 Defense Pentagon. Washington DC 20301-3060. Telephone: (703) 6958567.

For general information call the FAR Secretariat at (202) 501-4755.

## SUPPLEMENTARY INFORMATION:

## A. Background

In Adarand, the Supreme Court extended strict judicial scrutiny to Federal affirmative action programs that use racial or ethnic criteria as a basis for decisionmaking. In procurement, this means that any use of race in the decision to award a contract is subject to strict scrutiny. Under strict scrutiny. any Federal programs that make race a basis for contract decisionmaking must be narrowly tailored to serve a compelling Government interest.

Doj developed a proposed structure to reform affirmative action in Federal procurement designed to ensure compliance with the constitutional standards established by the Supreme Court in Adarand. The DoJ proposal was published for public notice and invitation for comments (61 FR 26042. May 23, 1996). The DoJ model is being inplemented in several parts: revisions to the FAR and the FAR supplements: Small Business Administration (SBA) regulations: and procurement mechanisms and applicable factors (percentages) determined by the Department of Commerce. The SBA regulations were published for public comment on August 14. 1997 (62 FR 23584). Requirements related to certification, protests, and appeals and other issues are also addressed in SBA's rules. On May 9, 1997. proposed amendments to the FAR, based on the DoJ Model, were published as a proposed rule in the Federal Register (62 FR 25786). An interim FAR rule that implemented the price evaluation adjustment for SDB concerns was previously issued in the Federal Register on June 30, 1998. This interim rule implements the evaluation factor or subfactor for SDB participation, incentive subcontracting with SDB concerns, and other coverage that is not directly related to the price evaluation adjustment for SDB concerns.

## B. Regulatory Flexibility Act

These changes may have a significant economic impact on a substantial
number of small entities within the meaning of the Regulatory Flexibility Act. 5 U.S.C. 601 et seq., because through the rule small business concerns may be provided benefits in Federal contracting. An Initial Regulatory Flexibility Analysis (IRFA) was submitted to the Chief Counsel for Advocacy of the Small Business Administration. A summary of the IRFA was published along with the FAR proposed rule in the Federal Register at 62 FR 25786, May 9. 1997. The economic impact associated with certification and associated costs. as well as other program requirements addressed in the SBA's changes to 13 CFR Parts 121, 124, and 134 have been addressed in analyses prepared by the SBA. The following information is provided to update the IRFA related to this FAR interim rule:
This interim rule would establish in the FAR two procurement mechanisms benefiting small disadvantaged businesses (SDBs). The first of these meclaanisms is a source selection evaluation factor or subfactor for planned SDB participation. primarily at the subcontract level. in the performance of a contract in the SIC Major Groups as determined by the Department of Commerce. This evaluation factor or subfactor would be used in competitive. negotiated acquisitions expected to exceed $\$ 500,000$ ( $\$ 1.000 .000$ for construction). This mechanism would not be applied to certain major categories of acquisition. including. for example, small business set-asides, 8 (a) acquisitions, and acquisitions in which source selection is based on a cost or price competition between proposals meeting the Government's minimum requirements.
The second mechanism provides for a monetary incentive for subcontracting with SDBs. Contracts resulting from solicitations in which SDB participation is evaluated may provide for a monetary payment to those prime contractors that meet specified targets for SDB participation as subcontractors in the SIC Major Groups as determined by the Department of Commerce.

The rule would also add to the FAR a requirement to evaluate the past performance of offerors in complying with targets for SDB participation and subcontracting plan goals for SDBs whenever past performance is to be evaluated.
The main impact of the rule is expected to be on firms seeking to obtain contracts from Federal government agencies and SDBs seeking subcontracts under those prime contracts. The best available estimate of the number of such firms is 30.000 . The basis for this estimate is the IRFA prepared by SBA addressing the changes to 13 CFR Parts 121. 124, and 134. The anticipated costs for certification and protest and appeal procedures are adclressed in SBA's IRFA. The primary impact of this interim rule is expected to be the increase in contract awards to qualified firms and a corresponding decrease in contract awards to firms that are not qualified as SDBs.

Within the constraints imposed by the need to implement the DOJ-proposed reforms, the rule was crafted throughout to select alternatives that would minimize any adverse economic impact on small business.

A copy of the IRFA may be obtained from the FAR Secretariat.

## C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (Pub. L. 104-13) applies because the interim rule contains reporting and recordkeeping requirements. Requests for approval of new and revised information collection requirements were submitted to the Office of Management and Budget under 44 U.S.C. 3501 et seq. The information collections required by this rule were approved under clearance 9000-0007 through June 30, 2000, and 9000-0150 through June 30, 2000. Public comments concerning this request were invited through a Federal Register notice published on May 9. 1997. No comments were received.

## D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DOD), the Administrator of General Services (GSA). and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary to allow adequate time for the significant number of potential SDB subcontractors to understand the requirements of the rule and to be certified as SDB's by SBA. The rule will conform the FAR to the model program designed by the Department of Justice to ensure compliance with Constitutional standards established by the Supreme Court and, thereby, avoid unnecessary litigation. A proposed FAR rule on this subject was published for public comment at 62 FR 25786 on May 9, 1997. As a result of public comments received in response to the proposed rule. changes have been made to the rule. This interim rule would qualify for publication as a final rule: however, further public comments are requested. Pursuant to Public Law 98-577 and FAR 1.501. public comments received in response to this interim rule will be considered in the formation of the final rule.

List of Subjects in 48 CFR Parts 1, 12, $15,19,52$, and 53

Government procurement.

Dated: June 23, 1998.
Edward C. Loeb,
Director. Federal Acquisition Policy Division.

## Federal Acquisition Circular

FAC 97-07
Federal Acquisition Circular (FAC) 97-07 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.
The policies. provisions. and clauses of this interim rule are effective for all solicitations issued on or after January 1. 1999.

Dated: June 17, 1998.
R.D. Kerrins.

Col. USA, Depury Director. Defense Procurement.
Dated: June 16. 1998.
Ida M. Ustad,
Deputy Associate Administrator. Office of Acquisition Policy. General Services Administration.

Dated: June 17, 1998.
Deidre A. Lee.
Associate Administrator for Procurement, NASA.

Therefore, 48 CFR Parts 1. 12. 15. 19. 52, and 53 are amended as set forth below:

1. The authority citation for 48 CFR Parts 1. 12, 15, 19, 52, and 53 continues to read as follows:

Authority: 41 U.S.C. 486 (c): 10 U.S.C. chapter 137: and 42 U.S.C. 2473 (c).

## PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

2. Section 1.106 is amended in the table following the introductory paragraph by adding. in numerical order, the following entries:
1.106 OMB approval under the Paperwork Reduction Act.

| FAR segment | OMB control No. |
| :---: | :---: |
| * | - • . |
| 19.12 ................... | 9000-0150 |
| - - | - - . |
| 52.219-25 ............. | 9000-0150 |
| - - | - . - |
| OF 312 ................ | 9000-0150 |
| * * | - . . |

## PART 12-ACQUISITION OF COMMERCIAL ITEMS

3. Section 12.303 (b) (1) is revised to read as follows:

### 12.303 Contract format.

(b) ***
(1) Block 10 if a price evaluation adjustment for small disadvantaged business concerns is applicable (the contracting officer shall indicate the percentage(s) and applicable line item(s)), if an incentive subcontracting clause is used (the contracting officer shall indicate the applicable percentage), or if set aside for emerging small businesses:

## PART 15—CONTRACTING BY NEGOTIATION

4. Section 15.304 is amended by adding paragraph (c) (4) to read as follows:
15.304 Evaluation factors and significant subfactors.

*     *         *             *                 * 

(c) ***
(4) The extent of participation of small disadvantaged business concerns in performance of the contract shall be evaluated in unrestricted acquisitions expected to exceed $\$ 500,000$
( $\$ 1.000 .000$ for construction) subject to certain limitations (see 19.201 and 19.1202).
5. Section 15.305 is amended by adding paragraph (a)(2)(v) to read as follows:
15.305 Proposal evaluation.
(a) ***
(2) ***
(v) The evaluation should include the past performance of offerors in complying with subcontracting plan goals for small disadvantaged business (SDB) concerns (see Subpart 19.7). monetary targets for SDB participation (see 19.1202). and notifications submitted under 19.1202-4(b).
6. Section 15.503 is amended in paragraph (a) (2) by revising the first sentence to read as follows:

### 15.503 Notifications to unsuccessful

 offerors.(a) * * *
(2) Preaward notices for small business programs. In addition to the notice in paragraph (a) (1) of this section. when using a small business set-aside (see Subpart 19.5). or when a small disadvantaged business concern receives a benefit based on its disadvantaged status (see Subpart 19.11 and 19.1202 ) and is the apparently successful offeror, upon completion of negotiations and determinations of
responsibility, and completion of the process in 19.304 (d), if necessary, but prior to award. the contracting officer shall notify each offeror in writing of the name and address of the apparently successful offeror. ***

## PART 19-SMALL BUSINESS PROGRAMS

7. Section 19.000 is amended at the end of paragraph (a) (7) by removing "and"; in paragraph (a) (8) by removing the period and inserting "; and" in its place: and by adding paragraph (a) (9) to read as follows:
19.000 Scope of part.
(a) ***
(9) The Small Disadvantaged Business Participation Program.

### 19.001 Definitions.

8. Section 19.001 is amended by revising the definition of "Small disadvantaged business concern" to read as follows:
19.001 Definitions.

Small disadvantaged business concern, as used in this part, means (except for 52.212-3(c)(2) and 52.2191 (b) (2) for general statistical purposes and 52.212-3(c) (7) (ii), 52.219-22(b)(2). and 52.219-23(a) for joint ventures under the price evaluation adjustment for small disadvantaged business concerns) an offeror that represents. as part of its offer, that it is a small business under the size standard applicable to the acquisition; and either-
(1) It has received certification as a small disadvantaged business concern consistent with 13 CFR 124. Subpart B; and
(i) No material change in disadvantaged ownership and control has occurred since its certification:
(ii) Where the concern is owned by one or more disadvantaged individuals. the net worth of each individual upon whom the certification is based does not exceed $\$ 750.000$ after taking into account the applicable exclusions set forth at 13 CFR 124.104(c)(2); and
(iii) It is listed, on the date of its representation, on the register of small disadvantaged business concerns maintained by the Small Business Administration: or
(2) For prime contractors, it has submitted a completed application to the Small Business Administration or a Private Certifier to be certified as a small disadvantaged business concern in
accordance with 13 CFR 124. Subpart B. and a decision on that application is pending. and that no material change in disadvantaged ownership and control has occurred since its application was submitted. In this case, a contractor must receive certification as an SDB by the SBA prior to contract award.
9. Section 19.201 is amended by revising paragraph (b) to read as follows:

### 19.201 General policy.

(b) The Department of Commerce will determine on an annual basis, by Major Groups as contained in the Standard Industrial Classification (SIC) manual. and region, if any, the authorized small disadvantaged business (SDB)
procurement mechanisms and applicable factors (percentages). The Department of Commerce determination shall only affect solicitations that are issued on or after the effective date of the determination. The effective date of the Department of Commerce determination shall be no less than 60 days after its publication date. The Department of Commerce determination shall not affect ongoing acquisitions. The SDB procurement mechanisms are a price evaluation adjustment for SDB concerns (see Subpart 19.11), an evaluation factor or subfactor for participation of SDB concerns (see 19.1202), and monetary subcontracting incentive clauses for SDB concerns (see 19.1203). The Department of Commerce determination shall also include the applicable factors, by SIC Major Group. to be used in the price evaluation adjustment for SDB concerns (see 19.1104). The authorized procurement mechanisms shall be applied consistently with the policies and procedures in this subpart. The agencies shall apply the procurement mechanisms determined by the Department of Commerce. The Department of Commerce, in making its determination, is not limited to the SDB procurement mechanisms identified in this section where the Department of Commerce has found substantial and persuasive evidence of-
(I) A persistent and significant underutilization of minority firms in a particular industry, attributable to past or present discrimination: and
(2) A demonstrated incapacity to alleviate the problem by using those mechanisms.
10. Section 19.304 is amended in the introductory text of paragraph (c) by revising the second sentence to read as follows:

### 19.304 Disadvantaged business status.

(c) * * * The mechanisms that may provide benefits on the basis of disadvantaged status as a prime contractor are a price evaluation adjustment for SDB concerns (see Subpart 19.11) and an evaluation factor or subfactor for SDB participation (see 19.1202).
11. Section 19.305 is amended in paragraph (a) by revising the last sentence to read as follows:
19.305 Protesting a representation of disadvantaged business status.
(a) * * * An offeror, the contracting officer, or the SBA may protest the apparently successful offeror's representation of disadvantaged status if the concern is eligible to receive a benefit based on its disadvantaged status (see Subpart 19.11 and 19.1202).
12. Section 19.306 is amended by revising paragraph (b) to read as follows:

### 19.306 Solicitation provisions.

(b) The contracting officer shall insert the provision at 52.219-22. Small Disadvantaged Business Status, in solicitations that include the clause at 52.219-23. Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns, or 52.219-25. Small Disadvantaged Business Participation Program-Disadvantaged Status and Reporting.
13. Section 19.703 is amended by revising paragraphs (a) (2) and (b) to read as follows:

### 19.703 Eligibility requirements for participating in the program.

(a) * * *
(2; In connection with a subcontract, or a requirement for which the apparently successful offeror received an evaluation credit for proposing one or more SDB subcontractors, the contracting officer or the SBA may protest the disadvantaged status of a proposed subcontractor. Such protests will be processed in accordance with 13 CFR 124.1015 through 124.1022. Other interested parties may submit information to the contracting officer or the SBA in an effort to persuade the contracting officer or the SBA to initiate a protest. Such protests, in order to be considered timely, must be submitted to the SBA prior to completion of performance by the intended subcontractor.
(b) A contractor acting in good faith may rely on the written representation
of its subcontractor regarding the subcontractor's status as a small business concern or a woman-owned small business concern. The contractor shall obtain representations of small disadvantaged status from subcontractors through use of a provision substantially the same as paragraph (b)(1)(i) of the provision at 52.219-22. Small Disadvantaged Business Status. A contractor shall confirm that a subcontractor representing itself as a small disadvantaged business concern is listed on the SBA's list of SDBs by accessing the list at http://www.sba.gov or by contacting the SBA's Office of Small Disadvantaged Business Certification and Eligibility. The contractor, the contracting officer, or any other interested party can challenge a subcontractor's size status representation by filing a protest, in accordance with 13 CFR 121.1601 through 121.1608. Protests challenging a subcontractor's small disadvantaged business representation shall be filed in accordance with 13 CFR 124.1015 through 124.1022.
14. Section 19.705-1 is amended by inserting the following sentence after the first sentence to read as follows:

### 19.705-1 General support of the program.

*     *         * This subsection does not apply to SDB subcontracting (see
19.1203). * * *


### 19.705-4 [Amended]

15. Section 19.705-4 is amended in the last sentence of paragraph (c) by removing "', small disadvantaged"

### 19.708 [Amended]

16. Section 19.708 is amended in the first sentence of paragraphs (c)(1). (c) (2), and (c) (3) by removing " small disadvantaged".
17. Subpart 19.12, consisting of sections 19.1201 through 19.1204, is added to read as follows:

Subpart 19.12-Small Disadvantaged Business Participation Program
19.1201 General
19.1202 Evaluation factor or subfactor
19.1202-1 Ceneral.
19.1202-2 Applicability.

19:1202-3 Considerations in developing an evaluation factor or subfactor.
19.1202-4 Procedures.
19.1203 Incentive subcontracting with small disadvantaged business concerns
19.1204 Solicitation provisions and contract clauses.
Authority: 41 U.S.C. 486 (c); 10 U.S.C. chapter 137: and 42 U.S.C. 2473(c).

Subpart 19.12-Small Disadvantaged Business Participation Program

### 19.1201 General.

This subpart addresses the evaluation of the extent of participation of small disadvantaged business (SDB) concerns in performance of contracts in the Standard Industrial Classification (SIC) Major Groups as determined by the Department of Commerce (see 19.201 (b)), and to the extent authorized by law. Two mechanisms are addressed in this subpart-
(a) An evaluation factor or subfactor for the participation of SDB concerns in performance of the contract; and
(b) An incentive subcontracting program for SDB concerns.
19.1202 Evaluation factor or subfactor.

### 19.1202-1 General.

The extent of participation of SDB concerns in performance of the contract. in the SIC Major Groups as determined by the Department of Commerce, and to the extent authorized by law, shall be evaluated consistent with this section. Participation in performance of the contract includes joint ventures. teaming arrangements, and subcontracts. Credit under the evaluation factor or subfactor is not available to SDB concerns that receive a price evaluation adjustment under Subpart 19.11. If an SDB concern waives the price evaluation adjustment at Subpart 19.11. participation in performance of that contract includes the work expected to be performed by the SDB concern at the prime contract level.

### 19.1202-2 Applicability.

(a) Except as provided in paragraph
(b) of this subsection, the extent of participation of SDB concerns in performance of the contract in the authorized SIC Major Groups shall be evaluated in competitive, negotiated acquisitions expected to exceed $\$ 500,000$ ( $\$ 1.000,000$ for construction).
(b) The extent of participation of SDB concerns in performance of the contract in the authorized SIC Major Groups (see paragraph (a) of this subsection) shall not be evaluated in-
(1) Small business set-asides (see Subpart 19.5):
(2) 8(a) acquisitions (see Subpart 19.8);
(3) Negotiated acquisitions where the lowest price technically acceptable source selection process is used (see 15.101-2): or
(4) Contract actions that will be performed entirely outside of any State, territory, or possession of the United

States, the District of Columbia, and the Commonwealth of Puerto Rico.
19.1202-3 Considerations in developing an evaluation factor or subfactor.

In developing an SDB participation evaluation factor or subfactor, agencies may consider-
(a) The extent to which SDB concerns are specifically identified;
(b) The extent of commitment to use SDB concerns (for example, enforceable commitments are to be weighted more heavily than non-enforceable ones);
(c) The complexity and variety of the work SDB concerns are to perform;
(d) The realism of the proposal:
(e) Past performance of offerors in complying with subcontracting plan goals for SDB concerns and monetary targets for SDB participation: and
(f) The extent of participation of SDB concerns in terms of the value of the total acquisition.

### 19.1202-4 Procedures.

(a) The solicitation shall describe the SDB participation evaluation factor or subfactor. The solicitation shall require offerors to provide, with their offers, targets, expressed as dollars and percentages of total contract value, in each of the applicable, authorized SIC Major Groups, and a total target for SDB participation by the contractor. including joint venture partners, and team members, and a total target for SDB participation by subcontractors. The solicitation shall require an SDB offeror that waives the SDB price evaluation adjustment in the clause at 52.219-23, Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns, to provide with its offer a target for the work that it intends to perform as the prime contractor. The solicitation shall state that any targets will be incorporated into and become part of any resulting contract.
Contractors with SDB participation targets shall be required to report SDB participation.
(b) When an evaluation includes an SDB participation evaluation factor or subfactor that considers the extent to which SDB concerns are specifically identified, the SDB concerns considered in the evaluation shall be listed in the contract, and the contractor shall be required to notify the contracting officer of any substitutions of firms that are not SDB concerns.

### 19.1203 Incentive subcontracting with

 small disadvantaged business concerns.The contracting officer may encourage increased subcontracting opportunities in the SIC Major Groups as determined by the Department of Commerce for SDB
concerns in negotiated acquisitions by providing monetary incentives (see the clause at 52.219-26. Small
Disadvantaged Business Participation Program Incentive Subcontracting, and 19.1204 (c)). Monetary incentives shall be based on actual achievement as compared to proposed monetary targets for SDB subcontracting. The incentive subcontracting program is separate and distinct from the establishment, monitoring, and enforcement of SDB subcontracting goals in a subcontracting plan.

### 19.1204 Solicitation provisions and contract clauses.

(a) The contracting officer may insert a provision substantially the same as the provision at 52.219-24. Small Disadvantaged Business Participation Program Targets, in solicitations that consider the extent of participation of SDB concerns in performance of the contract. The contracting officer may vary the terms of this provision consistent with the policies in 19.12024.
(b) The contracting officer shall insert the clause at 52.219-25. Small
Disadvantaged Business Participation Program-Disadvantaged Status and Reporting, in solicitations and contracts that consider the extent of participation of SDB concerns in performance of the contract.
(c) The contracting officer may, when contracting by negotiation. insert in solicitations and contracts containing the clause at 52.219-25, Small Disadvantaged Business Participation Program-Disadvantaged Status and Reporting, a clause substantially the same as the clause at 52.219-26. Small Disadvantaged Business Participation Program-Incentive Subcontracting. when authorized (see 19.1203). The contracting officer may include an award fee provision in lieu of the incentive; in such cases, however, the contracting officer shall not use the clause at 52.219-26.

## PART 52-SOLICITATION PROVISIONS AND CONTRACT CLAUSES

### 52.212-2 [Amended]

18. Section 52.212-2 is amended by revising the provision date to read "(Jan 1999) ${ }^{\circ}$; and in the parenthetical following paragraph (a) of the provision by inserting ": (iv) small disadvantaged business participation;" after " (see FAR 15.304)"
19. Section $52.212-3$ is amended by revising the provision date: and the introductory text of paragraph (c) (7) to read as follows:
52.212-3 Offeror Representations and Certifications-Commercial Items.

Offeror Representations and CertificationsCommercial Items (Jan. 1999)
(c) ***
(7) (Complete only if the solicitation contains the clause at FAR 52.219-23, Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns, or FAR 52.219-25, Small Disadvantaged Business Participation Program-Disadvantaged Status and Reporting, and the offeror desires a benefit based on its disadvantaged status.)
20. Section 52.212-5 is amended by revising the clause date: redesignating paragraphs (b) (7) through (b) (18) as (b) (9) through (b) (20), respectively: and adding new paragraphs (b) (7) and (b) (8) to read as follows:

### 52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders-Commercial Items.

Contract Terms and Conditions Required to Implement Statutes or. Executive OrdersCommercial Items (Jan. 1999)
(b)
(7) 52.219-25. Small

Disadvantaged Business Participation
Program-Disadvantaged Status and Reporting (Pub. L. 103-355. section 7102. and 10 U.S.C. 2323).
(8) 52.219-26. Small

Disadvantaged Business Participation
Program-Incentive Subcontracting (Pub. L. 103-355. section 7102. and 10 U.S.C. 2323).
21. Section 52.219-8 is amended by revising the clause date and paragraph (c) to read as follows:
52.219-8 Utilization of Small, Small Disadvantaged, and Women-Owned Small Business Concerns.

Utilization of Small. Small Disadvantaged, and Women-Owned Small Business Concerns (Jan. 1999)
(c) As used in this contract, the term "small business concern" shall mean a smali business as defined pursuant to section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto. The term "small business concern owned and controlled by socially and economically disadvantaged individuals" means an offeror that represents, as part of its offer, that-
(1) It is a small business under the size standard applicable to the acquisition;
(2) It has received certification as a small disadvantaged business concern consistent with 13 CFR 124, Subpart B;
(3) No material change in disadvantaged ownership and control has occurred since its certification;
(4) Where the concern is owned by one or more individuals, the net worth of each individual upon whom the certification is based does not exceed $\$ 750.000$ after taking into account the applicable exclusions set forth at 13CFR 124.104 (c) (2): and
(5) It is listed, on the date of its representation. on the register of small disadvantaged business concerns maintained by the Small Business Administration.
22. Section 52.219-9 is amended by revising the clause date and paragraphs (d) (5), and (d) (10) (iii); and by adding paragraph (j) to read as follows:

### 52.219-9 Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan.

Small, Small Disadvantaged and WomenOwned Small Business Subcontracting Plan (Jan. 1999)
(d) * **
(5) A description of the method used to identify potential sources for solicitation purposes (e.g., existing company source lists. the Procurement Marketing and Assistance Network (PRONET) of the Small Business Administration (SBA), the list of certified small disadvantaged business concerns of the SBA, the National Minority Purchasing Council Vendor Information Service, the Research and Information Division of the Minority Business Development Agency in the Department of Commerce, or small. small disadvantaged, and women-owned small business trade associations). A firm may rely on the information contained in PRONET as an accurate representation of a concern's size and ownership characteristics for the purposes of maintaining a small and womenowned small business source list. A firm shall rely on the information contained in SBA's list of small disadvantaged business concerns as an accurate representation of a concern's size and ownership characteristics for the purposes of maintaining a small disadvantaged business source list. Use of PRONET and/or the SBA list of small disacivantaged business concerns as its source lists does not relieve a firm of its responsibilities (e.g., outreach, assistance. counseling, publicizing subcontracting opportunities) in this clause.
(10) ***
(iii) Submit Standard Form (SF) 294. Subcontracting Report for Individual Contracts, and/or SF 295. Summary Subcontract Report. in accordance with the instructions on the forms or as provided in agency regulations and in paragraph (j) of this clause; and
(j) The Contractor shall submit the following reports:
(1) Standard Form 294. Subcontracting Report for Individual Contracts. This report shall be submitted to the Contracting Officer semiannually and at contract completion. The report covers subcontract award data related to this contract. This report is not required for commercial plans.
(2) Standard Form 295. Summary Subcontract Report. This report encompasses all the contracts with the awarding agency. It must be submitted semi-annually for contracts with the Depariment of Defense and annually for contracts with civilian agencies. If the reporting activity is covered by a commercial plan, the reporting activity must report annually all subcontract awards under that plan. All reports submitted at the close of each fiscal year (both individual and commercial plans) shall include a breakout. in the Contractor's format. of subcontract awards, in whole dollars, to small disadvantaged business concerns by Standard Industrial Classification (SIC) Major Group. For a commercial plan, the Contractor may obtain from each of its subcontractors a predominant SIC Major Group and repori all awards to that subcontractor under its predominant SIC Major Group.
(End of clause)

### 52.219-10 [Amended]

23. Section 52.219-10 is amended by revising the clause date to read " Jan. 1999)": and in the first sentence of paragraph (b) of the clause by inserting
"for small business concerns and women-owned small business concerns" after the word "goals".
24. Sections 52.219-24 through 52.219-26 are added to read as follows:
52.219-24 Small Disadvantaged Business Participation Program-Targets.

As prescribed in 19.1204 (a), insert a provision substantially the same as the following:
Small Disadvantaged Business Participation Program-Targets Uan. 1999)
(a) This solicitation contains a source selection factor or subfactor related to the participation of small disadvantaged business (SDB) concerns in the contract. Credit under that evaluation factor or subfactor is not available to an SDB concern that qualifies for a price evaluation adjustment under the clause at FAR 52.219-23. Notice of Price Evaluation Adjustment for Small
Disadvantaged Business Concerns, unless the SDB concern specifically waives the price evaluation adjustment.
(b) In order to receive credit under the source selection factor or suhfactor, the offeror must provide. with its offer. targets. expressed as dollars and percentages of total contract value, for SDB participation in any
of the Standard Industrial Classification (SIC) Major Groups as determined by the Department of Commerce. The targets may provide for participation by a prime contractor, joint venture partner, teaming arrangement member. or subcontractor: however, the targets for subcontractors must be listed separately.
(End of provision)

### 52.219-25 Small Disadvantaged Business Participation Program-Disadvantaged Status and Reporting.

As prescribed in 19.1204 (b), insert the following clause:
Small Disadvantaged Business Participation Program-Disadvantaged Status and Reporting Jan. 1999)
(a) Disadvantaged status for joint venture partners, team members, and subcontractors. This clause addresses disadvantaged status for joint venture partners, teaming arrangement members, and subcontractors and is applicable if this contract contains small disadvantaged business (SDB) participation targets. The Contractor shall obtain representations of small disadvantaged status from joint venture partners. teaming arrangement members. and subcontractors through use of a provision substantially the same as paragraph (b) (1) (i) of the provision at FAR 52.219-22. Small Disadvantaged Business Status. The Contractor shall confirm that a joint venture partner. team member, or subcontractor representing itself as a small disadvantaged business concern is included in the SBA's on-line list of SDBs at http://www.sba.gov or by contacting the SBA's Office of Small Disadvantaged Business Certification and Eligibility.
(b) Reporting requirement. If this contract contains SDB participation targets, the Contractor shall report on the participation of SDB concerns at contract completion. or as otherwise provided in this contract. Reporting may be on Optional Form 312 Small Disadvantaged Business Participation Report, or in the Contractor's own format providing the same information. This report is required for each contract containing SDB participation targets. If this contract contains an individual Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan, reports may be submitted with the final Subcontracting Report for Individual Contracts (Standard Form 294) at the completion of the contract. (End of clause)
52.219-26 Small Disadvantaged Business Participation Program-Incentive Subcontracting.

As prescribed in 19.1204 (c), insert a clause substantially the same as the following:
Small Disadvantaged Business Participation Program-Incentive Subcontracting Jan. 1999)
(a) Of the total dollars it plans to spend under subcontracts. the Contractor has committed itself in its offer to try to award a certain amount to small disadvantaged business concerns in the Standard lndustrial Classification (SIC) Major Groups as determined by the Department of Commerce.
(b) If the Contractor exceeds its total monetary target for subcontracting to small disadvantaged business concerns in the authorized SIC Major Groups, it will receive [Contracting Officer to insert the appropriate number between 0 and 10 ] percent of the dollars in excess of the monetary target, unless the Contracting Officer determines that the excess was not due to the Contractor's efforts (e.g., a subcontractor cost overrun caused the actual subcontract amount to exceed that estimated in the offer, or the excess was caused by the award of subcontracts that had been planned but had not been disclosed in the offer during contract negotiations). Determinations made under this paragraph are not subject to the Disputes clause of this contract.
(c) If this is a cost-plus-fixed-fee contract. the sum of the fixed fee and the incentive fee earned under this contract may not exceed the limitations in subsection 15.404-4 of the Federal Acquisition Regulation.
(End of clause)

## PART 53-FORMS

25. Section 53.219 is amended by adding paragraph (c) to read as follows:

### 53.219 Small business programs.

(c) OF 312 (1/99), Small Disadvantaged Business Participation Report. (See Subpart 19.12.)
26. Section $53.302-312$ is added to read as follows:
53.302-312 OF 312, Small Disadvantaged Business Participation Report.

BILLING CODE 6820-EP-U

SMALL DISADVANTAGED BUSINESS (SDB) PARTICIPATION REPORT

OMB No.: 9000-0150 Expires: 06/30/2000

Public reporting burden for this collection of information is estimated to average 8.66 hours per response, including the time tor roviewing instructions, searching existing data sources, gatharing and maintaining the data neaded, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information. including suggestions for reducing this burden, to the FAR Secretariat (MVR). Federal Acquisition Policy Division, GSA, Washington, DC 20405.

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| :---: | :---: |
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|  | 4. SDS PARTICIPATION AT PRIME CONTRACT LEVEL |
|  | $\left.\begin{aligned} & \text { A. SIC MAJOR } \\ & \text { GROUP }\end{aligned} \right\rvert\,$ B. DOLAA AMOUNT ${ }^{\text {a }}$ ( P. PERCENTAGE |

5. BREAKDOWN OF SDB PARTICIPATION AT SUBCONTRACT LEVEL. BY SIC MAJOR GROUP


## GENERAL INFORMATION INSTRUCTIONS

> 1. This form collects data on the participation of small disadvantaged business concerns in contracts that contain the clause at FAR $52.219-25$, Small Disadvantaged Business Participation Program. Disadvantaged Status and Reporting.
> 2. Submit this report to the contracting officer. If your organization is required to report subcontracting data under an individual subcontracting plan, you may attach this report to the final SF 294 . Subcontracting Report for Individual Contracts, submitted under the contract.
> 3. Report in whole dollars.

## SPECIFIC INSTRUCTIONS

Block 3. Report the total dollar amount of participation of small disadvantaged business concerns under the contract cited in Block 2. Participation may be through subcontracting, teaming arrangement, joint ventures, or as the prime contractor (provided the prime contractor waived its right to a price evaluation adjustmentl.

Block 4. Report the participation, if any, by small disadvantaged business concerns in this contract at the prime contract level. All prime contract dollars must be reported under the SIC code assigned to the prime contract. Report the dollar amount and percentage of the total contract value.

Block 5. Report, by SIC Major Group, as determined by the Department of Commerce, the participation by small disadvantaged business concerns in this contract at the subcontract level. Report the dollar amount and percentage of the total contract value.

Block 6. Provide the name, telephone number, and e-mail address of the individual who can answer questions related to this report.

## JUL 71998

MEMORANDUM FOR GOVERNMENT/INDUSTRY/TRADE

FROM: SHARON A. KISER FAR SECRETARIAT (MVR)

SUBJECT: Request for Comment


Attached are copies of two interim rules which change the Federal Acquisition Regulation. The following rules were published at 63 FR 35719 on June 30, 1998, and 63 FR 36120 July 1, 1998.

FAR Case
Number ( $s$ )
$97-004 \mathrm{~A}$

97-004B

Comment
Closing Date

Subject
Reform of Affirmative Action in Federal Procurement

Reform of Affirmative Action in Federal Procurement
$08 / 31 / 98$

08/31/98

Consistent with our efforts to expedite the rulemaking process, comments received after the date specified above may not be considered.

Please cite the appropriate $F A R$ case (s) and send your comments to Ms. Sharon Kiser, FAR Secretariat (MVR), General Services Administration, Federal Acquisition Policy Division, 1800 F Street, NW., Room 4037, Washington, DC 20405.

Attachments

CC: MVR: Official File - Reading MVR:
MVR: S.KISER:lme:07/02/98:501-0692:h\industry\interim.doc

## MAR 31999

MEMORANDUM FOR JEFFREY P. PARSONS, COL, USAF DIRECTOR
DEFENSE ACQUISITIOM REGULATIONS COUNCIL
SHARON A. KISER FAR SECRETARIAT


SUBJECT: FAC 97-07 Addendum, FAR Case 97-004B Reform of Affirmative Action in Federal Procurement

Attached are comments received on the subject FAR case published at 63 FR 71722; December 29, 1998. The comment closing date was March 1, 1999.

| $\frac{\text { Response }}{\text { Number }}$ | $\frac{\text { Date }}{\text { Received }}$ |  | $\frac{\text { Comment }}{\text { Date }}$ |  |
| :--- | :--- | :--- | :--- | :--- |
| 97-004b-1 | $03 / 01 / 99$ |  | $02 / 26 / 99$ | AIA |
| $97-004 \mathrm{~b}-2$ | $03 / 02 / 99$ | $03 / 01 / 99$ | HWAC |  |

Attachments

CC: MVR OFFICIAL FILE: READING: MVR: MVRR
CC: S.KISER:lme:03/03/99:501-0692/h/regovers/com/transmit/ 97-004B

John W. Douglass
President

February 26, 1999
General Services Administration
FAR Secretariat (MVR)
1800 F Street, NW
Room 4035
Washington, D.C. 20405
Attn.: Ms. Laurie Duarte

## Re: FAC 97-07 Addendum, FAR Case 97-004B

Dear Ms. Duarte:
The Aerospace Industries Association of America, Inc. ("AIA") appreciates this opportunity to comment on the December 29, 1998 Federal Register notice, published by the Department of Defense ("DoD"), the General Services Administration ("GSA") and the National Aeronautics and Space Administration ("NASA"), concerning the interim rule on affirmative action reforms in federal procurement. The AIA is a national, non-profit trade association that represents the manufacturers of commercial, military and business aircraft, helicopters, aircraft engines, missiles, spacecraft, and related components and equipment. Most AIA members provide goods and services under contract with the federal government and, as such, have participated in DoD and NASA programs that encourage increased subcontracting opportunities for small disadvantaged businesses ("SOBs").

Under the interim rule, contractors with the federal government may continue to rely in good faith on the self-representations of subcontractors as to their SDB status for Requests for Proposals ("REPs") issued before July 1, 1999. For RFPs issued on or after July 1, 1999, however, we expect that contractors will no longer be allowed to rely in good faith on SDB status claimed by subcontractors, but instead will be required to confirm such claims by consulting a list of certified SDBs compiled by the Small Business Administration ("SBA"). ${ }^{1}$ As discussed in the attached copy of AIA's December 7, 1998 letter to the White House Special Counsel to the President for Civil Rights, which AIA incorporates herein, third-party SDB certification is unwarranted unless a company will receive a price evaluation adjustment or similar preference because of its SDB status. The immediate result of the new third-party certification requirement will be a sharp decrease in the pool of potential SDB subcontractors for DoD and NASA procurements - not because they fail to meet the statutory criteria, but rather

[^0]because the SBA has not certified them. In AIA's view, subcontractors that meet the SDB criteria established by the Small Business Investment Act, as amended (15 U.S.C. § 637(d)(3)(C)), but which do not receive any such preferences, should be recognized as SDBs for purposes of meeting SDB participation goals.

AIA's concern that the number of certified SDBs that will be available by July 1, 1999 will fall well below the level needed to maintain current participation levels is based upon its own members' experience. In response to a request from the SBA to publicize the new certification requirements, AIA members began notifying their SDB subcontractors in October 1998 of the new measures and encouraged them to become certified with the SBA. AIA members also invited their SDB subcontractors to join them in attending regional workshops that addressed the certification requirements. Despite these efforts, the number of SDB subcontractors to AIA members that have obtained SBA certification remains small, indicating a lack of interest and/or resistance to the certification requirements on their part. Consequently, we fear that the success of AIA members in reaching SDB subcontracting goals - an achievement lauded by both government and industry - may become an historical relic, even though subcontracting by companies that meet the statutory SDB criteria continues to increase.

It is ironic that at the same time $\operatorname{DoD}$ seeks to require third party certification of SDB status, ostensibly to ensure that unqualified companies do not receive any preferences in procurement subcontracting, it also suspended all price evaluation adjustments for SDBs for one year. See 64 Federal Register 4847 (Feb. 1, 1999). Thus, not only are SDB subcontractors to AIA member companies not seeking any preferences from the Government because of their status, DoD has actually eliminated the possibility of such preferences, at least for the 1999 fiscal year. It is thus more clear than ever that, in the absence of any potential preferences, SBA certification of SDB status is unnecessary. Indeed, under these circumstances third-party certification requirements will only impose new costs on SDB subcontractors without providing any new benefits, and therefore may have the unfortunate effect of creating an impediment to SDB participation in future federal procurements.

For all these reasons, as well as those discussed in the attached letter, AIA recommends that the government's plans to eliminate the ability of contractors to rely in good faith on subcontractor representation of SDB status be suspended indefinitely in order to permit development of a more reasonable approach to address concerns over SDB subcontractor participation in federal procurement programs. As always, AIA remains willing and able to work with government officials towards that effort.

Sincerely and Respectfully.


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March 1, 1999
General Services Administration
FAR Secretariat (MBR)
1800 F Street, N.W., Room 4035
Washington, DC 20405
Attn: Ms. Laurie Duarte

Reference: FAC 97-07 Addendum, FAR Case 97-004B

## To Whom It May Concern:

The Hazardous Waste Action Coalition (HWAC) greatly appreciates the opportunity to comment on the extension of the certification requirement for small disadvantaged business (SDB) concerns until July 1, 1999 (63 FR 71722). HWAC is a national trade association representing the leading firms practicing in multimedia environmental management and remediation, as well as the full spectrum of the environmental services businesses. HWAC's member firms are firms of all sizes, including large, medium, and small firms.

HWAC speaks for the environmental industry as a collective whole, and ensures active representation of small businesses at all levels of our organization's leadership structure, including our Board of Directors, Committees, Subcommittees, and individual Task Forces. HWAC has been at the forefront of promoting full participation of firms of all sizes in environmental business activities. Five years ago, HWAC's Board officially recognized the significant contributions of small businesses to environmental restoration activities with the adoption of a Board-approved policy statement entitled "Participation of Firms of All Sizes in Hazardous Waste Cleanup." This policy statement has served to guide HWAC's advocacy of small business issues since 1993.

## Certification Procedural Fairness

HWAC applauds the Small Business Administration (SBA) for extending the original SDB certification date, which was January 1, 1999, until July 1, 1999. The SBA recognized that a significant number of small businesses would have been adversely affected if the certification requirement had taken effect on January 1, 1999


Hazardous Waste Action Coalition

General Services Administration
March 1, 1999
Page Two
due to the lack of SDB certifications issued by that date. Since issuing the extension, the SBA has undertaken outreach efforts to the federal agencies and the contracting community to ensure dissemination of the rule's requirements and to provide training on the required procedures. In addition, certification information and certification forms are available on the SBA web-site to facilitate easy access by the small business contracting community.

HWAC strongly encourages the SBA to once again reevaluate the "fairness" of the July 1 , 1999 deadline as the deadline approaches. HWAC's overall concern is that the majority of firms that seek, in a timely manner, SDB certification by the July 1 deadline will have the opportunity to have their certification applications acted upon in advance of the deadline. If there is a backlog of certifications "in the pipeline" as the deadline approaches, HWAC believes that it would be unfair for the deadline to take effect. Firms with "pending" applications as of the deadline will not be used on federal contracts by larger prime contractors because solicitations "will require contractors to use certified SDBs as subcontractors to take advantage of the SDB Participation Program" (63 FR 71722). Firms with applications pending but no decision by the SBA will therefore be excluded from federal contracts, thereby resulting in immediate financial harm to those firms.

The federal government consistently recognizes that small businesses often do not have the resources that larger firms have to comply with federal requirements. One issue associated with implementation of the SDB certification requirement has been "notification" -- how to notify all firms that are eligible for SDB certification that they must go through the certification process in order to continue to participate in federal contracting activities. To date, much of the notification has come from prime contractors informing their SDB subcontractors of the certification requirement. However, many SDB-eligible firms may still not be aware of the certification requirement.

In terms of application processing, HWAC understands that the certification process can take as much as 75 days after receipt of an application to complete. This would necessitate that applications for SDB certifications be on file with the SBA by April $15^{\text {th }}$ in order to ensure that certification by the July 1 deadline will be received. The SBA should evaluate the number of current certification applications against the potential thousands of firms that are eligible for certification and determine whether another extension should be granted.

Finally, HWAC encourages the SBA to take a hard look at the process for ensuring the issuance of timely certifications by the July $1^{\text {st }}$ deadline. HWAC understands that training of third-party certifies is presently underway. Can the SBA and their third party certifies act on all certification applications by the deadline? As indicated above, this certification process has established an entry criterion that didn't exist before to the federal contracting arena that will financially impact small firms.

Hazardous Waste Action Coalition

General Services Administration
March 1, 1999
Page Three
Another issue associated with the requirement is timely notification of final requirements. HWAC would like to inform you that one of the "complaints" associated with the SDB certification requirement is that the rules and forms have been changed several times. HWAC is not commenting on the veracity of this complaint - we are just notifying you that this is one of the complaints that we have heard. HWAC encourages the SBA to promptly notify the federal agencies, their contractors, and firms eligible for SDB certification that the process is final (i.e., no future changes will be made in the short term) and that firms that have not yet begun the certification process should begin to do so.

## Training

HWAC applauds the SBA for holding outreach sessions across the country to disseminate information about the certification requirement. HWAC believes that there are many small firms involved in the environmental business that still have questions about the rule's requirements. HWAC would like to host an SBA outreach briefing of the rule's requirements specifically for the environmental business community. HWAC believes that such a briefing is timely for the following reasons: (1) The SBA's last briefing in Washington, DC on the SDB certification requirements was held on November 19 and 20, 1998 (close to Thanksgiving and before certification requirements were all finalized), and (2) There are many small businesses in the environmental services industry seeking certification who need additional information on the program.

To discuss the possibility of HWAC hosting an SBA training session, or to discuss these comments further, feel free to contact William J. Birkhofer, Chair of HWAC's Government Affairs Committee, at 703-351-4203, Enemute Oduaran, Chair of HWAC's Small Business Committee, at 302-292-8995, or Terre Belt, HWAC's Executive Director, at 202-682-4352. Thank you very much for the opportunity to provide these comments on this very important rulemaking initiative.

Sincerely,

cc: Ms. Victoria Moss, GSA Federal Acquisition Policy Division
Mr. Mike Sipple, Director of Defense Procurement, DOD/Pentagon

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| Response Number | Date Received | Comment Date | Commenter |
| :---: | :---: | :---: | :---: |
| 95-029-34 | 07/14/97 | 07/14/97 | D. Dennis |
| 95-029-35 | 07/14/97 | 07/14/97 | CCIA |
| 95-029-36 | 07/14/97 | 07/14/97 | AGC |
| 95-029-37 | 07/14/97 | 07/14/97 | GSA/OIG |
| 95-029-38 | 07/14/97 | 07/11/97 | EPA |
| 95-029-39 | 07/14/97 | 07/14/97 | Newport News Shipbuilding |
| 95-029-40 | 07/14/97 | 07/14/97 | DLA <br> Personnel Support Center |
| 95-029-41 | 07/14/97 | 07/14/97 | MCR |

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MEMORANDUM FOR CAPTAIN D.S. PARRY, SC, USN DIRECTOR DEFENSE ACQUISITION REGULATIONS COUNCIL

SHARON A. KISER
FAR SECRETARIAT
SUBJECT: FAR Case 95-029, Part 15 Rewrite Contracting by Negotiation Competitive Range Determinations

Attached are comments received on the subject FAR case published at 62 FR 26640; May 14, 1997. The comment closing date is July 14, 1997.

Response Number

| 95-029-42 | 07/14/97 | 07/14/97 | codsia |
| :---: | :---: | :---: | :---: |
| 95-029-43 | 07/14/97 | 07/14/97 | Dickstein <br> Shapiro Morin \& Oshinsky |
| 95-029-44 | 07/15/97 | 07/14/97 | Linda H. Smith |
| 95-029-45 | 07/15/97 | 07/14/97 | DoD |
| 95-029-46 | 07/15/97 | 07/14/97 | Defense <br> Information <br> Systems Agency |
| 95-029-47 | 07/15/97 | 07/14/97 | Northrop Grumman |
| 95-029-48 | 07/15/97 | 07/14/97 | EDS |
| 95-029-49 | 07/15/97 | 07/14/97 | NASBP |
| 95-029-50 | 07/15/97 | 07/14/97 | Department of Transportation |
| 95-029-51 | 07/15/97 | 07/14/97 | Hewes, Gelband Lambert \& Dann |
| 95-029-52 | 07/15/97 | 07/14/97 | Allian Tech Systems |


| Response Number | Date Received | Comment Date | Commenter |
| :---: | :---: | :---: | :---: |
| 95-029-53 | 07/15/97 | 07/14/97 | U.S.Chamber of Commerce |
| 95-029-54 | 07/15/97 | 07/14/97 | ABA |
| 95-029-55 | 07/15/97 | 07/10/97 | DoD/Army Randall J. Bartholome |
| 95-029-56 | 07/15/97 | 07/10/97 | Thomas L. Riddle |
| 95-029-57 | 07/15/97 | 07/08/97 Chr | Dept. of Navy stopher H. Beck |
| 95-029-58 | 07/15/97 | 07/14/97 | DLA (MMPPP) |

Attachments

1713
$\left.\begin{array}{ll}\text { MEMORANDUM FOR CAPTAIN D.S. PARRY, SC, USN } \\ & \text { DIRECTOR } \\ & \text { DEFENSE ACQUISITION REGULATIONS COUNCIL }\end{array}\right\}$

Attached are late comments received on the subject FAR case published at 62 FR 26640; May 14, 1997. The comment closing date is July 14, 1997.

$\frac{\text { Response }}{\text { Number }}$$\quad$| Date Received | Comment Date |  | Commenter |
| :--- | :--- | :--- | :--- |
| $95-029-59$ | $07 / 15 / 97$ | $07 / 15 / 97$ | Commander, <br> Naval Air <br> Systems Command |
| $95-029-60$ | $07 / 15 / 97$ | $07 / 11 / 97$ | OMB |
| $95-029-61$ | $07 / 15 / 97$ | $07 / 15 / 97$ | Defense <br> Personnel <br> Support Center |
| $95-029-62$ | $07 / 18 / 97$ | $07 / 14 / 97$ | ITAA |
| $95-029-63$ | $07 / 15 / 97$ | $07 / 11 / 97$ | NASA |
| $95-029-64$ | $07 / 16 / 97$ | $07 / 14 / 97$ | DOD/Navy <br> $95-029-65$ |
| $95-029-66$ | $07 / 16 / 97$ | $07 / 16 / 97$ | SBA |
| $95-029-67$ | $07 / 16 / 97$ | $07 / 14 / 97$ | DoD/Army <br> (TACOM) |
|  |  | $07 / 15 / 97$ | American <br> Consulting <br> Engineers <br> Council |

## Comment $4.8-73$

MEMORANDUM FOR CAPTAIN DIS. PARRY, SC, USN DIRECTOR
DEFENSE ACQUISITION REGULATIONS COUNCIL
FROM: SHARON A. RISER
FAR SECRETARIAT
SUBJECT: FAR Case 95-029, Part 15 Rewrite; Contracting by Negotiation and Competitive Range Determinations

Attached are late comments received on the subject FAR case published at 62 FR 26640; May 14, 1997. The comment closing date is July 14, 1997.

## Response

Date Received
Comment Date
Commenter Number

| $95-029-68$ | $07 / 16 / 97$ | $07 / 14 / 97$ | DoD |
| :--- | :--- | :--- | :--- |
| $95-029-69$ | $07 / 17 / 97$ | $07 / 17 / 97$ | Nathan Task |
| $95-029-70$ | $07 / 17 / 97$ | $07 / 17 / 97$ | Department of <br> Commerce |
| $95-029-71$ | $07 / 18 / 97$ | $07 / 14 / 97$ | NAMC |
| $95-029-72$ | $07 / 18 / 97$ | $07 / 14 / 97$ | Small Business <br> Legislative <br> Council |
| $95-029-73$ | $07 / 18 / 97$ | $07 / 14 / 97$ | ASA, Inc |

Attachments

Jul 211997

MEMORANDUM FOR CAPTAIN D.S. PARRY, SC, USN DIRECTOR
DEFENSE ACQUISITION REGULATIONS COUNCIL
FROM:

SUBJECT:
SHARON A. RISER FAR SECRETARIAT


FAR Case 95-029, Part 15 Rewrite; Contracting by Negotiation and Competitive Range Determinations

Attached are late comments received on the subject FAR case published at 62 FR 26640; May 14, 1997. The comment closing date is July 14, 1997.

Response
Number
95-029-74
95-029-75
$07 / 21 / 97$

07/14/97
07/14/97 חCAA

Attachment

| MEMORANDUM FOR CAPTAIN D.S. PARRY, SC, USN |  |
| :--- | :--- |
|  | DIRECTOR |
| DEFENSE ACQUISITION REGULATIONS COUNCIL |  |

Attached are late comments received on the subject FAR case published at 62 FR 26640; May 14, 1997. The comment closing date is July 14, 1997.

Response
Number


Attachments
Gl= 029.78
Date Rec
$07 / 21 / 97$

Comment Date

## Commenter

95-029-79
$5-6-4 \cdot 7$
7-31-47
NASA


6862 Elm Street
Mclean. VA 22101-3833

Telephone (703) 821-8178 Focsimlie' (703)821-8274

Ranvir K Tenon President

## Dear Sirs

We are a small disadvantaged business with about $\$ 40$ million in revenue and over 450 staff members that provide full life cycle information technology services to Federal government agencies

The majority of our work program has been won in FAR-based competitions so we are familiar with the process We believe at would reduce unnecessary bid and proposal costs of small businesses like us if you retain only offerors with the greatest likelihood of award in the competitive range Our feeling is that number is generally two or three Such a move would also force offerors to put in their very best technical and cost bids initially and thus reduce the burden of reevaluation in the BAFO stage

We believe that all of the policy shifts in the proposed rule listed under Section C, Summary of Changes, are well thought out improvements and we strongly support them

On a somewhat related matter, we support the idea of separate small business awards in all unrestricted multi-award ID/IQ competitions with use of multiple SIC codes to permit different sizes of small businesses to compete (SIC code 7379, 4813, 8731, etc ) The requirements for small busines contracting participation as subcontractors for large primes is rarely implemented or enforced and is therefore ineffective

If you have any questions, please feel free to contact me at (703) 821-8178
Sincerely,
SETA Corporation


Ranvir K Trehan
cc Dr S Kelman

## Department of Energy

Washington, DC 20585
May 27, 1997

General Services Administration
FAR secretariat (VRS)
1800 F Street, NW, Room 4035
Washington, DC 20405
Subject: FAR Case 95-029, Group A
IDe Department of Energy (DOE) strong ty supports paragraph $15.406(\mathrm{c})$ of the proposed rule that would permit the contracting officer, after evaluation of all proposals, to establish the competitive range comprised of those proposals most highly rated, and to further reduce the range for purposes of efficiency. DOE has long believed that small competitive ranges strengthen the source selection process. Both the Government and industry save time and money when the Government determines and eliminates proposals that are no longer competitive as early as possible in the source selection process. We believe that the concern of industry, particularly the small business community, that smaller competitive ranges would prematurely eliminate otherwise winning proposals, is unfounded.

We examined our recent competıtıve awards to determine if award was made to other than one of the top three firms in order to determine if any competitor would be harmed by small competitive ranges. First we sampled our most recently awarded competitive negotiated contracts valued at over $\$ 5 \mathrm{million}$. Of those 43 contracts, none were awarded to other than one of the top three ranked competitors going into the competition range. Second, we sampled our competitive negotiated contracts, both set-aside and uminestriscted, over sion, 000 awarded to small businesses during FY 1996 and the first quarter of $F Y$ 1997. Of the 49 contracts sampled, none were awarded to a contractor who was not among the top three competitors going into the competitive range.

2

Based on this data, we believe that small competitive ranges would not prematurely eliminate otherwise successful proposals from the competition. Giving contracting officers the flexibility to reduce competitive ranges to the most highly rated would result in more timely and cost-efficient source selections.

Sincerely,


## $95-029-3$

## Government Sales Consultants, Inc.

1144C Walker Road, Great Falls, Virginia 22066
703-759-7216• Fax 703-759-7388
800-571-3973

May 28, 1997

General Services Administration
FAR Secretariat (VRS)
1800 F Street, NW
Washington, DC 20405
Greetings
I have reviewed the most recent draft of the FAR and have the following comments on Part 15 and related portions

1 The FAR at 74 is puny with regard to the evaluation of life cycle cost While this issue is larger than FAR 15, something needs to be done in both parts to bring this inadequate guidance into line with current law, case law and practice

2 FAR 84 deals with the process of buying from a GSA schedule It is madequate in that the market place has drastically changed and it is now possible in several categories - and especially in IT products - to have the same product on five or fifty GSA schedules Yet, 84 says the buyer need only compare the price of three schedules This is contrary to the Komatsu Dresser case of GAO in 1992 and often leads to comparing the price of three Fords or Chevys, which is hardly the intent and certainly not competition

Even worse is RFQs from FAR 15 are being used to establish BRAs (FAR 132 small purchases) for schedule orders in excess of $\$ 100$ million This is hardly the intent of the current FAR and is constantly being abused DISA has issued these with as little as three davis, and in one case three hours, response time Something needs to br fixed in FAR 8,13 and 15 to fix this abuse

The rewrite of FAR 15 allows unfettered abuse of the process by poorly trained CO s or biased COs It wall favor well known brand names, raise prices and favor the vendors who sell sizzle rather than Grade A meat who have the sales force to influence a wide variety of agencies simultaneously, regardless of the side by side comparison merits and prices of competitive products

The intent to eliminate BAFOs completely ${ }^{\circ}$ onsets the reason we, at GSA in 1972, stopped allowing late bids Fraud, ladies and gentlemen' Allowing late bids is an open mentation to fraud If that is not obvious as to how, invite me down for a couple of hours to explain what we so painfully learned when I was a GSA employee for five years.


Perhaps the worst problem I see, so far, is the complete elimination of the old FAR 15 402(b), preventing a vendor being given advance knowledge of government requirements Did I miss this in the new FAR or did you forget to put it in? Is advance knowledge now okay because it is common in the commercial world? Or is this merely an error you will shortly correct?

Now, don't get me wrong, I love procurement reform The changes are often so $1 l l$ advised, the government so confused and poorly trained and the vendors searching for assistance, that our business is currently booming better than post CICA These changes will further cause our business to expand We are very busy

But I submit that these changes will injure $90 \%$ of the vendor community, enrich a few firms, cause prices to rise and tend to allow agencies to standardize on well known brands, without doing a prop ar competition to ar me at that point.

Finally, we desperately need a section to provide buyers guidance on choice among a plethora of previously awarded GWACs, schedules, IDIQs, etc FAR 17207 is simply not adequate today

Sincerely,


Terry Miller
President
TM/tk
Enclosure
FAR PART 15 REWRITE
A.K.A
AGENCY DISCRETION AT ITS W Presented by:
THOMAS K DAVID
McMahon, David \& Brady
Attorneys At Law
8221 Old Courthouse Road
Suite 107
Vienna, VA 22182
(703) $903-0334$

## STATUS OF REWRITE

FAR COUNCIL TASKED GOVERNMENT AND INDUSTRY COMMITTEE IN JANUARY 1996 TO RE-WRITE
COMMENTS WERE NUMEROUS AND HIGHLY CRITICAL
HIGHLIGIXTS/LOWLIGHTS INCLUDE DISCRETIONARY COMPETITIVE RANGE DETERMINATIONS FEWER DISCUSSIONS WITH OFFEROR MORE COMMUNICATIONS WITH OFFERORS BAFOS ARE ALMOST EXTINCT (REVISIONS INSTEAD) ALLOWS LATE PROPOSALS
AND MUCH, MUCH MORE
SECOND PHASE TO COVER PRICING SECTIONS (157, 158 AND 15 9)
SCHEDULED FOR RELEASE IN 1997

N
$E-b 20-a b$

A. AGENCY ALLOWED TO RESTRICT COMPETITIVE RANGE IN ADVANCE OF REP ISSUANCE' NO RE
REP RESTRICTIONS
I $\quad$ RESTRICTIONS DUE TO "RESOURCES AVAILABLE" TO AGENCY AND "EFFICIENCY"

II $\quad$| DOES NOT COMPLY WITH FARE WHICH REQUIRES "GREATEST NUMBER" OF OFFEROR |
| :--- |
| TO BE INCLUDED IN COMPETITIVE RANGE |

III $\quad$ DOES NOT COMPLY WITH CICA REQUIREMENT TO "MAXIMIZE COMPETITION"
B. AGENCY ALLOWED TO LIMIT FIELD TO PROPOSALS WITH "MOST HIGHLY RATED" OF AWARD

I | LARA MANDATES "GREATEST NUMBER" THAT ARE "RATED MOST HIGHLY" |
| :--- |
| II PRE-AWARD DEBRIEF FOR OFFEROR NOT IN COMPETITIVE RANGE (NOT REQUIRED AND |

COMMUNICATION ARE "IN"
DISCUSSIONS ARE "OUT"
COMMUNICATIONS WITH OFFEROR ENCOURAGED

$\ll$
BYE-BYE BAFOS
15.409

$$
\begin{aligned}
& \begin{array}{l}
\text { "SELECT" OFFEROR ARE ALLOWED TO MAKE "REVISIONS" TO THEIR PROPOSALS } \\
\text { I } \quad \text { "REVISION" DEFINED AS A "CHANGE TO PROPOSAL AS A RESULT OF DISCUSSIONS" } \\
\text { II } \quad \begin{array}{l}
\text { ALL COMPETITIVE RANGE OFFEROR WILL BE ALLOWED TO MAKE MULTIPLE } \\
\text { REVISIONS }
\end{array} \\
\text { NO LIMIT ON THE NUMBER OF "REVISIONS" ALLOWED } \\
\text { WILL BE A COMMON CUTOFF DATE } \\
\text { AUCTIONING AND TECHNICALLY LEVELING AWAIT } \\
\text { OPPORTUNITY FOR FAVORITISM }
\end{array} \\
& <\quad \oplus \quad \backsim \\
& \text { 山 }
\end{aligned}
$$

A FEW MORE GREAT IDEAS
LATE PROPOSALS ARE ALLOWED IF "IN BEST INTERESTS OF GOVERNMENT"
MAY BE APPLIED TO SELECT OFFEROR
DATE OF AWARD NOT RELEASED TO UNSUCCESSFUL OFFEROR
COULD PREJUDICE SUBSEQUENT PROTEST
GOVERNMENT COST ESTIMATES RELEASABLE (TO EVERYONE')
PAST PERFORMANCE ADVERSE INFORMATION CAN REBUT AND REBUTTAL WILL BE CONSIDERED BY GOVERNMENT
-
ORAL PROPOSALS ENCOURAGED (FINALLY A GOOD IDEA') 15103 - BUT OPEN TO ABUSE

- $\varepsilon-620-96$

[^1]FAX 310373-0844

$$
\text { A/C } 97126
$$

May 19, 1997
General Services Administration
FAR Secretariat (VRS)
1800 F Street, NW, Room 4035
Washington, DC 20405
Re: FAR Case 95-029

Members of the FAR Part 15 Rewrite Committee:
Logicon, Inc. would like to express our appreciation for the outstanding work performed by the interagency FAR Part 15 Rewrite Committee. The revisions to FAR Part 15 issued on May 14, 1997, represent a substantial improvement over the earlier version issued on September 12, 1996.

We are concerned, however, that the proposed 60 -day period for comments (all comments are due by July 14, 1997) will not provide enough time to adequately analyze all of the changes contained in this new revision. In order to provide all interested parties adequate time to develop comments that will be useful to the Committee, we request that the comment period be extended by an additional 60 days to September 14, 1997. This lengthened comment period should be adequate to ensure that all commentors have adequate time to prepare their comments.

Sincerely, LOGICON, INC.

N. Roy Easton, Jr., Phi.

Director of Accounting Controls
Author: Jennings Wong at -IOS
Date. 5/29/97 2,00 PM
Priority: Normal
TO 95-29B@whw.gsa.gov at -INTERNET
BCC: Jennings Wong
TO: goldel eunsook@epamall.epa.gov at -INTERNET
TO. tanya.sadler@hq. doe.gov at -INTERNET
CC: richard.klimkosehq. doe.gov at -INTERNET
CC: Kenneth Naser at MOSPEP
CC: John Moresko
Subject: FAR CASE 95-029 - Comments

Comments on the proposed sule published 1n FR May 14. 1997, (pages 26640-26682) follows

1) FAR 15.302 Pollcy should be expanded to provide clear and conclse coverage addressing the recelpt of unsolicited proposals submutted pursuant to Sectaon 155 of the Energy Polıcy Act of 1992 and 10 CFR Pazt 436. It is unclear and difficult to distinguish whether FAR or DOE regulations prevail. FAR coverage and 10 cFR Part 43 f are not in agreement. This $1 s s u e$ should be resolved and not remain subject to interpretation.
2) The proposed FAR 15.404 "Evaluation factors and subfactors" has eliminated coverage of "envirommental objectives preacribed in Executave Order 12873 Federal Acquisition, Recycling and Waste Prevention. To the best of my knowledge, I am unaware of any statutory or executive (OFPP or EPA) pollcy change which rescinds existing requirements curcently contained $1 . n$ FAR $15.605(b)(1)$ (iv).

The above issues should be coordinated whth DOE and EPA respectively for proper resolution.

I may be reached at (202) 208-6704 should you have any questions regarding my comments.

Note, the comments do not represent the Department of the Interior as a whole, but merely individually expressed concerns

Author: mıc14 MMDF2 Mall System <mmdf@mic14.redstone.army.mı1> at INTERNET Date: 5/23/97 12:16 PM
Priority: Normal
TO: DHOLMES at ACQUIS1_PO
Subject: Failed mail (msg.ac12682)
Your message could not be delivered to
'95-029B@www.gsa.gov (host: www.gsa.gov) (queue: smtpddn)' for the following reason: ' [95-029B@www.gsa.gov](mailto:95-029B@www.gsa.gov)... User unknown'

## Your message follows:

Received: from michp758.redstone.army.mıl by mıcl4.redstone.army.mıl ld ac 12682; 23 May 97 12:14 CDT
Recelved: from [136.205.13.9] by michp758.redstone.army.mıl ld aa19072; 23 May 97 12:13 CDT
Received: from caMail by clsmtp.redstone.army.mil
(IMA Internet Exchange 2.1 Enterprise) id 0003551D; Fri, 23 May 97 12:12:40 -0500
Date: Fri, 23 May 1997 12:02:12 -0500
Message-ID: [0003551D.3272@ccsmtp.redstone.army.mil](mailto:0003551D.3272@ccsmtp.redstone.army.mil)
Return-recelpt-to: DHOLMES <DHOLMES@ccsmtp.redstone.army.mıl>
From: DHOLMES [DHOLMES@ccsmtp.redstone.army.mil](mailto:DHOLMES@ccsmtp.redstone.army.mil)
Subject: FAR Case 95-029
To: 95-029B@www.gsa.gov

## 23 MAY 97

FOLLOWING COMMENTS ARE OFFERED REGARDING ABOVE SUBJECT GROUP A:

1. 15.205 ADD "AND REQUESTS FOR INFORMATION" TO THE TITLE
2. 15.401 DEFINE "MATERIAL"
3. RECOMMEND CONSIDERATION OF THE FOLLOWING AS AN OPTIONAL APPROACH:

DEFINE AN OFFER/PROPOSAL AS THOSE ASPECTS OF AN OFFEROR'S RESPONSE TO A SOLICITATION THAT WOULD BE INCORPORATED INTO THE RESULTING CONTRACT. AT A MINIMUM THIS WOULD CONSIST OF A FULLY EXECUTED OF 303 (OR SF33), SECTION B COMPLETED WITH OFFERED PRICES AND A COMPLETED SECTION K. BUYING ACTIVITIES CHOULD HAVE THE OPTION OF EXPANDING THIS DEFINITION TO INCLUDE ANY OTHER PORTIONS OF A RESPONSE THAT SHOULD BE MADE A PART OF THE CONTRACT (SUCH AS KEY PERSONNEL, HARDWARE ENHANCEMENTS, ETC.).

ALL OTHER PORTIONS OF THE RESPONSE WOULD BE CONSIDERED "OTHER INFORMATION". THIS WOULD BE SUCH THINGS AS PAST PERFORMANCE INFORMATION, MANAGMENT PLANS, PERSONNEL QUALIFICATIONS, ETC. AND WOULD NOT BE INCORPORATED INTO THE CONTRACT WHEN AWARDED.

THIS APPROACH WOULD ALLOW COMMUNICATIONS AND EVEN REVISIONS/ADDITIONS TO THE "OTHER INFORMATION" SO LONG AS NO CHANGE WAS REQUIRED TO THE "OFFER/PROPOSAL".

THE ADVANTAGE OF SUCH AN APPROACH WOULD ALLOW AWARD WITHOUT DISCUSSIONS AND THE RESULTING OFFER REVISIONS AND THE EVALUATION THEREOF WHICH WOULD SHORTEN THE TIME TO CONTRACT AWARD.


Author Jerry Zaffos at GSA-PP

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Date. 6/17/97 4 39 PM
```

Priorıty Normal
TO Ralph DeStefano at GSA-V, Jerry Olson at GSA-V
CC Sharon Roach at GSA-PE
Subject. Part 15 Rewrate
I offer the following comments
7.105(b) (5) Recommend deletion as this requirement seems unnecessary and burdensome The contracting officer need only have assurances from budget people that funds are or whll be avallable at the time of award In PBS, Project managers, not contracting officers, normally handle budget issues

14404-1(f)(1) It appears that this section requires a formal determination of responsibility Normally, responsibility determinations are made on the bidder being considered for award Recommend deletion of the term "responsibility"

15 506-3 The cocumentation should reflect the complexity of the negotiations and should not have to conform to a prescribed format

$$
95-029-8
$$

COMMENTS ON PROPOSED REVISION TO
FAR PART 15 - CONTRACTING BY NEGOTIATION

1. Standard forms are mandatory forms delegated by a regulation. They can not be modified on the whim without approval of the issuing agency (this is called an exemption). Optional forms on the other hand are just that - optional. They are not delegated by a regulation. If an agency wishes to use the form they can; or they can develop their own agency form. This eliminates the need for an exemption. This also allows the agency to collect the data they need plus what is required. This procedures is described in FPMR 101-11.203(a) (2) and (3).
2. Since the procedures for negotiated procurements are changing, the forms involving procurements need changing too. Revise the SF 26, 30, and 33 (and any other forms SF 1448, 1447, and 1449?) to cover just sealed bids and offer the three new optional forms for just negotiated procurements.

the Government has determined that it has or may need to practice the inverition,
(2) That the invention not be assigned to any foresgn-owned or controlled corporation without the writen permission of the agency, and
(3) That any assignment or license of rights to use or sell the invention in the United States shall contain a requirement that any products embodying the invention or produced through the use of the invention be substantrally manufactured in the United States The agency shall notify the employee of any conditions imposed
(c) In the case of a determination under exther paragraph (a) or (b) of thus section, the agency shall promptly provide the employee with
(1) A signed and dated statement of 1 ts determination and reasons therefor and
(2) A copy of 37 CFR part 501

10 Section 5018 is amended by revising paragraphs (a) and (b), redesignating paragraphs (c) and (d) as paragraph (d) and (e), and adding new paragraph (c) to read as follows

## \$501 8 Appeals by employess

(a) Any Government employee who is aggrieved by a Government agency determmation pursuant to $\$ \$ 5016(a)(1)$ or (a) (2), may obtain a review of any agency determination by filing, within 30 days (or such longer period as the Secretary may, for good cause shown in writing, fix in any case) after receiving notice of such determination, two copies of an appeal with the Secretary The Secretary then shall forward one copy of the appeal to the hason officer of the Government agency
(b) On recelpt of a copy of an appeal filed pursuant to paragraph (a) of this section the agency liaison officer shall, subject to considerations of national security, or public health, safety or welfare promptly furnish both the Secretary and the inventor with a copy of a report containing the following information about the invention involved in the appeal
(1) A copy of the agency's statement specafied in \$ 5017 (c).
(2) A description of the invention in sufficient detanl to identify the mivention and show its relationship to the employee's duties and work assignments,
(3) The name of the employee and employment status, including a detaled statement of official diuties and responsibilities at the time the invention was made, and
(4) A detaled statement of the points of dispute or controversy, together with coples of any statements or written
arguments filed with the agency and of any other relevant evidence that the agency considered in making its determination of Government interest
(c) Within 25 days (or such longer pernod as the Secretary may, for good cause shown fix in any case) after the transmission of a copy of the agency report to the employee, the employee may file a reply with the Secretary and file one copy with the agency liaison officer

11 Section 5019 is revised to read as follows

## §5019 Patent protection

(a) A Government agency, upon determining that an invention coming within the scope of $\$ \$ 5016(2)(1)$ or (a) (2) has been made, shall promptly determine whether patent protection will be sought in the United States by or on behalf of the agency for such invention A controversy over the respective rights of the Government and of the employee shall not unnecessarity delay the filing of a patent application by the agency to avold the loss of patent rights In cases coming within the scope of $\$ 5016(\mathrm{a})(2)$ the filing of a patent application shall be conungent upon the consent of the employee
(b) Where there is an appealed dispute as to whether $\$ \S 5016$ (a) (1) or (a) (2) applies in determining the respective rights of the Government and of an employee in and to any invention, the agency may determine whether patent protection will be sought in the United States pending the Secretary s decision on the dispute If the agency decides that an application for patent should be filed, the agency will take such rights as are specrfied in $\$ 5016$ (a) (2), but this shall be without prejudice to acquiring the rights specified in paragraph (a)(1) of that section should the Secretary so decide
(c) Where an agency has determined to leave tutle to an invention with an employee under $\$ 5016$ (a) (2), the agency will, upon the filing of an application for patent, take the rights specified in that paragraph without prejudice to the subsequent acquisition by the Government of the rights specified in paragraph (a)(1) of that section should the Secretary so decide
(d) Where an agency has filed a patent application in the United States the agency will, within 8 months from the filing date of the US application, determine if any foreign patent applications should also be filed If the agency chooses not to file an application in any foreign country, the employee may request nights in that country subject to the conditions stated in
§5017 (b) that may be imposed by the agency Alternatively, the agency may permit the employee to retan foreign rights by including in any assignment to the Government of an unclassified US patent application on the invention an option for the Government to acquire title in any foremg country within 8 months from the filing date of the US application
12 A new $\$ 50111$ is added to read as follows

## § 50111 Submissions and inquiries

All submissions or inquiries should
be directed to Chief Counsel for
Technology telephone number 202-
482-1984, Room H4835. U S
Department of Commerce, Washington
DC 20230
Dated July 221996
Bruce A Lehman
Assistant Secretary of Commerce and
Commissioner of Patents and Trademarks Dated July 261996
Mary L Good
Under Secretary of Commerce for Technology
[FR Doc 96-19713 Fuled 8-6-96, 845 am ]
allung COOE $3510-18-\mathrm{P}$, $3510-16-\mathrm{P}$

## GENERAL SERVICES

ADMINISTRATION

## 41 CFR Part 101-11

[FPMR Interim Rule 8-1]
RIN 3090-AGO2

## Relocation of FIRMR Provisions Relating to GSA's Role in the Records Management Program

Agency Office of Policy. Planning and Evaluation, GSA
ACTION Interim rule with request for comments
SUMMARY This regulation reestablishes certan Federal Informatron Resources Management Regulation (FIRMR) provisions regarding records management in the Federal Property Management Regulations (FPMR) Thus action is necessary because the FIRMR is being abolished as of 12 midnight on August 8, 1996
DATES This rule is effective August 8 , 1996 Comments are solicited and are due October 7, 1996
Exprration Date December 31, 1997 adDresses Comments may be manled to General Services Administration, Office of Policy Planning and Evaluation, Strategic IT Analysis Division (MKS), 18th \& F Streets, NW, Room 3224
Washington, DC 20405
FOR FURTHER INFORMATION CONTACT R
Stewart Randall or Pat Smith of the

Office of Policy, Planning and Evaluation, Strategic IT Analysis Division (MKS), 18th \& F Streets, NW , Room 3224, Washington, DC 20405, telephone FTS/Commercial (202) 5014469 or (202) 501-0657 (tdd), or Internet (stewart randall@gsa gov or pat smith@gsa gov)
supplementary information (1) The President signed the National Defense Authorization Act (NDAA) for Fiscal Year 1996, Pub L 104-106, on February 10, 1996 Included in the NDAA was the Information Technology (IT) Management Reform Act of 1996 (ITMRA) Section 5101 of the Act repeals section 111 of the Federal Property and Administrative Services Act of 1949, as amended (the Brooks Act) (40 U S C 759) The Brooks Act was the authority for most of the provision in GSA's Federal Information Resources Management Regulation so that the Brooks Act repeal effectively disestablishes the FIRMR Therefore, any FIRMR provisions that are still needed, such as Part 201-9-Records Management, are being removed from the FIRMR and reestablished in the appropriate regulation
(2) GSA has determined that this rule is not a significant rule for the purposes of Executive Order 12866 of September 30, 1993, because it is not likely to result in any of the impacts noted in Executive Order 12866 affect the rights of specified individuals, or raise issues arising from the policies of the Administration GSA has based all administrative decisions underlying this rule on adequate information concerning the need for and consequences of this rule, has determined that the potential benefits to society from this rule outweigh the potentral costs, has maximized the net benefits, and has chosen the alternatıve approach involving the least net cost to society

## List of Subjects in 41 CFR Part 101-11

Archives and records, Computer technology Telecommunications, Government procurement, Property management, Records management, and Federal information processing resources activities

For the reasons set forth in the preamble, 41 CFR Chapter 101 is amended by adding subchapter B, consisting of part 101-11, to read as follows

SUBCHAPTER B-MANAGEMENT AND USE OF INFORMATION AND RECORDS

PART 101-11-CREATION,
MAINTENANCE, AND USE OF RECORDS

Subpart 101-110 General Provisions
Sec
101-11 0 Scope of part
101-111 General
Subpart 101-11 1-Agency Programs
101-11 100 Scope of subpart
101-11101 General
101-11 102 Policy
101-11 103 Procedures
Subpart 101-11 2-GSA Governmentwide Programs
101-11 200 Scope of subpart
101-11 201 General
101-11 202 Governmentwide programs
101-11 203 Standard and Optional Forms Management Program
101-11 204 Interagency Repors Management Program
Authority 40 USC 486(c)

## Subpart 101-110 General Provisions

## §101-110 Scope of part

This part prescribes policies and procedures for the creation, maintenance, and use of Federal agencies' records Unless otherwise noted the policies and procedures of this part apply to all records regardless of medium ( 1 e , paper, electronic or other)

## §101-11 1 General

(a) Chapters 29 and 31 of tutle 44 of the United States Code (U S C), require the establishment of standards and procedures to ensure efficient and effective records management by Federal agencies The statutory goals of these standards and procedures include
(1) Accurate and complete
documentation of the policies and transactions of the Federal Government
(2) Control of the quantity and quality of records produced by the Federal Government
(3) Establishment and mantenance of mechanisms of control with respect to records creation in order to prevent the creation of unnecessary records and with respect to the effective and economical operations of an agency,
(4) Simplification of the activities, systems, and processes of records creation, maintenance, and use,
(5) Judicious preservation and disposal of records and
(6) Direction of continuing attention on records from their mitial creation to ther final disposition, with particular emphasis on the prevention of unnecessary Federal paperwork
(b) The law assigns records management responsibilities to the Administrator of General Services (the Administrator), the Archivist of the United States (the Archivist) and the heads of Federal agencles
(1) The Administrator is responsible for providing guidance and assistance to Federal agencies to ensure economical and effective records management Records management policies and gudance established by GSA are contained in FPMR Part 101-11, records management handbooks, and other publications issued by GSA
(2) The Archivist is responsible for providing guidance and assistance to Federal agencies to ensure adequate and proper documentation of the policies and transactions of the Federal Government and to ensure proper records disposition Records management policies and guidance established by the Archivist are contamed in regulations in 36 CFR chapter XII and in bulletins and handbooks issued by the National Archives and Records Adminıstration (NARA)
(3) The heads of Federal agencies are responsible for complying with the policies and guidance provided by the Administrator and the Archivist

## Subpart 101-11 1-Agency Programs

## §101-11 100 Scope of subpart

This subpart prescribes policies and procedures for establishing and mantaining an agency records management program
§101-11 101 General
Section 3102 of tutle 44 of the U S C requires each Federal agency to establish an active and continuing records management program

## §101-11 102 Policy

Each Federal agency shall establısh and maintain an active continuing program for managing agency records, commensurate with agency size,
organization mission, and
recordkeeping activity

## §101-11 103 Procedures

Each Federal agency shall take the following actions to establish and maintain the agency's records management program
(a) Assign specific responsibility for the development and implementation of agencywide records management programs to an office of the agency and to a qualified records manager
(b) Consider the guidance contaned in GSA and NARA handbooks and bulletins when establishing and

implementıng agency records
management programs
(c) Issue a drectrve establishing program objectives, responsibilities authorities, standards, guidelines, and instructions for its records management program
(d) Apply appropriate records management practices to all records irrespective of the medium (e g , paper, electronic or other) on which the record resides
(e) Control the creation, maintenance, and use of agency records and the collection and dissemination of information to ensure that the agency
(1) Does not accumulate unnecessary records,
(2) Does not create forms and reports that collect information inefficiently or unnecessarily,
(3) Periodically reviews all existing forms and reports (both those origmated by the agency and those responded to by the agency but originated by another agency or branch of Government) to determine if they need to be improved or canceled,
(4) Mantains its records cost effectively and in a manner that allows them to be retrieved quickly and reliably and
(5) Keeps its mailing and copying costs to a minimum
(f) Standardize stationery in terms of size, letterhead design, color (of onginals record copies, and envelopes). markings that are permitted on envelopes and postcards, and number of stationery styles permitted
(g) Consider the voluntary standards contaned in the Table of Standard Specifications in the FPMR when developing agency statıonery standards
(h) Establish agency standards
regarding the types of correspondence to be used in official agency
communications, and the number and kind of copies required and their distribution and purpose
(i) Strive to
(1) Improve the quality, tone, clarity. and responsiveness of correspondence, and provide for its creation in a tumely econormical, and efficient manner,
(2) Design forms that are easy to fillin, read transmit. process, and retrieve, and reduce forms reproduction costs,
(3) Provide agency managers with the means to convey written instructions to users and document agency policies and procedures through effective directives management,
(4) Provide agency personnel with the information needed in the right place, at the right time, and in a useful format,
(5) Elimmate unnecessary reports and design necessary reports for ease of use,
(6) Provide rapid handling and accurate delivery of manl at mimmum cost and
(7) Organize agency files
(1) So that needed records can be found rapidly,
(ii) To ensure that records are complete, and
(iii) to facilitate the identification and retention of permanent records and the prompt disposal of temporary records

## Subpart 101-11 2-GSA

Governmentwide Programs

## §101-11 200 Scope of subpart

This subpart contans policies and procecures prescribed for the following GSA-managed programs
(a) The Standard and Optional Forms Management Program
(b) The Interagency Reports

Managernent Program

## §101-11 201 General

(a) The Standard and Optional Forms Management Program was developed and operated by OMB consistent with the authorines prescribed by the Budget and Accounting Act of 1921 GSA assumed responsibility for the program on May 29, 1967 through agreement with OMB
(b) The Interagency Reports

Management Program implements 44
U S C chapters 29 and 31, recognizing
OMB functions under 44 U S C $3504(\mathrm{e})$ and OMB implementation under 5 CFR 132016
§101-11 202 Governmentwide programs
§101-11 203 Standard and Optional Forms Management Program
(a) General (1) The Standard and Optional Forms Management Program was established to achieve Governmentwide economies and efficiencies through the development, maintenance and use of common forms (2) GSA will provide additional guidance on the Standard and Optional Forms Management Program
(b) Procedures Each Federal agency shall--
(1) Designate an agency-level Standard and Optional Forms Liatson
Representative and Alternate, and notify GSA in writung of such designees names titles, mailing addresses, and telephone numbers within 30 days of the designation or redesignation at the address in paragraph (b) (4) of this section,
(2) Promulgate Governmentwide Standard Forms pursuant to the agency s statutory or regulatory authority and issue in the Federal Register Governmentwhte procedures on the mandatory use, revision, or cancellation of these forms.
(3) Sponsor Governmentwide Optional Forms when needed in two or more agencres and announce the Governmentwide availability, revision or cancellation of these forms.
(4) Obtain GSA approval for each new revised or canceled Standard and Optional Form 60 days prior to planned emplementation and certify that the forms comply with all applicable laws and regulations Send approval requests to General Services Administration, Forms Management Branch (CARM), Washungton. DC 20405,
(5) Provide GSA with a camera ready copy of the Standard and Optional Forms the agency promulgates or sponsors prior to implementation at the address shown in paragraph (b) (4) of this section.
(6) Obtain promulgator's or sponsor's approval for all exceptions to Standard and Optional Forms prior to implementation
(7) Annually review all Standard and Optional Forms which the agency prornulgates or sponsors, including exceptions, for improvement, consolidation or cancellation,
(8) When requested by GSA and OMB subrnut a summary of the Standard and Optional Forms used for collection of information covered by 5 CFR part 1320.
(9) Request approval to overprint Standard and Optional Forms by contacting GSA (CARM), and
(10) Coordinate all matters concerning health care related Standard Forms through the Interagency Committee on Medical Records (ICMR) For additional information on the ICMR, contact GSA (CARM)
§ to:-11 204 Interagency Reports Management Program
(a) General (1) GSA manages the Interagency Reports Management Program to ensure that interagency reports and recordkeeping requirements are based on need, are cost-effective. and comply with applicable laws and regulations
(2) GSA will provide addittonal guidance on the Interagency Reports Management Program
(b) Procedures (1) Each agency shall
(1) Obtain GSA approval for each new revised, or extended interagency report, prior to implementing the report,
(11) Designate an agency-level interagency reports liaison representative and alternate, and notify GSA in writing of such designees' names, titles maling addresses, and telephone numbers within 30 days of the designation or redesignation (tii) Use Standard Form 360, Request to Approve an Interagency Reporting Requirement, to obtain GSA approval

Federal Register / Vol 61, No 153 / Wednesday, August 7, 1996 / Rules and Regulations 41003
for each new, revised, or extended interagency report,
(iv) Attach to each Standard Form 360 , a justufication statement (signed by the official who requested the report) describing the need for the report,
( $\left.{ }^{( }\right)$Explain how the reporting costs shown on Standard Form 360 were derived,
(vi) Make supportung documentation for cost estimates avalable for GSA review
(vil) Submit to GSA and OMB (see 5 CFR part 1320) simultaneously for approval, interagency repons that collect information from Federal agenctes and from either the public or State or local gqvernments,
(vi11) Notify GSA and/responding agenctes when an interagency report is no longer needed, and/
(1x) Send requests for GSA approval and notifications regarding interagency reports to General Services
Adminnstration, Strategic IT Analysis Division, (MKS), 18th and F Streets
NW, Washington/ DC 20405
(2) This section does ndt apply to the following interagency repdrts
(However interagency reports required by Federal agencies to respond to these reports are subject to this sechion )
(i) Legislative branch reports
(11) Office of Management and Budget (OMB) and other Executive Office of the President reports
(iii) Jydicial branch reports requred by couft order or decree
(iv) Reporting requirements for
security classified information
However, interagency reporting
requirements for non-sensitive or
unclassified sensitive information are
not exempt, even if such information is
1ater given a security classification by
the requesting agency
Dated July 31, 1996
David J Barram
Actung Admunistrator of General Services
[FR Doc 96-19960 Filed 8-6-96, 845 am ]
BILLING CODE 6820-25-P

## 41 CFR Part 101-35

[FPMR interim Rule F-1]
RIN 3090-AG03

## Relocation of FIRMR Provisions

Relating to the Use of Government Telephone Systems and GSA Services and Assistance
agency Office of Policy, Planning and Evaluation and the Federal
Telecommunications Service, GSA ACTION Interim rule with request for comments

SUMMARY This regulation reestablishes the Federal Property Management

## Regulations (FPMR) certain

telecommunications provisions of the Federal Information Resources
Management Regulation (FIRMR) These FIRMR provisions will be maintained in the FPMR after August 7, 1996 This
change is precipitated by the passage of the Information Technology
Management Reform Act of 1996, which effectively disestablishes the FIRMR
Dates This rule is effective August 8 1996

Comments are solicited and are due
October 7, 1996
Expiration Date August 8, 1998
ADDRESSES Comments may be malled to General Services Administration, Office of Policy, Planning and Evaluation,
Strategic IT Analysis Division (MKS)
18th \& F Streets, NW, Room 3224,
Washington, DC 20405 (for Part 10135 1) or General Services
Administration, Federal
Telecommunications Service (TCS)
7980 Boeing Court 4th Floor, Vienna
VA 22182-3988 (for §§101-35 2-10135 5)
FOR FURTHER INFORMATION CONTACT
Dorts Farmer (for Part 101-35 1) GSA,
Office of Pohicy Planning and
Evaluation, Strategic IT Analysis
Division (MKS), 18 th \& F Streets, NW , Room 3224 Washıngton, DC 20405 telephone FTS/Commercial (202) 5013194 (v) or (202) 501-0657 (tdd) or Internet (dons farmer@gsa gov) and James Cademartor1 (for Parts 101-35 2
through 101-35 5), GSA, Federal
Telecommunicatıons Service, 7980
Boeing Court, 4th Floor, Vienna VA,
22182-3988, telephone FTS/
Commercial (703) 760-7545 (v) or (703)
760-7583 (FAX), or Internet
(james cademartorı@gsa gov)
SUPPLEMENTARY INFORMATION (1) Section
111 of the Federal Property and
Administrative Services Act of 1949, as
amended (the Brooks Act) (40 U S C
759) was the authonty for many of the provisions in the FIRMR The passage of Public Law 104-106, the Information Technology Management Reform Act of 1996 signed February 10, 1996, repealed Section 111 and the General Services Administration s (GSA) authority to issue Governmentwide regulations for managing acquiring and disposing of information technology As a result the FIRMR will be abolished as of 1200 midnught on August 8, 1996 The referenced FIRMR provisions that apply to government
telecommunications will be maintained in the FPMR after August 71996
(2) Most of the language now contained in sections 201-20306 201-
$21600,201-21601,201-21602$ 201-
24 101, 201-24 101-1, 201-24 101-2
201-24 101-3, 201-24 102, 20124 106, and 201-24 203-1 of the FIRMR is being moved almost verbatim to the FPMR A few changes were needed to correct out of date references
(3) GSA has determuned that this is not a significant rule for the purposes of Executive Order 12866 of September 30 , 1993, because it is not likely to result in any of the impacts noted in Executive Order 12866, affect the rights of specified individuals or raise issues arising from the policies of the Administration GSA has based all administrative decisions underlyang this rule on adequate information concerning the need for and consequences of the rule, has determined that the potential benefits to society from this rule outweigh the potential costs has maximized the net benefits, and has chosen the alternative approach involving the least net cost to soclety
Lust of Subjects in 41 CFR Part 101-35
Archives and records Computer technology, Telecommumications, Government procurement Property management, Records management. Information technology
For the reasons set forth in the preamble, 41 CFR chapter 101 is amended by adding subchapter $F$. consisting of part 101-35 to read as follows
SUBCHAPTER F-MANAGEMENT AND USE OF TELECOMMUNICATIONS RESOURCES

## PART 101-35-

TELECOMMUNICATIONS
MANAGEMENT POLICY
Subpart 101-35 0-General Provisions
Sec
101-350 Scope of part
101-35 1-101-35 4 [Reserved]
101-35 5 Definitions
Subpart 101-35 1-Use of Government
Telephone Systems
101-35 100 Scope of subpart
Subpart 101-35 2-Authorized Use of Long Distance Telephone Services
101-35 200 Scope of subpart
101-35 201 Authorized use of long distance telephone services
101-35 202 Collection for unauthorized use
Subpart 101-35 3-The mandatory FTS Long Distance Network
101-35300 Scope of subpart
101-35 301 The mandatory FTS long distance network
101-35 301-1 General
101-35 301-2 Policies
101-35 301-3 Procedures
$95-029.9$

## Department of Energy

Washington, DC 20585

June 20, 1997

FAR Secretariat (MVRS)
GSA
Rm 4037
18th Fit NW
Washington, DC 20405
Reference FAR Case 95-029, Part 15 Rewrite
In reviewing FAR Case $95-029$ we noticed the coverage regarding oral presentations and offer the following observation

DOE experience in the use of oral presentations in the competitive environment indicates that their use promotes participation by small businesses Indeed we have had small business offer on solicitations that employ oral presentations who had not previously competed on a DOE procurement We attribute this to the reduced cost of competing when oral presentations are used The primary cost reductions to an offeror are in proposal preparation and reduced lead time to award

Should you have any questions, please call me at 202-586-8614
Sincerely,


Ed Lovett
Office of Procurement and Assistance Management

## DEPARTMENT OF THE TREASURY

Bureau of Engraving and Printing

WASHINGTON, DC 20228

## 07/01/97

FAR Secretariat (VRS)
General Services Administration
1800 F Street, NW
Washington, DC 20405

# CORRECTED COPY 

Subject For the public record.
Reference FAR Case 95-029
Use of Oral Presentations and its effect on Small Business Participation

## Dear Sir or Madam

This is a corrected copy of a letter dated June 19, 1997, that I sent you Please substitute that letter with this corrected version and accept my apologies

The Bureau of Engraving and Printing (BEP) has awarded 27 contracts using oral presentations Two contracts were awarded to small business concerns and eight to small disadvantaged businesses (SDBs) Of the remaining 17 contracts that were awarded to large businesses, many included Small Business Subcontracting Plans with very aggressive goals BEP is currently in the process of awarding six other contracts utilizing oral presentations Of these, two have been set aside for small businesses and two for SDBs

## Statistics

## Awards

| Total Awards 27 |  |
| :---: | :---: |
| Large Business | $17(629 \%)$ |
| Small Business | $02(074 \%)$ |
| SDBs | $08(296 \%)$ |

## Active Solicitations

Total Active 06
Large Business 02 (33 3\%)
Small Business 02 (33 3\%)
SDBs 02 (33 3\%)

We believe that small businesses have benefited from our use of oral presentations in many ways, but particularly by saving time and money Please call me (202/874-2534) or Efrain J Fernandez (202/874-3142) if you require more information

Sincerely,


General Services Administration<br>FAR Secretanat (VRS)<br>1800 F Streets, NW<br>Room 4035<br>Washington DC 20405<br>\section*{Dear Colleagues,}

Attached are comments relating to FAR Case 95-029 Thank you for the opportunity to comment


I appreciate the opportunity to offer comments on FAR Case 95-029 Please consider the following "Group A" comments

15101
In the not-so-good -old days the acquisition/procurement regulations had a very weak endorsement of what the regulations then called "greatest value" It said something akin to " While the low cost is properly the deciding factor in many procurements, it may sometimes be appropriate to consider non-cost factors as well as cost in circumstances such as Research and Development contracting and cost reimbursement contracting "

Because the regulations gave these two examples, many Federal agencies tended to use the best value process only for R\&D or other cost reimbursement contracting Happily, in the mid 80's, we all became involved with TQM and took into account the advice of Deming et al and began to buy the way that private individuals and companies buy We considered quality as well as cost And we did not limit this common sense buying technique - which we call "best value"- only to R\&D and CR

Thus, in a contract for technical support personnel we were able to spend an extra buck or two for better people In a contract for dining services we were able to get a contractor with outstanding past performance rather than limiting ourselves to "adequate" performers We did this even where the risk of "unacceptable performance' was low The idea was that the taxpayer should not have to be stuck with the low, acceptable offer when products and services are being procured for the Government If the outside world subscribed to the notion of "low acceptable" all of our parking lots would be full of subcompacts, everybody would buy the store brand instead of Coke or Pepsi, and the stock prices for discount airlines would go way up

In the proposed coverage we are taking a giant step backwards It sounds as if best value trade off techniques are recommended only when "less definitive" requirements are involved and when the risk of unacceptable performance is high It also appears to be a very weak endorsement of the technique If the concern is that we are unable to award to a low cost offer in best value, please keep in mind that it has been well settled in many protest opinions that - in a best value procurement where non-cost factors are more important than cost - the Government still has the alternative of going to the low offer It may do so whenever it wishes to take advantage of a "lower rated, lower cost" proposal such as in instances where the non-cost factors in higher rated proposals are not deemed by the source selection authority to be worth the proposed increase in cost If the concern is that best value takes too long, then include in your revised coverage that a best value procurement can have as few as "one" non-cost factors and as few as "one "evaluator And emphasize that award can be made without discussion

Because of the above considerations, the proposed wording of 15101 is certainly not necessary and almost certainly will jeopardize one of our most important acquisition reforms - the expanded use of best value Recommend it be replaced by the following
" An agency may obtain best value in negotiated procurement by any number of approaches For
example, an agency may use traditional negotiation techniques or multi-step selection In deciding whether to trade off cost and non-cost factors, agencies should take into consideration the scope and importance of the acquisition, the level of expertise and experience needed to meet the requirement, and other such environmental factors In routine contracting for commercial supplies and services, where criticality or complexity are not predominant and the amount of momes involved are not significant, agencies should consider other, less expensive selection techmques, such as awarding to the low offeror, or awarding to the offeror with the lowest cost, acceptable proposal "

151012
This paragraph provides that the contracting officer can anticipate that the best value will result from the low cost, acceptable offer

The impact of this radical approach would be to change best value from a process and end result to only an end result This would render many precedents and practices obsolete And it would do so without any discernible value being added.

A contracting officer can determine best value only by comparing offers- that is the best value process He or she cannot determine best value by hoping for or anticipating that the lowest offer will make the most business sense The only way this approach could possibly pass the common sense test is in markets where all contractors and products are equal And, offhand, I cannot think of one

Using the proposed ill advised redefinition of best value that includes the low cost, acceptable proposal approach, we will be executing- under the banner of best value - procurements where we will not be able to spend even one extra buck for a better contractor or a better product Having that choice is the essence of a best value selection

I have nothing against using two step sealed bidding or negotiated procurement where award is to be made to the low cost, acceptable offer However, it is not by any stretch of the imagination a best value process. And if the result turns out to be the best value it will be by happy accident and not due to any ESP on the part of the contracting officer

Again, this proposed change muddies the best value waters without achieving anything Please delete any inference that the low cost, acceptable proposal approach is a best value technique or any inference that using that approach will automatically result in the best value Common sense dictates that best value can be determined only by companng the ments and costs of proposals received

15 405(a) (2) (iv)
With regard to the requirement that firms without any past performance be given a neutral evaluation Recommend the "shalls" be changed to "mays" It has been held that an advantage earned by incumbency is not one that must be eliminated I see no difference here If the contracting officer feels that expenence and good past performance are essential to the
management of risk for a particular contract, then he or she should be empowered to make an exception to the feel good policy of neutral evaluations There are already small business setasides, mentor-protege programs, and "low offer" acquisitions that give new firms an opportunity to get a record of past performance We should not impose any "shalls" on the contracting officer that may not make good business sense in specific situations Empowerment - along with professionalism - is an essential requirement of true acquisition reform

15406 (c)
With regard to the inclusion of "highly rated" proposals in the competitive range In determining the competitive range the contracting officer must compare proposals against one another and must make an integrated assessment of ment and cost Thus a proposal with a "score" lower than other proposals may be left in the competitive range because of the opportunity for cost savings, and a very highly scored (rated?) proposal may be dropped because there is no realistic opportunity of reducing an unaffordable proposed cost Using the term "highly rated" without definition will certainly be confusing If we are saying that only the highest scored proposals are in the competitive range, then this is bad policy Recommend that, in lieu of " the contracting officer shall establish a competitive range comprised of those proposals most highly rated ", you substitute the words " the contracting officer shall establish a competitive range of those proposals with a realistic opportunity to receive award " Recommend all appropriate subparagraph be changed accordingly

I sincerely believe that the overwhelming number of contractors and contracting officers would endorse the notion that the competitive range only include those with a realistic chance to receive the award To do otherwise would be to incur additional expense for the parties involved without any real probability of gain

## 15406

Somewhere in 15406 it should be made clear that the contracting officer has the right to bring contractors that have been eliminated from the competitive range into the competitive range For example, the contracting officer may learn that one or more of the companies in the range are effectively disqualified (small business status, criminal charges etc) This changes the mix of those competing contractors with a realistic opportunity to receive award Those who had earlier been eliminated may, because of changed conditions, now have a realistic opportunity to receive award As another example, the agency ombudsman or ADR group may obtain information that leads them to recommend to the contracting officer that he or she add a previously deleted offeror to the competitive range

## 15 204-5 (b)

Recommend the addition of the following
"It is important to tailor instructions for each procurement and to strictly limit the use of boilerplate solicitation preparation instructions In tailoring, factors such as the expense of preparing proposals and the ease of evaluating proposals should be taken into consideration As a general rule, the government should not ask for information that is not essential to the evaluation
process for the specific procurement Further, tailoring must result in instructions that are consistent with Sections C and M and other sections of the uniform contract format "

## 15-204-4 (c)

Recommend including the following
"It is important to tailor evaluation factors for each specific procurement and to strictly limit the use of boilerplate evaluation factors Evaluation factors should be limited to those needed to select the best value from among competing contractors The determination of the factors to be used should be based upon an integrated assessment of the product or service being procured and the information obtained from market research and market surveys Again the cost of preparing and evaluating proposals should be a consideration, consistent with the needs of the government Tailoring must result in evaluation factors that are compatible with the information contained in Sections $C$ and $L$ and other sections of the uniform contract format "

Charles D Solloway Jr
Charles Solloway Associates
Edgewood MD 21040
410-679-4096

12158 Marbella Ct
Waldorf, MD 20601
21 June 1997
General Services Administration
FAR Secretariat (VRS)
1800 F St , NW, Room 4035
Washington, DC 20405
The following comments are offered relative to the FAR Part 15 REWRITE proposed rule, as published 14 May 1997

115 205(a) -- The last sentence provides for an agency to "permit" the charging of a fee for solicitations This would be more in keeping with the philosophy evident in FARA and at FAR 1 102(d) if it were changed to "unless precluded by agency regulations"
$215406(\mathrm{c})$-- Use of the termmology " ratings of each proposal against all evaluation criteria" could be interpreted to give preference to the scoring (whether numerical or otherwise) of cost/price proposals (since the term "rating" is usually associated with some sort of scoring methodology) While this may be an acceptable approach to evaluation, it is certainly not the rule of thumb
$315406(\mathrm{~d})(3)$ and 15407 (a) -- There appears to be a conflict between these two cites relative to the the extent to which "material weaknesses" are to be discussed/negotiated Subpart 15 406(d)(3) provides that "The contracting officer shall discuss significant weaknesses that could, in the opinion of the contracting officer, be altered to enhance materially the proposal's potential for award " However, 15 407(a) seems to indicate that all material aspects do not have to be discussed

415408 -- Should not the SSA also compare all PROPOSALS in the assessment?
$5 \quad 15504-1(\mathrm{~d})$-- It is not clear how, when, or why it would be appropriate to adjust proposed fee in a cost realism analysis Given that the Government is precluded from requiring an offeror to submit " supporting rationale for its profit or fee" [ref 15 504-4(b)(5)], there appears no basis on which the contracting officer could make a reasonable adjustment of the proposed fee Contracting personnel will undoubtedly attempt to apply a percentage of costs or to utilize a weighted guidelines approach Cost plus a percentage of cost approaches are prohibited at $16102(\mathrm{c})$ and $15504-4$ provides that when cost analysis is not used, a profit analysis is not required Given that the fee is fixed, the usefulness of any adjustments in the proposed fee in the cost realism analysis is not apparent


Denise Nolet
JUN 261997

United States
General Accounting Office
Washington, D.C. 20548
Office of the General Counsel

B-275695

June 26, 1997

General Services Administration
FAR Secretariat (MVRS)
18th \& F Streets, NW
Room 4037
Washington, D.C. 20405
Attention: Ms. Sharon A. Riser
Dear Ms. Riser:
This responds to the request for comments on the proposed Phase I revision of Federal Acquisition Regulation (FAR) Part 15 and related sections concerning acquisition techniques and source selection to be used in contracting by negotiation. The proposed rule was published in the Federal Register on May 14, 1997. Our comments do not encompass Phase II of the proposed rule, which addresses issues relating to contract pricing and unsolicited proposals.

We have strongly supported the FAR Part 15 redrafting effort. The proposed rule contains major improvements over the Phase I proposal published in September, 1996. We believe that the improvements will contribute greatly to the goal of a more flexible, simplified, and efficient process for selecting contractors in competitive negotiated acquisitions.

Our comments are limited to a few unclear portions of the proposal that could mislead contracting officials. We believe that to the extent possible, these areas should be clarified now rather than through subsequent bid protests and resulting case law.

Our specific comments are detailed in the attachment.


Robert P. Murphy General Counsel

Attachment

## ATTACHMENT

Oral Presentations and Communications with offerors: Sections 15.103 and 15.406

Section 15.103 encourages the expanded use of oral presentations. This is a promising addition to the FAR. We are concerned, however, that there is no guidance regarding an oral presentation where award is to be made on the basis of initial proposals, without discussions.

Where award is to be made on the basis of initial proposals, without discussions, communications are limited to the resolution of minor errors or clarifications that do not constitute proposal revisions. In view of these restrictions, where award is to be made without discussions there is little room for dialogue. In order to make clear to contracting officials that the role of oral presentations is very limited in these circumstances, we suggest that subsection 15.103(f) be amended to provide that if the government conducts "communications" as defined in section 15.001 during an oral presentation, it must comply with 15.406 .

Preaward and Postaward Debriefing of Offerors: Sections 15.605 and 15.606

The provision at $15.605(a)(2)$ allows an offeror excluded from the competitive range to request a delay of its preaward debriefing until after award. The provision further states that if the delay is granted, then "the date the offeror knew or should have known the basis of a protest" for the purpose of filing a timely protest with this Office pursuant to our Bid Protest Regulations at 4 C.F.R. § $21.2(\mathrm{a})(2)$ "shall" be the date the exclusion notice was received. Our current regulations do not address this situation.

To avoid conflict with the jurisdiction of our Office to determine whether a protest is timely, we recommend that the portion of subsection 15.605 (a) (2) that relates to the timeliness of protests to our Office be deleted. A generic warning that a request for a delayed debriefing could impact the timeliness of a protest concerning the subject of the debriefing would apprise protesters of a possible adverse timeliness determination by this Office. Also, the provisions at 15.606 (a) (4) (ii) and (iii) concerning the timeliness of protests filed with our Office in connection with delayed postaward debriefings or untimely debriefing requests should be deleted or similarly amended for the same reasons.

Lowest Price Technically Acceptable Source Selection Process: Section 15.101-2

The provisions at 15.101-2(b)(1) state that where award is to be made on the basis of the lowest-priced technically acceptable offer, the evaluation of an offeror's past performance is based on meeting or exceeding acceptability standards. The provision does not refer to the Small Business Administration's (SBA) Certificate of Competency (COC) process mandated by 15 U.S.C. § 637(b)(7). If an offer from a small business is the subject of a past performance evaluation on a pass/fail basis and the offer is rejected for failure to "pass," this is a nonresponsibility determination that must be referred to the SBA for consideration under that agency's COC process. Smith of Galeton Gloves. Inc., B-271686, July 24, 1996, 96-2 CPD 36. We recommend that a reference to the COC process be added to this section. Without such a reference, contracting officials may not be aware of the requirement to refer these matters to the SBA.

Requests for Proposals: Section 15.203
The provisions at $15.203(a)(2)$ authorize offeror to propose alternative contract line item structures. Whale the section states that the evaluators should consider the potential impact on other terms and conditions in the RFP, it fails to include a reference to the requirement for amending the RFP at section 15.206 if the proposed alternate changes, relaxes, increases, or otherwise modifies the RFP requirements or terms and conditions. We recommend the such a reference be added.

Subsections $15.203(e)$ and (f) authorize the use of letter REPs and oral REPs respectively. In each instance the prior version of FAR Part 15, published in September, 1996, provided that the use of letter or oral RPs would not relieve the contracting officer from complying with other FAR requirements. The warnings do not appear in the current proposal. In discussions with members of the contracting community, we have become concerned that some believe that the use of letter or oral RPs results in relief from other FAR requirements. To avoid this misconception, we recommend that the cautionary statements be retained in both sections.

Issuing Solicitations: Section 15.205
Subsection $15.205(\mathrm{a})$ governs the availability of solicitations. It states that copies of solicitations must be provided to small businesses upon request and provides that a "reasonable number of copies" should be available for distribution to "other eligible parties." The provision could be read as inconsistent with the requirement at 41 U.S.C. § 416 (d) that
all potential offeror, of whatever size, are entitled to the solicitation package. We recommend that the provision be amended to alert contracting officers to this requirement.

## Submission, Modification, Revision, and Withdrawal of Proposals: 15.208

Subsection 15.208 (c) authorizes the acceptance of late proposals if the due date is extended for all offerors, the lateness was caused by "actions, or inactions, of the Government," or the offeror demonstrates that lateness was due to causes beyond its control. In view of how critical decisions to accept late proposals are to offeror' perceptions of fair treatment by contracting agencies, we believe that the subsection should provide guidance for determining, for example, what type of government action or inaction would justify the acceptance of a late proposal. We recommend that the provision be amended to provide that late proposals may be accepted: (1) if the deadline is extended for all; or (2) the submission was late because of circumstances beyond the offeror's immediate control and acceptance of the late proposal would not likely result in any competitive advantage. Where it is determined that a proposal was late because of "improper" government action or inaction, it should be accepted. We suggest that the subsection be amended to read as follows:
" (c) Late proposals, modifications, and final revisions, may be accepted by the contracting officer provided-
(1) The contracting officer extends the due date for all offeror; or
(2) The contracting officer determines that the lateness was caused by improper Government actions or inactions; or
(3) The offeror demonstrates by submission of factual information that the circumstances causing the late submission were beyond the immediate control of the offeror, and the contracting officer determines that it is unlikely that a competitive advantage will occur."

# $95-029-14$ 

DEPARTMENT OF THE TREASURY
WASHINGTON, D C 20220
JUNUL゙ト 199897

General Services Administration
FAR Secretariat
1800 F Street, NW, Room 4035
Washington, DC 20405

## Regarding FAR Case 95-029, Group A

The Department of the Treasury strongly supports paragraph 15406 (c) of the proposed rule that would permit the contracting officer, after evaluation of all proposals, to establish the competitive range for purposes of efficiency Treasury believes that smaller competitive ranges strengthen the source selection process The Government and industry will save time and money when the Government determines and eliminates proposals that are no longer competitive as early as possible in the source selection process The small business community, however, fears that smaller competitive ranges might compromise the source selection process by prematurely eliminating otherwise-winning proposals from the competition

We reviewed our recent competitive awards to determine if smaller competitive ranges would affect the outcome of competitions Firstly, we reviewed our 1997 competitive negotiated contracts valued at over $\$ 5$ million Of those 26 contracts, none was awarded to a contractor who was not among the top three competitors going in to competitive range Secondly, we examined our competitive negotiated contracts, both set-aside and unrestricted, awarded to small businesses during FY 1995 through FY 1997 Of the 250 competitive negotiated contracts over $\$ 100,000$ we awarded to small business during FY 1995 and FY 1996, none was awarded to a contractor who was not among the top three competitors going in to competitive range

Based on these data, we are convinced that smaller competitive ranges would not prematurely eliminate otherwise-successful proposals from the competition Instead, we believe that small competitive ranges will only make the source selection process faster and cheaper for both the Government and industry We hope this information will contribute to more enthusiastic support for the proposed rule

Sincerely,


Robert A Welch, Director
Office of Procurement
[Procurement Executive]

From: Mary Lynn Scott
To: internet 95-029B@www gsa gov
Date: $\quad$ 7/3/97 412 pm
Subject: FAR Case 95-029 (Group A)

GSA FAR Secretariat (VRS)
1800 F Street NW
Room 4035
Washington, DC 20405
Dear Sir or Madam
This is in response to FAR Case 95-02S (Group $4_{1}$ ) The US Nuclear Regulatory Commission has used oral presentations for fourteen procurements as of June 30, 1997 Small businesses participated in nine of the procurements, six of which were set aside either for small businesses or 8(a) companies In one of the three competitive procurements that did not involve a seaside, a small business won a procurement over a large business As a result, small businesses received seven of these awards In no case did a large business receive an award for work which was previously performed by a small business

Further questions can be directed to me at (301) 415-6179 or Susan Hopkins, Policy Analyst (301) 415-6514

Mary Lynn Scott
Advocate for Procurement
Reform

CC: th

Author: "john batten" [jbattan@jaycor.com](mailto:jbattan@jaycor.com) at internet Date: 7/8/97 11:08 AM
Priority: Normal
TO: farcase 95-029 at GSA-V
CC: jbattan@jaycor.com at internet
Subject: Comments on FAR 15.5
COMMENTS ON SUBPART 15.5
15.502

The first sentence of section $15.502(a)(2)(i)$ makes a parenthetical mention of ofestablished catalog or market prices as an example of ofinformation related to pricesö. I suggest the deletion of the language within the parenthesis, and the substitution of $\hat{0}$ to be used to perform price analysiso.

My concern is that the current wording will imply that the use of ôestablished catalog or market pricesö is the only or the preferred method of performing price analysis with information other than cost or pricing data. In fact, it is only one of the six methods listed in 15.504-1(b). If, as I suspect, the objective 1 s to encourage the $C 0$ to use price analysis rather than cost analysis, it should be made clear that all of the price analysis methods listed in 15.504-1(b) are available.
15.503

My general comment on this section is that youmre moving in the right direction by requiring cost or pricing data as the exception and prohibiting it as the norm. However, I believe it should go further. In most of the situations where the $C 0$ is prohibited from obtaining cost or pricing data, he should also be prohibited from obtaining uncertified cost information. This is particularly true in cases of modifications to sealed bid and commercial item contracts because the contractor玉a accounting system may not be able to produce cost data that $1 s$ digestible by the Government. Such a contractor often has a process (rather than a job cost) accounting system, uses direct rather than absorption costing and does not segregate unallowable costs (and may be unacquainted with the entire concept of unallowable costs). The outputs of such a system, while very acceptable for financial accounting and the contractors internal needs, are incomprehensible to the average Government cost analyst who oneedso a cost element breakdown with weighted guidelines, cost of money and backup for the overhead rates.

As mentioned in section 15.502(a)(3), unnecessary submission of cost or pricing data leads to ôincreased proposal preparation costs, generally extends lead-tıme, and consumes additional contractor and Government resources.o These problems are equally applicable to unnecessary submission of uncertified cost information. The burden on the acquisition process has very little to do with certification. Rather, it stems from the need to collect, analyze, submit, and explain cost information and use it as the basis for negotiation. Accordingly, I suggest that the prohibition on obtaining cost or pricing data should be extended to prohibit the obtaining of uncertified cost information.

### 15.504

I suggest the addition of a requirement that any written field pricing report (regardless of the degree of formality) must be immediately provided by the originator to the contractor. This seems consistent with the current emphasis on communication. Moreover, no useful purpose is served by denying or delaying the availability of this data to the contractor. Procurement lead time will be shortened by enabling the contractor to begin preparing for negotiation as soon as possible. Under present procedure, negotiations are frequently delayed or prolonged by the late introduction of ôsurpriseö audit findings. My personal experience is that the factual
data provided to contractors by field auditors and technical specialists at exit conferences is often inaccurate or incomplete.

$$
97-004-16
$$

Author: "joe ely" <elyecontracta.nrl.navy.mil> at internet Date: 7/2/97 11:38 AM
Priority: Normal
TO: farcase 95-029 at GSA-V
Subject: COMMENT ON FAR CASE 95-029 B
This comment belongs in Group B.

The proposed rewrite of Part 15 should recognize that cost analysis may be the most appropriate type of analysis for some proposala below the $\$ 500,000$ threshold for obtaining cost or pricing data.

The definition of "information other than cost or pricing data" at 15.801 (which is retained at 15.501 of the proposed rewrite) includes "cost information." The definition of "cost analysis" also at 15.801 (and retained in slightly modified form at $15.504-1(c)$ of the proposed rewrite) includes review and evaluation of the separate cost elements of an offeror's or contractor's information other than cost or pricing data. It is clear from these two definitions that cost analysis may be performed when cost or pricing data are not obtained.
15.805-1(b), however, links the type of analysis to whether or not cost or pricing data are required: when cost or pricing data are required, the contracting officer must perform a cost analybis and should perform a price analysis; when cost or pricing data are not required, the contracting officer must perform a price analysis. (These same prescriptions are retalned at 15.504-1(a)(2) and (3) of the proposed rewrite.)

However, there are situations where, although cost or pricing data is not required, cost analysis is the most appropriate analytical technique. For example, an unsolicited research proposal for less that $\$ 500,0001 s$ not a commercial item, 18 not subject to adequate price competition, and typically has a unique statement of work developed by the offeror. The price analysia techniques at 15.805-2 (retalned in slightly modified form at 15.504-1(b) (2) of the proposed rewrite) are of limited usefulness in this example. The most useful proposal analysis would be a cost analysis of the proposed cost elements in conjunction with a technical analysis.

Under the current Part 15 and the proposed rewrite, however, only a price analysis would be required in the above example. The proposed language at $15.504-1$ (a) (2) should be revised to include ". . . unless the proposal is below the threshold for obtaining cost or pricing data and the contracting officer determines that cost analysis is in the beat interests of the government." If more precise guidance is preferred, the following sentence could be added ingtead: "A cost analysis may be used in lieu of, or in conjunction with, a price analysis for proposals for noncommercial items or services below the threshold for obtaining cost or pricing data if there is not adequate price competition and information other than cost or pricing data adequate for cost analysis is available."
J. C. ELY

Head, Contracting Division
Naval Research Laboratory

## Ul l 101997

General Services Administration
FAR Secretariat (VRS)
$2 \rightarrow$
1800 F Street, NW - Room 4035
Washington, DC 20405
Dear FAR Secretariat

The Department of Health and Human Services is responding to your request for comments on FAR Part 15 , Contracting by Negotiation (FAR Case 95-029)

In general, the Department still finds the rewrite incomplete, disjointed, and confusing in some areas Furthermore, we believe the rewrite lacks continuity and readability, and will cause a greater proliferation of "agency supplements" attempting to explain the vague and open-ended sections in the rewrite. We also note that the rewrite deviates from accepted FAR drafting conventions, making the part read somewhat differently from the rest of the existing FAR These criticisms are illustrated by the specific comments in the enclosures.

This office's comments are contained in the first enclosure, and comments from two of our agencies are in the following encloseures. Our agency comments are provided verbatim so that the Rewrite group may read, firsthand, what operational contracting office personnel thank of the new FAR Part 15

We recognize that many of our comments are cutting and critical, but, realizing the magnitude of the impact of the rewritten part 15, we sincerely hope that these comments will be given far consideration and will be judged from the perspective that they are being offered in an effort to improve the rewrite rather than to heap criticism upon it

Thank you for considering our comments.


Enclosures

## HHS COMMENTS ON FAR PART 15

2.101- The definition of "best value" is so generıcally nebulous that it sultably fits any situation Obviously, this was the intent of the drafters; however, we disagree and believe it is a disservice to contracting officers.
$410 \& 118$ - We object to the establishment of two subparts solely to address the toplcs of "contract line items" and "preaward testing."
14.404-1(f) (2) - We recognize this is in the exısting FAR at 15.103, but believe it needs to be modified to better state 1 ts intent We recommend "The negotated price(s) of the offeror(s) in line for award is(are) equal to or lower than the lowest bid price from a responsuble bidder "
15.000- Thas section is totally disjounted The three sentences address three completely different concepts that do not go together. The first sentence is the only one needed, and it should be rewritten to read: "Thas part prescribes polıcies and procedures governing contracting by negotiation, whether with or wathout competition " The second sentence should be deleted because there is no reason to highlight the "bargainıng" concept in the scope of the part. It is addressed in detail in the definıtion of "negotiation" 1 n section 15001 . The third sentence is a definition of "negotiated contract," and, if deemed necessary, should be added to section 15001
15.001- The first three definıtions (communications, discussions, and negotiation [should be "negotiations"]) are an a hierarchic or successlve order and should be represented that way through their definitions we propose:
"Communlcations" are all interchanges between the Government and an offeror following the recelpt of offers. Communlcations may include discussions, negotiatıons, or other forms of interchange.
"Discussions" are communlcations between the Government and an offeror that occur after establishment of the competitive range, and that may, at the contracting offacer's discretion, result in the offeror being allowed to revise its proposal. [NOTE We substıtuted "communications" for "negotiations" to show the hierarchlcal relationship, and to be consistent wath FAR 15.406(d)(1) ]
"Negotlations" are discussions that involve bargaining. Bargaining includes.... etc. (verbatım).

We also recommend the definltion of proposal modification be revised to read as follows for the sake of clarıty "Proposal modification" is a change to a proposal by the offeror made before the solicatation's closing date and time, or made in response to an amendment, or made to correct a mistake at any time before award.
15.101- In the second and fifth lines of the Federal Register version, change the word "procurements" to "acquisitions" to be consistent with the rest of the FAR

15 101-1 In paragraph (a), change "This" to "The" and add "tradeoff" so the sentence reads: "The tradeoff process is. " FAR convention, and common writing practices, dictate that the subject be identified when furst addressed in the text It is not acceptable to title the section and then begin the description with a reference to the title

In paragraph (b), change "applıes" to "apply" because there are more than one condition which follow.

Paragraph (b) (3) should be redesignated as new paragraph (c) because it addresses new thoughts separate from the items in paragraph (b).
15.101-2 The same comments made for 15.101 -1 apply here. The sentence should begın. "The lowest prıce technically acceptable source selection process is ...". In paragraph (b), the word "apply" should be used instead of "applıes" because there are more than one item
15.102- For clarıty, the beginning of paragraph (b) should be rewrıtten to read: "To $1 n 1 t ı a t e$ the multı-step source selection technique, the agency issues a sollcitation that describes
15.103- In the eighth line of paragraph (b), insert after "oral presentation," and "consıder" the words "the contracting officer should". This glves direction to a specific andividual and allows the contracting officer to exercise authorıty

15 405- Paragraph (a) (4) requires a subject title, to be in accord with (a) (1)-(3).
15.603- Is there a conflict between $15603(\mathrm{~b})(3)$ and 15.605(a) (2)? We are not certain.
15.606- Is there a conflict between 15.606(a)(3), $15.606(a)(4)(1)$, and $15.605(a)(3) ?$ Agaln, we are uncertain.

## 15001 Defintions

We have some basic concerns on the proposed changes in the commumications, discussions and negotiation areas that are discussed later in the comments We also noted instances in which the proposal defines or uses these terms in an inconsistent manner For example, the defimition in this subsection treats discussion as a form of negotations when, in fact, only some discussions constitute negotiations We suggest defining and consistently using the three terms along the following lines These suggestrons reflect the proposal's intent as we understand it
-- Communications are all interchanges that occur between the Government and offerors following the receipt of proposals These may include discussions, negotiations and other interchanges with offerors
-- Discussions are communtations between the Government and an offeror that occur after estabhishment of the competitive range and that may, at the contracting officer's discretion, result in the offeror being allowed to revise its proposal
-- Negotiations are discussions that involve bargaining Bargaining includes persuasion, alteration of assumptions and position, and give-and-take, and may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract As currently written, negotiations are not distungushable from bargaining and we question the need for the latter term

## 15002 Negotiated Acquisition

We suggest calling this section "Types of Negothated Acqusittons" While the entıre Part 15 deals with negotiated acquisitions, this subsection addresses two specific types, 1 e , sole source and compettive acquisitions

### 15.1 Source Selection Processes and Techniques

## 15101 Best Value Contınuum

In order to be consistent with Subsections $15101-1$ and $15101-2$, the second sentence in thrs subsection should refer to "processes" instead of "approaches"

## 15102 Muitt-step Source Selection Technque

This subsection authorizes a multi-step source selection process that could potentraily exclude some offerors from the competition pror to evaluation of full proposals We have the following concems
-- Offerors could potentally be excluded during the mital phase of the multi-step process for reasons that would be corrected in a normal negotiated process (e g , for failing to include certan descnptive literature) We are concerned that this would increase protests and related workload
-. The multi-step process is authonzed when the submission of full proposals would be "burdensome" to offerors and the Government However, this is an inherently subjective criterion and the mult-step process is not well-defined For example, we are uncertain when full proposals should be requested and when negotiations would be allowed The current wording could also be interpreted as precluding discussions beyond those conducted in the initial step We suggest providing more detailed guidance on when the mult-step process may be used and how it is to be conducted

## 15103 Oral Presentation

If a contractor scheduled for an oral presentation arrives late for that presentation, will the contracting officer have to make a written determination regarding the "acceptance" of the presentation, 1 e , do the late "proposal" regulations apply to oral presentations?

### 15.2 Solicitation and Receipt of Proposals and Information

## 15201 Presolicitation Exchanges with Industry

This subsection authorizes use of an RFI (Request for Information) to obtain planning information (including pace) from vendors The latest draft wording does state that the procurement integnty requirements apply to these information exchanges However, we continue to believe that the subsection should require that the exchanges be conducted under the direction of, or in coordination with the contracting officer This would help ensure that the exchanges are conducted without favoritism and that the Government obtains the needed information and no inappropriate information

## 15202 Advisory Multi-step Source Selection

We found the reference to "source selection" in the title of this subsection confusing since this advisory process does not actually involve source selection We also question the value of the "advisory" process given the fact that the solicitation would still have to be issued and all sources that participated in the advisory stage would remain eligible to compete

If this concept is incorporated in the FAR, we suggest providing further guidance on the information to be furnished to offerors that are deemed unlikely to be competitive This should include the extent of the information and whether it needs to be provided in writing We assume that one objective would be to avoid disclosing information that could provide a firm with a competitive advantage in successive stages of the competition

## 15203 Requests for Proposals

Paragraph 15203 (c) states that electronic methods may be used to issue REPs and receive proposals We would appreciate receiving clarifying guidance (in the paragraph) on whether hard copy REPs must be provided, upon request, when electronic REPs are used

## 15204 Contract Format

This section refers to a "standard" contract format but the language at 15 204-1 describes a "uniform" contract format We suggest using "inform" contract format throughout

## 15207 Handling Proposals and Information

Under this subpart, "If a proposal is received by the Contracting Officer electronically or by facsimile, and the proposal is unreadable to the degree that conformance to the essential requirements of the solicitation cannot be ascertained from the document, the Contracting Officer immediately shall notify the offeror and permit the offeror to resubmit his/her proposal The method and time for resubmission shall be prescribed by the Contracting Officer after consultation with the offeror The file must be documented to show what transpired The resubmission shall be considered as if it were received at the date and time of the onginal unreadable submission for the purpose of determining timeliness under 15 208(a), provided the offeror complies with the time and format requirements for resubmission prescribed by the Contracting Officer "

We are concerned that by allowing the offeror to resubmit his/her proposal, the far treatment of other offeror is at risk We are concerned about the potential for abuse and lack of equity among offerors

## 15208 Submission, Modification, Revision and Withdrawal of Proposals

The proposal to allow contracting officers to accept late proposals when the lateness was caused by the Government seems sensible to us, but we have concerns on the companion proposal to allow late proposals to be accepted without such a reason by simply extending the due date for all offerors In effect, this would allow the contracting officer to accept a late proposal by extending the due date for all offeror to the date at which the late proposal was received This would be prejudicial to the other offerors, who would have no practical ability to take advantage of the extended due date It would also increase the potential for leaked source selection information situations

When Government-caused lateness is not an issue, we suggest establishing an objective critenon for accepting late proposals such as a provision that allows late proposals to be accepted if they provide significant cost or technical advantage to the Government and are received within five calendar days of the specified receipt date Further, this approach avoids the need to extend the due date and amend the solicitation

## 15210 Forms

This section states that there are no prescribed forms for solicitations or contracts While this would not inconvemence the Government, it represents a move back toward the pre-FAR situation in which vendors had to deal with numerous different Federal forms

### 15.3 Unsolicited Proposals

Although this subpart provides helpful guidance for unsolicited proposals, given the definitions at 15001 , we question the frequent reference to "negotiations" instead of "discussions"

15 306-1 (a)(3) under Receipt and Initial Review
This appears to be the same as 15 307(a)(3) under Criteria for Acceptance and Negotiation of an Unsolicited Proposal

The sentence is no longer needed because there are no requirements for certifications in FAR 3 104-9

### 15.4 Source Selection

## 15400 Scope of Subpart

In general, we had difficulty comprehending the changes being proposed for Source Selection, and believe that this is due in part to the elimination of traditional contracting terms such as "Clanfications" and "Best and Final Offers" For example
-- 15 406(a) proposes to allow the Government to resolve minor or clerical errors or clarify certain proposal features without engaging in full-fledged discussions with offeror This concept closely resembles the "Clanfications" that are currently defined in FAR 15601 and authorized in FAR 15607, but the proposal does not use that traditional term
-- 15 407(b) authorizes the contracting officer to request final proposal revisions at the conclusion of discussions These revisions closely resemble the "Best and Final Offers" that are currently defined and authorized in FAR 15611 However, as in the case above, the proposal discards the traditional term without providing a better term or explanation

We suggest retaining the traditional terms that have evolved with and are familiar to the contracting community whenever possible In the cases (above), the traditional terms could be retained with little or no change in their current FAR definitions

## 15404 Evaluation Factors and Subfactors

Item 15 404-(d)(1) would require that the price or cost to the Government be "evaluated" in every source selection This wording could be construed as requiring that price or cost be reviewed and scored by a technical evaluation panel in conjunction with the technical evaluation criteria This is unrealistic in a research and development acquisition where a panel of outside experts is used to perform the evaluation This potential problem could be avoided by requinng that price or cost be "considered" (rather than "evaluated") in source selection

15 404(f) Evaluation Factors and Subfactors
We recommend that a definition for "significantly" be provided

## 15405 Proposal Evaluations

The information on "trade-offs" in Item (3) would be clearer if it cross-referenced the related discussion in proposed Section 15 101-1 Relatedly, it would be appropnate to require documentation when using the lowest price technically acceptable source selection process described at 15 101-2

This subsection proposes to allow the Government to "communicate" with offerors prior to establishing a competitive range in order to enhance its understanding of an offer or otherwise facilitate the evaluation process However, these communications could not be used to cure proposal deficiencies or material omissions or otherwise revise proposals We have basic concerns on the practicality of this concept

FAR 15607 currently authorizes precompetitrve range communications on minor informalites or mregulanties Many of the additional proposed communications would involve technical content, and offerors would naturally attempt to make related changes to their proposal (at the conclusion of formal discussions) regardless of the FAR prohibition Conversely, if the offeror failed to make such changes to its proposal, the Government's "enhanced understanding" would be tenuous because that understanding would not be reflected in the proposal or any other binding document We are concerned that the proposed change would provide little benefit if strictly followed, and would create temptations to exceed the intent and have commumcations on substantive matters with some offeror

## 15406 Competitive Range

While the parent section is entitled "Communications with offerors," this subsection basically describes the process of establishing a competitive range We found this organization confusing

Subsection 15406 describes the establishment of a competitive range consisting of the "most highly rated" proposals This phrasing implies that the competitive range and source selection will be based on technical quality factors only, 1 e , absent cost or price However, cost or pace frequently need to be considered along with technical quality factors, and we suggest using wording that makes it clear that this is permissible

## 15 406(e)(3) Limits on Communications

The proposed language in this subsection would allow the Government cost estimate to be given to all offerors in the competitive range during discussions We believe such release is inadvisable because it could distort the price competition Also, when the requirement is expressed functionally, release of the Government cost estimate could lead offeror to adopt the specific solution reflected in that estimate instead of trying to devise a better and less costly one

## 15407 Proposal Revision

Item "(a)" would allow the Government to eliminate an offeror that was no longer considered to be among the most highly qualified offerors from the competitive range at any time after discussions had begun This could be done regardless of whether or not all maternal aspects of the proposal had been discussed or the offeror had been afforded an opportunity to submit a revised proposal This authonty would have a high potential for abuse and related protest without additional procedural safeguards. If the proposal is adopted, we suggest requiring specific determinations and or documentation directed at ensuring a fair and supportable decision process

Item 15 407(b) makes reference to "final proposal revisions" that closely resemble the "Best and Final Offers" that are currently defined and authorized in FAR 15611 As noted above, we suggest retaining the term "Best and Final Offers" because of its familiarity to contractors and contracting personnel

### 15.5 Contract Pricing

15.503 Ensure that all source selection techniques and procedures are covered in a single part of FAR 15 The current rewrite has portions in 151 and in 15401

15 503-1 Obtaining Cost or Pricing Data
We recommend that a definition for "substantial" be provided
15 503-1 Obtaining Cost or Pricing Data
Adequate price competition should include lowest price technical acceptable offeror
15 503(iii)(4) Waivers
The HCA is at too high a level to be tasked with approving waivers, we recommend including a delegation of this assignment to someone at a lower level within the contracting activity's chain of command

15 504-1 Proposal Analysis Techniques
As a relatively minor comment in "Item (a)," we suggest stating that the objective of proposal analysis is to ensure that the agreed to price "will be" (not "is") fair and reasonable The purpose is to emphasize that the analysis must be performed prior to negotiating a price

The reference to "contracts" throughout Item "(d)(2) and (3)" is confusing since the guidance applies to "proposals" not to contracts

15 504-1(d)2)
This subpart requires cost realism analysis on competitive cost-rembursement contracts Cost realism analyses should be performed on noncompetitive cost-rembursement contracts as well

15 504-1(2)(g) Unbalanced Pricing
Consider changing Unbalanced Pricing to Performance Risk, and use Unbalanced Pricing as an example of a performance nsk

## PART 52

## 52 212-1 Instructions to Offerors - Commercial Items

The proposed revision would allow the contracting officer to accept late offers for commercial items under certain conditions We have the same concerns on this proposal as the ones expressed under FAR 15208 above

- $15.309(\mathrm{~h})(3)$ on FR page 26651, reads-
"Obtain the certifications required by 3.104 .9 and a listing of all persons authorized access to proprietary information by the activity performing the evaluation."

Currently, FAR Subsection 3.104-9 is entitled Contract clauses. Under a previous version of Procurement Integrity, it was entitled Certification requirements. I chalked this one up to the rewrite team testing us!

- Subpart 1.5.5 - Contract Pricing isn't the best written subpart. It's has many of the same problems that we 've seen in the earlier FAR rewrites under FASA/FARA, the wording isn't what was used in the FAR and earlier in the FPR. Fox example, "Contract Pricing". Contractors, vendors, manufacturers, and retailers perform "pricing". Buyers, purchasers do "price analysis"
- Section 15.503 Obtaining cost or pricing data, is similar. Perhaps it'g due to the rewrite team getting too close to their work.

Basically, obtain coat or priding data if the anticipated award amount is greater than $\$ 500,000$ and there are no exceptions to obtaining it, There axe more sentences in that subsection that are "qualified" then Ripley would believe. Why can't the authors of this rewrite use simple positive unqualified sentenced, make simple statements and then lat the exceptions to the statements.

- In paragraph $15.505(\mathrm{~d})$, it appears that when an impasse is reached the co cant simply thank the offeror for his time and terminate any further pursuit of a contract with him. The CO's decision is governed by someone at a higher level. Offeror won't have to reach an agreement with the CO because a higher up in the Government will no doubt agree with the offeror That's a terrible paragraph!
- Also, what do they mean by "the contractor insists on a price or demands profit/fee"? I don't want the author of that paragraph to do any negotiating on my behalf!


## U.S. SMALL BUSINESS ADMINISTRATION <br> Washington, DC 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY
NH 1 1 1997
General Services Administration
FAR Secretariat (MVRS)
18th \& F Streets, NW
Room 4037
Washington, DC 20405
Subject Federal Acquisition Regulations (FAR), Part 15 Rewrite Contracting by Negotiating, Competitive Range Determinations [FAR Case 95-029]

## Dear FAR Secretanat

This concerns the proposed rule, FAR Part 15 Rewrite Contracting by Negotiating, Competitive Range Determinations, published in the Federal Register on May 14, 1997

The Office of Advocacy has expressed its views on earlier versions of the subject proposal in letters to the FAR Secretanat, the Honorable Steve Kelman, the Honorable Sally Katzen, at public meetings in Washington, DC and Kansas City, and, most recently at a House Small Business Committee hearing This discussion will serve as a follow-up to our previous comments

This is a significant rule that will change how the government negotiates contracts and alter the process of "full and open competition " Many small business groups feel the proposal will limit competition and adversely affect the ability of small firms to win federal contracts The subject rule, however, is an improvement over earlier proposals Advocacy is pleased that several of its recommendations were incorporated in the May 14 proposal

While Advocacy would like to support the streamlining the rule fosters, we are concerned that certain aspects of the proposal will limit competition by giving the contracting officer significant authority to eliminate offeror prematurely -- for reasons of "administrative convenience " In theory, limiting the competitive range to promote government and offeror efficiency sounds great But, in the real world -- where contracting officers have concurrent buying actions on-going and are under significant pressure to do more with less -- we believe the rule will give government contracting officials license and incentive to focus on the fewest number of offeror that are the best known or who represent the most recognized brand name

We are particularly concerned that new government vendors, emerging firms and other small businesses, less polished in marketing or proposal writing skills, will be quickly eliminated from a competition

For the same reasons the Federal Trade Commission (FTC) recently ruled aganst the proposed merger between Office Depot and Staples, Inc, Advocacy is concerned that certain provisions in the FAR Part 15 proposal will limit competition, causing harm to numerous small businesses Small firms are the engine within our economy promoting competition, creating jobs, stimulating innovations and providing long-term economic growth The government has an undenable obligation to protect and cultivate the entrepreneurial spirit within the country

Public policy should not promote the concentration of federal contract dollars in the hands of a few industry giants If you consider FY'96 data and account for recent mergers, four mega-firms together received more than $\$ 44$ billion in government contracts or greater than 25 percent of all federal purchases over $\$ 25,000$ Small firms, representıng 95 percent of all businesses, received about 20 percent of all federal contract dollars for the same period

This is not a discussion about slowing reforms and increasing government unique preferences for small businesses It is about balancing reforms, such that small businesses are not disproportionately impacted and that vigorous, open competition is encouraged What meaningful benefits will be achieved, if several years from now we have a procurement process that provides numerous admınıstrative efficiencies, but only a small number of large firms doing business with the government?

Advocacy offers the following specific comments on the proposed rule

## Competitive Range Determinations

The recently enacted Federal Acquisition Reform Act (FARA), authorizes contracting officers to restrict the competitive range, "if the contracting officer determines that the number of offerors that would otherwise be included in the competitive range exceeds the number at which an efficient competition can be conducted "An appropriate question is, what is efficient compettion? Without specific guidance, this could be a major loophole

On the other hand, FARA specifically subordinates efficiency to the requirement for full and open competition stating," the Federal Acquisition Regulation (FAR ) shall ensure that the requirement to obtain full and open competition is implemented "In addition, FARA does not permit contracting officers to limit the competitive range on the basis of efficiency in every procurement

The regulatory proposal, we believe, goes beyond this limited statutory authority because it elimmates the requirement to include the "greatest number" of proposals in its primary definition of competitıve range, statıng that "the contractıng officer shall establish a competitive range comprised of those proposals most highly rated "As proposed, a contracting officer can limit the compettive range to as few as two proposals because the top two proposals would always be the most highly rated

Improvements to the proposal can be made by

- defining what is meant by "efficient competition" and tracking the legislative language to include the "greatest number" in the primary definition of competitive range
- incorporating a process where small firms that have a "reasonable chance" of winning, are advised regarding their standing in the procurement, and given the option to continue or drop out
- where applicable, requiring that at least one small business (highest ranked), with at least a "reasonable chance" of winning a particular contract, be included in the competitive range


## Regulatory Flexibility Analysis

The rule is expected to have a significant impact on a substantial number of small businesses and an Initial Regulatory Flexibility Analysis (IRFA) was prepared However, Advocacy finds the analysis to be inaccurate and misleading The IRFA, using FY '95 data, estimates that about 7,000 small businesses will be impacted by the rule

The purpose of the IRFA is to measure the impact of the proposal on small businesses and evaluate opportunities for alternative regulatory actions that minimize a rule's impact on small firms Advocacy suggests that the estimate of 7,000 impacted small businesses is significantly off the mark Advocacy agrees with the estimate that 602,000 entities will be impacted by the rule Where are the data to support the assumptions in the balance of the analysis? Without this data, the conclusions drawn in the analysis regarding small business impact are purely speculative

In addition, the IRFA failed to mention that the 188,863 competed procurement actions that were analyzed represented some $\$ 60$ billion or about 30 percent of all government contract dollars for the year Further, in FY '95 as well as in prior years, small firms won more contract actions when they were competed versus actions that were non-competed This is important information that should be disclosed in any discussion about the impact of the proposed rule

The IRFA states that the proposed rule "does not duplicate, overlap, or conflict with any other federal rules" Advocacy suggests that aspects in the proposal will conflict with Part $52-219 \mathrm{in}$ the FAR The FAR states, " It is the policy of the United States that small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals and small business concerns owned and controlled by women shall have the maximum practicable opportunity to participate in contracts let by any federal agency " Advocacy and the small business community believe that competitive range limitations built-in to the proposal will not provide "maximum practicable opportunity" for small businesses Since the proposal would severely restrict opportunities, it conflicts with the existing FAR policy statement

Finally, Advocacy believes the FAR Part 15 proposal should be considered a major rule, subject to Office of Management and Budget (OMB) review and analysis under Executive Order 12866

If the Office of Advocacy can be of further assistance, please contact the undersigned

cc The Honorable Sally Katzen, OMB, OIRA

# MEMORANDUM FOR GENERAL SERVICES ADMINISTRATION, FAR SECRETARIAT (VRS) 

FROM SAF/AQC<br>1060 Arr Force Pentagon<br>Washington DC 20330-1060

SUBJECT Comments on Proposed Rule Part 15 Rewrite (FAR Case 95-029)
The Air Force has been an active participant in the Part 15 Rewrite team's development of the proposed coverage on the subject case As part of the public comment process, we obtained Air Force field input and used it to form this consolidated Air Force comment The comments we offer consist of substantive policy issues (Atch 1) and issues identified as areas for clarification or admimstrative correction (Atch 2) Some of the inputs of our field activities demonstrate the uncertainty that exists when long-standing pohcies and processes are so significantly revised and will require clarification and training

Lt Col Greg Wacker and Mr Bob Bemben, SAF/AQCP, (703) 695-3859 and (703) 6950042 , will continue to be our representatives on the Rewrite team for Phase I and Phase II respectively


Attachments
1 Substantive Issues
2 Clarification Requests

Attachment 1

Arr Force Input<br>Substantive Issues

1 FAR 2101 Definitions We are concerned with the proposed definition of Best Value The proposed definition refers to an "outcome" which could mean the end product of the contract It also refers to the "acquisition" which also can refer to the end product or service The use of the term "Best Value" is historically used in reference to an "offer" and "source selection" We are concerned that the proposed definition has substantially changed the context of the use of "best value" in selecting an offer for contract award

Recommendation Use the Sep 96 definition"Best value means an offer or quote which is most advantageous to the Government, cost or price and other factors considered "

2 We are concerned with the word "significant" before the words "subfactors" and "factors" throughout FAR Part 15 in describing the tradeoff process and disclosure of criteria to industry in the solicitation It is important that there be no actual or perceived undisclosed evaluation factors or subfactors Being part of an evaluation criteria makes any factor and subfactors significant and they should be disclosed in the solicitation To say "disclose significant factors" implies there are other factors that will not be disclosed Making industry fully aware of all the factors used for the evaluation and tradeoff analysis will facilitate Best Value awards and will reduce the risk of protests

Recommendation Remove the word "sigmficant" before the word "subfactors" in FAR 15 101-1 (b) (1), FAR 15 101-2 (b) (1), FAR 15203 (a) (4), FAR 15404 (d) and FAR 15404 (e) Also remove the word significant before the words "factors" and "subfactors" in FAR 15102 (b) For FAR 15 204-5 (c) remove the word "significant" before the word "factors" and the words "any significant" before the word "subfactors"

3 FAR 15102 We have received questions relating to the kind of pricing data that can be requested if a full proposal is not required This is an area that is a significant change from the current practice which will require further clarification

Recommendation In FAR 15102 (b), provide further clarification of the type of limited pricing information that would be acceptable (for example, should the pricing information in step one include a not-to-exceed price?)

4 FAR 15203 In order to streamline the process involving sole source contracts we want to make it clear that letter REPs may be used in all sole source acquisitions and not just for "follow-on" acquisitions as the current language reads

Recommendation In FAR 15203 (e), first sentence, change to read "Letter REPs may be used in sole source acquisitions and other appropriate circumstances "

515206 (g) This is a very sensitive source selection area dealing with amending a solicitation based on an offeror's proposal We believe that it is important that potential offerors understand this process and that our intentions are described in the solicitation Recommend that a provision be developed that informs potential offeror that any proposed alternatives from the stated requirements may be incorporated into an amendment to the solicitation

Recommendation The following is suggested language for a provision "Offerors may submit proposals which depart from stated requirements Such proposals shall clearly identify why the acceptance of the proposal would be advantageous to the Government Any deviations from the terms and conditions of the solicitation, as well as the comparative advantages to the Government, shall be clearly identified and explicitly defined The Government reserves the right to modify the solicitation to allow all offerors an opportunity to submit revised proposals based on the revised requirements "

6 FAR 15 503-3(a)(1) Some commercial items may be new and do not have previous sales history The modified language requires that information on current sales or terms and prices for items being offered for sale be provided

Recommendation Change the last sentence to read "Unless an exception under 15 503-1(b)(1) or (2) applies, such information submitted by the offeror shall include, at a minimum, appropriate information on the prices at which the same item or similar items have previously been sold or are being offered for sale, adequate for determining the reasonableness of the price (10 U S C 2306a(d)(1) and 41 U S C $254 \mathrm{~b}(\mathrm{c})(2)$ )"

7 FAR 15 504-1(b)(2) With the increasing emphasis on the use of parametrics and cost modeling, it is important to highlight these techniques can be used

Recommendation Add another example "(vil) Comparison of proposed prices to prices derived from use of commercially available cost estimating models "
$8 \quad 15$ 504-2(a)(2), first sentence Field pricing organizations are in the best position to provide information on catalog prices, terms, and sales in the plant over which they have cognizance Tracking and providing this information to support contracting officers should be a routine part of their duties

Recommendation Add at the end of the sentence "or catalog pricing information "

915 504-3(c)(3) It should be made clear that alternate formats for submission of subcontractor cost or pricing data are acceptable and desirable as long as they are consistent with prime contract formats

Recommendation Change to read the same as $15503-5(b)(1)$
1015 506-3(a)(10) When dong price analysis of commercial tems, the profit or fee is not known and is not negotiated Without this change, it is implied that there must always be a profit or fee objective

Recommendation Change sentence to read "Except for the acquisition of commercial items, the basis for the profit or fee prenegotiation objective and the profit or fee negotiated "
$11 \quad 15$ 504-1(f)(1) This requires the unit price to reflect the intrinsic value of an item or service and shall be in proportion to an item's base cost This may be impossible in the purchase of commercial Items where new products may include high profit margins to cover development costs Why was the inapplicability of this language to commercial tems deleted? (see old 15-812-1(b))

Recommendation Reinstate previous language citing inapplicability to commercial items

Attachment 2

## Air Force Input <br> Requests for clarification \& administrative correction

1 FAR 15 102(c) The next to last sentence is ambiguous and needs clarifying Recommend adding "ether" to clarify as shown "The agency shall seek additional information in any subsequent step sufficient to permit either an award without further discussion or another competitive range determination"

2 FAR 15 203(d) Insert commas after words "proposals" and "modifications"
3 FAR 15 204-5(b)(5) Add the following words "or information other than cost or pricing data" at the end to acknowledge that competitive solicitations in which cost and pricing data is not requested

4 FAR 15 206(g) Remove parenthetical reference "(see 15 208(b) and 15 407(d))" at the bottom of this paragraph as the reference to 15208 (b) does not make sense in the context of this paragraph and 15407 (d) does not exist

5 FAR 15 210(c) Make the SF 33 information a separate paragraph "(d)" in order to be consistent with the way the other forms are treated

6 FAR 15210 (d) As a result of comment \#5 above, make this paragraph "(e)" Also modify this paragraph to be consistent with the way the other paragraphs are worded, as follows "Optional Form 17 Offer Label, may be furmshed with each request for proposals in order to promote identification and proper handling of proposals "

7 FAR 15 303(c)(3) Add the following words "endorsement, direction, or direct government involvement" after the word "supervision"

8 FAR 15 309(a) and (d) Put quotation marks around the legend set forth in the paragraph

9 FAR 15402 Add the following words to the end of the sentence "to the Government"

10 FAR $15403(\mathrm{~b})(1)$ Delete the word "an" after the word "includes" and delete the word "mix of" after the word "appropriate"

11 FAR 15 404(c) Add the following words "to each step" between the words "apply" and "shall"

12 FAR 15 405(a)(2) In the last sentence remove the word "comparative" before the word "assessment" This removes any potential contradiction with FAR 15 102-2 requiring pass/farl criteria

13 FAR 15 503-2(b) Add the word "interim" before the word "overrun" for clarification and to distinguish it from any final, negotiated overrun modification which also has funding on it

14 FAR 15 507-1(a), second sentence Add the following words" if no new data is provided," between the words "deficiency, or" and "consider" This will clarify the sentence

15 FAR 15 507-3(a), first sentence Delete the word "certified" The definition of cost or pricing data is data which is certified per FAR 15501

16 FAR 15 607(a), first sentence Change the word "part" to "Part"
17 FAR 52 215-41 Delete "(End of clause)" and insert "(End of Provision)"
18 Put quotation marks around the words being defined throughout the FAR Part 15 rewrite Examples FAR 2 01, FAR 15 301, FAR 15 401, FAR 15501

# P Parametric Cost Estimating 

Joint Industry/Government Initiative

General Services Administration
FAR Secretariat (VRS)
1800 F Streets, NW
Room 4035
Washington, DC 20405

## Subject: FAR Case 95-029, Group B - FAR Part 15.5 Comments

FAR Part 155 Rewrite Subcommittee,
On behalf of the Parametric Cost Estimating Initiative (PCEI) Working Group, we are pleased to provide our comments related to the parametric references contained in the initial FAR Part 155 rewrite

Since April 1994, a Working Group of Industry and Government Representatives has been working together to gain recognition of parametric cost estimating as an acceptable estimating technique so these techniques can be used as the primary basis of estimate for proposals submitted to the government To date, the PCEI has achieved several accomplishments including development of a parametric cost estimating handbook, delivery of a pilot parametrics training course in coordination with the Defense Acquisition University, and distribution of a periodic newsletter related to PCEI activities There are 13 Reinvention Lab Teams participating on the PCEI that are testing the expanded use of parametric cost estimating on proposals These teams are starting to complete their tests and are beginning to submit proposals to the government

Parametric cost estimating methods can be a major tool in streamlining and improving the acquisition process, when used properly One barrier to the increased use of parametrics has been that the term "parametrics" does not appear in the FAR The PCEI Working Group has received tremendous support from many Senior DoD Executives, including Ms Eleanor Spector, Director of Defense Procurement Ms Spector was instrumental in getting parametrics included in the first version of the FAR Part 155 Rewrite The members of the PCEI Working Group (see attachment 1 for a listing of Working Group members) reviewed the initial rewrite and have developed coordinated recommendations that will further enhance the parametric references Our recommended language will further encourage the appropriate use of parametrics in future contract priang actions

Consequently, our recommended language along with our rationale for these changes is presented below

FAR Case 95-029
Group B - FAR Part 155 Comments
Page 2

FAR 15.501 Definitions Recommend that the last sentence of the first paragraph be modified as follows

- Cost or pricing data may include parametric estimates as of elements of cost or price, from appropriately calibrated and validated appropriate validated-calibrated parametric models
- Rationale The order should be reversed because the calibration process occurs before validation

FAR 15.504-1 (c)(2)(i) Cost Analysis Recommend that subparagraph (C) be modified as follows

- Reasonableness of estimates generated by appropriately calibrated and validated validated/calibrated parametric models or cost-estımating relationships
- Rationale The order should be reversed because the calibration process occurs before validation Also, this terminology should be consistent with that recommended for 15 501, Definitions

FAR 15.504-1 (b)(2) Price Analysis Recommend that the following language be added, as a sub-element (vii)

- (vii) Use of parametric estimating methods
- Rationale Parametric estimating methods are a valid and useful price analysis method as well as a valid cost analysis method

We appreciate this opportunity to provide our comments and recommendations to the members of the FAR Part 15 Rewrite Subcommittee Please feel free to contact us if you have any questions or require further clarification of our recommendations


Jim Collins
PCEI Working Group Co-Chair 410/765-8033 (phone) 410/765-4886 (fax) collins J f@postal lsd northgrum com
bicuice Ge k
David Eck
PCEI Working Group Co-Chair 703/767-3290 (phone)
703/767-3234 (fax)
deck@hq1 dea mu

Enclosure
PARAMETRIC ESTIMATING INITIATIVE WORKING GROUP

| Phone/FAX |
| :---: |
| 202-358-0444 (C) |
| 202-358-3220 (F) |
| 410-765-6163 (C) |
| 410-765-5289 (F) |
| 804-765-4714 (C) |
| 804-765-4648 (F) |
| 703-767-3407 (C) |
| 703-767-2379 (F) |
| 703-805-5254 (C) |
| 703-243-9712 (F) |
| 817-777-5759 (C) |
| 817-777-2115 (F) |
| 703-602-0660 (C) |
| 703-602-2024 (F) |
| 314-233-8461 (C) |
| 314-232-7171 (F) |
| 703-604-6100 $\times 3536$ (C) |
| 703-604-3062 (F) |

10802 Knoll Court
Upper Marlboro, MD 20772

# General Services Administration 

FAR Secretanat (VRS)
1800 F Street, NW
Room 4035
Washington, DC 20405
Re: FAR Case 95-029

## Dear Sir or Madam

This is in response to the proposed rule published in the Federal Register on May 14, 1997 ( 62 FR 26640), regarding the Part 15 Rewrite I generally support the proposed Part 15 rewrite effort, particularly the proposed changes that clarify that cost data need not be required in all instances (eg, see 15 503-5(a)(1)) Hopefully, the proposed changes and rewnte will decrease the number of instances where solicitations unnecessarily require the submission of cost data (eg, where the reasonableness of a contractor's resulting proposed prices can be established by "price analysis") Of concern, however, are the proposed revisions on when the requirement for certified cost or pricing data can be waived

## GRANTING WAIVERS FOR EXCEPTIONAL CASES

## Process Encourages Waiver Requests

Under proposed 15 503-1(b)(4), a waiver is listed as an "exception" to cost or pricing data requirements Proposed 15 508(1) prescribes for inclusion in solicitations the provision at 52215-41 which "provides instructions to offeror on how to request an exception" (including a "waiver") Thus, potential contractors are routinely "instructed" to consider requesting a waiver

## Criteria For Granting Waivers Is Elusive

The Truth in Negotiations Act (TINA) provides that " in an exceptional case "the HCA can wave the Act's certification requirements In this context, my interpretation of the statutory language is that a waiver may be granted in rare cases

Proposed 15 503-1(c)(4) sets forth the standard for granting wavers It provides that the HCA may waive the requirement for obtaining the contractor's signed Certificate of Current Cost or Pricing Data, 1 e, the submission of "certified" cost or pricing data, "in exceptional cases." The ensuing example provides that if "certified" cost or pricing data were furnished on previous

buys and the contracting officer determines such data are sufficient, "when combined with updated information," a waiver may be granted

The submission of "updated information" is a normal occurrence for most follow on negotiated procurement actions By specifying "when combined with updated information," the proposed example obscures what constitutes an "exceptional" case

For example, assume that a contractor "certified" a cost proposal for a prior buy four months ago and the proposed indirect costs were predicated on forecasted indirect cost rates that were agreed to nine months ago However, to support the estimated indirect costs for a current proposal the contractor prepares a completely new forecast The two forecasts may involve different data and cover different periods of performance involved for the prior and current buys In such cases, would such updated projected indirect cost rate "information" qualify for the waiver?

Proposed 15 507-3(c) provides that FPRA's are to be covered by the "Certificate" that is to be obtained when the estimated indirect costs are actually negotiated for specific awards Would an updated FPRA negate the certification process envisioned under 15 507-3(c)?

As written, it is not made clear if the current proposed cost or pricing data must be based on the same previously certified data or if the proposal must be based on the updated data It is not clear if the previously certified data or the updated data is to be used to perform price analysis and/or cost analysis, when determining the prenegotiation objective or the reasonableness of the proposed contract price

If the previously certified data is to be replaced by the updated data, why would a certification for the updated data used to support the current contractor proposal not be deemed necessary? If the prior data is used, why should updated data be a consideration? Even if only the previously certified data were used, there would be no recourse for the Government under the current contract if the certification requirement were waived for the current contract and the previously certified data were subsequently found to be defective

These ambiguous provisions on what constitutes an exceptional case will probably not be implemented in a uniform and consistent manner

## Purpose of TINA is Omitted

As proposed, Part 15 does not set forth the underlying concepts and objectives of the Truth In Negotiations Act For example, Part 15 does not specify why a contractor or subcontractor is required to certify (in a signed Certification) that specifically identified cost or pricing data submitted to support a proposed price is complete, accurate and current at the time of agreement on price The underlying concept not disclosed is that the Government should be aware of the same universe of data known by the potential contractor The intent is to level the

## $95-029.22$

playing field by requiring the contractor to submit any information that could significantly affect the negotiation of contract price Part 15 does not explain that the Government has no recourse if the submission of "certified" cost or pricing data is not required and a prospective contractor submits defective data The negotiated contract price cannot be adjusted downward if the defective data resulted in the negotiation of an overstated contract price The contractor would also not be subject to other legal remedies associated with the filing of a false certification

Consequently, Part 15 does not appear to fairly balance the benefits associated with obtaining certified cost or pricing data with the disadvantages cited at proposed 15 502(a)(3) This unbalanced presentation could adversely influence an HCA's decision when processing a requested waiver

In Brief The "suggestive" solicitation waiver request provisions and the ambiguity of the waiver provision coupled with the unbalanced background coverage on TINA will increase potential contractors tendency to request waivers, particularly when negotiating on a fixed-price basis With such permissive FAR coverage, contracting officers and HCAs will find it increasingly difficult to not grant the requested waivers My primary concern is that the granting of waivers may escalate from occasional actions for "exceptional cases" as permitted under TINA to a routine "negotiable" consideration, 1 e , a recurring normal occurrence

## Recommendation

The proposed waver coverage should be made more explicit The phrase "in exceptional cases" should be at the beginning, not at the end, of the first sentence proposed at 15 503-1(c)(4) Then, the emphasis would be consistent with the language in TINA The proposed phrase, "when combined with updated information" should be deleted What constitutes an "exceptional case" should be more clearly defined Otherwise, the waiver authority intended for use in "exceptional" cases may degenerate into the widespread granting of routinely requested waivers in day-to-day practice This would not be in the taxpayers' interest

Thank you for consideration of these comments
Sincerely,


Albert Ruskin, CPCM

INTERNAL REVENUE SERVCE


ASSISTANT COMMISSONER (PROCUREMENT) M:P OFFICE OF PROCLIREMENT POLCY (M:P.P) CONSTELLATON CENTRE 6009 OXON HILL ROAD, 8TH FLOOR

OXON HILL, MD 20745
FAR Case 95-089

DATE: ᄀ1/1197

TO:

 PHONE\#: (202) 283-1258

FAX\#: (202) 283-1529

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FAR Case 95-029
Treasury has completed the review and we offer the following comments. All of our comments are in Group A.

## GENERAL:

The revised version is significantly improved over the version that was previously published. Many major problems have been resolved, as well as numerous minor problems. However, some issues remain to be addressed, including some regressions. For instance, commonly used terminology (egg, best value, statement of work (SOW)) appeared in the first publication, but SOW has now regressed to work statement.

Contracting by negonating is an acceptable and extensively used procedure In many organizations it is used much more extensively than sealed bidding. As such, it should stand on its own as much as possible The rewrite should include full text discussion of procedures, here, and eliminate cross references to FAR Part 14 as much as possible

## SPECIFIC

15000 The second sentence needs to be modified. Although taken from the current 15101 , it begs the question of whether all contracts are really governed by parts 14 and 15 . This is particularly troublesome in light of the definition of contract at 2.101 .

15001 We're getting proliferating definitions again Part of the original problem in terminology has been resolved by using "communication" as an all encompassing term However, "negotiation" remains both the total process and a specific step or procedure within that coral process. In the current structure "discussions" becomes an unnecessary term, as it has the same essential meaning as "negotiations." Outside of this rewrite "communication" is an all-encompassing term that includes discussion, negotiation, bargaining, etc. The best solution is to throw out the current definition of "discussion" in favor of a new structure

Negotiation should be the process.
Communication as all interchanges, meluding both discussions and bargaining
Discussions are conducted prior to the competitive range, and do not allow offer revision.
Bargaining is conducted after the competitive range and allows offer revision.

Ar a minimum, use negotiation in only one sense and change the definition of discussions to read "Discussions are communications . ." This will still

Page 2 FAR Case 95-029

leave interchanges before the competitive range without a name.
15.1 and 15.202 would seem to be out of place. They deal with source selection, they should be Sections or Subsections under Subpart 154 , Source Selection.

15 101. Reverse order of $15.101-1$ and 15 101-2. In 15.101-1(b)(3) delete the discussion of file documentation, as that requirement is specified elsewhere
15.201(a). This should also deal with interactions prior to receipt of proposals Exchange of information should also be encouraged after release did before proposals are received, so that we can work out any problems before proposals are received and we have to go out again. It would appear that between 15201 and 15.406 this time period has slipped through the cracks, as if no communication were contemplated

15 202. Rename to avoid confusion with 15.102 (eg, Ldpablity review, capability analysis, qualification prescreening, market research capability statement).
15.203(e) Define and describe letter RFP Provide examples of when it should be used, or avoided
15.204-2(c). Substitute statement of work (SOW) for work statement
15.206 Add a new subparagraph that deals with responding to offeror questions through solicitations amendments A good format would be "Question, Answer, Changed Requirement." This subparagraph should also point out that requests for interpretation of solicitation language require more than simply referring back to the solicitation language.

15 206(a) Delete ". . relaxes, increases, or otherwise modifies " as unnecessary, Each of these is a change, in one form or another, of the Governments requirements. If a decision is made to retain some of this language, please differentiate between "changes" and "otherwise modifies "
15.208(b) and (c) These only deal with "final" revisions. Does this mean that these requirements are not applicable to other revisions, such as those contemplated in 15.208(a)?

15 210(c). Reverse order of SF 30 and SF 33
15301 Expansion of the definition of unsolicited proposal dropped out the

Page 3 FAR Case 95-029

statement. which $1 s$ used at 15.303 (d) This could cause some confusion
15 304(b) This is not Agency Liaison Either move this or retitle
15.304, $15306,15.307$ and 15309 use three different terms (1.e , Agency Liaison, Agency contact point, and Coordinating office) to refer to what appears to be the same person/office If thus is the case, use a single term If thus is not the case, then there needs to be further detinimon of the different functions of the different prople/organzzations.
15.401 Delete "material." First, material failure is undefined If you moist on using maternal, define the term. Second, this gives the impression that a failure to meet a Government requirement is not a deficiency However, in a lowest price technically acceptable acquisition it should prevent award.

15 403(a). Do not specify the contracting officer as the source selection authority Allow maximum discretion to the agency head in making that decision. With the greater emphasis on matrix organizations, Integrated Product Teams, etc., technical personnel are taking a greater authonty in establishing their own destiny In lowest pace technically acceptable source selections, it may be appropriate to have the contracting officer as the source selection authonty. In tradcoff process source selections the decision should be made by requring/user/technical personnel Who better to determine what incremental benefits are worth the money, than those with the purse strings"? This is particularly true for major systems acquisitions.
15.403(b)(1) The words here are diving us to do additional work The elusion of "team" will drive organizations to establish teams, even when a contracting officer could make the decision on his/her own. Delete "contracting, legal, logistics, technical, and other," or they will be on every team If this must be in the FAR, caveat by adding "as necessary" or "ir required" Substitute "complete" for "comprehensive," as it sounds much less onerous and burdensome.

In 15.403(b)(3) and (4) and 15 404(a), (b) and (c ) add "significant" before "subfactors"
15.403(b)(4) and 15.405(a) Delete "solely," as the courts and boards have consistently held that decisions can be made based on d discriminators that logically follow from the evaluation factors or the purpose of the acquisition, even if not explicitly stated in the solicitation TMAC is probably the most famous recent case on this issue Expand coverage, as necessary, to convey this concept

Page 4 FAR Case $95-029$


15,404(a). The use of the word "criteria" creates an intermediate, unnecessary step or terminology set. The award decision should be based directly on the evaluation factors and significant subfactors.
15.405 and $15405(\mathrm{a})$. Change the tull of the section to "Evaluation," ids 15405 (a) immediately stales that proposal evaluation is an assessment of both the proposal and the offeror's ability to accomplish the contract, eluding evaluation of past performance
$15.405(\mathrm{a})(2)(1)$. The last sentence refers to the "comparative assessment of past performance information." However, there is nothing here to indicate why this is a "comparative" assessment, or what procedures must be followed.

15 405(a)(2)(iv) Good, the statutory reference has been added at this revision, but not the language Don't stick with the old FAR language or the term neutral. The statutory language is sufficient unto itself and the different terminology and added term only cloud the issue. FASA and 41 U S C 405 read, "In the case of an offeror with respect to which there is no information on past performance or with respect to which information on past performance is not available, the offeror may not be evaluated favorably or unfavorably on the factor of past contract performance."

15 406(b). This coverage places an unnecessary and unrequired limitation on communication with offerors The law does not preclude pre-competalive range interactions with offerors, no matter what we may elect to call them The only limitation is that discussions must be held with all offerors in the competitive range Early discussions will force the conduct of a competitive range decision, but that is a chicken/egg argument that need not be addressed. There is no requirement that specifies the timing of such discussions. There is also no limitation on discussions with offeror outside of the competitive range Thus is only a model that most, if not all organizations have adopted. Thus is the opportunity to make a better model that allows for far greater openness and communication. This greater flexibility also requires that the second sentence of 15.406 (b)(2) be deleted in addition to the previously discussed changes in definitions.

15 406(e)(3). Delete "to all offerors" as the language limits our options to disclose to one or some The BankStreet case indicates that you don't have to disclose the Government's estirnate to all offerors Include specific language about disclosure of the Government's ICE, IGCE, MPC The U S.C. reference seems to be out of place and incorrect
15.407(b) Any agreements should not only be confirmed in offer revisions, but if they materially affect the contract, should be meorporated in any
resulting contract Guidance should be provided that indicates that incorporating an offer's proposal by reference is probably not an inappropriate way to accomplish this.
15.603(b)(2). And what about part 12 ?
15.605(e)(1) and .606(d)(1) dee inconsistent.

1606 (c). Does this mean that under these circumstances we can release the information that was prohibited from release at $15.605(\mathrm{f})(2)$, (3) and (5)?

If you have any questions about Treasury's comments, please call Madelene Weinberger at 202-283-1258.

General Services Administration
FAR Secretanat (VRS)
1800 F Street, NW
Washington, DC 20405

## RE: FAR Case 95-029

## To Whom It May Concern

Thank you for the opportunity to comment on the rewnte of FAR Part 15 Listed below are my comments and recommendations for the final FAR

Under the Regulatory Flexibilty Act Page 5 last Paragraph, it states that the proposed rule would apply to all large and small entties that offer supplies and services to the Govemment in negotated acquistions I recommend that this provision be amended to include Government agencies bidding on contracts An example would be the Dept of Agnculture bidding on the FAA ICEMAN program
15.201 (f) I believe the intent is great, but I would encourage equal access to Government employees to discuss the specfic requirements. This section would allow the Government to post something on the Internet to meet the FAR requirement while other vendors may have had meaningful discussion with the Government regarding their application
15.205 (a) There should be a limitation on how much the Government could charge for solicitation sets । would recommend a $\$ 500$ maximum
15.206 (g) This provision could result in technical leveing and I recommend that this provsion be deleted
14.404 (3) (ii) I believe that the threshold for past performance starting in 1999 is low I believe this will cause an administrative burden on the Government and we will end up with poor information regarding contractor performance I would recommend rasing the level to $\$ 500 \mathrm{~K}$
15.406 (4) I am concerned about the scenano where a vendor is eliminated from the compettive range and is debrefed only to find a flaw in the initial evaluation of their proposal What recourse is available to a vendor at that point? I recommend a provsion for reconsideration if there was an error discovered during the debrefing This would also eliminate a potential protest

Cost Elements Page 59 (a) Cost analysis for all subcontractors will be reviewed by the Prme Cost and pricing data are very sensitive and the subcontractors would not want to disclose this type of information to a pnme. I would recommend that the subs be able to provide sensitive cost and pncing data directly to the Govemment It is likely that the prime we are bidding with today will be our compettor on another procurement tomorrow

Thank you for the opportunity to provide input to the FAR rewnte, and if you have any questions regarding my comments; please feel free to contact me personally at (703) 442-9100

$\because n+\Delta 130$

National Aeronautics and
Space Administration
Ames Research Center
Moffett Field, CA 94035-1000

## JA. 241-1

IL 10 1997

General Services Administration
FAR Secretariat
1800 F Street NW, Room 4035
Washington, DC 20405

SUBJECT • Case Number 95-029, Part 15 Rewrite, Impact of Electronic Processes for Commercial Items on Small Businesses

We are pleased to provide information for your use during the FAR 15 revision process Regarding the use of the electronic combed synopsis/solicitation for purchase of commercial teems, we have had very good experiences using this innovative procurement technique An important issue is the impact on small business Two metrics support our conclusion that it has not impacted small or small, disadvantaged businesses adversely

1) Small business ( SB ) awards, percentage of total obligations

FY96 (12 months)--FY97 (eight months)
Percentage of dollars to small businesses has grown from $201 \%$ to $206 \%$
Percentage of dollars to large businesses has declined from $5556 \%$ to $531 \%$
2) Small disadvantaged business (SDB) awards; percentage of total obligations

FY96 (8 months, October through May)--FY97 (8 months, October through May )--
Percentage of dollars to small disadvantaged businesses has grown from $17 \%$ to $19 \%$
Note The SDB data includes grants and subcontract dollars that are not included in the report on SB above Therefore, the two percentages are not directly comparable

Our Small Disadvantaged Business Utilization Specialist specifically mentions electronic commerce and the Internet in his conversations with small and small, disadvantaged businesses The firms appear to be receptive to the information He has heard no complaints Also, he has ongoing discussions with our Small Business Administration (SBA) Procurement Center Representative (PCR) and has received no negative feedback regarding NASA Ames Research Center's use of electronic processes (including the Internet)

We believe the new techniques have helped us significantly, with no adverse affect on the small


Charles W Duff, II
Procurement Officer
cc.

JUL 141997
HC/ Frances Sullivan

# ML -9 1997 

US Agency for
International
Development

General Services Administration
FAR Secretariat (VRS)
1800 F Street, NW
Room 4035
Washington, DC 20405
Attention. Mr Ralph Destefano
Reference: FAR Case 95-029, FAR: Part 15 Rewrite: Contracting by Negotiation; Competition Range Determination; Group A

Dear Mr. DeStefano:
In response to the Proposed Rule with request for comments published in the Federal Register on May 14, 1997 (62 FR 26639), the U.S. Agency for International Development (USAID) submits the following comments.

Regarding FAR 15. 208 Submission, modification, revision, and withdrawal of proposals, we have some questions and serious concerns about the proposed language, particularly paragraph (c), in which are found the circumstances when a "late" proposal may be accepted by the contracting officer. The contracting staff of USAID was surveyed for input on the proposed language, and while several of our contracting officers support the proposed language and the flexibility it would gave them to use their professional discretion to decide when to accept late proposals, many more a ratio of two to one) expressed concern about the lack of clearly defined criteria for doing so and the probable consequences, and even what exactly some of the proposed language means.

Proposed $15.208(c)(1)$ states that late proposals, modifications, and final revisions may be accepted by the contracting officer provided the contracting officer extends the due date for all offerors. We don't see the point of this paragraph, since in most cases, other offers will have already arrived on time, and extending the due date after the fact for these on-time offers is meaningless and could even be a red flag to those who met the deadline, since an after-the-fact extension would appear to be made to accommodate a "late proposal" If the point of this language $1 s$ to allow the contracting officer to extend the due date to accommodate a prospective offeror who gives prior notice that they need an extension, then such wording
ls unnecessary because the contracting officer already has authority to extend the closing date or time prior to receipt of proposals (proposed section 15.206).

We have no problem with the proposed language for paragraph 15.208 (c) (2).

Proposed $15.208(\mathrm{c})(3)$ generated the most concerns among our staff. The existing FAR language provides a level playing field in which all offerors are treated fairly; the deadline is clear and those offerors who meet it move on to the next stage of the evaluation process. Offerors are assured that their competition has the same amount of time to prepare their offers, and late proposals will be accepted only if the strict circumstances in FAR 52.215-10 exist. The current system does not tempt offers to try to manipulate the system because these circumstances are completely outside their control. Several of our contracting officers questioned why a system that has basically been working successfully needs to be "fixed".

By allowing the kind of discretion we read in this paragraph of the proposed rule, the real sense of a "deadline" is gone and offerors and even technical staff within the Agency (who favor a particular firm for some reason) may try to influence the contracting officer's decision to accept or reject a "late" proposal. Even if such attempts are not made and the proposal is late because "the circumstances causing the late submission were beyond the immediate control of the offeror", the analysis and additional file documentation that appears to be required to support using proposed 15.208 (c) (3) is not, in our opinion, streamlining the process.

Tied in with the additional file documentation indicated (either to extend a due date superfluously or to document the file as to why a late proposal was accepted or not), the primary concern expressed by our contracting officers was that the lr Judgment would be questioned, Justifiably or not, and that not having a clear, unambiguous standard for accepting late proposals will open the door for protests against the Contracting Officer's discretion, regardless of the soundness of his/her judgment in making the decision Even if no protest is filed, the Contracting Officer can expect to have to provide additional written communications to any other offerors who ask for an explanation of why a "late" offer is being accepted for consideration.

If this section of the proposed rule is finalized substantially as proposed, we recommend that, if possible, some protection against frivolous protests be included, too. Protest case law typically supports the contracting officer's decision in cases where his or her judgment is the basis for the protest, so we believe that our contracting staff will prevail against most potential protests resulting from this change in the treatment of late proposals. However, we believe the proposed language will put an unnecessary and onerous burden on the contracting officer to justify the decision to accept or reject a late proposal and request that some regulatory protection to discourage protests for this reason be enacted.

Thank you for offering us the opportunity to comment on this important rewrite effort. If you have any questions about this letter, please feel free to contact me or our Procurement Policy office (specifically, Ms Diane Howard, M/OP/P, at dhoward@usaid.gov) at 703-875-1533.

Sincerely,


# FROM Department of Defense Education Actıvity (DoDEA) Procurement Division <br> 4040 North Farfax Drive <br> Arlington, Va 22203-1634 

TO: General Services Administration
FAR Secretariat (VRS)
1800 F Streets, NW, Room 4035
Washington, DC 20405

## SUBIECT FAR Part 15 Rewnte, FAR Case 95-029

1 The following comments are offered on the proposed FAR Part 15 Rewrite, combined Phases I and II As requested, comments have been separated into two distinct groups
a Group A - Subparts $15.00,151,152,153,154$, and 156
(1) 15001 Dcfinitions Suggest that the definition of "clanfications" be included in this group, since it relates to the other terms defined here
(2) 15001 Definitions. It would be simpler and less confusing to have one term used for changes made to proposals both before and dfter the closing date "Proposal revision" would be a suitable term to use for any changes made to proposals at any tume
(3) 15103 Oral Presentations. The guidance on oral presentations is very good It covers the subject well and will be useful to anyonc consdering the use of oral presentations.
(4) 15201 Presolicitation exchanges with industry The problem of unauthorized obligations has not disappeared While we agree that open exchange between industry and government is a good thing, language cautioning unwarranted personnel to avoid such actions should be included in this arca In addition, it should be noted that it is not unusual for personnel unfamihar with statutory and regulatory requrements to be unfaitly influenced toward a particular product or company.
(5) 15.206(f) Amending the solicitation.

The guidance on cancellation of solicitations "at any stage" is welcome Lack of such specific wording has caused problems in the past
(6) 15401 Definitions.

The distinction between "deficiency" and "weakness" is not well made and could cause confusion. Suggest deleting the term "weakness". It appears to be subjectıve, and therefore not very useful
b GROUP B - Subpart 15.5
(1) 15 S04.2(b)(ii) Reporting field pricing information

This passage states that "the completed field pricing assistance results need not reconcile the audit recommendations and technical recommendations" In other words, the two need no longer be combined into one document. The concern raised by this change is that with the recent downsizing and increased emphasis on "cradle to grave" contracting which has resulted in a decrease in the number of trained cost and price analysts, procurement offices may lack personnel with the expertise to reconcile these two opinions For this reason, the two documents should be combined and reconciled before they are sent to the procurement office
(2) 15.504-4(c)(3) Profit - contracting officer responsibilities

The meaning of this paragraph is difficult to comprehend. It appears to say that facilities capital cost of money is not meluded in the base to which profit is applied If so, it would help to simplify the language and say so.

In addition, no mention is made as to the allowability of applying profit to general and administrative costs (G\&A). It would be helpful to have this issue addressed specifically.

## Federal Bar Association

July 11, 1997

## VIA FACSIMILE \& USS. MAIL

FAR Secretariat (VRS)
General Services Administration
1800 F Street, N.W
Attn Ms Melissa Rider
Room 4035
Washington, DC 20405

## Re: Comments Concerning Proposed Rewrite of FAR Part 15 FAR Case 95-029

Dear Ms. Rider

On behalf of the Government Contracts Section of the Federal Bar Association ("FBA") ${ }^{1 /}$, we respectfully submit these comments concerning the proposed rewrite of FAR Part 15, as published in the Federal Register on May 14, 1997

We have three basic comments concerning the latest version of the proposed rewrite of FAR Part 15 First, we commend the FAR Council for its thoughtful and diligent efforts to address in the May 14 version of the proposed rewrite the various comments provided in response to the earlier versions of the proposed rewnte (including comments provided by our own organization in October and November, 1996) We were particularly pleased to see in the May 14 version of the proposed rule (1) the elimination of the proposed provision authorizing the contracting officer to limit in advance the number of offeror in the competitive range, (2) significant changes to the scope of discussions (now addressed in $15.406(d)(3)$ ), and (3) the adoption of a common cut-off date and time for the submission of final proposal revisions. The revised version of FAR Part 15 appears to address all of the

[^2]FAR Secretariat (VRS)
July 11, 1997
Page 2
primary concerns that we expressed in response to earlier proposed versions of the rewnte, and we believe the revised version of FAR Part 15 is a substantially improved document whose adoption -- subject to a few minor points noted below -- we support.

Based on our review of the revised version of FAR Part 15, we have identified two areas of lingering concern Our first comment concerns the revised proposed rule governing late proposals as now set forth in FAR 15 208(c). The earlier version of this proposed rule (at FAR 15 207(b)) adopted a "best interests" of the government standard, while the revision now articulates three circumstances when the contracting officer can accept a late proposal (1) when the due date is extended for all offerors, (2) when the lateness was caused by the action or inactions of the Government, or (3) when the lateness was caused by circumstances "beyond the immediate control of the offeror " While the revised rule is much-improved over the earlier version, we remain concerned that the second and third standards for the acceptance of late proposals are unduly vague and will be difficult for the contracting officer to apply without giving rise to claims of preferential treatment from those offerors that submitted timely proposals. Rather than benefiting the government, we fear that the primary beneficiaries of this new rule will be those offerors who, while perhaps less vigilant and diligent than the competition, will aggressively pursue contracting officers to accept their late proposals based on "ginned up" excuses -- whose validity contractıng officers will now have to take time to consider and decide upon. Because of this lingerıng concern, we contınue to favor the "bright line" rule for late proposals set forth in current FAR 15407 and FAR 52 215-10. While these current standards are much more strict with respect to the acceptance of late proposals, we remain unconvinced of the need for a significant change in this area of the regulations and believe that the government's interests, with relatıvely few exceptions, are furthered -- not hindered -- by the current "bright line" standards for the acceptance of late proposals.

Our second area of comment concerns the proposed rule governing the preaward debriefing of offerors, as set forth at FAR 15605 . In particular, we are concerned about the practical impact of proposed FAR $15605(\mathrm{a})(2)$, which permits an offeror excluded from the compettive range to delay its debriefing until after contract award but puts the offeror on notice that, notwithstanding the debriefing delay, its "bid protest clock" at the GAO is running.

Based on our experience, we believe there are procurements where an offeror and contracting officer have a mutual interest in delaying a debriefing of the decision to exclude an offeror from the competitive range until after the contract award has been made Such a delay, for example, may represent a distraction and drain on resources that the contracting

FAR Secretariat (VRS)


July 11, 1997
Page 3
officer is pleased to defer until after award, while the contractor may prefer a delay until the identity of the winning offeror (which might have a recognized technical advantage or unique solution) is known We beheve the rule should permit -- not discourage -- such a mutually agreeable delay without forcing the hand of the contractor to file a GAO protest which, after an informative post-award debriefing, might never be filed at all We emphasize in this context that the delay must be acceptable to both the contracting officer and the offeror, in those circumstances where the contracting officer desires to proceed expeditiously with a preaward debriefing, the offeror should not be permitted to delay that debriefing until after award without the contracting officer's consent In its current form, however, a mutually acceptable debriefing delay cannot be accommodated without triggering the offeror's GAO protest clock We think this is unfortunate, as it may actually work to encourage the filing of GAO protests challenging an offeror's exclusion from the competitive range which might otherwise be avoided While we understand that this is an area in which the GAO's rules and jurisprudence must be considered (and, indeed, we understand the GAO has filed comments on this proposed rule), we believe both the government and contracting community would benefit from a rule allowing mutually agreed upon delays to preaward debriefings without triggering the offeror's GAO protest clock

In closing, we again express our appreciation to FAR Council for its consideration of the public comments submitted to date and for the numerous areas in which the latest proposed rewrite of FAR Part 15 reflects those comments. We welcome this final opportunity to submit comments on the proposed rewrite of FAR Part 15, and look forward to the issuance of a final version of FAR Part 15 later this year


DEPARTMENT OF THE NAVY OFFICE OF THE ASSISTANT SECRETARY RESEARCH, DEVELOPMENT AND ACQUISITION 1000 NAVY PENTAGON Washington dC 203sond000

## $95-029.29$

### 11.10 . 0

General Services Administration
FAR secretariat (VRS)
18 ${ }^{\text {th }}$ \& $F$ streets, NW, Room 4037
Washington, DC 20405
FAR Case 95-029
Gentlemen/Ladies:
We appreciate this opportunity to provide comments regarding FAR Case 95-029, Part 15 Rewrite, Phase I (Revised) and Phase II. The revisions to phase I alleviate a number of the concerns expressed by the May in our response to the prior version of Part 15. Phase I, published September 12, 1996. It remains our opinion that, even as revised, the late proposal language under "Submission, modification, revision, and withdrawal of proposals." at FAR 15.208, and the pre-competitive range language under "Communications with offerars," at FAR i5.406, will generate an unnecessary degree of litigation and administrative appeals which will likely interfere with the efficient and effective functioning of the procurement system.

Additionally, we have identified some contract policy issues which we believe should be further refined. Principal among then are the ability of an offeror to propose an alternate structure to the Government designated contract Line Item Numbers (CLINe) at FAR 15.203 (a), the introduction of federal regulatory language with respect to release of cost information during the proposal evaluation phase at FAR 15.405 (a)(4), and the language concerning Proposal revisions at 15.407.

The Navy has no significant concerns with respect to Phase II. We do offer for consideration a number of editorial comments regarding both Phase I and Phase II.
our concerns and comments are addressed in detail in Attachment (1). Applicable changes to the FAR rewrite language at FAR 15.208, 25.406, and 15.407 are offered for consideration in Attachment (2). The comments provided in Attachment (3) are issues of lesser importance or editorial in nature. Each attachment separately delineates our comments into the Group A and Group $B$ categories as requester


[^3]GROUP A -
15,203(a)(2)(i)(i1) M Recommend reference to offeror being authorized to propose alternative CLIN structure be deleted. While this might be desirable with respect to performance specifications $\lambda t$ should be recognized that it could complicate the evaluation, and add time consuming alterations and reviews of the final contract and funding documentation. This is especially true when, as 15 common in DoD, multiple funding citations are applicable. Since agencies already have the authority to permit offerors to propose alternate ChINs when appropriate to a particular procurement action the addition of specific language to this effect is not considered necessary.

FAR 15,208 submission modification, revision, and withdrawal of proposals.

FAR 15.208(c)(2), and the clause at 52.215-1(c), permits the Government to accept late proposals based on a written determination by the contracting officer that the lateness was caused by actions, or inaction, of the Government. This language does not address the type of "action of inaction", such as failure of the Government to follow established procedures for handing of proposals, which could constitute an excusable delay.

FAS 15.208(c)(3) permits Government acceptance of a late proposal When in the judgment of the contracting officer the lateness was "beyond the immediate control of the offeror". Again, this language does not provide guidance relative to what could be considered as an excusable delay.

In order to ensure fairness in the process there should be some standard for deciding under what circumstances a late proposal may be accepted. For example, the offeror might need to demonstrate that it made a reasonable attempt to submit on time and that it was late as a result of some excusable delay factor. Beyond this, the contracting officer might have to determine that there is no evidence that the offer ar knew of, or was influenced by, any of the previously submitted proposals and that there is no reason to believe that the lateness provided the offeror with a competitive advantage. Additionally. it might be appropriate to indicate a relatively short time limit on when a late submission could be accepted after the established date and time.
15.405(4) - The release of cost information to the evaluation team is an agency decision which will vary in accordance with the circumstances of each procurement. This has been recognized in prior regulatory coverage by the convention of not including coverage of this topic. Introduction of coverage in the Part 15 rewrite is not necessary and may send an inappropriate message that release of cost information to technical evaluators is

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encouraged. We recommend this language be deleted and that Part 15 continue to be silent regarding this issue.

### 15.406 - Communication with offeror,

PAR 15.406(a) ~ Communications and award without discussions. We share the concern expressed by the speaker from the General Accounting office at the Defense Procurement Conference that the proposed language appears ta go beyond that which is statutorily permitted. In order to accomplish the desired objective of expanding the boundaries for communications in a situation where award without discussions is considered feasible, while at the same time avoiding violation of established statutory prohibitions, it is recommended that the proposed language be clarified to make a distinction between issues that reach to the evaluation criteria and issues which do not reach evaluation factors, such as business and administrative issues. We recognize that this would eliminate any communication concerning an offeror's past performance which has been designated to be a mandatory evaluation factor. While we agree that it would be desirable to eliminate any potential controversy concerning an offerors past performance as early as possible in the selection process it is difficult to envision the topic of past performance not leading to a dialog which goes past what has historically been permitted. Communications with offerors in those instances where award is to be made without discussions should, therefore, be limited only to the clarification of business and administrative issues.

FAR 15.406 (b) - Communications before establishment of the competitive range Historically, GAO and the courts have permitted minor clarifications before a determination of the competitive range, at which point 10 U.S.c. 2305 required discussions with all offerors in that range. The attempt to expand communications to include interaction with the offeror regarding perceived deficiencies, which are defined (FAR 15.401) as a material flaw to meet a government requirement, or a combination of significant weaknesses that increases the risk of unsuccessful performance to an unacceptable level, is too transparently "discussions" without a determination of the competitive range. The Navy recognizes that the General Accounting office did not take issue with the inclusion of "perceived deficiencies" as an area of pre-competitive range communications in its comments on the september 12, 1996, version of the Part 15 rewrite. Nevertheless, it remains the opinion of the Navy that it would be a mistake to open up the communications process at this juncture of the selection process to include addressing perceived proposal deficiencies. To do so invites litigation which could well be decided against the Government. It is recommended that the current language be rephrased to avoid this potential legal concern.
15.406(a) - Communications with offeror after establishment of the competitive-5ange.
15.406(d)(2) - The objective should be phrased in a manner which ties together the evaluation and selection steps of the process. / The following editorial changes are offered for consideration:

The primary objective of discussions is to maximize the Government's ability to obtain best mite select the offer which represents the best value, based on the Government's stated requirement and the evaluation criteria get forth in the solicitation.
15.406(a) (3) - Under the first paragraph the wards "in the opinion of the contracting officer" are unnecessary and should be deleted. AII words after "In discussing other aspects of the proposal . . ." should also be deleted because they are 1 unnecessary and potentially confusing. The concept embodied in the language implies a change in the Government's requirement after some offers have been eliminated.
15.407, Proposal revisions - Recommend the language relative to "whether or not all material aspects of the proposal have been discussed of the offeror has been afforded an opportunity to submit a proposal revision" be deleted. This language goes to the principle of "meaningful" discussions. While recognizing that the term "meaningful" has been the subject of much dispute in the past, it is aoubtrul that the principle will be abandoned in spite of the revised language. It is further recommended that the language be revised to more clearly demonstrate the process of multiple changes to the offer until such time as the offer $1 s$ eliminated, or discussions are declared over by issuance of a request for "final" offer, which replaces the concept of "best and final" offers.

GROUP B - None

## ATTACHEMENT

(2)

The following revisions to the part is rawrite, which reflect the concerns expressed in Attachment (I), are offered for consideration:
15.208(5) - Late proposals, modufications, and final revisions may be accepted by the contracting officer provided -
(1) The contracting officer extends the due date for all offerace; of
(2) The contraeting officer, deteruimed in wititing-on-the
 thorough revies of the eizcumgtancas which eaurad an offer to be receired after the designated elosing time, determines in uriting that the lateness was caused by Eadiure of the Goyernment to establish or to follow adecqute fecoipt and recoraing proceduras: or
(3) Ifr-tin jungment-of-the-ontrueting oftien- theoffewer


 that the lateness was bayond the control of the offerar or the offeror's delivery agont (aither omployeo or commen carribry on the Dasis of factual infozination submitted by the offeroz vinich daronstrates (i) the proposal, modification or revisien vas delivarad into the possegsion of the offeror"s dalivery agent in adequate time to be delivered by the designsted elosing time, (2) mitigating eircumstances beyond the control of the offeror or the delivery agent (e.g., transportation delay causad by an aceicient, a flight cancellation, or an analogous circumstanoel pfevented timely delivery, and (3) actual delivery was complatad an yapidiy an reasomably possible given the extenuating cireumstances and, turther, the contracting officer aetarmines in vriting there ia a reasonable basis to believe the proposal or change vas preparad prior to the time specified for receipt, and that adoeptance af the late proposel vould not provida eomperitive advantage to the offeror.

## gar 15. 406 Comunications with offerors.

15.406(a) - (a)Comunications and award without discussions. (1)
 indicate avard vithout eonducting diacussions is feasible. commanications with offerors may be used to resolve minor or elerical errors or to clarify buainean and adminiztrative agpects of the proposal that are not bubject to the avaluation eriteria.
15. $406(b)$ - Communications with offerors before establishment of the competitive range. ff a-ompetive-zamg ioto-be
 evaluation resulta indicate that the Government' ability to establish a competitive range woula be enhanced by limited communications with those offerors whose exclusion from, or inclusion in, the competitive range is uncertann, fot
communications may be conducted mane torment
 the prop ert of with suck offeror to facilitate the Government's
 convidered-in-ruting propesalior
(32) infer the puperefresing issues thet-must-be explexey-to determine Issues which may bo addressed to determine whether a proposal should be placed in the competitive range include:
(i) Ambiguities in the proposal or other concerns (e-g., perceived feteneiear weaknesses, errors, omissions, or mistakes (see 14.4071);
(ii) Information relating to relevant past performance.
(3) fret t edrest-whon applicable, adverse past performance information on which the offeror has not previously had an opportunity to comment shall be addressed.
(4) Such communications shall not be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, on der revise -the properer nor shall-prowide an opportunity for the offeror to revise its proposal be providedternater

15406(d) - Communications with offerors after establishment of the competitive range. (1) Such communications are discussions, tailored to each offeror's proposal, and shall be conducted by the contracting officer with each offeror within the competitive range.
 Government utility ter oterim best -tau, bored of the
 oufiectatient The objective of discussions is to maximize the Government's ability to select the offer which represents the best value, based on the Government's stated requirement and the evaluation criteria set Earth in the solicitation. +3 )The scope and extent of discussions are a matter of contracting officer judgment. The contracting officer shall, subject to paragraph (e) of this section and $15.407(a)$, indicate to, or discuss with, each offeror still being considered for award, significant weaknesses, deficiencies, and other aspects of its proposal (such as cost, price, performance, and terms and

 potential sev-iward are susceptible to material enhancement in the areas subject to the evaluation criteria get forth in the solicitation. The seepernhextert of disetesion-areu-wetten
 Properal, the whereat indy, intuationo-where-the



 everedea ant mandatory minimums, that their proposals would be
 price deferred.
15.407 (a) - As a result of discussions, the contracting offient may request offerors retained in the competitive range to submit one or more revisions ta their proposal until such time as the offeror has been eliminated from further consideration for award. (b) xi, after-hurussi hind begun then an offeror 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 met 41


 or otherwise m from the competitive range, no further revisions to that offeror's proposal shall be accepted or considered.

 At the conclusion of discussions . . .

## ATIACHMENT (3)

GROUP A -
15.001- The Webster definition of negotiation is "conferring, discussing, or bargaining to reach agreement." The emphasis on the 'bargaining' aspect (which has heretofore been avoided in the
a FAR) detracts from the preeminent emphasis of "discussing" which
is the culmination of the negotiation process under competitive negotiation procedures, Recommend that the definition be revised to place the emphasis on discussions as described in 15.406.
15.101-163) - Recommend the following editorial change: This process permits tradeoffs among cost or price and non-cost factors and allows the Government to accept other than the lowest priced proposal. The perceive befits the selection of a
10 higher-priced proposal shall merit the additional cost, and the perceived benefits and rationale for tradeoffe must be documented in the file in accordance with 15,408.

15, 306-1(a)(2) - Revise to read as follows: freud ten emitted Is suitable for aumiasion in response to an existing agency requirement (see 15.302).
15-405(a)(1) - Amend fourth sentence by adding ". . offeror's
1.2 ability to perform the contract at the offered price."
15.405(a)(2)(iii) - Amend to make a single sentence which ends "critical aspects of the requirement ven such information may be relevant to the instant acquisition."

GROUP B
15.504(2)(d) - Revise the first sentence to read: ". . . , shall notify the contracting officer immediately if the contractor data provided . . ."
15.504-3(c) (5) - Change as follows: "If there is more than one prospective subcontractor for any given work, the contractor need only submit to the Government cost of pricing data for the prospective subcontractor most likely to receive award to the gevertmeft."
(6) $15.507-4(0)$ - Insert "A" in front of Program should-cost . . .

Ms. Melissa Rider
Federal Acquisition
Regulation Secretariat (VRS)
General Services Administration
1800 F Street, Room 4035
Washington, D.C. 20405
Dear Ms. Rider:
We have reviewed FAR Case 95-029, Part 15 Rewrite:
Contracting by Negotiation; Competitive Range Determinations and agree with the proposed changes to FAR Parts 15.0, 15.1, 15.3, and conforming revisions to Subparts $1.102-2,4$ 1001, 6101 , 7 105, 14.201-6, $14404-1,16.306,42.1502,421701,43.301$, and Parts 52 and 53. We offer the enclosed comments on other sections.

As requested, we have divided comments into Group A - those comments that relate to Subparts 15.00 through 154 and 15.6 and conforming revisions to Parts 1, 5, 6, 36, 52, and 53 - and Group $B$ - those comments that relate to Subpart 15.5 and conforming revisions to Parts $4,7,11,16,42,43$, and 52.

We appreciate the opportunity to review the case Please contact Mr. Terrence J. Letko at (703) 604-8759 if you have any questions.


Enclosure

# Part 15 Rewrite: Contracting by Negotiations; Competitive Range Determinations 

## Group A. Revisions

We have commented on the issues in the order in which they are presented for Group A. Suggested deletions are lined through and proposed replacement text underlined.

1. FAR 2.101, Definition of Best Value. The proposed definition should be changed as follows: "Best value means the outcome of an acquisition that, in the Government's estimation, provides the greatest overall benefit in response to the based on all evaluation factors and significant subfactors, including price, set forth in the solicitation (see Subpart 15.1) "

Rationale: The suggested change recognizes that best value is based on an evaluation of the proposal against various evaluation factors, as discussed in FAR Part 15. The General Accounting Office (GAO), when reviewing protests involving best value procurements, will determine whether the procuring agency justified the source selection in accordance with the stated evaluation factors, and any deviation from the evaluation factors wall likely result in the protests being sustained
2. FAR 11.801, Preaward Testing. The proposed wording should be changed as follows. "Preaward testing or product demonstration, when required by the solicitation, should be conducted in accordance with a formal test plan that identifies performance requirements for outputs or service levels and describes the tests to be used to verify or validate performance capabilities. The results of such tests will be used to rate the proposal, to determine technical acceptability, or otherwise to evaluate the proposal."

Rationale: We believe that a test plan is desirable because, in best value procurements, procuring activities will be required to make cost/technical tradeoffs in deciding between competing proposals A test plan would also provide a supportable basis for determining which product is technically superior
3. FAR 15.205. Issuing Solicitations. We are recommending the following provisions be added in a new paragraph.

## ****

(c) Solicitations containing classified information shall be issued only under the following circumstances.
(1) The contracting officer has determined that the classified information is necessary for potential offeror to develop offers

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(2) The solicitation is properly marked as a classified document and references specific agency requlations that provide guidance on the procedures to be followed in the handling, dissemination, and disposition of the classified information.
(3) Recipients have the necessary security clearances and facilities to receive and safeguarding the classified information."

Rationale: The proposed wording is a rewrite of the current $F A R$ 15.408 and excludes any guidance on the issuance of solicitations containıng classıfied information. FAR 15.205 should include guldance that is more specific to contracting officer responslbilıties than the current guidance in FAR 15 408(b), whıch merely states that solicitatıons involvıng classified information shall be handled as prescribed by agency regulations.
4. FAR 15.206 , Amending the Solicitation. The proposed wording In paragraph ( $g$ ) should be changed to read as follows. "If the proposal considered to be of best value to the Government (determined according to the establıshed evaluation criterıa) $\quad$ nvolves a departure from the stated requirements, the contracting officer shall amend the solicitation, provided, that this can be done without revealing to the other offerors the alternate solution proposed or any other information that is entitled to protection (see $15207(b)$ and $45.407(\mathrm{~d})+15.406(\mathrm{e}) \mathrm{L} . "$

Rationale: The suggested change to best value is for consistency. "Best value" is used instead of "most advantageous" throughout the subpart. The suggested reference changes refer to more appropriate FAR references.
5. FAR 15.605, Preaward debriefing of offerors Part of the proposed language in paragraph (a) (2) related to delayed preaward briefings should be re-phrased to conform with the code of Federal Regulatıons being implemented. We are striking through proposed language requiring further clarification and conformity as follows "However, if an offeror-requests delayed briefing under this section, the date the offexor knew or ohould have Henn the bas of a-protest for the purposes-of 4 CFR 21.2(a) (2) shall be the date the offerer recelved notiee of its erelusion frem the competition"

Rationale: The Code of Federal Regulations provides in 4 CFR 21.2(a)(2). "Protests other than those covered by Paragraph [4 CFR] (a) (I) shall be filed not later than 10 days after the basis of protest is known or should have been known (whichever is earlier), with the exception of protests challenging a procurement conducted on the basis of competıtıve proposals under which a debriefing is requested, and, when requested, is required. In such cases, with respect to any protest basis which is known or should have been known either before or as a result

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of the debriefing, the initial protest shall not be filed before the debriefing data offered to the protestor, but shall be filed not later than 10 days after the date on which the debriefing is held." (Underlining added for emphasis.) The poposed FAR 15.605 language appears to conflict with the 4 CFR protest dates and the time allotted for filing a protest
6. FAR 15.606, Postaward debriefing of offerors. The proposed paragraph (a) (4) (Ii) should be clarified and re-examined to comply with 4 CPR $21.2(a)(2)$ for reasons provided in Comment 6, above.
7. FAR 36.520, Contracting by negotiation. For consistency, we recommend the proposed wording be changed as follows. ". . the provision at 52 236-28, Preparation of Offers ProposalsConstruction, when contracting by negotiation."

OFFICE OF THE INSPECTOR GENERAL, DOD
COMMENTS ON FAR CASE 95-029

# Part 15 Rewrite: Contracting by Negotiations; Competitive Range Determinations 

## Group B. Revisions

We have commented on the issues in the order in which they are presented for Group B. Suggested deletions are lined through and proposed replacement text underlined.

1. FAR 15.503-3(c) Limitations related to commercial items. We recommend Paragraph (c) (1) be revised to state. "Requests for sales data relating to commercial items shall be limited to data for the same or similar items actually sold commercially and to the government during a relevant time period. The contracting officer shall determine the relevant time period based on the volume of previous commercial and government sales."

Rationale: The proposed regulation on information that can be requested for commercial items is unclear. It provides no examples or explanation of "similar" items or the "relevant time period" that can be used to evaluate sources for requesting information to determine price reasonableness.

The Federal Acquisition Streamlining Act (FASA) directed the use of commercial processes but also required the contractor to show that it sold the 1 fem in substantial quantities to the general public, without regard to the quantity of items that may be sold to the Federal Government. The Federal Acquisition Reform Act (FARA) provides a commercial item exception to the requirement for certified cost or pricing data without requiring that the item be sold in substantial quantities or to the general public. As a result, many items previously only sold to the military may meet the new definition of commercial item though under FASA they did not. When commercial items previously not treated as such are new and unique or high-dollar, the Government may need to perform historical pricing analysis using all sources because commercial sales information related to one contractor is insufficient or not available.

Only competition will yield sufficient information to evaluate price reasonableness. Unless competition and marketbased pricing to increase both price reasonableness and cost realism probability can be obtained for previously sole-sourced parts, the Government must evaluate previous military sales. Recent OIG audits of major contractors (Boeing and Sundstrand) have demonstrated the problems with pricing commercial items using the new regulations. The contractors increased their prices for aircraft spare parts by 300 to 500 percent when the Government began procuring the parts as commercial items even though a contractor is still sole-source.
2. FAR 15.504-1 Proposal analysis techniques. We recommend the following clarifications and added coverage:
a. The wording in paragraph $1(a)(4)$ should be revised to state " Cost analysis shall be used to evaluate information other than cost or pricing data.

Rationale: The change corresponds to wording in paragraph $1(d)(2)$ which provides that cost realism analysis shall be performed on competitive cost reimbursable contracts. Because price analysis does not cover cost elements, cost analysis must be used to perform cost realism.
b. Paragraph (c) (2) (i) (C) provides that cost or pricing data and evaluation of cost elements may be verified using appropriately validated/calibrated parametric models or cost estimating relationships (CERs). The guidance should be strengthened to specify that the Administrative Contracting Officer (ACO) or his representative should approve the parametric estimating techniques and cost estimating relationships before the contractor uses them in price proposals Also, parametric models should only be approved for price proposals within the database range used to calibrate and validate the CER

Rationale: Unless the ACO determines the reasonableness of the CERE used, the risk of price or cost manipulation is high. Parametric estimating eliminates the need for traditional pricing support such as detailed work breakdown structures, cost elements, hours, materials, and in some cases indirect rates. As a result, the Government does not have valuable information that could be used to evaluate reasonableness Also, parametric estimates should only be used when they make sense for the present estimate When parametric models are applied to values outside the validated range, the resulting estimates are less likely to be realistic.
c. The guidance in paragraph (d), Cost realism analysis, should be expanded to include cost analysis techniques such as. bid comparisons; Independent Government Cost Estimates; and information already available in the form of forward pricing rate agreements, audited forward pricing labor and indirect rates, labor union agreements, or recently reviewed cost and pricing data Guidelines should also be provided on what methods are appropriate in various circumstances

Rationale. Although the proposed guidance in paragraphs $1(b)$, Price analysis, and $1(\mathrm{c})$, Cost analysis, is extensive, paragraph $1(d)$ provides no comparable guidance for performing cost realism analysis. The proposed guidance should also identify specific techniques that may be used or give examples to demonstrate how to perform cost realism analysis.

Cost realism should be performed to identify unrealistically low offers for cost reimbursable contracts The low offers usually represent contractor attempts to "buy-in" below actual costs to win the bid with the expectation to request subsequent contract modifications to recover all costs Cost reimbursable competitive proposals should be reviewed for cost realism to identify the most probable cost and to provide a basis for determining the best value to the Government in the source selection process.
d. Language in paragraph $1(f)(2)$ should be clarified as follows. " . contracting officers shall require that offeror identify in their proposals those items supply that they will not-manufacture or to which they -will not-eontribute-sugnificant wile that will not receive applications of direct labor costs and related burden in order to develop the final product or contracted item, unless adequate price competition is expected "

Rationale The term "no significant value" ls vague and will not facilitate the reaching of agreements between the Government and contractors. The guidance needs to be more specific, especially since the Government will rely on contractor self-governance to Identify the supply items that will not become part of the product cost.
3. FAR 15.504-2. Information to support proposal analysis. We recommend the following additions and clarifications
a. Section (a), Field Pricing Assistance, should include a requirement that the contracting officer contact the cognizant contract administration or audit office before requesting field pricing assistance. Coordination $1 s$ essential to identify and request copies of information field offices may already have that may eliminate the need for additional field pricing assistance.

Rationale: The proposed guidance provides that the contracting officer should request field pricing assistance when the information available at the buying command is inadequate to determine a fair and reasonable price our recommendations support the DoD acquisition streamlining initiative for reducing unnecessary acquisition costs and conserving audit resources The contracting officer should not request field pricing or audit reports when information is already available at either the buying command, the cognizant contract administrative or audit offices to determine a fair and reasonable price The available information should be used to verify proposed rates, factors, and costs and evaluate cost reasonableness The verification of costs can be confirmed using informal procedures instead of comprehensive written reports The Defense Contract Audit Agency Contract Audit Manual provides for such procedures.
b Section (c), Audit assistance for prime or subcontracts, should include language in a new paragraph (5) to incorporate text eliminated in the existing FAR 15 805-5(a)(1) provisions, as

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follows. "Requests for field pricing assistance should be tailored to ask for minimum essential information needed to ensure a fair and reasonable price. Information of the type described in paragraphs (a)(1) (i) through (a) (1)(vi) of this subsection, which is often available to the contracting officer from the Administrative Contracting officer or from the cognizant auditor, may be useful in determining the extent of any field pricing support that 1,5 needed --." The referenced subparagraph (I) through (iv), which gave examples of the types of pricing information that may be available at the audit office, should also be added back.

Rationale. The reinstated language gives examples of cost information that can assist the contracting officer in determining whether enough information is already available to determine reasonableness without requesting field pricing.
4. FAR 15.504-3, Subcontract pricing considerations. We recommend adding language in a new paragraph (c) (2) as follows: * * *
(c) (2) When the contractor or higher-tier subcontractor wall not perform the subcontract cost analysis, the contractor or higher-tier subcontractor shall submit or cause to be submitted by the subcontractor (s), cost or pricing data to the Government for subcontracts that are the lower of
(1) $\$ 1,000,000$ or more or
(il) Both more than the pertinent cost or pricing data threshold and more than 10 percent of the prime contractors proposed price.

The proposed paragraphs (c) (2) through (c) (5) should be renumbered (c)(3) through (c) (6) accordingly.

Rationale. We recommend retaining the $\$ 1$ mullion threshold in the current FAR 15.806-2(a) for subcontracts with the understanding that field pricing is not required unless the contracting officer deems it necessary. We believe the raising of the threshold for subcontract information represents unacceptable risk of defective pricing as supported by GAO studies on the subject. Further, the submission of cost or pricing data is an assurance that a contractor has an adequate estimating system.

Contractors cannot comply with the stated requirement in paragraph (c) to analyze cost or pricing data before awarding a subcontract if the subcontractor does not provide a breakdown of rates, factors and direct costs or otherwise allow the contractor access to accounting records and provide support for the proposed costs. Subcontractors frequently refuse to disclose rate information to prime contractors for profit and competitive reasons. The Government should be alerted to instances where subcontractors deny contractors or higher tier subcontractors access to cost or pricing information. In those instances, the contracting officer must arrange for Government review of the

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subcontractor data. The submission of the appropriate cost or pricing data reduces the cycle time for awarding contracts.
5. FAR 15.504-4, Profit. The proposed wording in paragraph (c) (5) should be changed to "The contracting officer shall not require any prospective contractor to submit breakouts or supporting rationale for its profit or fee objective but may consider them if they are submitted voluntarily."

Rationale: FAR $15.903(\mathrm{e})$ presently includes a similar provision which guides contracting officers and contractors on the appropriate use of profit-related data that contractors may voluntarily submit to the Government.
6. FAR 15.506-3. Documenting the Negotiation. We recommend clarifying paragraph (b) as follows. "Whenever field pricing assistance has been obtained, the contracting officer shall forward a copy of the malysisprice negotiation memorandum to the office (s) providing assistance (audit, technical, and administrative contracting office)

Rationale: Traditionally, contracting officers have routinely sent copies of price negotiation memorandums to the auditors, but not necessarily to the servicing Administrative Contracting Officer and not to the technical personnel. Therefore, if the intent $1 s$ for all participating parties to receive copies of the price negotiation memorandums, those parties should be specifically ıdentıfıed
7. FAR 15.507-1, Defective cost or pricing data we recommend the following changes:
a. Paragraph (b) (7)(1) should be clarified to state. "In addition to the price adjustment amount, the Government is entitled to recovery of any overpayment plus interest on the overpayment.

Rationale: Paragraph (b) (1) states that the Government 1 s entitled to a price adjustment, including profit or fee, of any significant amount by which the price was increased because of defective data Paragraph (b) (7) further states that the Government is entitled to interest on any overpayments but falls to emphasize the Government should collect the overpayment to prevent additional interest from accruing.

Our reviews of defective pricing settlements have continually shown that contracting officers frequently misinterpret current, unclear FAR provisions on cost recovery. Contracting officers often neglect to recover overpayment amounts though they adjust the price and collect interest on any *overpayment Unless the FAR is clarified, that problem wall continue
b. Paragraph (b) (7) (Iv) should be revised to state. "In the pie demand letter, the contracting officer shall separately include.

Rationale: The demand letter should separately include the repayment amount, the penalty amount (if any), the interest through a specific date, and a statement that interest will continue to accrue until repayment is made. However, that information is not appropriate for the price adjustment contract modification. The modification should make the appropriate downward price adjustment and may discuss overpayment and Interest collections, but should not include interest as part of the price adjustment Interest must be deposited in a miscellaneous funds account that results in funds being returned to the Treasury and not the program office Interest cannot be reprogrammed, which is essentially what could happen if the interest is included as part of the price adjustment
8. FAR 15.507-2, Make-or-buy programs. We disagree with the proposed $\$ 10$ million threshold for make-or-buy programs in paragraph (c) (2). The current $\$ 5 \mathrm{milli}$ ion threshold $2 n$ FAR 15.703 (b) should be retained. We are not aware of any reviews or studies that have shown the current $\$ 5$ million threshold to result in an unnecessary administrative burden on contractors
9. FAR 15.508, Solicitation provisions and contract clauses. We recommend the following changes for consistency and clarity
a. The proposed wording in paragraph (m) (4), Table 15-2, Cost Elements, paragraph (2), should be changed to read. ". In addition, provide a summary of your cost analysis and a copy of cost or pricing data submitted by the prospective source in support of each subcontract, or purchase order that is of $10,000,000 \$ 1,000,000$ or more, or both more than the pertinent cost or pricing data threshold and more than 10 percent. of the prime contractor's proposed price."

Rationale. The basis for the recommended change is the same as in paragraph 8 for the proposed wording of FAR 15.504-3(c) (1)
 FAR 15.804-8 on the same topics should be reinstated

Rationale: The italicized headings are helpful to frequent users of the FAR.
10. FAR 52.215-41(a), Exemptions from cost or pricing data. For consistency, we recommend adding language to state that the contracting officer shall request cost information, other than cost or pricing data, to determine cost realism for cost
reimbursable competitive proposals

Rationale. Since FAR $15.504-1$ requires the contracting officer to evaluate cost realism of cost reimbursable competitive procurements, the contract clause must be modified to require the contractor to submit the data necessary for the cost realism review and to allow the contracting officer to request the information.
11. FAR 52.215-41(a)(1) (ii). The proposed language should be edited for consistency and to avoid misinterpretation, as follows. "For a commercial item exception, the offeror shall submit, at a minimum information on prices at which the same item or similar items have previously been sold to the commercial market and the Government At a minimum, that is the information must be adequate for evaluating the reasonableness of the price for this acquisition."

Rationale The recommended change is based on the same rationale as that stated for FAR 15.503-3(c) In section 1 above. This FAR clause was never amended to $1 m p l e m e n t$ the new FASA requirements for receiving a commercial item exemption.
12. FAR 52.215-42(a)(I) (ii) (B) relates to subcontracts and should be revised for the same reason as FAR 52 215-41 (a) (1) (11)

# 5 

 HOUSEHOLD GOODS FORWARDERS ASSOCIATION OF AMERICA, INC. ${ }^{\text {© }}$2320 MILL ROAD, SUITE 102, ALEXANDRIA, VIRGINIA 22314-4679
TELEPHONE (703) 6843780 FAX (703) 684-3784
July 14, 1997

TERRY R HEAD President Alexandria, Virginia
-
RICHARD W CURRY Chairman Orange, Callfornia
-
HAN HELDERS
Vice Chaliman Carisbad, Califomla

。
JEFFREY J BELL Executive Committee Member at Large Orange Park, Florida -

GEORGE A FOUCH
Executive Committee Member at Large Bellevue, Washington
-

GEORGE W PASHA, IV Member at Large Corte Madera, Calfornia -
HEINO PREISSLER Executive Committoe Member at Large Bellevue, Washington
-
DONALD L. COLLINS
Assoclate Members' Representative
St Thomas, US Virgin Islands -

JOEL SUMMER
Assoclate Members'
Representative at Large
Brooklyn, New York
-
ALAN F WOHLSTETTER
Goneral Counsel
Washington, DC

General Services Admınistration
FAR Secretariat (VRS)
18th \& F Streets, N W
Room 4035
Washington, DC 20405
Re: FAR Case 95-029 -
Federal Acquisition Regulation
Part 15 Rewrite

The Household Goods Forwarders Association of Amerıca, Inc. (HHGFAA) submits these comments in response to the notice of the proposed revision of Part 15 of the Federal Acquisation Regulation (FAR) in FAR Case 95-029, 62 Fed Reg. 26640, et seq., May 14, 1997

The HHGFAA is an association consisting, inter alia, of household goods freight forwarders, who are engaged in contracting directly with the Department of Defense (DoD) in the forwarding of household goods and personal effects of military service members and their dependents, as partıcıpants in the DoD Personal Property Program admınistered by the Mılıtary Traffic Management Command (MTMC).

According to MTMC's records, 1,364 motor carrıers and freıght forwarders partıcıpate as prıme contractors in the DoD Personal Property Program,
including 161 household goods freight forwarders. The number of DoD-approved carriers that are small businesses is 1,194 or 87.5 per cent of the 1,364 DoD approved carrıers (MTMC Carrier Approval Statıstics).

In addıtion, there are hundreds of small business moving and storage companies which participate in this program as subcontractors and which provide many of the required physical facılities, vız., trucks and warehouses. Further, many of these small business concerns have been developed to meet the needs of the DoD and their continued existence is dependent upon their ability to continue participation in DoD's Personal Property Program.

The HHGFAA has a genuine interest in the proposed revision of Part 15 of the FAR because of the impact on its household goods freight forwarder members which are predomınantly small business concerns.

The HHGFAA previously filed comments on November 26, 1996 in this F'AR Case 95-029 and on September 17 and September 25, 1996 in FAR Case 96-303, in opposition to the proposed Competitive Range Determination Rule, to show that adoption of that proposed rule inevitably will result in the exclusion of many household goods freight forwarders, primarıly small business concerns, from competing for contracts in the DoD programs. DOD has announced its intent to solicit future requirements under the FAR. The first MTMC personal property solicitation under the FAR, MTMC Solicitation DAMT01-97-R-3001 for mınımum requirements
of $\$ 5,021,000$ and maximum requirements of $\$ 75,000,000$, was issued March 14, 1997 and is presently pending the outcome of GAO protests based in large measure on solicitation restrictions which preclude small business concerns from effectively competing for contracts to be awarded. If the proposed revision is adopted the contracting officer would have unfettered discretion to limit the number of highly rated bids he will consider for award, thereby effectively eliminating the ability of these small business concerns to effectively pursue a protest with GAO.

COMMENTS ON THE REVISED PROPOSED
COMPETITIVE RANGE DETERMINATION RULE
Proposed Rule $15.406(\mathrm{c})$ provides in pertinent part:
(c) Competitive range. (1)... Based on the ratings of each proposal against all evaluation criteria, the contracting officer shall establish a competitive range comprised of those proposals most highly rated, 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 $15.405(\mathrm{a})$ and 15.406(c)(1), 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 offeror that the competitive range can be limited for purposes of efficiency...the contracting offalder may limit the number of proposals in the competutive range to the greatest number that will permit an efficient competition among the most highly rated proposals (10 U.S.C 2305(b)(4) and 41 U.S.C. 253b(d).

The HHGFAA opposes the revised proposed Competitive

Range Determınation Rule, $15.406(\mathrm{c}), 1 /$ on the ground that at confers unlımıted discretion on the contracting officer to exclude qualified offerors from the competitive range that otherwise would have a reasonable chance of being selected for award under present FAR 15.609(a) Our specifac objections to the proposed rule are:

1. The proposed rule is vague and indefinite because It does not define "efficıent competition" nor does it provide crıteria for determining the "greatest number [of offerors] that will permit an efficient competation." The proposed competıtave Range Determination Rule, 15 406(c), adopts, without explanation or guidance, the statutory language of section 4103 of the Federal Acquisition Reform Act of 1996 (FARA). The purpose of a rule is to 1 mplement a statute (which this proposed rule does not do); a rule, as here considered, whach merely parrots the language of a statute serves no useful purpose.

If the proposed rule were to be adopted, a contracting officer would have unfettered discretion to elıminate all but as few as two offerors from the competitive range. This restriction in the name of "efficient competition" is materially unfair to

1. The HHGFAA Commends the elimination of former proposed rule 15.406(b), which would have authorized a contracting officer, prior to issuance of the solicitation, to limit the number of offers to be included in the competitive range on the basis of "historical data" or because the agency does not have "resources avallable." Adoption of those provisions would have had a material adverse 1 mpact on the abılıty of small busıness concerns to compete for government contracts because a restriction in the solicitation on the number of offerors to be included in the competitive range would discourage small businesses from submıtting proposals.
highly rated offeror that would be excluded from the competitive range.

We submit that this right of contracting officers arbitrarily to exclude highly rated offeror by citing "efficıencyl" will have a particularly adverse impact on small business concerns by discouraging their participation in government procurements. As the Revised Initial Regulatory Flexabılıty Analysis (RIRFA) recognizes, "there are many small businesses that do not do business with the government because of the complexity of offering, evaluation and award." At least under present FAR 15.609(a), a small business concern that has a reasonable chance of award is included in the competitive range and is considered for the purpose of contract award. Under the proposed rule, a small business will have the same expense in preparing its proposal, with less likelihood of receiving a contract award, despite presenting a highly-rated proposal, due to unlimited authority of a contracting officer to exclude highlyrated offeror early in the evaluation to achieve "efficiency" The proposed revision will disproportionately impact, through loss of revenues, small business concerns which are presently participating in government procurements and will discourage them from incurring the cost of preparing offers which can be arbitrarıly excluded from consideration for contract award
2. This unfairness to small business is exacerbated because the proposed Competitive Range Determination Rule does not provide any criteria to guide a contracting officer's deter-
mination of when 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."

Although the proposed rule directs that the competitive range be limıted to the "greatest number" that will permit an efficient competition, this direction is materially inadequate because there are no criteria governang how this number is to be determined. For the reasons set forth in paragraph 1, this arbitrary restriction on competition by highly rated offerors has a more signıfıcant adverse $1 m p a c t$ on small busıness concerns.

We also note that the revised RIRFA (p. 2) states that the proposed Part 15 revision will lower bid and proposal costs. We submit that small business concerns want a fair opportunity to compete for government contracts - not to sacrifice that opportunity to save on bid and proposal costs.

## RECOMMENDATIONS

The HHGFAA submits that the Part 15 revision should:

1. Define what is meant by an "efficient competition" in proposed FAR 15.406(c). Unless "efficient competition" is defined, contracting officers will have unlımıted discretion to exclude offerors on this ground, with a disproportionate adverse lmpact on the abilıty of small busıness concerns to compete for government contracts.
2. Establish FAR guidelines for determining the mınımum number of offerors in a competative range. From the standpoint of small business, such guıdelınes are necessary to
prevent contractıng officers from arbitrarıly and unduly lımıting the number of proposals to be ancluded in the competitave range, especially where the pool of potential offerors consists of a signıficant number of small business concerns, such as in the DoD Personal Property Program. Uniess contracting officers are restricted by regulation, the authority to limıt the competative range could be used by contracting officers as a means of discouraging small businesses from submıtting offers by sıgnıficantly reducing the likelihood that a small business concern's offer would be consıdered for award even $ı f$ otherwise qualıfıed for the competıtive range. As stated above, this restriction on competatıon by highly rated offerors falls with a heavy impact on small business concerns.
3. Require that the competatuve range establıshed for multiple award procurements, such as the DoD Personal Property Program, in which HHGFAA members compete, reflects the extent of participation of small business concerns in past procurements. For example, if 3 of 15 contracts in a procurement historically had been awarded to small business concerns, the competatave range established should include a minımum of 20 per cent of small business offerors. If less than the specıfied percentage of small business offerors meet the crıteria for the competıtıve range, those small business offerors that meet the criteria should be included in the competitive range. This will go a long way to elimınate the concern of small business that the discretion embedded in the proposed regulations will not be exercised


In a manner which disadvantages small business
4. Reaffirm in Part 15 of the FAR the government's commitment to utilizing qualified small business concerns in federal procurements.
5. Require written tracking of all contracting officer communications with offeror prior to and after stablıshment of the competitive range. (FAR 15.406).
6. The HHGFAA reasserts its support of the SBA's Office of Advocacy's position that the Competitive Range Determınation Rule and the rewrite of FAR Part 15 should be considered as major rules subject to Office of Management and Budget (OMB) review under Executive Order 12866. (HHGFAA Comments, September 17, 1996 at pp. 3-4). As the Office of Advocacy has stated, competed federal contracts in fiscal year 1995 represented about $\$ 130$ billion or 64 per cent of all federal contracts, which sum is well in excess of the $\$ 100$ million threshold of Executive Order 12866. Moreover, as the Office of Advocacy recognizes, these proposed FAR revisions will significantly alter the government contract principle of "full and open competition" and, as a result, adversely affect many small business concerns.

For the above reasons, we request that the Competitive Range Determination Rule and the rewrite of Part 15 of the FAR not be adopted as proposed, that the amendments and alternatives discussed herein be implemented and that the proposed FAR revasion be submitted to OMB for review in accordance with Executive Order No. 12866.


DELIVERED BY HAND

DEPARTMENT OF THE ARMY
 ATTENTION OF

14 JUL L 1997

SARD-PEP

General Services Administration
EAR Secretariat (VRS)
1800 F Streets, NW. Room 4035
Washington, DC 20405

Gentlemen/Ladies:

We appreciate the opportunity to provide comments on EAR Case 95-029 (the revised proposed rule on the FAR Part 15 Rewrite). We congratulate the Rewrite Team on the improvements made since publication of the inItial rule, Particularly noteworthy is the increased flexibility the revisions provide an the source selection process. However, we offer the following comments and suggestions:

1. 15.101-2 says that past performance can be evaluated in a LPTA source selection process, yet it also says that tradeoffs are not permitted and that proposals are evaluated for acceptability but not ranked. This is inconsistent with GAO case law, which has permitted the evaluation of past performance when it is used to make a relative comparison of offerors. Evaluating past performance on a go/no go basis could be viewed as a responsibility determination which could run afoul of the Small Business Administration "s Certificate of Competency process. Although 15.405(a)(2) also says that past performarice evaluation Is a "comparative assessment of past performance information" that is separate from a responsibility determination, the language $1 n 15.101-2$ does not permit such a tradeoff or comparison to be made. Can you have a low "cost" technically acceptable acquisition under 15.101-2 (as opposed to a low priced technically acceptable acquisition?)"
2. Recommend adding coverage on draft REPs at 15.203. We are advocates of draft REPs since our experience reflects that they contribute to simplifying and enhancing the source selection process.
3. The Model Contract Format included in the original proposed rule $1 s$ more streamlined and easier to use than the current Uniform Contract Format. (15.204). We encourage its widespread use in DOD.
415.208 (c) permits the acceptance of late proposals $1 f$ (1) the contracting officer extends the time for all; (2) the lateness was caused by government action or inaction; or (3) the lateness was beyond the offeror's control. Although this benefits the government by allowing the consideration of an advantageous late proposal, it has great potential to be applied unfairly to different offerors, and provides a disincentive for offerors to submit timely proposals. If this is intended to apply only to the exceptional case, then the circumstances when late proposals would be accepted should be narrowed so that it is clear when they apply. For example, outside time limit for accepting late proposals (e.g. 24 hours/one week) could be added, so that a proposal that $1 s 3$ months late could not be accepted. In addition, you could describe the types of government actions (e.g. improper, intentional) or outside causes that would invoke (2) or (3).) Absent such modification, a firm "late is late" rule is preferable.
4. $15.405(a)(2)(i v)$ defines a neutral rating as "one that neither rewards nor penalizes offeror without relevant performance history." It goes on to say that a neutral evaluation cannot affect an offeror's rating but "It may affect the offeror's ranking if a significant number of the other offerors participating in the acquisition have past performance ratings either above or below satisfactory." Although the proposed coverage is helpful in defining neutral, it has the effect of treating a neutral rating as an average rating, because it seems to require that an offeror with a neutral rating be placed in the middle of the scale. It should be made clear that, depending upon the inherent risk associated with the acquisition, being placed in the middle of the scale may result in a ranking of a low to moderate risk. Therefore, recommend that after the parenthetical reference to 41 U.S.C. 405, the following statement be added:
"Depending upon the 2 inherent risk associated with the acquisition, an offeror with a neutral rating may be Judged as posing a performance risk ranging from low to moderate."
5. At 15.406, suggest adding a paragraph to address "Communications with potential offerors between solicitation issuance and receipt of proposals." With the shift toward more communications between the Government and contractors, we believe communications at this point would further enhance the process, ensuring clearer understanding of the Government's requirements and the contractors' ability to satisfy those requirements. However, the coverage should make it clear that the contracting officer will control any discussions during this period.
6. 15.406(a) permits award without discussion, subject to clerıcal/minor errors and certain errors relating to past performance (relevance; information on which the offeror has not had a chance to comment). Past performance communications are not advisable in this context, because they can be complex, and may, in a given acquisition, determine who gets the award.
7. The language at $15.406(b)$ "Communications with offeror before establishment of the competitive range" is confusing. We believe contracting officers will have difficulty implementing at. This section wall become a likely source of much litigation, which will unduly delay the procurement process. Recommend elimination of $15.406(\mathrm{~b}) 1)$. This language is restrictive and is inconsistent with the major shift toward more open communications.
8. 15.406(b) permits communications with offerors before the competitive range is established to clarify perceived deficiencies, weaknesses, errors, omissions or mistakes. Recommend deleting the words "perceived deficiencies, weaknesses," because perceived deficiencies and weaknesses are not ambiguities
9. 15.406 (d) (3) says that the contracting officer must discuss weaknesses, deficiencies, and other aspects of the proposal that could "be altered to enhance materially the proposal's potential for award." GAO requires that discussions be meaningful, so that offerors are informed of their deficiencies and given an opportunity to correct them. The language about materially enhancing an offeror's opportunity for award sounds more lake technical leveling to force a proposal up to a certain level, rather than pointing out where a proposal fails to meet the government's requirements. Therefore, we recommend the language be changed to read ". . . aspects . . . that would prevent that proposal

Erom being selected for award." 15,407(a) permits offerors to be eliminated from the competitive range after discussions have commenced whthout being given the opportunity to revise their proposals. As noted above, GAO may not find discussions to be meaningful unless offerors are given the opportunnty to revise their proposals.
11. We agree with the coverage in $15.406(\mathrm{~d})$ (3) permitting the government to tell an offeror that they are offering too much in the way of enhancements in a best value procurement.
12. 15.407 allows proposal revisions only at the contracting officer's discretion. We recommend that you remove this artificial barrier and permit offerors to automatically revise their proposals as a result of discussions. The government will then have documentation to rely on when evaluating proposals. In addation, at the present time offerors may change anything in their BAFOs, unless they are specifically and expressly barred from the risk of having their proposal rating either increased or decreased. We should be relying on the wisdom of offerors to determine what they must change in thelr proposals, not the dictates of Contracting Officers. From a litigation standpoint, we open the door for many protests from losing offerors that the winner exceeded the scope of what is permissible in the revisions to the winner's proposal.
13. Your description of unbalanced pricing at 15.503-5 is an mprovement over the prior coverage because it is much less confusing.
14. In light of the fact that the term "bargaining" $1 s$ being introduced into the EAR for the first time, it would be better to give it its own definition in 15.001, rather than have it defined as a subpart of the defination of the term "negotiation."

Enclosure 1 provides additional comments for your conslderation, most of which are pramarily editorial in nature.

We look Forward to the dynamic changes and improvements in the source selection process that this proposed rule provides. My point of contact for this action 15 Mrs. Esther Morse, 703-695-3039.
sincerely,


Enclosure

## ADDITIONAL ARMY COMMENTS

14 404-1(f)(2) Delete. Restnction to lowest price seems an unwarranted carryover from the failed sealed bidding effort; at this point, "use of negotiation" should allow a best value tradeoff

15002 (b) Shorten to "minimize the complexity of the process, white maintaining martial and comprehensive evaluation of all proposals," etc

15103 (c)(6) Delete There should be no preset hint to give-and-take communications in the course of oral presentations; by definition, these are not "discussions" (see 15.406d) Our experience with oral presentations shows that offeror expect, not unreasonably, that a face-toface meeting of the pnncipal participants parties will include some on-the-spot give-and-take in reaction to their presentations. If this is denied, the sessions become more a matter of theatrics than the "real-tume interactive dialogue" which is their stated intent

15 201(a) Correct "is encouraged" to "are encouraged"
15 201(e) For "needs to" substitute "desires to."
15.204-2( h ) and 15.204-3 Revise UCF narrative to clanfy distraction between Section H and Section I: Section I should contain standard contract clauses whose text or detanled content is denied from FAR and its supplements, Section H the nonstandard clauses specific to the particular contract or to the contracting activity
$15206(f)$ Revise beginning for clanty, to read. "If, in the judgment of the contracting officer (based on market research or otherwise), an amendment proposed for issuance after offers have been received is so substantial as to exceed what prospective offerors could reasonably have anticipated, so that additional sources might likely have submitted offers had it been known to them,"etc
15.302 Revise to state the policy in general terms ("It is the policy of the Govemment to encourage the submission of new and innovative ideas to meet its present and future requirements '); then list particular programs which implement it, with FAR cites for each ("Programs and techniques used by the Government to implement this policy include Broad Agency Announcements (see 35.016)" etc ); then conclude "New and unovative ideas that do not fall under topic areas publicized under those programs and techniques may be submitted as unsohcited proposals."
15.306-2(a)(5) Delete superfluous (and ungrammatical) "who is."

15 309(b) Change "each sheet" to "each page" or, preferably, "each portion" (to allow for electronic submission)

15 404(d)(3) Delete subparagraph (11) at this time, change threshold in (1) later when the change takes effect Consider simplifying to one sentence: "Past performance shall be evaluated exceed \$1,000,000; however, past performance need not be evaluated if (OFPP Policy Letter 92-5)"
exceed $\$ 1,000,000$; however, past performance need not be evaluated if . . (OFPP Polly Letter 92-5) "

15405 Add subparagraph: "(c) For restrictions on use of support contractor personnel in proposal evaluation see 37 203(d)" Absence of thus very important cross-feference from current FAR has occasioned much confusion among users.

15 406(b)(1) This limitation on clarification is unnecessarily restrictive. Suppose one offer is clearly among the best (and so will certainly form part of any competitive range) but contains an ambiguity; if it means what the evaluators hope it does, it will be a clear winner and award can be made without discussions. The proposed rule would needlessly preclude prompt resolution of the uncertainty

15408 Clarification of the last sentence may be desirable, indicating that quantification can be useful as a supporting rationale but is not to be considered the sole driver of the source selection decision (If not, simplify "provide quantification of the tradeoffs" to read "quantify the tradeoffs ")
15.503-1 Subsection title "Prohibition on obtammeng cost or prating data" is confusingly harsh wording, following manedately after the 15503 section title "Obtaining cost or pricing data"; substitute "Circumstances precluding obtaining cost or pricing data" or the like.
15.504-1(a)(2) and (3) appear surprisingly dismissive of price analysis, which has traditionally been advocated as a sanity check that should be utilized in every acquisition, e g., "You may be able to make a price decision using price analysis alone, but you cannot make an equally sound decision by relying solely on accounting and techmeal analyses of the proposed cost In other words, you must use price analysis on every procurement " (Armed Services Pricing Manual, 1986, paragraph 16 "Pricing Dogma") Recommend replacing subparagraph (2) with a statement similar to ASPM's, and deleting "When appropriate" from subparagraph (3). Some form of price analysis is always available, such as comparison with the historical cost of roughly similar items

15,504-1(c)(2)(1)(A) Better to specify "any identified allowances for contingencies," to clanfy that evaluators are to validate any contingency fund (s) identified as such in the contractor's proposal, but not to allow inflated numbers elsewhere to pass as provision for (unmentioned) contugencies that may arse
15.504-1(f)(2) The qualification "unless adequate price competition is expected" seems inappropriate; since the purpose is to gather data for consideration of breakout in future procurements, the circumstances of the instant procurement are irrelevant

15 504-3(c)(1)(n) "Unless the contracting officer believes" should be "determines," since there should be a written record for the audit trail

15 504-3(c)(5) Relocate misplaced "to the Government" to follow "submit"
15.504-4(d)(1)(C) Is it really desirable to say "The labor elements in the allocable indirect costs should be given the profit consideration they would receive if treated as direct labor"? Is it not Government policy to encourage maximum allocation of costs as direct labor, which is easiest to verify?

15 506-3(a)(7) "Negotiated agreement" would be more accurate than "negotiated position."
15.506-3(b) "The analysis" - what analysis? Reference seems to be to "the documentation" mentioned in paragraph (a), 39 text lines above, clanfy by repeating those words here

15 507-2 (c)(1) Should not make-or-buy programs be limited to "noncompetitive negotiated acquisitions," relying on market forces to ensure economical practices in competitive buys?
15.507-2(e)(1) For "As a rule" at beginning of third sentence, substitute "Normally" In this context, "as a rule" might be taken as presenptive rather than descriptive.
15.603 Throughout this paragraph the word "notices)" should be replaced by 'notifications)," since "notice of award" is elsewhere used as a term of art for notification of the successful offeror that it has been selected to receive the award (e.g. 15.604 just below, cf, current FAR $14408-1(c)(2)$ and 15.1004 ). Use of distinct terminology would be helpful

15 606(a)(1) As written, thus subparagraph would naturally be read as referring to the successful offeror because of the ambiguity of "notice of contract award" noted in the comment on 15.603 Substitute "notification of contract award th accordance with 15603 (b) "

15 606(a)(3) Move second sentence to end of preceding subparagraph (a)(2), adding the word "also" before "be debnefed."

15606 (d) Suggest adding new item, "The number and identity of offeror within the competitive range," as (d)(3), renumbering following items accordingly. Some hesitancy on this point persists among contracting personnel

15 607(b) and (c) Text in draft is roundabout and confusing, better to restore current FAR 151007 (c), simply changing current "best and final offers" to "revised proposals"

52 215-1(a)(4) For "negotiations" substitute "communications" IAW 15,406(b)
52.215-1(c)(1) for "in paper media" substitute "in hard copy (paper or computer disk format legible to the contracting office)" to allow for use of semi-automated techniques

52 215-6(b) "County" is misplaced, belongs to the first fill -in, not the second.

Author: daniel_damanskıs@phil.fisc.navy.mil at internet
Date: $7 / 14 / 97$ 10:41 AM
Priority: Normal
TO: farcase 95-029 at GSA-V
Subject: FAR PART 15 REWRITE COMNENTS
Subject: FAR PART 15 REWRITE COMMENTS
Author: DANIEL DAMANSKIS at FISC-PHILA
Date: 7/14/97 9:59 AM
These comments are from a team of contracting officers at the following Navy contracting office:

FISC Norfolk Detachment Philadelphia
700 Robbins Avenue, Bldg. 2B
Philadelphıa, PA 19111-5082
Point of Contact: Daniel Damanskis (215) 697-9730
E-Mail Address: daniel-damanskis@phil.fisc.navy.mil
Comments on FAR Part 15 Rewrite:
We feel that the majority of the FAR Part 15 rewrite is superfluous. It appears in many gections to be a veiled attempt to codify much of previous case law evolving from GAO decisions. The sheer volume of specifics included in the eighty plus pages involves unnecessary minutia. We have always used many of the specifics included in the rewrite since much of what has been spelled out in detail was always available and within the discretion of contracting officers in exercising their authority. We feel the majority of the rewrite would better gerve the contracting community if it were included in the form of a Guide Book simılar to some of the recent Best Practices Guides issued by OFPP and not included as additional regulation added to the FAR.

Specific comments relating to Group A:
FAR 15.201(f): There needs to be clarification as to the distinction between what is "general" information that may be disclosed at any time and "specific" information about a proposed acquisition that must be made available to the public as soon as poseible. This section has the potential to "open up Pandora's box" since the control of information outside of the 1102 acquisition community and improper release of specific information will lead to some companies getting an unfair advantage and the disclosure of this unfair advantage may not come to light until much later in the acquisition cycle and jeopardıze the integrity of the acquisition process on individual actions.

FAR 15.207(c): We have a concern that inclugion of the language as written could be a problem unless the words "at the discretion of" 19 added before "the contracting officer" in the first sentence. The potential exista that offerorg may intentionally submit offers particularly those in electronic format as an intentionally scrambled transmission to provide additional time to respond to solicitations particularly if the contracting officer 1 not permitted diacretion to determine if the additional time for submisaion beyond that granted all offerors should be allowed. The current language appears to bind the contracting officer to allow for reaubmission automatically if the document is unreadable and only allow for discretion as to the amount of time that will be granted to permit a resubmission of the offer via facsimile or electronically.

FAR 15.404(f): We feel that thin paragraph should be rewritten as follows:
(f) The solicitation shall also state, at a minimum, the relative importance of all evaluation factor other than cost and price, when combined, in relation to cost and price.

Limiting the relative importance of non-price evaluation factors to the three choices of significantly more important than, approximately equal to, and significantly less important than is too restrictive. There are other variations that may be appropriate in deciding the relative weights the source selection plan may want to utilize depending on the individual circumstances.
Otherwise, you could make the three choices as examples only by adding the preface "such as" before listing the three specific choices.

Author: ddennis@ngb-emh2, army.mil at internet Date: 7/14/97 2:43 PM
Priority: Normal
TO: farcase 95-029 at GSA-V
Subject: fwd: Comments on FAR Case 95-029
Please see following message.
----m-------
Original Text
From D DENNIS, on 07-14-97 2:35 PM:
To: internet[95-029@www.gsa.gov]
Group A Comments

General: Recommend a three to six month period for training after promulgation of the revision and prior to implementation. Implementation would be permissive during this phase in period.

Uniform contract format and Letter RFP's: 15.203(e) sets forth the circumstances when letter RFP's may be used.
15.204 sets forth situations in which use of the uniform contract format need not be used and includes item (d) Letter requests for proposals. I agree that letter RFP's need not be in uniform contract format but recommend that 15.204 (d) be modified to indicate that contracts resulting from letter RFP's should comply with the uniform contract format.

Late proposals: Proposed FAR 15.208(c)(1) provides that late proposals, modifications and other revisions may be accepted by the contracting officer provided -- the contracting officer extends the due date for all offeror. Does this mean the POo may extend the due date after the date and time for receipt of proposals has passed or only before proposals are due?

Proposed FAR 15.208(c)(3) sets forth circumstances under which a contracting officer may accept late proposals, modifications and final revisions and includes the situation where in the contracting officers judgment the offeror demonstrates by submission of factual information the circumstances causing the late submission were beyond the immediate control of the offeror. What is "beyond the immediate control" of an offeror?
a. Late delivery by Federal Express or another carrier selected by the offeror to deliver the proposal?
b. Traffic delays when the offeror is on the way to deliver the proposal?
c. Weather?

Also see FAR 52.212-1 concerning late proposals.
C) CHA

Computer \& Communications Industry Association

General Services Administration FAR Secretariat (MVRS)

BY HAND
18th \& F Streets, N.W.--Room 4037
Washington, D.C. 20403
Re: FAR Case 95-029

## Dear Sir or Madam:

The Computer \& Communications Industry Association is pleased to submit these comments on the FAR 15 Rewrite. Except as otherwise noted in these comments, all FAR references are to the FAR numbers in the proposed FAR 15 Rewrite.

Although this version of the FAR 15 Rewrite has some improvements over the September 12 draft, there are still a number of areas in which further work is required. The draft still permits unreasonable restrictions of competition that are against the interests of both vendors and taxpayers. Our specific concerns are discussed below.

## FAR 15.101-2-Lowest Price Technically Acceptable Source Selection Process

CCIA applauds the FAR drafters' decision to remove language that would have given contracting officers impermissibly vague discretion regarding proposal revisions. CCIA believes that this section is much improved as a result of this change. However, the section as revised raises a legal issue regarding the use of past performance evaluations. The proposed regulation provides that "Past performance shall be evaluated as a non-cost factor " and that offeror shall be evaluated to determine whether they meet or exceed "the acceptability standards for non-cost factors " This language strongly implies that an offer not meeting the non-cost factors' acceptability standards (including the standards applicable to past performance) must be rejected.

The proposed regulation creates a conflict regarding the evaluation of small businesses' past performance under the lowest price, technically acceptable

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evaluation approach. GAO has already stated in one bid protest decision that SBA referral for a certificate of competency is mandatory when past performance is evaluated on a pass/fail basis, and the agency rejects a small business for falling the past performance standard. See T Head \& Co. Inc, B-275783, March 27, 1997 Accordingly, the regulation should direct contracting officers to refer any proposed rejection of a small business to the SBA so that the Certificate of Competency process can be completed GAO has apparently made a simular recommendation. See Federal Contracts Reports, Vol 97, June 30, 1997 at 767 In light of these problems, the regulation should also advise contracting officers to strongly consider omitting the past performance evaluation factor, as permitted by proposed FAR 15.404 (d) (3) (in), when using the lowest price, technucally acceptable selection process

## EAR 15 102--Multi-Step Source Selection Technique

Although this section is a signuficant improvement over the inttal version, CCIA believes that the mult-step techruque is still vague and of little utility The regulation gives little guidance to contracting officers as to how this technique is supposed to work Offerors are not required to submit "full proposals" intially, but they must provide "at a minumum, the submission of statements of qualifications, proposed technical concepts and past performance and pricing information." There is not much left for the subsequent, "full proposal." Also, agencies are supposed to evaluate the inutial proposal submission using all of the solicitation's evaluation factors These same factors will also be used at subsequent stages in the procurement. It is very difficult to see why multi-step provides any savings in time or expense over the normal procurement practice of evaluating initial proposals and establishing the competitive range. This point is particularly apt if the FAR 15 Rewrite's restrictive defintion of the competitive range remains in effect As proposed, multi-step source selection adds traps for the unwary whule providing no improvement to the acquisition process

## FAR 15.208--Submission, Modification, Revision and Withdrawal of Proposals

CCIA continues to question the need for the revision to the late proposals clause that is contained in FAR 15208 (c) (3) In CCIA's view, the addition of further reasons to accept late proposals will only lead to needless litigation as to whether the offeror's proposal was late because of circumstances "beyond the immediate control of the offeror." There is no need for this new exception, particularly since contracting officers are already given the opportunity to accept any late proposal if they extend the due date for all offerors (FAR 15208 (c) (1)). By farrly enforcing the current late proposal rules, contracting officers are already acheving the desirable result of encouraging vendors to submit their proposals

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on time. The proposed change will have the opposite effect, and truly represents a solution in search of a problem.

The use of the phrase "immediate control" is also troubling To our knowledge, this phrase has no current role in Government contract law It is unclear what "immediate" (as opposed to proximate?) control means. The current default clause in FAR 52.249-8 excuses contractor defaults "if the farlure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor." See current FAR 52 249-8 (c) At a minimum, the proposed exception to the late proposal rule should use language that has already been construed in an established body of law CCIA also supports the GAO's suggestion that contracting officers should not invoke this proposed exception unless they determine that "it is unlikely that a competitive advantage will occur " See Federal Contracts Reports, Vol 97, June 30, 1997 at 767.

We do not, however, support the GAO's proposed addition of the word "improper" to FAR 15209 (c) (2) Any Government action or inaction that causes a proposal to be late is, by definution, "improper" The proposed qualification does not contribute any clarity, and creates the unfortunate situation in which the Government could reject a proposal whose lateness was caused by "proper" Government action or inaction, whatever that means

## FAR 15 405--Proposal Evaluation

CCIA remains concerned that the FAR 15 Rewrite omits the language in current FAR 15.610 (c) (6), which requires the contracting officer to "[p]rovide the offeror an opportunity to discuss past performance information obtained from references on which the offeror had not had a previous opportunty to comment." CCIA belleves that it is not enough simply to rely on the general provisions of FAR 15406 (d), which define general criteria for communications with offerors Past performance information is qualitatively different from other evaluation data that is gleaned from offerors' proposals, and for which the offeror is the only source. Past performance information comes from third parties whose reliability and motivations cannot be readily assessed by Government evaluators The only reliable way of checking derogatory information is to obtain the offeror's rebuttal In this manner, the Government will minimize the chance that biased or erroneous data will infect its evaluation Since it is often hard to gauge the effect of derogatory information on an overall past performance evaluation, it is better to maintain current practice and allow offerors to address all derogatory information, rather than leaving it to contracting officers to decide which derogatory information should be discussed with offerors

## FAR 15.406--Competitive Range

CCIA commends the FAR drafters for removing language that would have permitted a contracting officer to set an arbitrary limit on the number of proposals that could be included in the competitive range before the first proposal was received. This provision was an invitation to irrational procurement, and was appropriately removed from the FAR

On the other hand, the proposed regulation on the competitive range (FAR 15.406 (c) (2)) still contains a competitive range test that 15 inconsistent with the structure established by the Federal Acquisition Reform Act (FARA) and the goals of full and open competition.

FARA does not contain a statutory defintion of the competitive range This decision may be construed as an endorsement of the current regulatory test, which requires inclusion of all proposals that have a reasonable chance of receiving award. FARA permits the Government, in certain instances, to 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 hughly in accordance with such criteria " (Emphasis added). Proposed FAR 15406 (c) (2) limuts the competitive range to "those proposals most hughly rated . " Under thus test, the agency would never have to include more than the two, top rated proposals in the competitive range The proposed language does not require contracting officers to include the "greatest number" of proposals in the competitive range

The proposed FAR language stands the statutory scheme on 1 ts head. FARA authorizes, in some procurements, limiting the competitive range to the greatest number of proposals that will permit efficient competition The proposed FAR 15 Rewrite permits a more restrictive limitation of the competitive range than the exception in FARA Why would a contracting officer ever invoke the exception, which requires inclusion of the greatest number of proposals, when the general rule in FAR 15.406 (c) (1) does not? The FAR 15 Rewrite allows, in all procurements, a more restrictive definition of the competitive range than the test established in FARA for some procurements

CCIA contınues to believe that there is no need to revise the competitive range test that is contained in current FAR 15609 (a). This test supports full and open competition and has the additional advantage of clarity Its terms have been sufficiently litigated so that there will not be a new wave of protests to test its meaning Since FARA specifically authorizes contracting officers to reduce the proposals in the competitive range for reasons of efficiency, the statute

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eliminates any concern that the FAR's current, competitive range test will include too many proposals in too many procurements CCIA also contmues to believe that prior to promulgating a new, restrictive definition of the competitive range, it is better to implement an advisory downselect process and see whether this change addresses whatever problem the FAR drafters percerve.

If the FAR drafters persist in advocating a new competitive range test, then the new draft must at least convey the idea that the competitive range should include more proposals, rather than less The competitive range is established at the point in the procurement where the Government's requirements are often in flux, and the chance for miscommunication is high CCIA suggests that the drafters revise the language in proposed FAR 15.406 (c) to state that, "Based on the ratings of each proposal against all evaluation criteria, the contracting officer shall establish a competitive range comprised of all highly rated proposals, unless the range is further reduced for purposes of efficiency pursuant to paragraph (c)(2) of this section "

CCIA is also troubled by the FAR drafters' fallure to accept the regulatory challenge imposed by FARA to specify the conditions in which efficiency can be used to limit the competitive range. At a minımum, agencies should be required to take all reasonable steps to reduce the burden of the procurement process before excluding offerors from the competitive range These steps include establishing page limits for proposals, electronic proposal submission and evaluation, and use of streamlined evaluation criteria that can be evaluated on a checklist basis

## FAR 15 406-Communications With Offerors

Subsection (e) drops the current prohbitions contained in FAR 15610 (e) against auction techniques CCIA belleves that this prohbition should be retained, and is not inconsistent with the types of information that proposed FAR 15.406 (e) (3) permits contracting officers to reveal

## FAR 15 407--Proposal Revisions

Subsection (b) is significantly improved over the prior version CCIA believes that some additional changes will further improve this section First, offerors should be given an opportunty to revise their proposals prior to establishing a second, competitive range This step is necessary to insure that proposals are properly evaluated before they are excluded from the procurement. Second, the regulation should provide that each offeror will receive equal amounts of time for proposal revisions (unless otherwise agreed between the offeror and the Government). Although CCIA does not believe that
common cut-offs are necessary for each round of revisions prior to BAFOs, offerors must be treated fairly The best way to avoid unfaurness is simply to give everyone equal time for revisions, even if the submission of revisions (prior to final proposal revisions) is staggered.

CCIA is also puzzled by the language in FAR 15407 (a) allowing the Government to exclude from the procurement an offeror that was initially included in the competitive range "whether or not all material aspects of the proposal have been discussed . ." This implies that the first stage is meaningless and that an offeror may be peremptorily excluded from a procurement because his proposal has been surpassed by other offerors who have had the benefit of full discussions with the Government Under the proposed regulatory scheme, a contracting officer could hold discussions with some, but not all offerors or hold full discussions with some offerors and partial discussions with others The opportunties for unfair treatment in this proposal are troubling. The proposed regulation is a dramatic departure from current law, which permits a proposal to be excluded in a second determination of the competitive range only after the contracting officer complies with current FAR 15.610 (b), which requires discussions "with all responsible offerors who submit proposals within the competitive range "

## FAR 15606 --Postaward Debriefing of Offerors

This section contains two provisions regarding the timeliness of protests (15.606 (a) (4) (11), (ni)) that should be deleted A similar provision is also contained in FAR 15.605 (a) (1) Both regulations purport to interpret the timeliness rules established by GAO in 4 CFR § 21 As a policy matter, CCIA believes that the GAO bid protest system should be adminustered by the GAO through its regulations and decisions, and not through the FAR The inclusion of FAR provisions on matters within GAO's purview creates a potential for conflict that should be avorded

These provisions are also bad policy By arbitrarily starting the deadline for protesting at a point where the offeror lacks signuficant information, the regulation encourages protests based on rumor, speculation or the understandable desire to avoid rejection based on untımeliness The regulation also penalizes offerors who request delayed debriefings There are good reasons for making this request The amount of information that can be conveyed at a post-award debriefing is signuficantly greater than the amount of information provided in a pre-award debriefıng An offeror should be allowed to make a reasoned business decision as to whether a protest is appropriate based on as full

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an understanding as possible of the basis for award and the offeror's competitive position in the procurement

Finally, the proposed regulations are based on a serious factual error The decision to start the protest clock running when an offeror is excluded from the competitive range, or when he receives notice of award assumes that the offeror will always have adequate information, on those dates, regarding the decision to protest But the notice that an offeror has been excluded from the competitive range, for example, often conveys no more than that the offeror has been excluded The receipt of notice does not tell the offeror how, why, or on what basis the Government made its decision To state by regulatory fiat that timeliness runs from receipt of notice assumes facts regarding the offeror's knowledge that are very frequently untrue

## FAR 15.608--Discoyery of Mistakes

This provision defines the rules that apply to mistakes discovered after award Current FAR 15607 contains useful procedures regarding the disclosure of mistakes before award We believe that these procedures should be retaned in the FAR 15 Rewrite.

We appreciate the opportunity to provide these comments, and would be pleased to discuss these matters further at your convenuence

Sincerely,



THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
1957 E Street, N W • Washington, DC $20006 \cdot(202) 393-2040 \cdot$ FAX (202) 347-4004 www age org
cmmaster@agc org

J HOWARD MOCK, President

PETER K W WERT, Senior Vice President
TERRY DEENY, Vice President ROBERT J DESJARDINS, Treasurer

STEPHEN E SANDHERR, Executive Vice President

DAVID R LUKENS, Chief Operating Officer

July 14, 1997

General Services Administration
FAR Secretariat (VRS)
1800 F Street, NW
Room 4035
Washington, DC 20405

Re FAR case 95-029

The Associated General Contractors of America (AGC) appreciates the opportunity to comment on the above-referenced proposed rule AGC represents more than 33,000 of the United States construction industry's leading firms, including 7,500 general contractors AGC member firms are engaged in the construction of the nation's commercial buildings, factories, warehouses, highways, bridges, airports, water works facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, and site preparation and utilities installation for housing developments

## [1] Industry impact.

In 1995 , federal construction spending totaled over $\$ 16$ billon Changes proposed under the rewrite to FAR 15 will have significant impacts on the way federal construction contracts are negotiated In particular, AGC is concerned over how the proposed changes will affect small businesses, which account for approximately $95 \%$ of AGC's membership In this regard, AGC is concerned with the Government's decision not to certify this proposed rule as a "major rule " This failure means that the proposed rule will not be subject to a review under the Small Business Regulatory Enforcement Fairness Act (SBREFA), which was enacted to protect small businesses from enforcement of arbitrary or harmful rules without offsetting benefits
[2] 15.101-2 Lowest price technically acceptable source selection process.
AGC suggests that "[c]ommunications," as incorporated under 15 101-2(b)(4), should be limited to clarifications and should not be used in a manner that would allow preferred offerors an opportunity to improve their proposal.

## [3] 15.102 Multi-step source selection technique.

AGC is concerned that under 15102 (c) offerors who are eliminated from the competitive range following the initial competitive range determination are unable to participate " in any subsequent step " AGC suggests that when a solicitation has been significantly amended, an offeror who has previously been eliminated from the competitive range may deserve to be reinserted into the competitive range based on the significantly changed circumstances 15102 (c) should be revised to provide this discretion to the contracting officer

## 14] 15.103 Oral presentations.

AGC generally supports cost-effective oral presentations AGC is concerned, however, that the proposed rule does not provide sufficient guidance for ensuring that oral presentations are as fair and cost effective as possible AGC suggests that cost-effective parameters be established for structurıng oral presentations AGC further suggests that a videotape or audiotape of all oral presentations should be required under 15103 (d) to assist agency decisionmakers and others with an accurate record for reflection and review

## [5] 15.201 Presolicitation exchanges with industry.

AGC is concerned that one-on-one meetings under 15 201(c)(4) could remove the appearance of impartiality from a competition AGC suggests deletıng this subpart

## [6] 15.205 Issuing solicitations.

AGC encourages agencies to make all solicitation sets avalable free of charge to industry associations and other not-for-profit organızations for purposes of making the solicitation sets widely avaulable

## [7] 15.206 Amending the solicitation.

AGC suggests revising 15 206(e) so that all offerors of a solicitation, including those who have been eliminated from the competitive range, receive amendments to the solicitation As discussed in section 2 of this comment, AGC beheves that offerors previously removed from the competitive range should be allowed to rejoin the competitive range based on an amendment to the solicitation

AGC believes that $15206(\mathrm{~g})$ is unfair A new solicitation should occur if the Government plans to award a contract based on a departure from 1ts stated requrements

## [8] 15.207 Handling proposals and information.

AGC believes that the issue of timely resubmission is not adequately addressed under 15 207(c) Although the contracting officer is required to notify an offeror "immediately" if resubmission, due to the unascertanability of the submitted document, is required, the resubmission is not required to occur immediately $A G C$ beheves the Government should provide safeguards to prevent an appearance of purposeful delay

## [9] 15.405 Proposal evaluation.

Given the increasing importance of the collection and use of past performance information in the selection process, AGC believes it is important that the Government move toward a system that is fatr and impartal to all parties AGC suggests modifications to 15406 which will effectuate fair procedures for past performance information evaluations

## [10] Past performance.

General note on past performance The proposed Part 15 rewrite properly acknowledges the importance of past performance information in the source selection process However, because the proposed rewrite does not require all apparent deficiencies in a contractor's past performance to be discussed during the evaluation process, it falls short of both adequately protecting contractor rights and ensuring that the Government does business with those contractors that are properly qualified As such, AGC proposes revisions to these rules that would require contracting officers to explain fuily all deficiencies in every offeror's past performance information at any stage where a decision is being made that would affect the rights of that offeror (e g., award without discussions, establishment of the competitive range, and source selection decision)

AGC believes these modifications are necessary in order to ensure that source selection officials are relying on complete, accurate, and current past performance information At present there is no uniform system in place throughout the Government concerning performance reviews for contractors Recent judicial decisions (as weil as rulings from the Comptroller General) make it clear that the lack of uniformity concerning the generation, analysis, and reporting of past performance information has oftentimes resulted in source selection officials using information that is not the most current or accurate

The approach AGC suggests would ensure that offerors and source selection officials would have the opportunity to discuss openly and freely that information within the source selection official's possession relatıng to each offeror's past performance AGC suggests the following modifications pursuant to past performance evaluations


Under $15406(\mathrm{a})(1)$, delete the parenthetical expression that follows the words " aspects of proposals " and insert the following new sentence "Whenever the Government determunes that it is appropriate to make award without discussions, the Government shall nonetheless provide all offerors that received less than the maximum possible score, ranking, rating or evaluation on the past performance element(s) of the evaluation criteria the opportunity to address the reasons therefore and amend therr proposals accordingly before any final award decision is made "

Under 15 406(b)(3), delete section "(11)"
Under 15 406(b)(4), revise to read as follows "Shall address all adverse past performance information that caused any offeror to receive less than the maximum possible score, ranking, ratıng or evaluation on the past performance element(s) of the evaluation criteria, irrespective of whether the offeror previously had an opportunity to comment upon such information "

Under 15406 (d), insert new section (4) as follows "The contractıng officer shall discuss with each offeror still being considered for award all information in the Government's possession that caused any offeror to receive less than the maximum possible score, ranking, rating or evaluation on the past performance element(s) of the evaluation criteria, and provide any such offeror the opportunity to address the reasons therefore and amend its proposal accordingly before any final award decision is made "

## [11] 15.406 Communications with offerors.

AGC is concerned that appropriate safeguards have not been sufficiently established to prevent charges of partiality based on communications and/or discussions which are allowed to occur under 15406 as proposed

Under 15 406(b)(2), it appears the Government may enter into communcations which could extend beyond merely clarifying a nonunderstood provision in a proposal Clearly, the government could "facilitate the Government's evaluation process" by unintentionally or intentionally coaching an offeror during a commumication, notwithstanding the government's disclamer later in this section Communications should be narrowly tailored to allow the government to gam a full understanding of a proposal but not to allow the Government to provide an advantage to any particular offeror

AGC continues to maintain that determination of the competitive range is a problem Under 15406 (c)(1), agencies are required to establish a competitive range based on proposals from the "most highly rated" offerors, unless the range necds to be reduced for reasons of government efficiency $15406(\mathrm{c})(2)$ allows the contracting officer to limit the competitive range to "the greatest number that will permit an efficient competition among the most highly rated proposals " This language can result in a competitive range
consisting of one preferred offeror, who then becomes the only offeror to submit a final proposal This interpretation is faciltated by an exemption to the requirement to obtain cost or pricing data, $15503-1(\mathrm{c})(1)(111)$, which considers as "adequate price competition" -- for purposes of exempting an offeror from providing cost or pricing data -- acquisitions where only one proposal is actually received and the offeror had no expectation of competition It is hard to contemplate a competition of one as competitive AGC therefore encourages the Government to disallow down-selection of offerors based solely on efficiency

AGC also has concerns over the conduct and purpose of "discussions" which take place with offerors determined to be in the competitive range AGC is concerned generally over the possibility that offerors can be treated unequally by a contracting officer Adequate safeguards to prevent a "better discussion" with a preferred offeror are not apparent

A further concern is that $15.406(\mathrm{~d})(3)$ can be read as encouraging contracting officers to engage in bid shopping This can particularly be a concern where agencies have established weighted gurdelines for profit or fee prenegotiation objectives and contracting officers are concerned about deviating from the prenegotation standard, despite what the market may be indicating AGC applauds policy guidance on profit set forth in sections 15 504-4(a)(3) and 15 505(a) and encourages the government to instruct contracting officers that the purpose of "discussions" should not be to reduce contractor profit to zero

## [12] 15.503 Obtaining cost or pricing data.

AGC is concerned that $15.503-1$ (c)(1)(111), which considers as "adequate price competition" -- for purposes of exempting an offeror from providing cost or pricing data -- acquisitions where only one proposal is actually received and the offeror had no expectation of competition, provides an opportunity for contracting officers to limit the competitive range unfarly. AGC believes that by definition there can not be "adequate price competition" where only one offeror submits a proposal Therefore, AGC suggests that 15 503-1(c)(1)(111) be deleted

## [13] 15.504-1 Proposal analysis techniques.

AGC is concerned that adequate guidelines have not been established for performing a cost realism analysis under 15 504-1(d) AGC notes that the appearance of impartiality can be lost if it appears that a probable cost determination under 15 504-1(d)(2)(11) benefits a preferred offeror
[14] 15.504-4 Profit.
AGC is concerned that 15 504-4(c)(6) not be interpreted by contracting officers to mean that change orders for the same type of work should always be assigned the same target profit or fee Each construction project is unique and contracting officers should always
consider the particular circumstances involved in a change or modification, even though the work involved may look similar to previous actions

## [15] 15.505 Price negotiation.

AGC applauds the policy guidance at $15505(\mathrm{a})$ reading " A farr and reasonable price does not require that agreement be reached on every element of cost, nor is it mandatory that the agreed price be within the contracting officer's initial negotiation position AGC agrees with the Government that best value will result from a negotiation that is governed by the market

## [16] 15.507-1 Defective cost or pricing data.

AGC believes the standard at $15.507-1(\mathrm{~b})(6)(11)$ is impossible to prove The language allows a contracting officer to disallow an otherwise allowable contractor offset of defective cost or pricing data if " $[t]$ he government proves that the facts demonstrate that the price would not have increased in the amount to be offset even if the avalable data had been submitted before the date of agreement on price " This provision could result in lengthy and costly litigation It should therefore be deleted

AGC is also concerned regardıng the treatment of prime contractors relative to subcontractors and certification of defective cost or pricing data under 15 507-1(e) This section allows contracting officers to reduce the prime contract price when prime contractors have certified defective subcontractor cost or pricing data AGC believes a "good farth reliance" exception to the prime contract price reduction should exist for prime contractors who do not have knowledge of the defect or could not have ganed knowledge of the defect with due diligence, unless the exception would provide a "significant windfall profit" to the prime contractor

## [17] 15.605 Preaward debriefing of offerors.

AGC believes a clanfication is necessary under $15605(a)(2)$ If an offeror under this section does not submit a timely written request for a preaward or delayed debriefing due to the direction of the contracting officer, for the purposes of 4 CFR $212(\mathrm{a})(2)$ timeliness shall be determmed using the date the offeror submits a written request for a preaward or delayed debriefing as the date of notice of exclusion from the competition
[18] 15.607 Protests against award.
AGC encourages the Government to delete "and are requested to submit revised proposals " from $15607(\mathrm{~b})(2)$. This language can be read to enable the government to select preferred offerors to the exclusion of other qualified offerors, ncluding the protestor, who were in the competitive range on a protested award

AGC recognızes and appreciates the hard work the Government has undertaken in addressing the many issues involved in federal negotiated contract regulations At the Government's request, AGC welcomes the opportunity to discuss or clarify these comments


Christophér S Monek
Executive Director
Market Services

U.S. General Services Administration

Office of Inspector General


General Services Administration
FAR Secretarlat (MVRS)
18th \& F Streets, N.W.
Room 4035
Washington, DC 20405

Re: FAR Case 95-029 - FAR Part 15 Rewrite, Group B
Dear Sir or Madam:
The Office of Inspector General (OIG), General Services Administration (GSA), appreclates the opportunity to submit its comments on FAR Case 95-029, a proposed rule which would rewrite FAR Part 15, Contracting by Negotıation, in order to "infuse innovative techniques into the source selection process, simplify the process, and facılitate the acquisition of best value." Our sole comment relates to the proposed coverage, at section 15.5042 , which would provide guidance to contracting officers on when to request audit assistance in negotiating contracts. As you may know, GSA OIG audıtors perform, at the request of contracting officlals, audit reviews and prepare fleld pricing reports on proposals for negotiated contracts.

Current FAR coverage provides, at section 15 805-5(a)(1), that contracting officials shall request a field pricing report before negotiating any contracting actions above $\$ 500,000$ unless they have available adequate information to determine price reasonableness. Proposed section 15.504-2(a) would provide that contracting offlcers "should request field pricing assistance when the information available at the buyıng activıty is inadequate to determine a fair and reasonable price." We would advocate retaining the current standard which, while it provides contracting officıals with sufficient flexıbilıty and approprlately vests them with discretion on a case-by-case basis to not require field pricing support if appropriate, nevertheless affirmatuvely sets out the threshold of $\$ 500,000$ and requires contracting officers to obtain field pricing support in instances where adequate price reasonableness information is not available for contracting actions over that threshold. We feel the current regulatory language more appropriately emphasızes and encourages

18th and "F" Streets, NW, Washington, DC 20405

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the use of field pricing support to aid in the negotiation of significant contracting actions.

If you have any questions relating to these comments, please feel free to call Kathleen $S$. Tight, Counsel to the Inspector General on (202) 501-1932.

Sincerely,


William R. Barton
Inspector General

# UNITED STATES ENVIRONMENTAL PROTECTION AGENCY 

 WASHINGTON, DC 20460
# UL 1 | 1997 

OFFICE OF ADMINISTRATION AND RESOURCES
MANAGEMENT

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Ms Sharon A. Kaiser
General Services Administration.
FAR Secretariat (MVRS)
1800 F Street, NW, Room 4037
Washington, DC 20405
Re FAR Case 95-029
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Dear Ms Riser:

This is in response to the proposed rule 95-029, Part 15 Rewrite Contracting by Negotiation and Competitive Range Determinations The Environmental Protection Agency (EPA) has the following comments regarding the rewrite

- The evaluation factors and subfactors in FAR 15404 have eliminated the environmental objectives as prescribed in Executive Order 12873 dated October 20, 1993, Federal Acquisition, Recycling, and Waste Prevention. These objectives are currently set forth in FAR 15605 EPA favors retaining the environmental objectives, which are addressed in FAR Part 23, as evaluation factors.
- FAR 1.102-2(c) (3) states in the second sentence that "All contractors and prospective contractors shall be treated fairly and impartially, but need not be treated the same." While we agree with this concept, it represents a dramatic shift from previous policy as it pertains to source selection One could argue that it would be difficult to treat prospective contractors fairly and 1 partially if they are not afforded the same treatment Consideration should be given to revising the sentence to read as follows: " The goal
of participants in the system is to treat all contractors and prospective contractors fairly and impartially..."
- FAR $6.101(b)$ states in part that "Contracting officers shall provide for full and open competition...that [is] best suited to the circumstances of the contract action and consistent with the need to fulfill the Government's requirements efficiently" It is unclear what is implied or intended by the statement ...fulfil the Government's requirements efficiently .."

FAR 15 000, which addresses the scope of the part, omits any reference to limited competitions such as acquisitions conducted under FAR 6.2, Full and Open Competition After Exclusion of Sources. The scope of Part 15 should clearly state that it applies to competitive, noncompetitive, and limited competitive negotiated procurements.

- FAR 15001 Definitions. This section as a whole does not recognize communications or discussions with offeror which occur before receipt of proposals. Language should be added to include communications or clarifications which may be necessary during the period between solicitation issuance and receipt of proposals
- FAR 15001 Definitions--Communications. it should indicate that communications occur after the receipt of initial proposals.
- FAR 15.001 Definitions--Negotıation. it should indicate that negotiation occurs after receipt and evaluation of initial proposals.
- FAR 15001 Definitions--Proposal modification it should state that $1 t$ is a change made to a proposal before the solicitation's (or an amendment to the solicitation's) closing date and time.
- FAR 15.002 addresses types of negotiated acquisition It should also refer to acquisitions with limited competition. In 15.400 the scope of the subpart has
the same omission; the scope should refer to limited competitions.
- FAR 15.100 Scope of the subpart on Source Selection Processes and Techniques should be enhanced by adding the following sentence at the end of the section "Other acquisition processes and techniques may be used to design acquisition strategies as appropriate to the specific circumstances of the acquisition "
- FAR 15 101-1 in discussing the trade-off process should address a trade-off analysis in which award is made to an offeror other than the highest technically rated offeror.
- FAR 15103 in addressing oral presentations at the end of the introductory paragraph should state "when appropriate and requested." FAR $15103(c)(6)$ addresses oral presentations and states, "The scope and content of communications that may occur between the Government's participants and the offeror's representatives as part of the oral presentations, e.g., state whether or not discussions will be permitted during oral presentations (see 15406 (d))." This conflicts with the definition of "Discussions", as defined in FAR 15.001 and the FAR clause 52.2151(a)(4), where $1 t$ specifically states that "discussions are negotiations that occur after establishment of the competitive range that may, at the contracting officer's discretion, result in the offeror being allowed to revise its proposal". Recommend removing the words "e.g., state whether or not discussions will be permitted during oral presentations (see $15406(\mathrm{~d})) "$, as discussions are not permitted prior to the establishment of the competitive range.
- FAR 15.103 is addressed by another commenter as allowing for dialogue as a part of oral presentations. The dialogue is characterized as clarifications and not discussions This commenter states that there is a risk placed on the contracting officer by following this approach, namely, to avoid technical leveling

No language was suggested to indicate that dialogue during the oral presentations is actually clarifications.

FAR 15.201(c) (4) addresses one-on-one meetings with potential offerors. It may be useful to state that no potential offeror should receive preferential treatment in the opportunity to participate in such meetings; the Government needs to clarify its acquisition strategy to avoid any appearance of favoring a particular contractor.

- FAR 15.206(g) could be enhanced by adding in language indicating that paragraph ( $g$ ) is subject to the requirement in paragraph (f) ie., that if the departure from the stated requirements is so substantial that it is beyond what prospective offeror could have reasonably anticipated, cancellation and resolicitation will be mandatory
- FAR 15.208(3) on late proposals has been modified and puts the burden on the contracting officer to determine the actual facts and circumstances surrounding a late submission. It is possible that many late proposals could be subject to continuous appeals by offeror for inclusion due to a unique situation or circumstance which prevented the timely submission of the proposal Based on this FAR change, the contracting officer could almost never render a proposal late. This commenter believes that the FAR section on late proposals should remain unchanged.

FAR 15.306-1 details items that the agency contact point shall determine This listing appears to be a confusing overlap between the role of the agency contact point and the contracting officer. For instance, should not the contracting officer be determining if there is sufficient technical and cost information? What does an approval of a contracting officer mean if the agency contact point is making all these determinations?

- FAR 15.405(a) (1) Cost or price evaluation. This section states that under fixed price or fixed price with economic price adjustment contracts, the contracting officer may use price comparison to satisfy the price analysis requirement. This guidance should be further clarified to include ID/IQ contracts with fixed unit prices.

FAR 15.405(a)(2) (li) addresses past performance evaluation. It should state that offeror may identify any relevant current contracts.

FAR 15.405(a) (4) addresses the issue of cost information being provided to members of the technical evaluation team The paragraph should state when (at what point in the process) the cost information may be provided to the team.

- FAR 15.406(b) indicates that communications with offerors before establishment of the competitive range should not provide an offeror an opportunity to revise its proposal, but can be used to address ambiguities in the proposal or other concerns. If an offeror uses the communications to address ambiguities or other concerns, would this not lead to proposal revision which the proposed rule arguably prohibits?
- FAR 15 406(c) addresses establishing the competitive range The competitive range is comprised of proposals most highly rated, unless the range is further reduced for "purposes of efficiency" by the contracting officer. However, the concept of "efficient competition" is not explained in 15.406(c) nor in the provision at 52.215-1(f) What rationale is acceptable for "purposes of efficiency"? Would resource constraints be an acceptable reason to further reduce the competitive range? Does this change mean that contracting officers will now have the authority to make competitive range decisions by selecting an appropriate number of "highly rated proposals" without concern about being overruled by a protest forum?
- Furthermore, the concept of most highly rated is vague and confusing. The most highly rated needs to be in relation to a standard, such as the maximum potential rating.
- FAR $15.406(c)(1)$ states that the competitive range shall be comprised of " ..those proposals most highly rated..." This seems to imply that cost is not a valid reason to exclude an offeror, or that cost must be point scored or color scored. The language should be revised to state that the competitive range should include those proposals that "offer the best value to the Government..."
- FAR 15.406(d)(3) omits the fact that the contracting officer should also discuss "weaknesses" with the offeror. It only refers to deficiencies and significant weaknesses.
- FAR 15407 (a) Proposal revisions. The first sentence should be clarified to read, "If, after discussions have begun, an offeror originally in the competatave range .."
- FAR 15.407(b) At the end of paragraph (b) a clarifying sentence could be added to the effect that the contracting officer can request further revisions if determined to be necessary
- FAR 15.503-3 states that the contracting officer should not obtain more information than is necessary for determining the reasonableness of the price or evaluating cost realism when requiring information other than cost or pricing data Currently FAR 15.502 uses the words shall not when requiring the unnecessary submission of actual cost or pricing data Is there a reason for this different standard (the should not standard) in requiring information in the other than cost or pricing data category?

We appreciate the opportunity to comment on the proposed rule and look forward to the implementation of the rewritten FAR part 15.


FAR Case 95-029, Part 15 Rewrite Comments Nos. 39 thru 41 are missing.

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS
1250 Eye Street, NW, Suite 1200
Washington, DC. 20005
(202) 371-8414

July 14, 1997
CODSIA Case 19-96
General Services Admınıstratıon
FAR Secretariat (VRS)
$18^{\text {th }} \&$ F Streets, NW
Washington, D C. 20405
Subject. FAR Case No 95-029, FAR Part 15 Rewrite, Group A and Group B Comments
Dear DAR Council and CAA Council
The undersigned members of the Council of Defense and Space Industry Associations (CODSIA) appreciate the opportunity to comment on the proposed rule published in the Federal Register on May 14, 1996 (FAR Case No 95-029, 62 Fed Reg 26640) Under this submission, we are including our summary-level comments regarding major areas of concern on FAR Case No 95-029, Group A (Subparts 150 through 154 and 156 ) and Group B (Subpart 15 5) CODSIA's detailed comments on Group A subparts of the FAR Part 15 Rewrite are enclosed (Enclosure 1), as are Group A miscellaneous clarifications (Enclosure 2) Our detailed comments on Group B (Subpart 15 5) are also enclosed (Enclosure 3), as are Group B miscellaneous clarifications (Enclosure 4)

Formed in 1964 by industry associations with common interests in the defense and space fields, CODSIA is currently composed of nine associations representing over 4,000 member companies across the nation Participation in CODSIA projects is strictly voluntary, a decision by any member association to abstain from participating in a particular activity is not necessarily an indication of dissent

CODSIA members strongly support the Rewrite effort and believe that the May 14 proposed rule has significantly improved over the first proposal ( 61 Fed Reg 48380, dated September 12, 1996) The downsized industry and Federal government acquisition workforces and much smaller Federal government budgets make it incumbent upon us to do much more with fewer resources The only way that we can mutually accomplish this task is by streamlining acquisition procedures and eliminating non-value-added procedures, processes, and reviews CODSIA members consider that the drafters of the FAR Part 15 Rewrite have approached this project in that spirit and delivered a product that is fair to the government and its taxpayers as well as equitable for its contractors. We have recommended a number of changes that we beheve will increase clarity and content, while remaining consistent with the intent of the Rewrite We urge your consideration and adoption of these recommendations

DAR Council and CAA Councll
July 14, 1997
Page 2

The following summary identıfies the nine areas in Group A on which CODSIA members focused their attention and comments

1 Multi-Step Source Selection Technique: In attempting to deal with the many negatıve comments that the drafters recerved on this section (15102) during Phase I of the Rewrite effort, we believe that they have created a result that is less workable than was Phase I The Rewrite neither explains that there is any other source selection alternative, 1 e , Single-Step Source Selection, nor does it provide any useful guidance or criteria to help in determining which technique may be best to apply in a given procurement The new rule contemplates multiple competitive range determinations, which CODSIA members consider antithetical to streamlined acquisition and very similar in effect to the discredited practice of multiple rounds of BAFOs In addition, the rule confuses advisory and mandatory down-selects and is ambiguous regarding the recourse of a firm that does not "survive" the first step of a multi-step process CODSIA members believe that the first part of the Multı-Step process should never result in a potential competitor being refused further access to the process without any recourse

2 Communications ys. Discussions: CODSIA members believe that the bright line which existed between communications and discussions in Phase I of the Rewrite has been elımınated in this latest draft We strongly suggest that this distinction be reinserted into the regulation Reinsertion will provide a clear line for practitioners and define a clear difference in practice, e g , an offeror's proposal cannot be revised as a result of communications, but a proposal revision can result from discussions CODSIA has proposed several changes in Subparts 150 and 154 to refine the definitions of these terms and increase the clarity of explanations of the different consequences and results of communications versus discussions

## 3 Indicating Evaluation Credit to be Given for Technical Solutions that Exceed Mandatory Minimums: Some solicitations contemplate giving credit to offerors that exceed mandatory technical minımums and allow the government to negotiate with offerors for increased performance beyond the stated mandatory mınımums However, current rules do not require that the solicitation state which of these over-and-above capabilities would be most valuable to the government, nor does the regulation allow the government to disclose this information during discussions CODSIA members believe that 15406 (d), which governs discussions with offerors after establishment of the competitive range, should be amended to allow, if not require, the government to suggest to an offeror, during discussions, that its proposal would be more competitive if the excesses were removed and the offered price/cost were decreased

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4 Late Proposals: Paragraph 15 208(c) lists the circumstances in which the contracting officer may elect to accept late proposals It allows acceptance of a late offer, provided that the contracting officer extends the due date for all offeror CODSIA members consider this to be a solution that is nether fair nor equitable Once the due date for proposals has passed, extending that date for offerors that got proposals in on time will not help them at all, because they presumably have already put together the best, most complete proposal that they can. This practice will only benefit the offeror that did not comply with the rules We strongly recommend deletion of this unfair practice at 15 208(c)(1)

5 Past Performance: This version of the Rewrite incorporates many of the changes that CODSIA recommended during Phase I to include fairness in the past performance evaluation process However, there remain basic flaws that must be addressed to render past performance treatment equitable CODSIA recommendations are included in the detailed comments on Group A at 15 405(a)(2) and $15406(\mathrm{a})$ and (e) Our recommended changes incorporate the concept that past performance information must be relevant and that offerors must be provided with an opportunity, either prior to or during the proposal evaluation period, to comment on any adverse past performance information that the government is using

6 Best Value: CODSIA members strongly disagree that best value (see FAR 2 101) is an "outcome," in our Phase I comments, we defined best value as a process leading to a determination, eg, lowest price is an outcome, but not necessarily the best value Based on our experience, the proposed definition of best value must be significantly supplemented with a clear description of the range of contract requirements subject to the application of best-value procedures

7 Preaward Debriefing. CODSIA members acknowledge that the emphasis on preaward debriefings has been strengthened in the May 14 rule However, because of the lengthy precedent and experience that most government procurement personnel have had with the pre-Clinger-Cohen Act rules that prohibited preaward debriefings, we believe that the new rule must be much stronger than it is now In other words, we believe that preaward debriefings, when properly requested, should be the rule rather than the exception, and we have proposed appropriate modifications to FAR 15605

8 "Efficient Competition" CODSIA members believe that the Rewrite still does not embody the intent of the Congress when it modified the statute to include "efficiency" The law, at 10 U.S C $2305(\mathrm{~b})(4)(\mathrm{B})$, clearly allows the contracting officer to "limit the number of proposals in the competitive range, in accordance with the criteria specified in

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the solicitation, to the greatest number that will permit an efficient competition among the offeror rated most highly $\underline{n}$ accordance with such criteria "While the statute clearly identifies "efficiency" as an influence on the process, the proposed Rewrite uses "efficiency" as a discriminator in the acquisition process, and it fails to connect "efficiency" with the solicitation's evaluation factors We have recommended a number of changes to 15406 and 15408 to incorporate the statutory construct

9 Auctioning The regulation does not include a clear prohibition against auctioning CODSIA members have added such a prohibition at 15 406(e) In addition, we have added a definition of what constitutes auctioning so that the extent and limits of the prohibition will be clear to practitioners

The following summary identifies the five areas in Group B on which CODSIA members focused their attention and comments. We note that, with some exceptions, most of the guidance contained in the new Subpart 15.5 is not substantially different from the guidance contained in Subparts 157,158 , and 159 . Further, except as noted below, we were pleased that the reforms implemented under the Federal Acquisition Streamlining Act of 1994 (FASA) and the ClingerCohen Act of 1996 have essentially remained intact Below is a summary of CODSIA's analysis and recommendations on the proposed Subpart 155 rewrite and conforming changes to other sections of the FAR.

1 Access to Records and Audit Rights. A cornerstone of recent contract pricing reforms was the creation of a bright-line test between "cost or pricing data" and "information other than cost or pricing data." This distinction was crucial to determining an offeror's proposal support obligations and the extent of government access to records and audit rights The reformed policy not only involved separate definitions, but it established an expressed preference for proposal support information, a new solicitation notice (FAR 52 215-41), separate instruction tables (Table 15-2 and Table 15-3), and separate forms (Standard Form 1411 and Standard Form 1448)

We are deeply concerned that the proposed rewrite, which eliminates Table 15-3, Standard Form 1411, Standard Form 1448, will obscure the bright-line test This will undoubtedly result in confusion over government access to records and audit rights, particularly postaward audit rights The problem is exacerbated further by a policy at FAR 15 503-5(a)(4) which allows the contracting officer to specify "necessary preaward and postaward access to offeror's records" without providing any guidance to the contracting officer on what is necessary

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As the DAR Council and CAA Councll are no doubt aware, government access to records and audit rights has consistently been one of private industry's greatest concerns in the area of contract pricing, especially for commercial companies In possibly dismantling the bright-line test, the proposed rewrite will substantially increase private industry's business risks We recommend the following

- Elimınate contracting officer discretion at FAR 15 503-5(a)(4) to determıne necessary preaward and postaward access to offeror's records,
- Insert a new provision at FAR 15 503-6 which clearly sets forth the government's policies on access to records and audit rights,
- Modify the solicitation notice at FAR 52 215-41 and contract clause at FAR 52 215-42 to implement the government's policies on access to records and audit rights, and
- Remstate Standard Form 1448 (if Standard Form 1448 is reinstated, it should be substantially revised to eliminate unnecessary questions)

2 Unfinished Commercial Item Reforms. To date, the government has not yet fully implemented the reforms necessary to achieve the goals of FASA and the Clinger-Cohen Act In addition, since implementation of the FASA reforms on October 1, 1995, private industry continues to experience a number of problems on contracts for the acquisition of commercial items We again recommend the following

- Add definitions of "discount" and "concession" at FAR 15501 or remove the disclosure obligation at FAR 52 215-41 and FAR 52 215-42 The requirement to disclose unpublished discounts is particularly unfair if terms are not defined
- Clarify at FAR 15502 that the contractıng officer is to seek a fair and reasonable price for commercial items based on prices at which the same or similar items have been sold in the commercial market, which is the standard set forth in the Truth in Negotiations Act (TINA) Contracting officers should be prohibited from requiring disclosure or seeking most favored customer prices

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- The FAR continues to contain a number of most favored pricing provisions which should be revised to be consistent with the requirements of FASA and the Clinger-Cohen Act These include FAR 13 203-1, FAR 16 601, FAR 31.106-3, and FAR 52 232-7 (all citations are before rewrite)

3 Parametric Estimates We strongly disagree with the proposed revision to the definition of "cost or pricing data" at FAR 15 501, which adds parametric estımates to a list of items considered to be cost or pricing data Parametric estimating is a pricing technique which involves historical data, modeled cause and effect relationships, and projections based on those relationships By their nature, estimates produced by this modeling technique will vary from actual results, and the variances are traceable to imperfect assumptions about the future and imperfect cause and effect relationships It is unreasonable to view such imperfections as a basis for defective pricing allegations

As a minimum, this change should be not be part of the Part 15 rewrite project and should, instead, be considered within the broader context of parametric estimating policies and procedures

4 Cost Realism We are concerned that the proposed rewrite misapphes the concept of cost realism Its long-standing purpose has been to assess whether an offeror's proposed solution, as reflected in resources to be applied by the offeror (e.g, materials, hours), reflects a clear understanding of the work to be performed (see FAR 15 504-1(d)(1)) It essentially has been a guard against unrealistically low offers on competitively awarded cost type contracts

The purpose of cost realism has never been, nor should it be, to determine the probable cost of performance and best value Those are price evaluation techniques used in competitive source selection and are distinctly different from determining whether an offeror understands the solicitation requirements The concept is also being confused in the proposed rewrite with past performance evaluation, where cost realism would be used to evaluate quality concerns, service shortfalls, and responsibility determinations Our prımary concern is that confusing these concepts will induce contractung officers to require submission of cost data in competitive acquisitions For private industry, this would be a major setback from the reforms that were implemented as a result of FASA and the Clinger-Cohen Act

We are greatly concerned with the application of cost realism to firm-fixed-price contracts If a proper price analysis has been performed by the contracting officer, there should be no need to assess cost realism as a guard against unrealıstıcally low offers

Furthermore, any effort to apply cost realism to firm-fixed-price contracts should not be implemented by the DAR Council and CAA Council unless and untıl the Cost Accountıng Standards (CAS) Board has exempted firm-fixed-price contracts that do not involve the submission of certified cost or pricing data from CAS We have been frustrated that, despite our repeated urgings, the activittes of the FAR Council and the CAS Board have not been adequately coordinated This lack of coordınation has led to a well-known problem where firm-fixed-price contracts have been exempted from TINA but not from CAS For many companies, CAS compliance is a key criterion for declining government business

5 Subcontract Cost or Price Analysis We do not agree that the long-standing policy on subcontractor refusal to grant a higher-tier contractor access to records, previously described at FAR 15 806, is understood well enough to be removed This guidance was highly relevant, especially when competitors teamed on particular projects but had to substantially limit access to records and release of proprietary information In this case, it has been well recognized that the government's interests would be best served if the contracting officer intervened and performed field pricing actions, as necessary, on behalf of the prime contractor or higher-tier contractor CODSIA urges the DAR Council and CAA Council to retain this policy In addition, we urge the retention of present FAR policy, as noted in our analysis at 15 504-3(b), regarding submıssion of subcontractor price analyses and cost or pricing data.

Finally, it is clear that the ultimate effectiveness of acquisition reform hes in the training and education of the acquisition workforce That fact, coupled with the far-reaching impacts of the proposed revisions, mandates that adequate time for the requisite training of the workforce be allotted prior to the effective date of the revisions

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If you have any questions about CODSIA's comments, we will be pleased to make available representatives from CODSIA's Operating Committee who are evaluating the proposed FAR Part 15 Rewrite

Sincerely,

## SEE CODSIA SIGNATORIES, NEXT PAGE

Enclosures
CODSIA Analysis and Recommendations, Group A
Group A Miscellaneous Clarifications and Corrections
CODSIA Analysis and Recommendations, Group B
Group B Miscellaneous Clarifications and Corrections
cc Administrator for Federal Procurement Policy
Acting Deputy Under Secretary of Defense for Acquisition Reform
Director for Defense Procurement

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Aerospace Industries Association

Lawrence F Skıbbıe
President
American Defense Preparedness Association/
National Security Inductrial Ascociation n


Lorraine M Lavet
Chief Operatıng Officer
American Electronics Association

Cynthia Brown
President
American Shipbuildıng Association


Kenneth McLennan
President
Manufacturers Alliance for Productivity and Innovation

Bert M Concklın
President
Professional Services Councıl


Penny Eastman
President
Shipbuilders Council of Amenca

ISSUE
1 102-2 Performance standards

## DISCUSSION

CODSIA members beheve that the rewrite of Part 15 makes clear throughout that it is permissible to treat contractors differently ( $e g$, hold one discussion with some, multiple discussions with other) Because that fact appears to us to be self evident, we are concerned that including in the very opening of the rule the phrase " but need not be treated the same" is an unnecessary invitation to disparate treatment As such, and because the phrase itself adds nothing to the rule, we recommend its deletion

## RECOMMENDATION

(3) The Government shall exercise discretion, use sound business judgment, and comply with applicable laws and regulations in dealing with contractors and prospective contractors All contractors and prospective contractors shall be treated fairly and impartially but need not be treated the same-

## ISSUE

2101 Definitions - Best Value

## DISCUSSION

CODSIA's January 7, 1997, comments on FAR Case 95-029 recommended that the definition of "best value" be replaced with a more complete explanation of the "best value" concept Our January 1997 Discussion stated "CODSIA members are supportive of best value contracting but our collective experience is that the definition as proposed is inadequate because it lacks a meaningful and operational description of what best value has become in practice Based on our experience, the proposed definition of "best value" must be significantly supplemented with a clear description of the range of contract requirements subject to the application of best value procedures We further recommended that an explanation be inserted in 15101 m lieu of the definition in 2101 We suggested as follows

Best value means a process for determining whether an offer or quote is most advantageous to the Government based on a well-considered trade-off among such factors as quality, past performance, cost/price and other as identified in the solicitation Best value procedures are applicable to all acquisitions whether they involve products and services with a low risk factor or highly complex, developmental or experimental requirements accompanied by a high risk factor Best value contracting involves a determination as to which proposal is most advantageous to the Government based on an evaluation and tradeoff between quality and cost/price Quality includes such factors as past performance, technical approach, and management capability

Although the present Rewrite has adopted the concept of "Best value continuum" in the 15 101, CODSIA members again strongly recommend the above paragraph in place of the language in 15101 for two principal reasons First, the CODSIA language specifically notes that "best value procedures are applicable to all procurements " This is a concept which deserves emphasis because the government always seeks the best value Second, the CODSIA language makes specific reference to "a well-considered trade-off," which is the foundation to the "best value" concept

## RECOMMENDATION

### 2.101 Definitions



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15101 Best value continuum
An agency-ean obtain best value in negotiated procurements by using any one or a cembmation of source selection approaches In different types of procurements, the relative importance of cost or price may vary For example, in acquisitions where the requirement is clearly definable and the risk unsuccessful contract performance is mammal, cost or price may play a dommant role in source selection The less definitive the requirement, the more development work required, or the greater the performance risk, the more technical or past performance considerations may play a dommant role in source selection

Best value means a process for determining whether an offer or quote is most advantageous to the Government based on a well-considered trade-off among such factors as quality, past performance, cost/price and other as identified in the solicitation. Best value procedures are applicable to all acquisitions whether they involve products and services with a low risk factor or highly complex, developmental or experimental requirements accompanied by a high risk factor. Best value contracting involves a determination as to which proposal is most advantageous to the Government based on an evaluation and tradeoff between quality and cost/price. Quality includes such factors as past performance, technical approach, and management capability.

## ISSUE

11801 Preaward testing

## DISCUSSION

See 15405 for Discussion and Recommendation

## RECOMMENDATION

Preaward testing or produce demonstration, when required by the solicitation, need not be conducted accordance with a formal test plan The results of such tests or demonstrations may be used to rate the proposal, to determine techmeat acceptability, or otherwise to evaluate the proposal

See the revised language in 15 405(a)

ISSUE
Section 15001 Definitions

## DISCUSSION

One of the principal features of the FAR Part 15 Rewrite was the introduction of the "bright line" distinction between "communications" and "discussions" as being a function of the establishment of the competitive range. The May 1997 Rewrite has eliminated that distinction and by dong so has eliminated some useful clarity to the Rewrite proposal

CODSIA members recommend that the distinction be retained as originally proposed A clear distinction is helpful to procurement practitioners (industry and government alike) because the status of the procurement ( 1 e , whether in "communications" or "discussions") will determine the rights of both parties For example, if the procurement process has reached the communications stage, then all offeror know that they cannot revise their proposals (and "proposal revision" remains a defined term in 15.001) unless and until they are selected for the competitive range The communications stage also limits the government as they can only utilize communications to rate a proposal, but not to change one See 15 406(b)(2),(3) CODSIA members believe that, if the distinction is blurred as presently proposed, the procedures and expectations of the contracting parties outlined in 15406 will be compromised

## RECOMMENDATION

Communications are all interchanges that occur between the government and offeror and an offeror, meluding discussions conducted after the competitive range s established prior to the establishment of the competitive range

Discussions are negotiations that occur after establishment of the competitive range that may, at the contracting officer's discretion, result in the offeror being allowed to revise its proposal. These negotiations may include bargaining Negotiation is a procedure that, after receipt and evaluation of proposals from offers, permits-bargaming Bargains 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

ISSUE
15 101-1 Tradeoff process

## DISCUSSION

Over the past several years, as best value contracting has emerged in the contracting community, it appears that contracting agencies have evaluated various elements of an offer that exceed the specifically identified requirements of the solicitation Such evaluations are conducted despite the absence of any language in the solicitation that advises offeror of the advantages of offering more than required What is particularly troublesome is that the government frequently knows prior to issuing the solicitation what specific enhancements, improvements, above grades, etc it would like to purchase and for which it is willing to pay a premium Consequently, while contracting officers dutifully describe their minimum needs, they are not so dutiful when identifying the value that would, or could, be placed on a proposal offering more than the minimum needs

This concern could be addressed through the cumbersome and expensive process of alternate offers However, CODSIA members believe that a more streamlined solution would be for contracting officers to identify those capabilities or characteristics of the solicited item, service or construction project that will influence evaluation and subsequently affect contract award By doing so, contracting officers will be able to more specifically describe their true needs and the corresponding value to the government of those needs We recommend that the FAR so prescribe

## RECOMMENDATION

(b)(1) The solicitation shall clearly state fall evaluation factors and significant subfactors that will affect contract award and their relative importance shall be clearly stated in the solrettation including those related to capabilities in excess of the solicitation requirements.

## ISSUE

## 15102 Multi-step source selection technique

## DISCUSSION

The proposed rewrite introduces a new source selection technique known as "multi-step " This technique appears to be designed to enable the government to winnow the field of offeror early in the acquisition process, even before the final solicitation is issued and proposals are submitted In comments on the initial proposed rewrite, CODSIA members stated support for the use of multi-step source selection techniques, provided that offeror are fully informed of the government's reasons for considering them to be not viable candidates for award, that preaward debriefings be made mandatory for those eliminated from a competition, and that no offeror be eliminated from a competition unless adequate information "for there to be binding offers" is solicited and received by the government

On balance, CODSIA members believe, however, that the revised proposed rewrite creates a cumbersome and confusing dynamic with little or no streamlining Moreover, the revised proposal changes many of the terms and procedures involved in a multi-step procurement in a manner that, in industry's view, renders the technique impractical

For instance, in the original rewrite, the downselects that occur under a multi-step procurement were never referred to as "competitive range determinations" However, in the revised version, this is precisely the definition given to the downselects

This raises two major issues of concern first, industry firmly believes that competitive range determinations should never be made without benefit of full proposals Yet the rewrite clearly contemplates those determinations being made on the basis of "limited information " While the proposal does attempt to define what degree of information is adequate to enable a downselect decision, it remains ambiguous and confusing At one point in the preamble, it is stated that no offerors will be eliminated without submitting "proposals", at another point, the term "limited information" is used, and later the term" full proposals" is introduced CODSIA members have recommended elsewhere that a clear definition of the term "proposal" be added to the Rewnte Moreover, industry is concerned that the "bright line" test contained in the original proposal has been eliminated. In the original, the level of information necessary for a mandatory downselect is outlined and covered by the summary line "for there to be binding offers" That phrase appears nowhere in the revised proposal, thus further adding to the confusion and concern surrounding the technique

Second, the Rewrite speaks of "one or more competitive range determinations," AFTER which the government would issue a final solicitation and seek full proposals Such a construct clearly flies in the face of efficiency -- since it poses the potential for companies to be required to develop one or more "partial" proposals (which can be time consuming and expensive) and, even more importantly, clearly creates a process in which multiple BAFOs and revisions will be the
norm This is a practice that is antithetical to streamlining and efficiency and has long been opposed by industry

Further, industry believes that a technique such as this can be helpful in certain, limited circumstances, but that efficiency alone is not an adequate reason In cases where the government faces significant uncertainty about how to fulfill its needs, or the requirements are highly complex, such an approach might well make sense However, industry does not support the use of multı-step techniques simply as a means of reducing the burden on the government it is always burdensome to prepare even partial proposals, and always burdensome to evaluate them As such, setting that as a standard is akin to setting no standard at all

In addition, the revised proposal does not adequately refine the mandatory vs advisory downselect options -- indeed, the two are treated in entirely separate sections of the proposal In order to fully grasp the nuances and conditions for using different techniques, it is industry's view that the two (mandatory and advisory downselect) must be contained within the same section so as to provide a clear logic ladder for the contracting officer to use in making his or her determinations

With that in mind, and given the substantial changes that have been made to the section on multi-step techniques, CODSIA members now believe that the most prudent course of action would be to establish a multi-step technique that provides solely for advisory downselects and which leaves mandatory downselects to normal competitive range determinations Under the construct recommended by CODSIA members, the government could opt for a multi-step technique in circumstances in which, as stated above, the government faces significant uncertainty about how to fulfill its needs, or the requirements are highly complex. When such a course is selected, the government would

1 Issue an initial request for information or other notice, inviting all interested parties to respond The notice would include as much information about the government's requirements as is available and would clearly delineate that this is to be a multi-step procurement. Offerors would be told that a failure to respond during the presolicitation phase (s) would eliminate them from participating during later stages Offerors would be asked to submit "initial information," including proposed technical approaches, qualifications, past performance, and some general information relative to the prices that will be involved for the service of product

2 Evaluate the responses submitted by interested offeror and notify those offerors who appear to be clearly non-competitive for the eventual award that they are considered such -- and why

3 Issue a formal solicitation which seeks a full proposal Any interested party may respond to the solicitation, provided they responded as well to the presolicitation notice

4 Evaluate the proposals submitted and ether award without discussions OR establish a competitive range (depending on what the solicitation said would be done)

5 Move to award

Contracting officers should also be admonished to avoid wherever possible multiple BAFOs and proposal revisions for it is there that many of the real burdens on contractors can be found

As noted earlier, industry was prepared to support the government's proposal for a multistep acquisition technique However, given the limitations that must be placed on such a technique (particularly in the area of debriefings -- which under the CODSIA construct becomes irrelevant, since there is no preaward debriefing right as a result of an advisory downselect), and the new levels of confusion and ambiguity that appear in the new proposal, it is the consensus of CODSIA members that the multi-step technique should involve only advisory, and not mandatory, downselects

## RECOMMENDATION:

Revise 15102 as follows

### 15.102 Source selection techniques.

There are two basic source selection techniques that may be employed by the Government: Single-step selection and multi-step selection. The single-step technique is generally more efficient and less costly to the Government and offerors and therefore is most often used.
(a) Multr-step source selection may be appropriate when the submission of fut proposals at the beginning of a source selection would be burdensome for offerers to prepare and for Government permed to for use in competitive procurements when
(1) The Government is uncertain how its requirements might be met;
(2) Satisfying the Government's requirements is likely to require technically complex solutions;
(3) The cost of preparing a full proposal is likely to require the commitment of substantial resources by offerors;
(4) The cost of reviewing full proposals submitted by offerors is likely to require the commitment of substantial resources by the Government; and/or
(5) The contracting officer determines that, considering (1) through (4), it is unduly burdensome and inefficient of Government and offeror resources to require full proposals as initial submissions from offerors.

Using the multi-step techniques described in this section, agencies may seek limited information initially, make one or mere competitive range determinations, and request full proposals from those remaining in the competitive range- make an advisory down-select (see below), and release a complete solicitation to remaining firms and any other offerors that elected to participate after being informed that the firm was unlikely to be a viable competitor.
(b) The agency shall issue a sollertation that describe the supplies or services to be acquired, identifies the eritern that will be used in making the-souree selection decision, and identities the information that must be submitted m response to the first step solvent may publish a presolicitation notice (see 5.204) that provides a general description of the scope or purpose of the acquisition and invites potential offerors to submit information that allows the Government to advise the offerors about their potential to be viable competitors. The presolicitation notice must disclose all significant evaluation factors and subfactors that the agency will consider in evaluating proposals and their relative importance. It shall outline what submissions are expected in future steps. At a minimum, the notice shall contain sufficient information to permit a potential offeror to make an informed decision about whether to participate in the acquisition; it shall advise them that failure to participate in the first step will preclude participation in any subsequent step. Whet the selentation will not requrre the submission full proposals in first step, it shall require, at mammon, the submission of statements of qualifications, proposed technical concepts, and past performance and prying information The presolicitation notice may not require the submission of full proposals in the first step, but it shall require that each respondent submit, as a minimum, statements of qualifications, proposed technical concepts, and past performance and limited pricing information. The soletandso shalt outline what submissions are expected in future steps -The solicitation must disclose all signifient factors and subfactors, meluding cost or price, that the agency will consider in evaluating proposals, and their relativerane The selientation must contain suffienent informer permit potential offerors to make informed decisions about whether to participate m the acquisition, and shalt advise them that faure to pattepate in the first step will preclude partiepation in any subsequent step
(c) The agency shall evaluate all responses in accordance with the criteria stated in the selientan notice, and shall advise each offeror respondent either that it
has been selected to participate in the next step of the acquisition or that has beencluded from the competitive range- will be invited to participate in the resultant acquisition or, based on the information submitted, that it is unlikely to be a viable competitor. These net domed to ben the competitur range shall be informed in accordance with 15603 that they will not be permitted to participate in any subsequent step, and shall be debriefed as required by 15605 and 15606 . The agency shall seek additional information in any subsequent step sufficient to permit any-award without further diseusion or ane the come rang en The agency shall advise respondents considered not to be viable competitors of the general basis for that opinion. The agency shall inform all respondents that, notwithstanding the advice provided by the Government in response to their submissions, they may participate in the resultant acquisition.
(d) The multi-step technique then proceeds similarly to a single-step source selection; ie., the Government shall issue a formal solicitation to those firms that the Government considered to be viable competitors and to any firms that were given an advisory down-select notice but elect to continue the competition. The Government shall evaluate the proposals in accordance with Subpart 15.4 and either award without discussions or establish a competitive range, depending on what the solicitation said would be done (see 15.209 (a)). The proeesinds at contract award or encellation of the acquisition

ISSUE
15103 Oral presentations

## DISCUSSION

Industry recommends that the record of oral presentations be objectively verifiable through the use of either videotaping or a verbatim written record (ie, a transcript from a properly certified court reporter service) and be made available to both parties

CODSIA members do not support the use of either subjective or unilateral documentation (such as government notes) to record oral presentations. If the government insists on using other than the two objectively verifiable mediums above then CODSIA members strongly recommend that the method and level of detail of the record be mutually agreed to prior to the oral presentation

## RECOMMENDATION

15 103(a) Presentations by offeror to the Government may be used to substitute for, or augment, written information Use of oral presentations as a substitute for portions of a proposal can be effective in streamlining the source selection process Oral presentations may occur at any time in the acquisition process after issuance of the solicitation and are subject to the same restrictions as written information, regarding timing (see 15 208) and content (see 15 406) Oral presentations provide an opportunity for dialogue among the parties in competitive and sole source acquisitions Pre-recorded videotaped presentations that lack real-tıme interactive dialogue are not considered oral presentations for the purposes of this section, although they may be included in offeror submissions, when appropriate
(d) The contract file shall contain a record of oral presentations to document what the Government relied upon in making the source selection decision The method and level of detail of the record shall be either (1) objectively verifiable (videotaping or verbatim written record) or (2) mutually agreed to by the Government and the contractor prior to oral presentation. (eg, videotaping, written minuter, Government notes, copies of offeror briefing shies or presentation notes) shall be at the discretion of the -source selection authority $\mathbf{A}$ copy of the record placed in the contract file shall be provided to the offeror.

ISSUE
15201 Presolicitation exchanges with industry

## DISCUSSION

The proposed rule (both here and in other sections) addresses "products and services " The FAR, however, covers "supplies and services (including construction)" See FAR 2101 We recommend that the language of the proposed Rewrite be consistent with the general coverage of the FAR

Subsection (b) states that the purpose of presolicitation information exchanges is to enhance the Government's ability to obtain quality products We believe the benefit to industry also should be recognized and have recommended language to accomplish this

The cross-reference to the procurement integrity provisions in subsection (c) is not clear We have recommended language to clarify what we believe to be the meaning of the crossreference

Subparagraph (f) prohibits the selective disclosure of information "necessary" to the preparation of proposals It seemingly would permit selective disclosure of information that, while not "necessary" for preparation of a proposal, would nevertheless give the recipient a substantial advantage in any ensuing competition In addition, the proposed rule only requires that materials distributed at a conference be made available to all potential offeror Materials made available at other forums or to an individual offeror are apparently not within the scope of the disclosure requirement

We believe the general policy should be that any information or material provided to a particular potential offeror or any group of potential offerors must be made available to all offeror An exception would be made if information is disclosed to a potential offeror in response to the offeror's inquiry and making that information publicly available would tend to reveal the potential offeror's technical approach or otherwise disclose the offeror's confidential business strategy We have recommended the language to accomplish this

## RECOMMENDATION

(b) The purpose of exchanging information is to improve the understanding of Government requirements and industry capabilities, thereby allowing potential offerors to judge whether or how they can satisfy the Government's requirements and enhancing the Government's ability to obtain quality products supplies and services (including construction) at reasonable prices, and increase efficiency in proposal preparation, proposal evaluation, negotiation, and contract award
(c) Agencies are encouraged to promote early exchanges of information about future acquisitions An early exchange of information can identify and resolve concerns regarding the acquisition strategy, including proposed contract type, terms and conditions and acquisition planning schedules, the feasibility of the requirement, including performance requirements, statements of work, and data requirements, the suitability of the proposal instructions and evaluation criteria, including the approach for assessing past performance information, the availability of reference documents and information exchange approaches, and any other industry concerns or questions (see 3104 regarding procurement integrity requirements) Any exchange of information must be consistent with the procurement integrity provisions of 3.104 . Some techniques to promote early exchanges of information are--
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(f) General information about agency mission needs and future requirements may be disclosed at any time When specific information about a proposed acquisition that would be necessary for the preparation of prepesats is disclosed to one or more potential offerors, that information shall be made available to the public as soon as possible, in order to avoid creating an unfair competitive advantage For example, When a presohictation or preproposal conference is conducted, materials distributed at the conference should shall be made available to all potential offerors, upon request Information provided to a particular potential offeror in response to that offeror's request shall not be disclosed if doing so would tend to reveal the potential offeror's technical approach or otherwise disclose that offeror's confidential business strategy.

## ISSUE

Enc. 1

15202 Advisory multi-step source selection
See above recommendation combining 15.102 and 15202

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## ISSUE

15203 Requests for proposals

## DISCUSSION

CODSIA members have two comments for this section of the Rewrite The first comment is on alternate CLIN structures and the second is on "letter REPs "

## Alternate CLIN Structures

The impact of the inclusion of an alternate CLIN structure in a contractor's proposal extends far beyond the "terms and conditions or the requirements (e $g$, place of performance or payment and funding requirement)" referenced in this proposed section The inclusion of an alternative CLIN structure can significantly decrease the ability of the government to properly evaluate the (or cost) of that proposal

When government procurement personnel evaluate complex proposals, they normally develop a sophisticated computerized pricing (or costing) model based on the CLIN structure and WBS (Work Breakdown Structure) described in the solicitation Any changes to ether the solicitation's CLIN structure or WBS result in an incomplete proposal evaluation which cannot be performed without substantial changes in the computerized pricing or costing model

For example, assume that the original CLIN structure described in the solicitation contained 20 CLINs and that the government pricing (or costing) model was based on these 20 CLINs If a contractor proposed 22 CLINs, the government pricing (or costing) model would not include the prices (or costs) of the 21 st and 22 nd CLINs in the determination of its estimated price (or cost) and the contractor would have gained an unfair price (or cost) advantage by proposing the two additional CLINs In order to eliminate the unfair price (or cost) advantage that this contractor would thereby receive, the government would have to revise its computerized pricing (or costing) model at substantial additional cost to ensure that all proposals, including those with different CLIN structures, were fairly and equitably evaluated

In order to ensure the fair and equitable treatment of all proposals, CODSIA members recommend that subpart 15 203(a)(2)(ni) be revised to limit the solicitation or acceptance of proposals containing alternative CLIN structures to those instances in which the government computerized pricing (or costing) model is capable of including the prices (or costs) of these additional CLINs

## Letter REPs

In the interest of economy and efficiency, this section authorizes the contracting officer to utilize letter solicitations when it is not expected that more than one prospective offeror is a potentially viable candidate for contract award The most likely circumstance for this scenario is
the follow-on acquisition to an existing contract -- but it is not the only possible circumstance To accommodate this likelihood, the language authorizes the use of letter REPs in other appropriate circumstances
"Other appropriate circumstances" is not defined, illustrated, or discussed It effectively gives the contracting officer authority to use letter REPs in any number of situations without the basis for challenge or dispute Alternatively, given the literal interpretation possible of the stated language, the authority to use the letter REPs might be construed as being confined or limited to situations in which the instant procurement is a follow-on acquisition to an existing active contract or prior completed contract

It is conceivable that a letter RFP might be appropriate for an initial acquisition that is inherently sole source in nature

## RECOMMENDATION

Add the following to 15 203(a)(2)
(iii) Before soliciting or accepting proposals with alternative CLIN structures, the contracting officer will ensure that the alternative CLIN structures can be accommodated by both the Government's cost model for proposal evaluation purposes and the Government's contract payment facility.

Make the following change in 15 203(e)
(e) Letter RPs may be used in sole source follow on acquitions and ether appropriate crreumstances Letter REPs may be used in sole source acquisitions and sole source follow-on acquisitions, as appropriate. Letter REPs should be as complete as possible and, as a minimum, should contain the following
(1) RFP number and date,
(2) Name, address, and telephone number of contracting officer,
(3) Type of contract contemplated,
(4) Quantity, description, and required delivery dates for the item, (5) .

ISSUE
15 208(c) Late Proposals

## DISCUSSION

CODSIA members support the Rewrite language that permits the contracting officer to accept proposals that have been received late due to circumstances beyond the offeror's control Under those circumstances, there is no potential prejudice to other offeror

However, permitting the contracting officer to receive a late proposal in any case where the due date for all other offerors is extended creates a significant potential for prejudice We strongly recommend deleting it Obviously, a proposal only will be deemed "late" if it is received after the due date stated in the solicitation Other offeror already will have submitted their proposals To grant an offeror that already has submitted its proposal extra time in which to submit the already-submitted proposal is meaningless It is akin to allowing students "extra time" to work on their tests after they have turned them in and left the classroom because one test taker did not properly budget his or her time and did not complete the test by the announced completion time Such extensions are inherently prejudicial to the others

We also recommend that the contracting officer be required to make a determination in writing that a late submission was beyond the offeror's control This is properly required under subparagraph (2) when the lateness is due to government mishandling There is at least as strong a reason to require that the determination be documented in writing when the lateness is due to reasons external to the government. We also suggest that the standard be changed from circumstances beyond the offeror's "immediate" control to beyond the offeror's "reasonable" control There is substantial case law discussing what is or is not beyond a person's "reasonable" control We see no reason to create a new standard for purposes of late proposals

## RECOMMENDATION

(c) Late proposals, modifications, and final revisions may be accepted by the contracting officer provided--

## (1) The contracting officer extends the due date for all efferors, or

(2) (1) The contracting officer determines in writing, on the basis of a review of the circumstances, that the lateness was caused by actions, or actions, of the Government, or
(3) (2) In the judgment of the contracting officer, as determined in writing, the offeror demonstrates by submission of factual information that the circumstances causing the late submission were beyond the mmedne reasonable control of the offeror
(d) The contracting officer shall promptly notify any offeror if its proposal, modification, or revision was received late and whether or not it will be considered, unless contract award is imminent and the notice prescribed in 15 603(b) would sufficc
(e) Proposals may be withdrawn at any time before award Written proposals are withdrawn upon receipt by the contracting officer of a written notice of withdrawal Oral proposals in response to oral solicitations may be withdrawn orally The contracting officer shall document the contract file when such oral withdrawals are made One copy of withdrawn proposals should be retained in the contract file (see $4803(a)(10)$ ) Extra copies of the withdrawn proposals may be destroyed or returned to the offeror at the offeror's request Extremely bulky proposals shall only be returned at the offeror's request and expense.

## ISSUE

15 209(b) Audit and Records - Negotiation

## DISCUSSION

It must be made clear that the government's access to records and audit rights, as imposed through the "Audit and Records - Negotiation" clause at 52 215-2, does not apply to contracts for the acquisition of commercial items The lack of guidance has been a significant source of confusion for contracting officers and private industry When combined with changes made in the proposed rewrite at Subpart 155 , the failure to provide expressed direction in this area will only add to the confusion

## RECOMMENDATION

Add to the list of exceptions under 15 209(b)
(x) Contracts for the acquisition of a commercial item (see 2.101).

ISSUE
15 209(h) Order of Precedence clause

## DISCUSSION

The proposed revision to the Order of Precedence clause has several problems In order to appreciate these problems, it is necessary to understand the structure of the current clause The terminology used in the present clause follows the Uniform Contract Format, found at Table 15-1 (FAR 15 204) This present structure is as follows

## Order of Precedence Clause

(1) The Schedule (excluding specifications)
(2) Representations \& Instructions
(3) Contract Clauses
(4) Other Documents, Exhibits, Attachments
(5) The specifications

By contrast, the Rewrite proposes the following

## Order of Precedence Clause

(1) The Schedule (excluding specifications)
(2) Performance requirements (Including the specifications and special terms and conditions negotiated for the contract)
(3) Other documents, exhibits, and attachments
(4) Contract clauses
(5) Representations and other instructions

## Uniform Contract Format

Sections A-H (Part I)
Sections K-M (Part IV)
Section I (Part III)
Section J (Part III)
Section C (Part I)

Section/Title
Part I -- The Schedule
A Solicitation/contract form
B Supplies or services and prices/costs
C Description/specifications/work statement
D Packaging and marking
E Inspection and acceptance
F Deliveries or performance
G Contract administration data
H Special contract requirements

Unfortunately, the Rewrite's Order of Precedence clause introduces the term "Performance requirements (including the specifications and special terms and conditions negotiated for the contract) " The difficulty is that the term "performance requirements" is undefined because there is no existing Section of the Uniform Contract Format specifically denominated "performance requirements " One reasonable interpretation might be that the "performance requirements," in a more general sense, are sprinkled throughout the entire contract, in all Sections and attachments This interpretation could then lead to misinterpretations and disputes over whether a particular contract provision constitutes a "performance requirement," and what the consequence is for placement in the precedence listing

The reference to "special terms and conditions negotiated for the contract" is also confusing Section H (which is part of the Schedule) is currently entitled "Special contract requirements" and contains those terms and conditions unique to the contract which override the standard FAR clauses The revision's reference to "special terms and conditions" may be an inexplicable attempt to remove Section H from the Schedule and lower its priority in

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interpretation If it does not refer to Section $H$, then it is unclear what portions of the contract it is intended to reach

Furthermore, elevating the precedence of the specifications from last to second is extremely problematic In addition to nullifying many years of procurement law precedent, specifications are typically the province of the engineering and program management functions, rather than the contracts and business functions. Consequently, the specifications will be prepared by individuals largely unfamiliar with government procurement laws and regulations It is foreseeable that the specifications might contain provisions which would deviate from the FAR clauses included in Section I, many of which reflect statutory requirements The revised Order of Precedence clause would presume to give priority to the specifications, rather than the contract clauses Besides representing a puzzling and ill-conceived prioritization, such a hierarchy may well be unenforceable where the specification was contrary to law or a fundamental procurement principle

Finally, it is worth noting that although the Order of Precedence clause was changed by the Rewrite, the Uniform Contract Format was not The reason for not changing the Uniform Contract Format is because the Model Contract Format is to be added to the DFARS as a test Until that test is completed, it seems imprudent to have one half of the change in the Rewrite, but not the other half Consequently, there is no apparent reason for raising the specifications to a higher priority for contract interpretation purposes over the special contract requirements

## RECOMMENDATION

Retain FAR 52 215-33, the present "Order of Precedence" clause so that the Schedule (Sections A-H) continues to have precedence over the specifications in Section J By doing so, contracting officers can focus on what they wish to buy through the special contract requirements and the statements of work and contractors can avoid misinterpretations of priorities Both parties can then avoid disputes

52215-8-Order of Precedence Uniform Contract Fermat
Order of Precedence--Unıform Contract Format (Date)
Any meonssteney in this sollettation or centract shall be reselved by giving precedence in the followng order-
(a) The Sohedule (eveluding the specifieations),
(b) Performanee requrrements (including the specifieations and spectal torms and
eonditions negetrated for the contraet),
(c) Other documents, exhbuts, and attachments,
(d) Centract clauses;
(e) Representations and other insturtions

FAR 52.215-33 ORDER OF PRECEDENCE (JAN 1986)
Any inconsistency in this solicitation or contract shall be resolved by giving precedence in the following order: (a) the Schedule (excluding the specifications); (b) representations and other instructions; (c) contract clauses; (d) other documents, exhibits, and attachments; and (e) the specifications.

## ISSUE

153 Unsolicited Proposals

## DISCUSSION

There are two basic issues raised by the Rewrite's coverage of unsolicited proposals The first deals with early involvement of the contracting officer under $15306-2$ and the second deals with access to information contained in unsolicited proposals under 15 309(a)

The contracting officer is mentioned, almost as an afterthought, only at the end of paragraph (b) However, it is imperative that the contracting officer be brought into the review process as soon as agency officials determine that a particular unsolicited proposal is worth a comprehensive evaluation CODSIA members recommend making the contracting officer an integral part of the process at paragraph (a), when the comprehensive evaluation is initiated

The text of the "Use and Disclosure of Data" legend to be placed on the title page of an unsolicited proposal has been changed The current legend states that "The data in this proposal shall not be disclosed," while the proposed legend begins with the statement that "This proposal includes data that shall not be disclosed" (emphasis added) CODSIA members hope that this change was inadvertent and can be corrected, because the effect of the change will be to render some parts of an unsolicited proposal not subject to the protective legend We do not think that this is a proper result, because even the fact that a firm has submitted an unsolicited proposal could, in some cases, be of interest to a competitor

Both of these matters can be addressed with only a small change to the Rewrite

## RECOMMENDATION

15 306-2 Evaluation
(a) Comprehensive evaluations shall be coordinated by the agency contact point, who shall attach or imprint on each unsolicited proposal, circulated for evaluation, the legend required by 15309 (d) When performing a comprehensive evaluation of an unsolicited proposal, evaluators, one of whom shall include the contracting officer, shall consider the following factors, in addition to any others appropriate for the particular proposal

## 15309 Limited use of data

(a) An unsolicited proposal may include data that the offeror does not want disclosed to the public for any purpose or used by the Government except for evaluation purposes If the offeror wishes to restrict the data, the title page must be marked with the following legend

## Use and Disclosure of Data

The propel eludes data that The data in this proposal shall not be disclosed outside the Government and shall not be duplicated, used, or disclosed--in whole or in part--for any purpose other than to evaluate this proposal However, if a contract is awarded to this offeror as a result of--or in connection with--the submission of these data, the Government shall have the right to duplicate, use, or disclose the data to the extent provided in the resulting contract This restriction does not limit the Government's night to use information contained in these data if they are obtained from another source without restriction. The data subject to this restriction are contained in Sheets [insert numbers or other identification of sheets]

## ISSUE

15401 Definitions

## DISCUSSION

We have two comments for this definitional section First, the three (not two) definitions should be moved to 15001 so they can relate, and be interpreted as relating, to the entire Part 15 , not just Subpart 154 on source selection For example, the phrase "significant weaknesses and deficiencies" appears in $15606(\mathrm{~d})(1)$ on postaward debriefings CODSIA members recommend that each of the definitions relate to the proposal only

The other comment is that the only distinction between a "deficiency" and a "weakness" appears to be proposal versus contract performance As presently drafted, a proposal can be "deficient" but contain no "weaknesses." Conversely, the proposal could contain an unlimited number of "weaknesses" but not be "deficient" (unless there were so many "weaknesses" that they somehow totalled a "significant weakness" or two or three) Presumably the drafters of the Rewrite wanted to focus on contract performance as the discriminator in evaluating proposals However, proposal evaluation and contract performance are completely separate events If the proposal is not properly drafted or conceived, the evaluators cannot be certain that the company in question can perform that particular contract Nevertheless, the Rewrite definitions appear to presume that contract performance is the consequence of who is the offeror rather than the consequence of the offeror's proposal

An additional reason for the CODSIA recommendation is because other parts of the Rewrite, notably 15 406(d)(3) on communications, are based on the evaluation process (not contract performance) and the nomenclature that is specific thereto, 1 e , "communications" and "discussions" That is, during communications, only weaknesses need be disclosed, but during discussions, significant weaknesses and deficiencies must be disclosed Since these terms are relevant only to the proposal evaluation process, CODSIA members believe that the definitions should encompass only that stage.

## RECOMMENDATION

We recommend that the definitions be relocated to 15001 and separated into three distinct definitions In order to place the focus of the definitions on the evaluation of the proposal rather than the speculation on contract performance, we suggest the new definitions in 15001 should read
"Deficiency," as used in this subpart, is a material the failure of a proposal to meet a material Government requirement or a cembmation of significant weaknesses in a proposal that increases the risk of unsuccessful contract performance to unaceeptablelevel.
"Weakness," as used in this subpart, is a flaw in the proposal that mereases the fisk of unsuccessful contract performance

A "significant weakness," as used in this subpart, is a flaw, or a series of flaws, in the proposal that appreciably mdecreases the fisk of unsuccessful contract perform likelihood of award unless addressed and resolved.

## ISSUE

## 15405 Proposal and cost or price evaluation

## DISCUSSION

The Rewrite section on proposal evaluation raises several important issues dealing with the definition of "proposal," past performance information and disputes, cost realism, and preaward testing

## Definition of "Proposal"

First, throughout the rewrite, the use of terms like "initial information," "full proposals" and so forth appear The Rewrite should carefully define what is meant by a "proposal " In the view of CODSIA's members, in order for a proposal to constitute a binding offer, it must include basic terms such as price, quantity, schedule, technical details, past performance information, etc Under this construct, the submission of "proposals" would be a prerequisite for an agency to utılize a procurement technique in which offerors are eliminated from the competitive range (as opposed to being given advisory opinions as to their viability)

## Past Performance Information

Second, in its treatment of past performance, the proposed rewrite does not make clear that in evaluating an offeror's past performance, the agency must evaluate offerors' comments on ALL past performance information obtained, not just offerors' comments relative to information contaned from sources identified by the offeror Furthermore, CODSIA members continue to believe that ongoing disputes should not be considered in evaluating past performance This is not to say that any contract that is the subject of a dispute should not be considered in the evaluation of past performance, but only those issues related to the dispute need be excluded

CODSIA members do not believe that a contractor will initiate disputes or litigation and execute a Contract Disputes Act certification in order to exclude specific past performance information from the evaluation Contractors always weigh the cost of litigation (management time, attorney fees, customer goodwill) prior to filing a claim Consequently, CODSIA members recommend that past performance information related to matters that are the subject of a formal or established disputes proceeding should be excluded from evaluation unless the affected offeror expressly requests otherwise

## Cost Realısm

CODSIA members are also quite concerned that the government wishes to employ cost realism analyses on fixed price contracts By the very nature of a fixed price contract, the contractor is assuming the risk of profitable performance Whether the cost is "realistic" to the
government is irrelevant to the performance, or profitability, of the contract Consequently, we have recommended that the sentence in 15 405(a)(1) be deleted

## Preaward Testing

The subject of the proposed FAR 11801 , Preaward testing, is not descriptive of "agency needs," and is mispositioned under FAR Part 11 -- DESCRIBING AGENCY NEEDS It is more pertinent to proposal evaluation and source selection The fact that "results of such tests or demonstration may be used to rate the proposal or otherwise evaluate the proposal" obviates any need to dispute that conclusion

While it may not be imperative that preaward testing or product demonstration, when required by the solicitation, be conducted in accordance with a formal test plan, it is imperative to ensure that all offerors are evaluated against the same standards This can only be accomplished if there is a requirement to the effect that the testing is conducted pursuant to uniform or comparable measurement criteria and under comparable circumstances and conditions Anything less would be in contravention of the prescriptions set forth in Subpart 154 Source Selection (more specifically, FAR 15 403(b)(3) and (4) and the requirement in FAR 15 404(b)(2) to support meaningful comparison and discrimination between and among competing proposals)

## RECOMMENDATION

Insert at 15001

## Proposal is a binding offer that is submitted in response to a government solicitation.

In 15 405(a), add an additional subparagraph entitled "Preaward Testing," reworded to read as follows

Where preaward testing or product demonstration is required by the solicitation and the results of such testing or demonstration may be used to rate the proposal, to determine technical acceptability, or otherwise to evaluate the proposal, the solicitation shall prescribe the circumstances, conditions, and measurement criteria to be employed in the conduct of such testing or demonstration to ensure meaningful comparisons and discrimination between and among competing proposals.

Insert at $15405(\mathrm{a})(1)$ a few additional words related to proposal evaluation, delete the sentence on cost realism at $15.405(\mathrm{a})(1)$ and add a new second sentence at 15 405(a)(2)(11)
(a) Proposal evaluation is an assessment of the proposal and the offeror's ability to perform the prospective contract successfully An agency shall evaluate competitive proposals and then assess their relative qualities solely on the factors and subfactors specified in the solicitation Evaluations may be conducted using any rating method or combination of methods, including color or adjectival ratings, numerical weights, and ordinal rankings The relative strengths, deficiencies, significant weaknesses, weaknesses, and risks shall be documented in the contract file
(1) Cost or price evaluation Normally, competition establishes price reasonableness Therefore, when contracting on a firm-fixed-price or fixed-price with economic price adjustment basis, comparison of the proposed prices will usually satisfy the requirement to perform a price analysis (but see 15 504$1(d)(3))$, and a cost analysis need not be performed. In limited situations, a cost analysis (see 15 503-1(c)(1)(1)(B)) may be appropriate to establish reasonableness of the otherwise successful offeror's price When contracting on a costreimbursement basis, evaluations shall include a cost realism analysis to determine what the Government should realistically expect to pay for the proposed effort, the offeror's understanding of the work, and the offeror's ability to perform the contract Cost realism analyses may also be used on fixed-price incentive contracts -or, nereeptienal cases, on other eomptive fixed priee-type (3) price evaluation.
(2) Past performance evaluation
(1)
(11) The solicitation shall describe the approach for evaluating past performance, including evaluating offeror with no relevant performance history, and provide offerors an opportunity to identify past contracts (including Federal, State, and local government and private) for efforts similar to the Government requirement The solicitation shall also authorize offerors to provide, and require the government to consider, information and corrective actions relative to any adverse past performance reports obtained by the government, whether those reports are related to the identified contracts or are obtained from other sources. However, unless requested to do so by the offeror, the contracting officer shall not consider information related to matters under contracts that are in dispute or litigation before a court, an agency board of contract appeals, or alternative dispute resolution forum when evaluating an offeror's past performance. .
(iii) The evaluation may take into account relevant past performance information regarding predecessor companies, key personnel who have relevant experience, or
subcontractors that will perform major or critical aspects of the requirement Such information may be relevant to the instant acquisition.
(iv) ${ }^{* * *}$
(3) Technical evaluation When tradeoffs are performed, the sere selection contract file records shall include--

ISSUE
15406 Communications with offerors

## DISCUSSION

There are several elements to the proposed section on communications with offeror
To begin with, proposal revisions resulting from communications are not clearly prohibited The regulation retains the distinction between communications and discussions and the implications/consequences of each However, the line between the two is not the bright line that it should be. Phase II does not include a clear prohibition against an offeror revising a proposal after/as a result of communications with the government However, the section on discussions does state clearly that discussions may result in proposal revisions CODSIA's position is that this distinction between communication and discussions is critical. The definition of "communications," at 15001 , does not resolve the problem, because it encompasses all interchanges after receipt of proposals, including discussions Therefore, a reader could interpret the regulation to allow proposal revisions under 15406 (a) The fact that the definition of "discussions" (also at 15001 ) specifically mentions that the offeror may be allowed to revise its proposal is not sufficient We suggest a new sentence at the end of FAR 15 406(a)(1) that reads "Whenever an award is to be made without conducting discussions (see 15001 ), offeror shall not be allowed to revise their proposals "

Furthermore, the Rewrite proposal must clarify the distinction between communications and discussions The definitions at 15001 define "discussions" as a subset of "communications" The critical distinction between the two ( 1 e , that communications do not result in proposal revisions and are not sufficient to cure proposal deficiencies or material omissions) is buried in 15 406(b)(2) This critical distinction, which applies to all communications, whether or not followed by discussions, should be raised to a more visible, and more universally apphcable, part of the regulation We suggest that a revised sentence be inserted and moved from 15406 (b)(2) to a location immediately after the title of section 15406 and before "(a) Communications and award without discussions " The revised sentence would read

## 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

Several other minor changes, which appear below in the Recommendation, would place the proper emphasis on the new regulations

The next major issue is the proposed new standard for inclusion in the competitive range as "proposals most highly rated" This standard is one which is considerably higher than that in use currently (see FAR 15 609(a) which states " shall include all proposals that have a reasonable chance of being selected for award ") Yet, the proposed standard is more permissive
than the standard included in the previous Rewrite, te, "proposals having the greatest likelihood of award "However, CODSIA members are not certain that this interpretation is correct, because the regulation does not define or explain the standard CODSIA agrees to the use of the new standard ("most highly rated") proposed, primarily because selection is based on actual ratings of evaluated proposals However, there needs to be some clanfication and definition in the Rewrite about what that really means CODSIA recommends the following

> Agencies shall evaluate all proposals in accordance with 15 405(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 those proposals most highly rated in accordance with such evaluation criteria, unless the range is further reduced for purposes of efficiency pursuant to paragraph (c)(2) of this section

The Rewrite proposal still allows the contracting officer, after establishing what the competitive range would be if it included all proposals most highly rated, to further reduce the competitive range "for purposes of efficiency" FAR $15406(\mathrm{c})(2)$ authorizes the contracting officer to base this determination on whether the number of most highly rated proposals "exceeds the number at which an efficient competition can be conducted "Efficiency, in Phase II, is determined at a later point in the acquisition (after proposals are received and fully evaluated), and CODSIA members appreciate this recognition of the need for a complete evaluation prior to elimination of offerors

However, we believe that the drafters are still missing the point that Congress intended when it modified the statute to include "efficiency" The statute (10 U S C 2305(b)(4)(B)) clearly allows the contracting officer to "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" That is, the statute clearly identifies "efficiency" as an influence on the process while the proposed Rewrite uses "efficiency" as a discriminator in the acquisition process In other words, the Rewrite does not limit the interpretation of efficiency, as does the statute CODSIA members do not believe that the Rewrite correctly implements the concept of "efficient competition" that the Congress envisioned when it included section 4101 in PL 104-106 (the Clinger-Cohen Act)

While we understand that efficiency now plays a part in establishing the competitive range, we believe that it is a specific, limited aspect of efficiency, as delineated in the statute, rather than the discriminatory efficiency that the Rewrite includes The regulation does not provide any indication of how, or on what basis, the contracting officer will determine efficiency, neither does it connect "efficiency" with the solicitation's evaluation factors Unchanged, this would allow the government to base its decision on the number of proposal evaluators who were available at a given time The availability of government resources should not be the basis on which qualified offerors are excluded from further consideration

At $15406(c)(2)$, first sentence Delete the phrase "determme 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" and insert the following.

After evaluating all proposals in accordance with 15405 (a) and 15 406(c)(1), the contracting officer may determine the the nub of most highly rated proposals that might -otherwise be melded in the competitive range exceeds the number at whet efficient competition can be conducted 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

In summary, if a new form of contact between offeror and the government is to be introduced, it is crucial that what is and what is not permissible be clear The revised proposal does a reasonably good job of establishing those lines, but more clanty is still needed

One feature of the Rewrite which CODSIA members continue to strenuously object to is the government's ability to conduct an auction under 15 406(e) Contrary to what the Rewrite drafters apparently believe, industry does not engage in auctioning when purchasing its supplies and services. The principal reason that companies do not engage in auction techniques is because of the poor reputation that company will attain if it is perceived as an untrustworthy recipient of confidential business information ( 1 e, price and delivery information) As stated in our January 1997 comments, "CODSIA members believe that auction techniques are always inappropriate and we adopt the language of FAR $15610(\mathrm{e})$ "

While the revised proposal goes a long way toward clarifying the importance of two-way dialogue on past performance issues, additional language is vital if full confidence is to be vested in the past performance process For example, the rewrite does not require that, when award is to be made without discussion, offeror be given an opportunity to address adverse past performance reports on which they have not had an opportunity to comment before As well, CODSIA members behove that the identity and/or location of a contract must be disclosed at the request of an offeror CODSIA members believe such comments are integral to the process and must be required, at least where offerors who might otherwise be competitive for the award are concerned

## RECOMMENDATION

15406 Communications with offeror Communications shall not be used to cure proposal deficiencies, significant weaknesses or material omissions, materially alter the technical or cost elements of the proposal, and/or otherwise revise the proposal
(a) Communications and award without discussions (1) If award will be made without conducting discussions, communications with offeror may be used to resolve minor or clerical errors or to clarify certain aspects of proposals (eg, the relevancy of an offeror's past performance information and adverse past performance information on which the offeror has not previously had an opportunity to comment) Such communications shall be conducted with any offeror that is the subject of an adverse past performance report from any source on which the offeror has not previously had the opportunity to comment, if that offeror would, if not for such report, be considered for award or inclusion in the competitive range. Whenever an award is to be made in a competitive procurement without conducting discussions (see 15.001), offerors shall not be allowed to revise their proposals.

## ***

(c) Competitive range (1) Agencies shall evaluate all proposals in accordance with 15405 (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 those proposals most highly rated in accordance with such evaluation criteria, 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 15405 (a) and 15406 (c)(1), the contracting officer may determine that the number of most highly rated proposals that might therwre be meluded in the competitive range exceeds the number at which an efficient competition can be conducted 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 Provided the solicitation notifies offerors that the competitive range can be limited for purposes of efficiency (see the provision at 52215-1(f)), 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 2305 (b)(4) and 41 U S C 253 b (d))
(d) Communteations Discussions with offeror after establishment of the competitive range (1) Ste communtertons discussions, tailored to each offeror's proposal, and shall be conducted by the contracting officer with each offeror within the competitive range
(3) The contracting officer shall, subject to paragraph (e) of this section and 15 407(a), indicate to, or discuss with, each offeror still being considered for award, significant weaknesses, deficiencies, and other aspects of its proposal
(such as, cost, price, performance, and terms and conditions) that could, in the opinion of the contracting officer, be altered to enhance materially the proposal's potential for award The scope and extent of discussion are a matter of contracting officer judgment. Findreussing other aspects of the proposal, the Government may, in situations where the solicitation stated that evaluation credit would be given for techmeal solutions exceeding any mandatory mummy, negotiate with offeror for increased performance beyond any mandatory minimums, and the Government may suggest to offerors that have exceeded any mandatory mmmmums, that their proposals would be more competitive if the excesses were removed and the offered price decreased When discussing other aspects of the proposal in situations where the solicitation stated that evaluation credit would be given for technical solutions exceeding any mandatory minimums, the Government may negotiate with offerors about increased performance beyond any mandatory minimums. Where the solicitation did not so state, then during discussions the Government may suggest to offerors that have exceeded any mandatory minimums that their proposals would be more competitive if the excesses were removed and the offered price decreased.
(e) Limits on communications 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 unique technology, innovative and unique uses of commercial items, or 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 fficer 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 analysts supporting thatenelusion 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 US C 423(h)(1)(2)),
(4) Reveals the names of individuals providing reference information about an offeror's past performance, although the identity and location of the contract or subcontract that is the subject of the reference shall be disclosed at the request of the offeror,
(5) Constitutes an auction technique such as --
(i) indicating to an offeror a cost or price that it must meet to obtain further consideration; or
(ii) advising an offeror of its price standing relative to another offeror; or
(iii) otherwise furnishing information about other offeror's prices; or
(6) Knowingly furnishes source selection information in violation of 3104 and 41 US C $423(\mathrm{~h})(1)(2)$

## ISSUE

15407 Proposal revisions

## DISCUSSION

The regulation allows an offeror "an opportunity to submit a proposal revision" (FAR 15406 (a)), presumably at any time during discussions, and subsequently gives each offeror still in the competitive range "an opportunity to submit a final proposal revision" (FAR 15407 (b)) This section contemplates maintaining the old system under which offeror could be called upon to submit multiple revisions to their proposals It encourages auctioning and can easily result in multiple "best and final offers" There is no incentive in the proposed system for streamlining or for an offeror to present its best offer in the initial proposal The needed streamlining and cost savings in time and paperwork that initially prompted the FAR Part 15 Rewrite will not materialize unless offerors are encouraged to present their best offer initially and multiple proposal revisions are made the exception rather than the rule

## RECOMMENDATION

(a) If, after discussions have begun, an offeror in the competitive range is no longer considered to be among the most highly rated offeror 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 the offeror has been afforded an opportunity to submit a proposal revision (see 15406 (d)) 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 proposal reverent that elanfy and document understandings reached during negotiations At the conclusion of discussions, the contracting officer shall give each offeror still in the competitive range shall be given an opportunity to submit a proposal revision that clarifies and documents understandings reached during negotiation The contracting officer is required to establish a common cutoff date for receipt of final -proposal revisions Requests for proposal revisions shall advise offeror that the final proposal such revisions shall be in writing and that the government intends to make award without ebtannegg further discussions

## revisions

## ISSUE

15408 Source selection

## DISCUSSION

Proposed FAR 15408 allows the source selection authonty's decision to be based on "business judgments and tradeoffs" as well as a comparative assessment of proposals against source selection criteria in the solicitation This is the equivalent of throwing in another source selection factor after the fact, without allowing offerors an opportunity to base their proposals on it CODSIA members consider this to be patently unfair and a violation of the statute

The FAR, at 1 602-2, states that "contracting officers should be allowed wide latitude to exercise business judgment," but that exhortation is directed toward such generic subjects as "(e)nsur(ing) that contractors receive impartial, fair, and equitable treatment" Further, the source selection authority is seldom a contracting officer, so the business judgment stricture is not directed at the SSA

The law is clear and unequivocal It requires that the contract award be made "to the responsible source whose proposal is most advantageous to the United States, considering only cost or price and the other factors included in the solicitation" (10 U S C 2305(b)(4)(C)) It is, therefore, beyond the scope of the statute for the source selection authority, or anyone, for that matter, to base the source selection decision on anything beyond the source selection factors and relative weights that are specified in the solicitation These references to "business judgments and tradeoffs" should be deleted

Further, with respect to the quantification of tradeoffs, FAR 15408 refers to "a comparative assessment of proposals against all source selection criteria in the solicitation" Later, it states that "documentation need not provide quantification of the tradeoffs that led to the decision " If "tradeoffs" here refers to something other than a best-value evaluation based on the factors and subfactors specified in the solicitation, then the reference should be deleted in its entirety However, if the term "tradeoffs" is intended to refer to the best-value evaluation process, then the documentation must include something more than the rationale for such tradeoffs, only an explanation of the quantifiable, logical, and documentable tradeoffs that were made in accordance with the solicitation can justify the source selection decision

## RECOMMENDATION

15408 Source selection

The source selection authority's (SSA) decision shall be based on a comparative assessment of proposals against all source selection criteria in the solicitation While the SSA may use reports and analyses prepared by others, the source selection decision shall represent the SSA's independent judgment The source selection decision shall be documented, and the documentation shall include the rationale for any bustness-judgments and tradeoffs, eluding benefits associated
with additional costs. Although The rationale for the selection decision must be documented- and that documentation need must provide quantification of the tradeoffs that led to the decision

ISSUE
15605 Preaward debriefing of offerors

## DISCUSSION

In earher comments on the initial rewrite proposal, CODSIA members had strongly urged that preaward debriefings be mandatory for offerors excluded from a competition prior to award Whenever an offeror is excluded from a competition, a timely debriefing is vitally important to enable that offeror to understand the deficiencies and weaknesses in its proposal so it can overcome those problems on concurrent or subsequent procurements In some cases, the lag time between exclusion from a competition and the conduct of a postaward debriefing can be very sigmificant

The proposed Rewrite comes close to acheving that goal, but still allows the government to avoid providing a preaward debriefing "if, for compelling reasons, it is not in the best interests of the Government . "While it is conceivable that such reasons might exist, the proposed rule provides no gutdance to contracting officers on what types of circumstances could legitmately be deemed "compelling." CODSIA members contmue to beheve that a preaward debriefing should be mandatory At a minimum, the rule should articulate appropriate examples of "compelling reasons" so that the intent of the rule is clear and followed Furthermore, if this exclusion is to remain, the rule should make explicttly clear that, for purposes of a potentral protest, the date the offeror knew or should have known the basis for a protest shall be the date of the actual debriefing, if a preaward debriefing was requested by the offeror and refused by the government

In addition, it is industry's view that adverse past performance reports on which the offeror has not previously commented or been made aware MUST be among the mandatory elements of any debriefing.

## RECOMMENDATION

At 15 605(b), add clanfying language delineating examples of "compelling reasons "
(a)(1) The offeror may request a preaward debriefing by submiting a written request for debriefing to the contracting officer within 3 three days after recerpt of the notice of exclusion from the competition.
(2) At the offeror's request, this debnefing may be delayed unt1l after award If delayed untul after award, the debriefing shall include all information normally provided m a postaward debnefing (see 15606 (d)) However, if an offeror requests a delayed debriefing under this section, the date the offeror knew or should have known the basis of a protest for the purposes of 4 CFR 21 2(a)(2) shall be the date the offeror recerved notice of its exclusion from the competition
(3) If the offeror does not submit a timely request, the offeror need not be given either a preaward or a postaward debriefing Offerors are entitled to no more than one debriefing for each proposal.
(b) The contracting officer shall make every effort to debrief the unsuccessful offeror as soon as practicable, but may refuse the request for a preaward debriefing ff, only for compelling reasons;itis net in the best interests of the Government Compelling reasons exist, for example, when the acquisition involves classified information for weapons systems or the acquisition is being conducted during a declared national emergency. The identification of specific compelling reasons and rationale for delaying the debriefing shall be documented in the contract file If the contracting officer delays the debriefing, it shall be provided no later than the time postaward debriefings are provided under 15606 In that event, the contracting officer shall include the information at 15 606(d) in the debriefing. In the event a request for a preaward debriefing is refused by the government, the date the offeror knew or should have known the basis for a protest shall be the date on which the requested debriefing is actually conducted.
(e) At a minimum, preaward debriefings shall include--
(4) An evaluation of past performance information obtained by the government and which was used in source selection evaluation.

## ISSUE

15606 Postaward debriefing of offeror

## DISCUSSION

The only changes recommended to this section by CODSIA members are technical in nature The disclosure of adverse past performance information, particularly such information on which the offeror has not had the opportunity to comment previously, must be a mandatory element of a debriefing, the recommendation below conforms to the change previously recommended at 15 406(e)(4).

## RECOMMENDATION

(b) Debriefings of successful and unsuccessful offeror may be done orally, in writing, or by any other method mutually acceptable to the contracting officer and the offeror.
(d) At a minimum, the debriefing information shall include--
5) For acquisitions of commercial end items, the make and model of the item to be delivered by the successful offeror, and
(6) Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed; and
(7) An evaluation of past performance information obtained by the government and which was used in source selection evaluation.

## ISSUE

## DISCUSSION

See Discussion in 15.208(c)

## RECOMMENDATION

## 52 212-1 Instructions to Offerors--Commercial Items

(f) Late offers Offers or modifications of offers received at the address specified for the receipt of offers after the exact time specified for receipt of offers are "late " Late proposals, modifications, and final revisions may be accepted by the Contracting Officer provided--
(1) The Contratmg Officer extends the due date for all offerors, or
(2)(1) The Contracting Officer determines in writing on the basis of a review of the circumstances that the lateness was caused by actions, or mactions, of the Government, or
(3) (2) In the judgment of the Contracting Officer, the offeror demonstrates by submission of factual information that the circumstances causing the late submission were beyond the immediate control of the offeror *****

## ISSUE

52 215-1 Instructions to Offeror -- Competitive Acquisition

## DISCUSSION

See Discussion under 15 208(c) regarding late proposals The following recommendation is consistent with CODSIA's position throughout

## RECOMMENDATION

52 215-1 Instructions to Offeror -- Competitive Acquisition
As prescribed in 15 209(a), insert the following provision
Instructions to Offeror -- Competitive Acquisition (Date)
***
(c) Submission, modification, revision and withdrawal of proposals
***
(3) Offerors are responsible for submitting proposals, and any modifications or final revisions, to the Government office designated in the solicitation on time Late proposals, modifications and final revisions may be accepted by the Contracting Officer provided --
(1)-The-Contractung Officer extends the due date for all efferors, or
(\#i) The Contracting Officer determines in writing on the basis of a review of the circumstances that the lateness was caused by actions, or inactions, of the Government, or
(\#\# ii) In the judgment of the Contracting Officer, the offeror demonstrates by submission of factual information that the circumstances causing late submission were beyond the immediate control of the offeror

## ISSUE

52 215-3 Request for Information or Solicitation for Planning Purposes

## DISCUSSION

See Discussion in 15001

## RECOMMENDATION

As prescribed in 15 209(c), insert the following provision
Request for Information or Solicitation for Planning Purposes (Date)
(a) The Government does not intend to award a contract on the basis of this solicitation or to otherwise pay for the information solicited except as provided in subsection 31.205-18, Bid and proposal costs, of the Federal Acquisition Regulation
(b) Although "proposal" and "offeror" are used in this Request for Information, your response will be treated as information only it shall not be used as a proposal as defined in $\mathbf{1 5 . 0 0 1}$.
(c) This solicitation is issued for the purpose of [state purpose]
(End of provision)

ISSUE
52215-8 Order of Precedence--Uniform Contract Format

## DISCUSSION

See Discussion in 15 209(h)

## RECOMMENDATION

As prescribed in -15 209(h), insert the following clause-
Order Preedence-Unform Contract Format (Date)

(End of clause)
See Recommendation in 15209 (h)

# MISCELLANEOUS CLARIFICATIONS AND CORRECTIONS 

## TO

PROPOSED FAR PART 15 DATED MAY 14, 1997

The material which follows consists of various clanfications of a minor nature and multiple corrections (typographical, some edits) to enhance the proposed rule. The material has been segregated into Group A and Group B

## GROUP A

Part 1. Change the title of Part 1 from "Federal Acquisitions Regulations System" to "Federal Acquisition Regulation System"
15.000. The rewrite cites " competitive and noncompetitive negotiated acquisitions" (emphasis added). The term "other than competitive" is preferred to the term "noncompetitive", since, for instance, an offer can be noncompetitive (higher price, etc) in a competitive acquisition

In addition, the statement is made in 15000 that "Negotiated procedures may include bargaining". This implies that the procedures have been the subject of a negotiation Recommend that the sentence be reworded to state "Negotiation procedures may include bargaining"
15.002(a). In the first sentence, hyphenate sole-source Hyphenation seems to be inconsistent throughout the rewrite (e g. lowest priced proposal, but higher-priced proposal) Recommend a thorough recheck
15.101-1(a). Suggest rewording this paragraph as follows for clarity
"(a) This process is appropriate when it may be in the best interest of the Government to consider award to [other than the lowest priced offeror] an offeror other than the offeror that submitted the lowest-priced offer "
15.203(a), (e). Need to standardize on ether "at a minimum" or "as a minimum"
15.203(d). Insert a comma between the words "proposals" and "modifications" so that the sentence reads " . . authorize receipt of proposals, modifications or revisions by facsimile"
15.204(c). Recommend this sentence be modified to read. "Contracts for supplies or services
15.204-2(a)(3)(viii). Recommend that the list of respondent information to be provided include also the respondent's e-mall address
15.206(b). Subparagraph (b) allows the contracting officer to use oral notices when time is of the essence, with subsequent formalizing of the notice with an amendment. Recommend that electronic methods be utilized, and that subparagraph (b) include electronic methods in addition to (or in heu of) oral notices Speed and efficiency are maintained, since electronic notices can be sent to all offeror at virtually the same time In addition, the formal amendment to the solicitation could be accomplished electronically
15.206(g). In subparagraph (g) change the references at the end of the subparagraph from 15 208(b) and 15 407(d), to 15.207 (b) and 15 406(e), respectively
15.304(a)(3). In subparagraph (a)(3), delete the colon after "agency" so that the text reads " . such as any agency upcoming solicitations, ."
15.306-2(a)(5). In subparagraph (a)(5), change " 1 s " to "are" so that the text reads " team leader, or key personnel who are critical in achieving . ".
15.309(f)(3). In subparagraph (f)(3), the words to be deleted are not contained in the text of the legend referred to in subparagraph (d)
15.309(h)(3). Subparagraph (h)(3) incorrectly cites FAR 3 104-9 regarding the Procurement Integrity certifications to be obtained, et cetera. The proper citation should be ether (or both) 3.104-4 "Statutory and related prohibitions, restrictions, and requirements" or 3.104-5 "Disclosure, protection, and marking of contractor bid or proposal information and source selection information"
15.403(b)(6). Insert a period in lieu of a comma at the end of (6)
15.404(d)(3)(iii). This paragraph states that past performance need not be evaluated if not appropriate to do so, and cites OFPP Letter 92-5 as the authority. Recommend that, rather than citing the OFPP Policy Letter which is subject to change, the requirement/relief be added to the FAR, making the FAR self-sufficient If the citation of the OFPP Letter was meant as a potential source for the type of contracting officer documentation required, it could be cited as illustrative only.
15.407(b). In order to avoid any misunderstandings about the receipt and contracting officer handing of final proposal revisions which may be late to the established common cut-off date, it is recommended that this paragraph (b) be amended by adding the following sentence at the end of the paragraph "The requirements of 15208 concerning timely submission of offers and the rules for consideration of late offers apply."
$15.606\left(\right.$ a)(4)(ii). In subparagraph (a)(4)(11) change the reference from " $15605(\mathrm{a})(11)^{\prime}$ " to "15605(a)(2)"
15.609(a). Rewrite 53 215-1 (c) prescribes use of the SF 33 in conjunction with award of negotiated contracts, along with OF 307 and SF 26 . However, 15609 (a) and (b) only cover the use of OF 307 and SF 26 to award negotiated contracts It appears that reference to the SF 33 may have been unintentionally omitted in 15 609(a)
52.215-7. The provision regarding Annual Representations and CertificationsNegotiation retains obsolete language. The language in the current clause at 52.215-35 should be used in leu of the language in rewrite clause 52 215-7 The proposed rewrite version of the clause does not reflect changes to the current FAR clause which deleted the requirement to certify to the existence of the annual representations and certifications.

Part 53. Delete the prescription for use of the SF 1411 and SF 1448 from Part 53 of the rewrite (current FAR 53 215-2)

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

## SUBPART 155 - CONTRACT PRICING

## 15500 Scope of subpart.

This subpart prescribes the cost and price negotiation policies and procedures for pricing negotiated prime contracts (including subcontracts) and contract modifications, including modifications to contracts awarded by sealed bidding

### 15.501 Definitions.

Cost or pricing data (10 U S C $2306 \mathrm{a}(\mathrm{h})(1)$ and 41 U S C 254(d)) means all facts that, as of the date of price agreement or, if applicable, anther another date agreed upon between the parties that is as close as practicable to the date of agreement on price, prudent buyers and sellers would reasonably expect to affect price negotiations significantly

> CODSIA ANALYSIS
> CODSIA does not believe the proposed change to "an earlier date" is consistent with the amendments made to Truth in Negotiations Act (TINA) under sections 1207 and 1251 of the Federal Acquisition Streamlining Act of 1994 (FASA) which specifies "another date" The proposed rewrite offered no explanation for the change

> Similar changes were made throughout FAR Subpart 155 and related solicitation provisions and contract clauses

Cost or pricing data are data requiring certification in accordance with 15 506-2 Cost or pricing data are factual, not judgmental, and are verifiable While they do not indicate the accuracy of the prospective contractor's judgment about estimated future costs or projections, they do include the data forming the basis for that judgment Cost or pricing data are more than historical accounting data, they are all the facts that can be reasonably expected to contribute to the soundness of estimates of future costs and to the validity of determmations of costs already incurred They also include such factors as vendor quotations, nonrecurring costs, information on changes in production methods and in production or purchasing volume, data supporting projections of business prospects and objectives and related operations costs, unit-cost trends such as those associated with labor efficiency, make-or-buy decisions, estimated resources to attain business goals, and information on management decisions that could have a significant bearing on costs Cost or prime data may delude parametric estimates of elements-of cost or price, from appropriate validated calibrated parametric models

## CODSIA ANALYSIS

CODSIA disagrees that parametric estimates are cost or pricing data By their nature, estimates produced by this modehng technique will vary from actual results, and the variances are traceable to imperfect assumptions and cause and effect relationships It is unreasonable to view such imperfections as a basis for defective pricing allegations These estimates are necessarily judgmental, they are nether factual nor verifiable Therefore, they are not cost or pricing data As a minimum, this change should be not be part of the Part 15 rewrite project and should, instead, be considered within the broader context of parametric estimating policies and procedures

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

Gestreatism means an assessment of whether or not the costs in an offerer's proposal are realistic for the work to be performed, reflect a clear understandmg of the requirements, and are consistent with the various elements of the offeror's technteal proposal

## CODSIA ANALYSIS

Definition duplicates coverage at FAR 15 504-1(d) Definition should be deleted for same reasons definitions of "commercial item," "cost analysis," field pricing support," "price analysis," and "technical analysis" were deleted


#### Abstract

Discount means a price reduction regularly applied in the normal course of business in accordance with a commercial company's established written policies or customary practices. Examples include purchase volume discounts, reseller discounts, original equipment manufacturer discounts, national account discounts, educational institution discounts, state and local government discounts, etc. Price discounts do not include concessions, such as trade-tns, nonmonetary incentives (egg., extended warranties, free supplies or services); discounts contingent upon other events (e.g., coupons); and temporary promotional discounts (e.g, inventory clearance sales, special marketing incentives).


## CODSIA ANALYSIS

CODSIA has been disappointed that the FAR Council has yet to provide a workable definition of published discounts and unpublished discounts, particularly if the Government persists in imposing a disclosure obligation at FAR 52 215-41 and FAR 52 215-42 This is a high-risk concern to industry because the FAR's ambiguity creates an environment for unfounded allegations of failure to disclose ( 1 e , what is an unpublished discount?)

Forward pricing rate agreement means a written agreement negotiated between a contractor and the Government to make certain rates available during a specified period for use in pricing contracts or modifications Such rates represent reasonable projections of specific costs that are not easily estimated for, identified with, or generated by a specific contract, contract end item, or task These projections may include rates for such things as labor, indirect costs, material obsolescence and usage, spare parts provisioning, and material handling

Forward pricing rate recommendation means a rate set unilaterally by the admınıstratıve contracting officer for use by the Government in negotiations or other contract actions when forward pricing rate agreement negotiations have not been completed or when the contractor will not agree to a forward pricing rate agreement

Information other than cost or pricing data means any type of information that is not required to be certified in accordance with 15 506-2 and is necessary to determine price reasonableness or assess cost realism For example, such information may include pricing, sales, or cost information, and includes cost or pricing data for which certification is determined inapplicable after submission

CODSIA ANALYSIS
See CODSIA comment at FAR 15 503-3
Price, as used in this subpart, means cost plus any fee or profit applicable to the contract type
Subcontract, as used in this subpart, also includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or a subcontractor

# CODSIA ANALYSIS \& RECOMMENDATIONS <br> FAR SUBPART 15.5 REWRITE <br> FAR CASE 95-029 

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

### 15.502 Pricing policy.

Contracting officers shall -
(a) Purchase supplies and services from responsible sources at fair and reasonable prices In establishing the reasonableness of the offered prices, the contracting officer shall not obtain more information than is necessary To the extent that cost or pricing data are not required by $15503-4$, the contracting officer shall generally use the following order of preference in determining the type of information required
(1) No additional information from the offeror, if the price is based on adequate price competition, except as provided by 15 503-3(b)
(2) Information other than cost or pricing data
(1) Information related to prices (e g , established catalog or market prices), relying first on information available within the Government, second, on mformation obtained from sources other than the offeror, and, if necessary, on information obtained from the offeror When obtaining information from the offeror is necessary, unless an exception under 15 503-1(b) (1) or (2) applies, such information submitted by the offeror shall include, at a minimum, appropriate information on the prices at which the same or similar items have been sold previously, adequate for evaluate determining the reasonableness of the price

> | CODSIA ANALYSIS |
| :--- |
| See CODSIA comment at FAR $15503-3$ |

(ii) Cost information, that does not meet the definition of cost or pricing data at 15501
(3) Cost or pricing data The contracting officer should use every means available to ascertain whether a fair and reasonable price can be determined before requesting cost or pricing data Contracting officers shall not require unnecessarily the submission of cost or pricing data, because it leads to increased proposal preparation costs, generally extends acquisition lead-time, and consumes additional contractor and Government resources
(b) Price each contract separately and independently and not -
(1) Use proposed price reductions under other contracts as an evaluation factor, or
(2) Consider losses or profits realized or anticipated under other contracts
(c) Not include in a contract price any amount for a specified contingency to the extent that the contract provides for a price adjustment based upon the occurrence of that contingency

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(d) When acquiring a commercial item, the contracting officer shall seek a price that is fair and reasonable based on prices at which same or similar items have been sold in the commercial market with appropriate consideration given to differences in terms, conditions, and circumstances. The contracting officer shall not require the offeror to ether propose or agree to the lowest price at which a commercial teem was sold or will be sold to the general public Solicitation notices and contract clauses which impose most favored customer pricing are prohibited.

> CODSIA ANALYSIS
> CODSIA continues to recommend strongly that the DAR Council and CAA Council adopt a rule which makes it clear that the contracting officer should not seek or otherwise require commercial companies to offer or accept most favored customer pricing terms However, an offeror may volunteer to provide most favored customer pricing The Government's pricing goal should be "fair and reasonable," as with all other Government procurements This is a significant risk area for commercial companies which, as yet, has not been adequately dealt with by the Government
15.503 Obtaining cost or pricing data (10 U.S C. $2306 a$ and 41 U.S.C. 254b)

15 503-1 Prohibition on obtaining cost or pricing data (10U.S.C. 2306a-and-41 U.S.C. 254b)
(a) Cost or pricing data should not be obtained for contract actions below the pertinent threshold at 15.5034(a)(1). However, the head of the contracting activity, without power of delegation, may authorize the contracting officer to obtain cost or pricing data below the pertinent threshold upon making a written finding that cost or pricing data are necessary to determine whether the price is fair and reasonable and the facts supporting that finding. Cost or pricing data shall not be obtained for acquisitions at or below the simplified acquisition threshold

## CODSIA ANALYSIS

CODSIA recommends relocating provision at 15 503-4(a)(2) to the list of prohibitions under 15 503-1 in order to make it clear that obtaining cost or pricing data below the TINA threshold is prohibited, unless the HCA makes a written determination that such data is necessary
(b) Exceptions to cost or pricing data requirements The contracting officer shall not require submission of cost or pricing data to support any contract action(centrats, subeentracts, or medificatens) (but may require information other than cost or pricing data to support a determination of price reasonableness or assess cost realism) -

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    CODSIA ANALYSIS
"Contract action" has already been defined at FAR 2 101
See CODSIA comment at FAR 15 503-3
```

(1) When the contracting officer determines that prices agreed upon are based on adequate price competition (see standards at paragraph (c)(1) of this subsection),
(2) When the contracting officer determines that prices agreed upon are based on prices set by law or regulation (see standards at paragraph (c)(2) of this subsection),

## CODSIA ANALYSIS \& RECOMMENDATIONS <br> FAR SUBPART 155 REWRITE <br> FAR CASE 95-029

## CODSLA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(3) When a commercial item is being acquired (see standards at paragraph (c)(3) of this subsection),
(4) When a waiver has been granted (see standards at paragraph (c)(4) of this subsection), or
(5) When modifying a contract or subcontract for commercial items (see standards at paragraph (c)(3) of this subsection)
(c) Standards for exceptions from cost or pricing data requirements - (1) Adequate price competition A price is based on adequate price competition if -
(1) Two or more responsible offerors, competing independently, submit priced offers response responsive to the Government's expressed requirement and if -

## CODSIA ANALYSIS

CODSIA is concerned that the proposed change alters an established meaning of adequate price competition It has been generally understood that an offeror's proposal must be capable of being accepted by the Government Merely responding to the solicitation has not been sufficient
(A) Award will be made the offeror whose proposal represents the best value where Price is a substantial factor in source selection the award decision, and

> CODSIA recommends that the DAR Council and CAA Council adopt the Comptroller General's long-standing position that price must be a substantial factor in the award decision
(B) There is no finding that the price of the otherwise successful offeror is unreasonable Any finding that the price is unreasonable must be supported by a statement of the facts and approved at a level above the contracting officer,
(11) There was a reasonable expectation, based on market research or other assessment, that two or more responsible offerors, competing independently, would submit priced offers response responsive to the solicitation's expressed requirement, even though only one offer is received from a responsible offeror and if -
(A) Based on the offer received, the contracting officer can reasonably conclude that the offer was submitted with the expectation of competition, eg, circumstances indicate that-
(1) The offeror believed that at least one other offeror was capable of submitting a meanmgfut responsive offer, and
(2) The offeror had no reason to believe that other potential offeror did not intend to submit an offer, and
(B) The determination that the proposed price is based on adequate price competition and is reasonable and is approved at a level above the contracting officer, or

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(iii) Price analysis clearly demonstrates that the proposed price is reasonable in comparison with current or recent prices for the same or similar items, adjusted to reflect changes in market conditions, economic conditions, quantities, or terms and conditions under contracts that resulted from adequate price competition
(2) Prices set by law or regulation Pronouncements in the form of periodic rulings, reviews, or similar actions of a governmental body, or embodied in the laws are sufficient to set a price
(3) Commercial teems Any acquisition for an them that meets the $a$ commercial item definition in 2 101, or any modification, as defined in paragraph (e) (1) or (2) of that definition, that does not change the tom from-a commerctaltem anemerethe is exempt from the requirement for cost or pricing data Also exempt are modifications to contracts for commercial items, exempted under this section, as long as the modification does not change the contract to an acquisition of a noncommercial item

## CODSIA ANALYSIS

Rewrite confuses the meanings of product modification and contract modification Both were expressly addressed by FASA
(4) Waivers The head of the contracting activity (HCA) may, without power of delegation, waive the requirement for submission of cost or pricing data in exceptional cases The authorization for the waiver and the supporting rationale shall be in writing The HCA may to be fair and reasonable without submission of cost or pricing data For example, if cost or pricing data were furnished on previous production buys and the contracting officer determines such data are sufficient, when combined with updated information, a waiver may be granted If the HCA has waived the requirement for submission of cost or pricing data, the contractor or higher-tier subcontractor to whom the waiver relates shall be considered as having been required to provide cost or pricing data Consequently, award of any lower-tier subcontract expected to exceed the cost or pricing data threshold requires the submission of cost or pricing data unless an exception otherwise applies to the subcontract or the waiver specifically includes that subcontract

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

## 15503-2 9 thererreumstances where east or prieng data are not required.

## (a) The exercise of an option -at the price established at contract award or mittrat negotiation does not require submision-of cost or pricing data

(b) Gest or prying data are net required for proposals used solely for overrun fundeng-or interim billing price adjustments

## CODSIA ANALYSIS

The examples provided are obvious instances where cost or pricing data are not required and do not warrant expressed coverage CODSIA is concerned that examples might be misinterpreted as the only circumstances There certainly are many other instances which could be listed (e $g$, meremental funding actions, structuring contract financing arrangements, CAS cost impact analyses, preparation of Government budget estimates, etc )

Renumbering of succeeding provisions is assumed

### 15.503-3 Requiring information other than cost or pricing data.

(a) General (1) The contracting officer is responsible for obtaining information that is adequate for evaluating determining the reasonableness of the price or detemmme assessing cost realism However, the contracting officer should not obtain more information than is necessary for determining the reasonableness of the price or evaluating assessing cost realism To the extent necessary to determine the reasonableness of the price the contracting officer shall require submission of information from the offeror Unless an exception under 15 503-1(b) (1) or (2) applies, such information submitted by the offeror shall include, at a minimum, appropriate information on the prices at which the same item or similar items have previously been sold, adequate for determining the reasonableness of the price (10USG-2306a(d)(1) and -41 USG-254b(0)(2))

## CODSIA ANALYSIS

CODSIA urges the DAR Council and CAA Council to exercise greater care in maintaining a consistency in terms related to the concepts of price reasonableness, cost realism, cost analysis, and price analysis In several places the proposed rewrite creates confusion, and this will no doubt lead to conflicts over required data, access to records, and audit rights

Similar changes were made throughout FAR Subpart 155
(2) The contractor's format for submitting such information should be used (see 15 503-5(b)(2))
(3) The contracting officer shall ensure that information used to support price negotiations is sufficiently current to permit negotiation of a fair and reasonable price Requests for updated offeror information should be limited to information that affects the adequacy of the proposal for negotiations, such as changes in price lists Such data shall not be certified in accordance with 15 506-2

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(b) Adequate price competition When adequate price competition exists (see 15 503-1(c)(1)), generally no additional information is necessary to determine the reasonableness of price However, if there are unusual circumstances where it is concluded that additional information is necessary to determine the reasonableness of price, the contracting officer shall, to the maximum extent practicable, obtain the additional information from sources other than the offeror In addition, the contracting officer may request information to determme assess the cost realism of competing offers or to evaluate competing approaches

## CODSIA ANALYSIS

CODSIA appreciates efforts to add clarity to the Government's intent to restrict submission of cost or pricing data or information other than cost or pricing data where adequate price competition is expected This continues to be a problem in private industry, especially in the area of cost realism (see CODSIA comment at FAR 15 504-1(d))
(c) Limitations relating to commercial items ( $10 U S \in 2306 a(d)(2)$ and 41 US $-254 \mathrm{~b}(\mathrm{~d})$ ) (1) Requests for sales data relating to commercial items shall be limited to data for the same or similar items during a relevant time period
(2) The contracting officer shall, to the maximum extent practicable, limit the scope of the request for information relating to commercial items to include only information that is in the form regularly maintained by the offeror as part of its commercial operations

## (3) The contracting officer shall not require an offeror to disclose or otherwise represent as accurate the lowest prices paid to the offeror by the general public for same or similar items.

> CODSIA ANALYSIS
> CODSIA urges the DAR Council and CAA Council to clarify that, consistent with the provisions at FAR 52 215-41, an offeror is not compelled to disclose its lowest prices, especially for customer classes and circumstances unrelated to the Government's position as a purchaser (e g, reseller, original equipment manufacturer) This is a high-risk concern to industry because many companies do not have the infrastructure necessary to identify the lowest prices paid on individual transactions
(4) Information obtained relating to commercial teems that is exempt from disclosure under the Freedom of Information Act (5 U S C 552(b)) shall not be disclosed outside the Government

### 15.503-4 Requiring cost or pricing data (10-U.S.C. 2306a-and-41-U.S.C. 254b)

(a)(1) Cost or pricing data shall be obtained only if the contracting officer concludes that none of the exceptions in 15 503-1(b) applies However, if the contracting officer has sufficient information available to determine price reasonableness, then a waiver under the exception at $15503-1(b)(4)$ should be considered The threshold for obtaining cost or pricing data is $\$ 500,000$ Unless an exception applies, cost or pricing data are required before accomplishing any of the following actions expected to exceed the current threshold or, in the case of existing contracts, the threshold specified in the contract
(1) The award of any negotiated contract (except for undefinitized actions such as letter contracts)

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(11) The award of a subcontract at any tier, if the contractor and each higher-tier subcontractor have been required to furnish cost or pricing data (but see waivers at 15 503-1(b)(4))
(iii) The modification of any sealed bid or negotiated contract (whether or not cost or pricing data were initially required) or any subcontract covered by paragraph (a)(1)(1) of this subsection Price adjustment amounts shall consider both increases and decreases (e $\mathrm{g}, \mathrm{a} \$ 150,000$ modification resulting from a reduction of $\$ 350,000$ and an increase of $\$ 200,000$ is a pricing adjustment exceeding $\$ 500,000$ ) This requirement does not apply when unrelated and separately priced changes for which cost or pricing data would not otherwise be required are included for administrative convenience in the same modification Negotiated final pricing actions (such as termination settlements and total final price agreements for fixed-price incentive and redeterminable contracts) are contract modifications requiring cost or pricing data if the total final price agreement for such settlements or agreements exceeds the pertinent threshold set forth at paragraph (a)(1) of this subsection, or the partial termination settlement plus the estimate to complete the continued portion of the contract exceeds the pertinent threshold set forth at paragraph (a)(1) of this subsection (see 49 105(c)(15))
(2) Unless prohibited because an exception at $15-503$-1 (b) applies, the he od of the contracting activity, without power of delegation, may authorize the contracting officer to octan cost prem data for prong actions below the pertinent threshold in paragraph (a)(1) of thesubsectron, provided the action weeds the-smpllfied acquisition threshold The head the contracting activity shall justify the requirement for cost or price data-The documentation shall melude a written finding that east or pricing data are necessary to determine whether the price is far and reasonable and the facts supporting that finding

> CODSIA ANALYSIS
> CODSIA recommends relocating provision at 15503 -4(a)(2) to 15503 -1(a) in order to make it clear that cost or pricing data should not be required below the TINA threshold
(b) When cost or pricing data are required, the contracting officer shall require the contractor or prospective contractor to submit to the contracting officer (and to have any subcontractor or prospective subcontractor submit to the prime contractor or appropriate subcontractor tier) the following in support of any proposal
(1) The cost or pricing data
(2) A certificate of current cost or pricing data, in the format specified in $15506-2$, certifying that to the best of its knowledge and belief, the cost or pricing data were accurate, complete, and current as of the date of agreement on price or, if applicable, another date agreed upon between the parties that is as close as practicable to the date of agreement on price
(c) If cost or pricing data are requested and submitted by an offeror, but an exception is later found to apply, the data shall not be considered cost or pricing data as defined in 15501 and shall not be certified in accordance with 15 506-2
(d) The requirements of this section also apply to contracts entered into by an agency on behalf of a foreign government

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

15.503-5 Instructions for submission of cost or pricing data or information other than cost or pricing data.
(a) Taking into consideration the policy at 15502 , the contracting officer shall speofy insert the solicitation provision at 52.215-41 and contract clause at 52.215-42 in the solicitation (see 15508 (1) and (m)) when ether cost or pricing data or information other than cost or pricing data is required.
(1) Whether cost or pricing data are required,
(2) That, in leu of submittmy cost or pricing data, the offeror may submit a request for exception from the requirement to submit cost or proud data,
(3) Any-mformation other than cost or priemg data that is required, and
(4) Necessary preaward or postaward access to offeror's records

## CODSIA ANALYSIS

CODSIA is greatly concerned with the structure of any policy that allows the contracting officer to determine the extent of access to records and audit rights Coupled with the proposed elimination of Table 15-3 and Standard Form 1448, the proposed rewrite obscures the bright-line test which was created as a result of FASA See CODSIA's proposed FAR 15 503-6
(b)(1) Unless required to be submitted on one of the termination forms specified in subpart 496 , the contracting officer may require submission of cost or pricing data in the format indicated at Table 15-2 of 15 508, specify an alternative format, or permit submission in the contractor's format
(2) Information other than cost or pricing data may be submitted in the offeror's own format unless the contracting officer decides that use of a specific format is essential and the format has been described in the solicitation

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

### 15.503-6 Access to records and audit rights.

(a) Where cost or pricing data are submitted, the contracting officer or an authorized representative has the right to examine books, records, documents, or other directly pertinent records to evaluate the accuracy, completeness, and currency of the cost or pricing data for a period ending 3 years after final payment under the contract (see 52.214-26 and 52.215-2).
(b) Where information other than cost or pricing data are submitted, the contracting officer or an authorized representative has the limited right to examine, at any time before award, books, records, documents, or other directly pertinent records to verify any request for an exception under this provision and the reasonableness of price (see 52 215-41 and 52.215-42). Access does not extend to cost or profit information or other data relevant solely to the offeror's determination of the prices to be offered in the catalog or marketplace.

## CODSIA ANALYSIS

Although CODSIA understands and supports the FAR rewrite goals to be economical in wording, this is one area where clarity is absolutely critical Heretofore, the Governments policies and procedures have been fractured and inconsistent We recognize that the principle embodied here, while reflected elsewhere in the FAR, warrants specific attention in the context of 155 This is a high-risk concern to industry
15.504 Proposal analysis.
15.504-1 Proposal analysis techniques
(a) General The objective of proposal analysis is to ensure that the finatagreed-te agreed upon price is fair and reasonable
(1) The contracting officer is responsible for evaluating determining the reasonableness of the offered prices The analytical techniques and procedures described in this section may be usedsengly or m combmaten with others, to ensure that the final agreed upon price is fair and reasonable The complexity and circumstances of each acquisition should determine the level of detail of the analysis required
(2) Price analysis shall be used when cost or pricing data are not required (see paragraph (b) of this subsection and 15 504-3)
(3) Cost analysis shall be used to evaluate the reasonableness of individual cost elements when cost or pricing data are required When appropriate, price analysis shall be used to verify that the overall price offered is fair and reasonable

## CODSIA ANALYSIS

CODSIA agrees with proposal but wishes to note this changes a long-standing policy that price analysis is always performed As presented, when would a price analysis be appropriate?

## CODSLA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

## (4) Cost anatysis may also be \#sed to evaluate informan other than cost or pricmig data determmecest reasenableness or cost reatcm

CODSIA ANALYSIS<br>As written, this guidance is meaningless and will confuse the relationships between cost analysis and information other than cost or pricing data Moreover, it farls to adequately drfferentiate between a cost analysis and cost realism assessment A clear differentiation is important because it affects provisions on TINA, CAS, access to records, and audit rghts<br>Renumbering of succeeding provisions is assumed

(5) The contracting officer may request the advice and assistance of other experts to assure an appropriate analysis is performed
(6) Recommendations or conclusions regarding the Government's review or analysis of an offeror's or contractor's proposal shall not be disclosed to the offeror or contractor without the concurrence of the contracting officer Any discrepancy or mistake of fact (such as duplications, omissions, and errors in computation) contaned in the cost or pricing data or information other than cost or pricing data submitted in support of a proposal shall be brought to the contracting officer's attention for appropriate action
(7) The Arr Force Institute of Technology (AFIT) and the Federal Acquisition Institute (FAI) jontly prepared a series of five desk references to guide pricing and negotiation personnel The five desk references are Price Analysis, Cost Analysis, Quantitative Technıques for Contract Pricing, Advanced Issues in Contract Pricing, and Federal Contract Negotiation Techniques The references provide detailed discussion and examples applying pricing policres to pricing problems They are to be used for instruction and professional guidance However, they are not directive and should be considered informational only Copies of the desk references are available on CD-ROM which also contans the FAR, the FTR and varıous other regulatons and traming matertals The CD-ROM may be purchased by annual subscription (updated quarterly), or undividually (reference "List ID GSAFF," Stock No 722-009-0000-2) The individual CD-ROMs or subscription to the CD-ROM may be purchased from the Superintendent of Documents, U S Government Printing Office, by telephone (202) 512-1800 or facsimıle (202) 512-2550, or by mail order from the Superintendent of Documents, PO Box 371954, Pittsburgh, PA 15250-7954 Free copies of the desk references are avalable on the World Wide Web, Internet address
http $/ / \mathrm{www}$ gsa gov/staff/v/guides/instructions htm
(b) Price analysis (1) Price analysis is the process of examining and evaluating a proposed price wthout evaluating its separate cost elements and proposed profit
(2) The Government may use various price analysis techniques and procedures to ensure a far and reasonable price, given the circumstances surrounding the acquisition Examples of such techniques include, but are not lumited to the following
(i) Comparison of proposed prices received in response to the solicitation
(ii) Comparison of previously proposed prices and contract prices with current proposed prices for the same or simular end items, if both the valdity of the comparison and the reasonableness of the previous price(s) can be established

## CODSLA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(iii) Apphcation of rough yardsticks (such as dollars per pound or per horsepower, or other units) to highlight significant inconsistencies that warrant additional pricing inquiry
(iv) Comparison with competitive published price lists, published market prices of commodities, similar indexes, and discount or rebate arrangements
(v) Comparison of proposed prices with independent Government cost estimates
(vi) Comparison of proposed prices with prices obtained through market research for the same or similar items
(c) Cost analysis (1) Cost analysis is the review and evaluation of the separate cost elements and profit in an offeror's or contractor's proposal (eluding cost prong or information ether the cost or prong data), and the application of judgment to determine how well the proposed costs represent what the cost of the contract should be, assuming reasonable economy and efficiency
(2) The Government contracting officer may use various cost analysis techniques and procedures to ensure a far and reasonable price, given the circumstances of the acquisition Such techniques and procedures include the following
(1) Verification of cost or pricing data and evaluation of cost elements, including -
(A) The necessity for, and reasonableness of, proposed costs, including allowances for contingencies,
(B) Projection of the offeror's cost trends, on the basis of current and historical cost or pricing data,
(C) Reasonableness of estimates generated by appropriately validated/calibrated parametric models or costestimating relationships, and
(D) The application of audited or negotiated indirect cost rates, labor rates, and cost of money or other factors
(il) Evaluating the effect of the offeror's current practices on future costs In conducting this evaluation, the contracting officer shall ensure that the effects of inefficient or uneconomical past practices are not projected into the future In pricing production of recently developed complex equipment, the contracting officer should perform a trend analysis of basic labor and materials, even in periods of relative price stability
(iii) Comparison of costs proposed by the offeror for individual cost elements with -
(A) Actual costs previously incurred by the same offeror,
(B) Previous cost estimates from the offeror or from other offeror for the same or similar items,
(C) Other cost estimates received in response to the Government's request,
(D) Independent Government cost estimates by technical personnel, and
(E) Forecasts of planned expenditures


## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(iv) Verification that the offeror's cost submissions are in accordance with the contract cost principles and procedures in part 31 and, when applicable, the requirements and procedures in 48 CFR Chapter 99 (Appendix of the FAR looseleaf edition), Cost Accounting Standards
(v) Review to determune whether any cost or pricing data necessary to make the contractor's proposal accurate, complete, and current have not been either submitted or identified in writing by the contractor If there are such data, the contracting officer shall attempt to obtan them and negotiate, using them or making satisfactory allowance for the incomplete data
(vi) Analysis of the results of any make-or-buy program reviews, in evaluating subcontract costs (see 15 507-2)
(d) Cost realism andysts assessment (1) Cost realism analyss assessment is the process of independently reviewing and evaluating specific elements of each offeror's proposed cost estimate to determine whether the estumated propesed cost elements are realistic for the work to be performed, reflect a clear understanding of the requirements, and are consistent with the unique methods of performance and materials described in the offeror's technical proposal Cost realsm does not equate to the Government's estumate of most probable cost.
(2) Cost realism analyses assessments shall be performed on signfficant competitive cost-rembursement contracts to determme the probable of performance for oach offerer
(1) The probable cost may differ from the proposed cest and should reflect the Government's best estimate of the eest of any contract that is mest likely to result from the efferer's propesal. The probable cest shall be used for purpeses of evaluation to determme the best value-
(11) The probable cost is determmed by adjusting ench efferor's proposed cost, and foe when appreprrate, to reflect any additions or reductions in cost elements to realistic levels based on the results of the cost realism analysis

## CODSIA ANALYSIS

The purpose of a cost realism assessment should not be to determine the probable cost of performance (or life cycle cost) and best value Those are distunctly different concepts and have no role in determining whether an offeror understands the solictation requrements The purpose of cost realism is adequately stated in FAR 15 504-1(d)(1)

## CODSLA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(3) Cost reatum analyses may also be used on compettive fixed pree neentwe contractsof, in exceptral cases; en other competitive fived price-type contraets when new requrrements may not be fully wndersteod by cempeting efferofs, there are quality concerns, or pace oxperfence indicates that contructers' proposedcosts have resulted m quality or servee sharfalls-Results of the analysif may be used in performaneo risk assessments and respensibulty determmations However, propesals shall be waluaturing the criterta in the seltertation, and the offered prices shall not be adjusted as result of the analysis-

> CODSIA ANALYSIS
> Cost realism is beng confused with a past performance evaluation which should not require the submission of information other than cost or pricing data Furthermore, the DAR Council and CAA Council should not apply cost realism to firm fixed price contracts unless and until the CAS Board has exempted firm fixed price contracts that do not involve the submission of certified cost or pricing data CODSIA was disapponted that, despite its repeated suggestions, the activites of the FAR Councll (or FASA umplementation teams) and the CAS Board have not been adequately coordnated This lack of coordination has led to a weill-known problem where firm fixed pice contracts have been exempted from TINA but not CAS For many companies, CAS is a key criterion for declnng Government business

## (3) Cost realsm assessments shall not be performed on contracts for commercial tems.

## CODSIA ANALYSIS

The provision on cost realism should be clarified to state that such assessments shall not be made on contracts for commercial items The acceptance of a commercial item in the marketplace should be sufficient to satisfy the concerns expressed in FAR 15 504-1(d)(1)
(e) Technical analysis (1) The contracting officer may request that personnel having specialized knowledge, skills, experience, or capability in engineering, science, or management perform a technical analysis of the proposed types and quantities of materials, labor, processes, special tooling, facilities, the reasonableness of scrap and spoilage, and other associated factors set forth in the proposal(s) in order to determine the need for and reasonableness of the proposed resources, assuming reasonable economy and efficiency
(2) At a minimum, the technical analysis should examine the types and quantites of material proposed and the need for the types and quantittes of labor hours and the labor mix Any other data that may be pertinent to an assessment of the offeror's ability to accomplish the technical requirements or to the cost or price analysis of the service or product being proposed should also be included in the analysis
(f) Unit prices (1) Unit prices shall reflect the intrinsic value of an item or service and shall be in proportion to an item's base cost (e g , manufacturing or acquisition costs) Any method of distributing costs to line items that distorts the unit prices shall not be used For example, distributing costs equally among line items is not acceptable except when there is Itttle or no varration in base cost

## CODSLA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(2) Except for the acqustion of comerctal items Contracting officers shall require that offerors identify in their proposals those items of supply that they will not manufacture or to which they will not contribute significant value, unless adequate price competition is expected ( 10 U S C 2304 and 41 U S C $254(\mathrm{~d})(5)(\mathrm{A})(1)$ ) Such information shall be used to determine whether the intrinsic value of an item has been distorted through application of overhead and whether such items should be considered for breakout The contracting officer may require such information in all other negotiated contracts when appropriate

## (3) This secton does not apply to contracts for commercial items.

> CODSIA ANALYSIS
> CODSIA suggests revision so that it is clear that all FAR 15 504-1(f) does not apply to contracts for commercial items
(g) Unbalanced pricing (1) Unbalanced pricing may increase performance risk and could result in payment of unreasonably high prices Unbalanced pricing exists when, despite an acceptable total evaluated price, the price of one or more contract line items is significantly over or understated as indicated by the application of cost realusm assessments or price analysis techntques The greatest risks associated with unbalanced pricing occur when -

## CODSIA ANALYSIS

CODSIA finds this substantially rewritten provision to be very confusing (e g , over or understated compared to what') This change will relate the assessment back to previously defined methods of evaluation
(1) Startup work, mobilization, first articles, or first article testing are separate line items,
(i1) Base quantities and option quantities are separate line items, or
(ii1) The evaluated price is the aggregate of estimated quantities to be ordered under separate line items of an indefinite-delivery contract
(2) All offers with separately priced line items or subline items shall be analyzed to determine of the prices are unbalanced If cost or price analysis techniques indicate that an offer is unbalanced, the contracting officer shall -
(i) Consider the risks to the Government associated with the unbalanced pricing in determung the competitive range and in making the source selection decision, and
(11) Consider whether award of the contract will result in paying unreasonably high prices for contract performance
(3) An offer may be rejected of the contracting officer determines the lack of balance poses an unacceptable risk to the Government

## CODSLA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

### 15.504-2 Information to support proposal analysis.

(a) Field pricing assistance (1) The contracting officer should request field pricing assistance when the information available at the buying activity is inadequate to determine a fair and reasonable price Such requests shall be tailored to reflect the minimum essential supplementary information needed to conduct a technical or cost or pricing analysis
(2) Field pricing assistance generally is directed at obtaining technical, audit, and special reports associated with the cost elements of a proposal, including subcontracts Field pricing assistance may also include information relative to the business, technical, production or other capabilities and practices of an offeror The type of information and level of detail requested will vary in accordance with the specialized resources available at the buying activity and the magnitude and complexity of the required analysis
(3) When field pricing assistance is requested, contracting officers are encouraged to team with appropriate field experts throughout the acquisition process, including negotiations Early communication with these experts will assist in determining the extent of assistance required, the specific areas for which assistance is needed, a realistic review schedule, and the information necessary to perform the review
(4) When requesting field pricing assistance on a contractor's request for equitable adjustment, the contracting officer shall provide the information listed in 43 204(b)(5)
(5) Field pricing information and other reports may include proprietary or source selection information (see 3 104-4 (I) and (k)) Such information shall be appropriately identified and protected accordingly
(b) Reporting field pricing information (1) Depending upon the extent and complexity of the field pricing review, results, including supporting rationale, may be reported directly to the contracting officer orally, in writing, or by any other method acceptable to the contracting officer
(i) Whenever circumstances permit, the contracting officer and field pricing experts are encouraged to use telephonic and/or electronic means to request and transmit pricing information
(ii) When it is necessary to have written technical and audit reports, the contracting officer shall request that the audit agency concurrently forward the audit report to the requesting contracting officer and the administrative contracting officer ( ACO ) The completed field pricing assistance results may reference audit information, but need not reconcile the audit recommendations and technical recommendations A copy of the information submitted to the contracting officer by field pricing personnel shall be provided to the audit agency
(2) Audit and field pricing information, whether written or reported telephonically or electronically, shall be made a part of the official contract file (see $4807(f)$ )
(c) Audit assistance for prime or subcontracts (1) The contracting officer may contact the cognizant audit office directly, particularly when an audit is the only field pricing support required The audit office shall send the audit report, or otherwise transmit the audit recommendations, directly to the contracting officer
(1) The auditor shall not reveal the audit conclusions or recommendations to the offeror/contractor without obtaining the concurrence of the contracting officer However, the auditor may discuss statements of facts with the contractor
(ii) The contracting officer should be notified immediately of any information disclosed to the auditor after submission of a report that may significantly affect the audit findings and, if necessary, a supplemental audit report shall be issued


## CODSIA RECOMMENDATIONS SHOWN IN BOLDITTALICS

(2) The contracting officer shall not request a separate preaward audit of indirect costs unless the information already available from an existing audit, completed withm the preceding 12 months, is considered inadequate for determining the reasonableness of the proposed indirect costs ( 41 U S C 254 d and 10 U S C 2313)
(3) The auditor is responsible for the scope and depth of the audit Copies of updated information that will sıgnificantly affect the audit should be provided to the auditor by the contracting officer
(4) General access to the offeror's books and financial records is limited to the auditor This limitation does not preclude the contracting officer or the ACO , or their representatives from requesting that the offeror provide or make available any data or records necessary to analyze the offeror's proposal
(d) Deficient proposals The ACO or the auditor, as appropriate, shall notify the contracting officer ummediately if the data provided for review is so deficient as to preclude review or audit, or if the contractor or offeror has denied access to any cost or pricing data considered essential to conduct a satisfactory review or audit Oral notifications shall be confirmed promptiy in writing, meluding a description of deficient or denied data or records The contracting officer immedately shall take appropriate action to obtain the required data Should the offeror/contractor again refuse to provide adequate data, or provide access to necessary data, the contracting officer shall withhold the award or price adjustment and refer the contract action to a higher authority, providing details of the attempts made to resolve the matter and a statement of the practicability of obtaining the supplies or services from another source
(e) Subcontractor refusal to grant access to records. The contracting officer shall be informed of circumstances where a prime contractor or higher-tier subcontractor has been denied access to subcontractor records, including the subcontractor's reasons In such cases, the contractung officer shall determine the necessary field pricing assistance to be performed directly by the Government. Upon completion of the field pricung assistance, the contracting officer shall disclose the results to the prime contractor or higher-tter subcontractor only after obtaining permussion from the subcontractor. If the subcontractor withholds permussion on disciosure, the contracting officer shall perform a cost analysis or price anaiysis and provide general results to the prime contractor or higher-tter subcontractor without disclosing subcontractor propritary data (e.g., range of fair and reasonable prices). If the subcontractor requested an exception under 15 503-1(b), the contractung officer shall mdicate to the prime contractor or higher-tier subcontractor whether the exception is approved.

## CODSIA ANALYSIS

CODSIA does not agree that the long-standing policy on subcontractor refusal to grant a higher-tier subcontractor access to records, previously described at FAR 15 806-3(a)(3), is understood well enough to be removed This guidance was highly relevant, especially as competitors began teaming on particular projects but had to substantially limit access to records In this case, it has been recognized that the Government's interests would be served if the Government intervened and performed field pricing actions on behalf of the prime contractor or higher-tier contractor CODSIA urges the DAR Council and CAA Council to retan this policy

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

### 15.504-3 Subcontract pricing considerations

(a) The contracting officer is responsible for the determination of price reasonableness for the prime contract, including subcontracting costs The contracting officer should consider whether a contractor or subcontractor has an approved purchasing system, has performed cost or price analysis of proposed subcontractor prices, or has negotated the subcontract prices before negotiation of the prime contract, in determining the reasonableness of the prime contract price This does not relieve the contracting officer from the responsibility to analyze the contractor's submission, meluding subcontractor's cost or pricing data
(b) The prime contractor or subcontractor shall -
(1) Conduct appropriate cost or price analyses to establish the reasonableness of proposed subcontract prices,
(2) Include the results of these analyses the price propeal as part of its own cost or pricing data submission, and
(3) When required by paragraph (c) of this subsection, submit subcontractor cost or pricing data to the Government as part of its

| CODSIA ANALYSIS |
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| CODSIA recommends that the present language of 15 504-3(b)(2) and (3) be |
| retained This will acknowledge the very real situations where it is not feasible |
| to submit all required data at the time of inital price proposal submission and |
| where subcontract price analyses and subcontract cost or pricmg data |
| traditionally are provided with the prime contractor's cost or pricing data |
| submissions |

(c) Any contractor or subcontractor that is required to submit cost or pricing data also shall obtain and analyze cost or pricing data before awarding any subcontract, purchase order, or modification expected to exceed the cost or pricing data threshold, unless an exemptron in $15503-1(\mathrm{~b})$ applies to that action
(1) The contractor shall submet forward, or cause to be submited forwarded by the subcontractor(s), cost or pricing data to the Government for subcontracts that are the lower of etther -
(1) $\$ 10,000,000$ or more, or
(ii) Both more than the pertment cost or pricing data threshold and more than 10 percent of the prime contractor's proposed price, unless the contracting officer believes such submission is unnecessary
(2) The contractung officer may require the contractor or subcontractor to submit forward to the Government (or cause sumssion forwarding of) subcontractor cost or pricing data below the thresholds in paragraph (c)(1) of this subsection that the contracting officer considers necessary for adequately pricing the prime contract
(3) Subcontractor cost or pricing data shall be submitted in the format provided in Table 15-2 of 15508

## CODSLA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(4) Subcontractor cost or pricing data shall be current, accurate, and complete as of the date of price agreement, or, if applicable, an earlef another date agreed upon by the parties and specified on the contractor's Certificate of Current Cost or Pricing Data The contractor shall update subcontractor's data, as appropriate, during source selection and negotiations
(5) If there is more than one prospective subcontractor for any given work, the contractor need only submit cost or pricing data for the prospective subcontractor most likely to recerve award to the Government
15.504-4 Profit.
(a) General This section prescribes policies for establishing the profit or fee portion of the Government prenegotiation objective in price negotiations based on cost analysis Thas section does not apply to contracts for commercial items.

> | CODSIA ANALYSIS |
| :--- |
| CODSIA's suggests revision so that it is clear that FAR $15504-4$ does not apply |
| to contracts for commercial items This is made necessary as a result of |
| combining FAR Subparts 157,158 , and 159 |

(1) Profit or fee prenegotation objectives do not necessarily represent net uncome to contractors Rather, they represent that element of the potential total remuneration that contractors may receive for contract performance over and above allowable costs This potential remuneration element and the Government's estimate of allowable costs to be incurred in contract performance together equal the Government's total prenegotation objective Just as actual costs may vary from estmated costs, the contractor's actual realized profit or fee may vary from negothated profit or fee, because of such factors as efficiency of performance, incurrence of costs the Government does not recognize as allowable, and the contract type
(2) It is in the Government's interest to offer contractors opportunties for financial rewards sufficient to stimulate efficient contract performance, attract the best capabilttes of qualified large and small business concerns to Government contracts, and mantain a viable industrial base
(3) Both the Government and contractors should be concerned with profit as a motivator of efficient and effective contract performance Negotiations amed merely at reducing prices by reducing profit, without proper recognition of the function of profit, are not in the Government's interest Negotiation of extremely low profits, use of historical averages, or automatic application of predetermmed percentages to total estumated costs do not provide proper motivation for optımum contract performance
(b) Policy (1) Structured approaches (see paragraph (d) of this subsection) for determinung profit or fee prenegotiation objectives provide a discipline for ensuring that all relevant factors are considered Subject to the authorities in 1301 (c), agencles making noncompetitive contract awards over $\$ 100,000$ totaling $\$ 50$ million or more a year -
(1) Shall use a structured approach for determming the profit or fee objective in those acquisitions that require cost analysis, and
(ii) May prescribe specific exemptions for situations in which mandatory use of a structured approach would be clearly inappropriate
(2) Agencies may use another agency's structured approach

## CODSLA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(c) Contracting officer responsibilities (1) When the price negotiation is not based on cost analysis, contracting officers are not required to analyze profit
(2) When the price negotiation is based on cost analysis, contracting officers in agencies that have a structured approach shall use it to analyze profit When not using a structured approach, contracting officers shall comply with paragraph (d)(1) of this subsection in developing profit or fee prenegotiation objectives
(3) Contractıng officers shall use the Government prenegotiation cost objective amounts as the basis for calculating the profit or fee prenegotiation objective Before the allowability of facilities capital cost of money, this cost was included in profits or fees Therefore, before applying profit or fee factors, the contracting officer shall exclude any facilities capital cost of money included in the cost objective amounts. If the prospective contractor fails to identify or propose facilities capital cost of money in a proposal for a contract that will be subject to the cost principles for contracts with commercial organizations (see subpart 312 ), facilities capital cost of money will not be an allowable cost in any resulting contract (see 15 508(i))
(4)(1) The contracting officer shall not negotiate a price or fee that exceeds the following statutory limitations, imposed by 10 U S C 2306(e) and 41 U S C 254(b)
(A) For experımental, developmental, or research work performed under a cost-plus-fixed-fee contract, the fee shall not exceed I 5 percent of the contract's estimated cost, excluding fee
(B) For architect-engineering services for public works or utilities, the contract price or the estimated cost and fee for production and delivery of designs, plans, drawings, and specifications shall not exceed 6 percent of the estimated cost of construction of the public work or utility, excluding fees
(C) For other cost-plus-fixed-fee contracts, the fee shall not exceed 10 percent of the contract's estimated cost, excluding fee
(i1) The contracting officer's signature on the price negotiation memorandum or other documentation supporting determination of farr and reasonable price documents the contracting officer's determination that the statutory price or fee limitations have not been exceeded

## (iil) Agenctes shall not establish administrative cetlings or create administrative procedures that could be represented to contractors as de facto ceilings.

> CODSIA ANALYSIS
> CODSIA does not agree that the long-standing prohibitions on agency limitations, previously described at FAR 15901 , should be removed The imposition of cerlings amounts, in effect, to cost sharing, is not always appropriate
(5) The contracting officer shall not require any prospective contractor to submit breakouts or supporting rationale for its profit or fee objective
(6) If a change or modification calls for essentially the same type and mix of work as the basic contract and is of relatively small dollar value compared to the total contract value, the contracting officer may use the basic contract's profit or fee rate as the prenegotiation objective for that change or modification

## CODSIA ANALYSIS \& RECOMMENDATIONS <br> FAR SUBPART 15.5 REWRITE <br> FAR CASE 95-029

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(d) Profit-analysis factors - (1) Common factors Unless it is clearly inappropriate or not applicable, each factor outlined in paragraphs (d)(1) (1) through (vi) of this subsection shall be considered by agencies in developing their structured approaches and by contracting officers in analyzing profit, whether or not using a structured approach
(1) Contractor effort This factor measures the complexity of the work and the resources required of the prospective contractor for contract performance Greater profit opportunity should be provided under contracts requiring a high degree of professional and managerial skill and to prospective contractors whose skills, facilities, and technical assets can be expected to lead to efficient and economical contract performance The subfactors in paragraphs (d)(1)(1)(A) through (D) of this subsection shall be considered in determining contractor effort, but they may be modified in specific situations to accommodate differences in the categories used by prospective contractors for listing costs -
(A) Material acquisition This subfactor measures the managerial and technical effort needed to obtain the required purchased parts and material, subcontracted items, and special tooling Considerations include the complexity of the items required, the number of purchase orders and subcontracts to be awarded and administered, whether established sources are available or new or second sources must be developed, and whether material will be obtained through routine purchase orders or through complex subcontracts requiring detailed specifications Profit consideration should correspond to the managerial and technical effort involved
(B) Conversion direct labor This subfactor measures the contribution of direct engineering, manufacturing, and other labor to converting the raw materials, data, and subcontracted items into the contract items Considerations molude the diversity of engineering, scientific, and manufacturing labor skills required and the amount and quality of supervision and coordination needed to perform the contract task
(C) Conversion-related indirect costs This subfactor measures how much the indirect costs contribute to contract performance The labor elements in the allocable indirect costs should be given the profit consideration they would receive if treated as direct labor The other elements of indirect costs should be evaluated to determine whether they merit only limited profit consideration because of their routine nature, or are elements that contribute significantly to the proposed contract
(D) General management This subfactor measures the prospective contractor's other indirect costs and general and administrative (G\&A) expense, their composition, and how much they contribute to contract performance Considerations include how labor in the overhead pools would be treated if it were direct labor, whether elements within the pools are routine expenses or instead are elements that contribute significantly to the proposed contract, and whether the elements require routine as opposed to unusual managerial effort and attention
(ii) Contract cost risk (A) This factor measures the degree of cost responsibility and associated risk that the prospective contractor will assume as a result of the contract type contemplated and considering the reliability of the cost estimate in relation to the complexity and duration of the contract task Determination of contract type should be closely related to the risks involved in timely, cost-effective, and efficient performance This factor should compensate contractors proportionately for assuming greater cost risks

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(B) The contractor assumes the greatest cost risk in a closely priced firm-fixed-price contract under which it agrees to perform a complex undertaking on time and at a predetermined price Some firm-fixed-price contracts may entail substantially less cost risk than others because, for example, the contract task is less complex or many of the contractor's costs are known at the time of price agreement, in which case the risk factor should be reduced accordingly The contractor assumes the least cost risk in a cost-plus-fixed-fee level-of-effort contract, under which it is reimbursed those costs determined to be allocable and allowable, plus the fixed fee
(C) In evaluating assumption of cost risk, contracting officers shall, except in unusual circumstances, treat time-andmaterials, labor-hour, and firm-fixed-price, level-of-effort term contracts as cost-plus-fixed-fee contracts
(iii) Federal socioeconomic programs This factor measures the degree of support given by the prospective contractor to Federal socioeconomic programs, such as those evolving small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, women-owned small businesses, handicapped sheltered workshops, and energy conservation Greater profit opportunity should be provided contractors that have displayed unusual initiative in these programs
(iv) Capital investments This factor takes into account the contribution of contractor investments to efficient and economical contract performance
(v) Cost-control and other past accomplishments This factor allows additional profit opportunities to a prospective contractor that has previously demonstrated its ability to perform similar tasks effectively and economically In addition, consideration should be given to measures taken by the prospective contractor that result in productivity improvements, and other cost-reduction accomplishments that will benefit the Government in follow-on contracts
(vi) Independent development Under this factor, the contractor may be provided additional profit opportunities in recognition of independent development efforts relevant to the contract end item without Government assistance The contracting officer should consider whether the development cost was recovered directly or indirectly from Government sources
(2) Additional factors In order to foster achievement of program objectives, each agency may include additional factors in its structured approach or take them into account in the profit analysis of individual contract actions

### 15.505 Price negotiation.

(a) The purpose of performing cost or price analysis is to develop a negotiation position that permits the contracting officer and the offeror an opportunity to reach agreement on a fair and reasonable price A fair and reasonable price does not require that agreement be reached on every element of cost, nor is it mandatory that the agreed price be within the contracting officer's initial negotiation position Taking into consideration the advisory recommendations, reports of contributing specialists, and the current status of the contractor's purchasing system, the contracting officer is responsible for exercising the requisite judgment needed to reach a negotiated settlement with the offeror and is solely responsible for the final price agreement However, when significant audit or other specialist recommendations are not adopted, the contracting officer should provide rationale that supports the negotiation result in the price negotiation documentation

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(b) The contracting officer's primary concern is the overall price the Government will actually pay The contracting officer's objective is to negotiate a contract of a type and with a price providing the contractor the greatest incentive for efficient and economical performance The negotiation of a contract type and a price are related and should be considered together with the issues of risk and uncertainty to the contractor and the Government Therefore, the contracting officer should not become preoccupied with any single element and should balance the contract type, cost, and profit or fee negotiated to achieve a total result - a price that is fair and reasonable to both the Government and the contractor
(c) The Government's cost objective and proposed pricing arrangement directly affect the profit or fee objective Because profit or fee is only one of several interrelated variables, the contracting officer shall not agree on profit or fee without concurrent agreement on cost and type of contract
(d) If, however, the contractor insists on a price or demands a profit or fee that the contracting officer considers unreasonable, and the contracting officer has taken all authorized actions (including determining the feasibility of developing an alternative source) without success, the contracting officer shall refer the contract action to a level above the contracting officer Disposition of the action should be documented

### 15.506 Documentation.

### 15.506-1 Prenegotation objectives.

(a) The prenegotiation objectives establish the Government's initial negotiation position They assist in the contracting officer's determination of fair and reasonable price They should be based on the results of the contracting officer's analysis of the offeror's proposal, taking into consideration all pertinent information including field pricing assistance, audit reports and technical analysis, fact-finding results, independent Government cost estimates and price histories
(b) The contracting officer shall establish prenegotation objectives before the negotiation of any 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, the contracting officer shall document the pertinent issues to be negotiated, the cost objectives, and a profit or fee objective

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

## 15 506-2 Certificate of Current Cost or Pricing Data.

(a) When cost or pricing data are required, the contracting officer shall require the contractor to execute a Certificate of Current Cost or Pricing Data, using the format in this paragraph, and shall include the executed certificate in the contract file $A$ certificate shall not be required for mformatton other than cost or pricing data
$\square$
CODSIA ANALYSIS
CODSIA believes additional clarity is needed

## Certificate of Current Cost or Pricing Data

This is to certify that, to the best of my knowledge and belief, the cost or pricing data (as defined in section 15501 of the Federal Acquisition Regulation (FAR) and required under FAR subsection 15 503-4) submitted, either actually or by specific identification in writing, to the Contracting Officer or to the Contracting Officer's representative in support of $\qquad$ * are accurate, complete, and current as of $\qquad$ ** This certification includes the cost or pricing data supporting any advance agreements and forward pricing rate agreements between the offeror and the Government that are part of the proposal

Firm $\qquad$
Signature $\qquad$
Name $\qquad$
Title $\qquad$
Date of execution ${ }^{* * *}$

* Identify the proposal, quotation, request for price adjustment, or other submission involved, giving the appropriate identifying number (eg, RFP No )
** Insert the day, month, and year when price negotiations were concluded and price agreement was reached or, if applicable, an earlier another date agreed upon between the parties that is as close as practicable to the date of agreement on price
*** Insert the day, month, and year of signing, which should be as close as practicable to the date when the price negotiations were concluded and the contract price was agreed to


## (End of certificate)

(b) The certificate does not constitute a representation as to the accuracy of the contractor's judgment on the estimate of future costs or projections It applies to the data upon which the judgment or estimate was based This distinction between fact and judgment should be clearly understood If the contractor had information reasonably available at the time of agreement showing that the negotiated price was not based on accurate, complete, and current data, the contractor's responsibility is not limited by any lack of personal knowledge of the information on the part of its negotiators
(c) The contracting officer and contractor are encouraged to reach a prior agreement on criteria for establishing closing or cutoff dates when appropriate in order to mmmize delays associated with proposal updates Closing or cutoff dates should be included as part of the data submitted with the proposal and, before agreement on price, data should be updated by the contractor to the latest closing or cutoff dates for which the data are available Use of cutoff dates coinciding with reporis is acceptable, as certain data may not be reasonably available before normal periodic closing dates (eg, actual indirect costs) Data within the contractor's or a subcontractor's organization on matters significant to contractor management and to the Government will be treated as reasonably available What is significant depends upon the circumstances of each acquisition
(d) Possession of a Certificate of qurrent Cost or Pricing Data is not a substitute for examining and analyzing the contractor's proposal
(e) If cost or pricing data are requested by the Government contracting officer and submitted by an offeror- but an exception is later found to apply, the data shall not be considered cost or pricing data and shall not be regarded as certified in accordance with this subsection Examples elude .
(1) Contractor unnecessarily submitted cost or pricing data when price was based on adequate price competition.
(2) Contractor submitted cost or pricing data when price was expected to exceed the pertinent threshold, but resulting contract action was less than the pertinent threshold.
(3) Contracting officer required submission of cost or pricing data below the pertinent threshold without the written approval of the head of the contracting activity.


### 15.506-3 Documenting the negotiation.

(a) The contract file shall document the principal elements of the negotiated agreement The documentation (e $g$, price negotiation memorandum ( PNM ) shall include the following
(1) The purpose of the negotiation.
(2) A description of the acquisition, eluding appropriate identifying numbers (eg, RFP No )
(3) The name, position, and organization of each person representing the contractor and the Government in the negotiation
(4) The current status of any contractor systems (eg, purchasing, estimating, accounting, and compensation) to the extent they affected and were considered in the negotiation

## FAR SUBPART 15.5 REWRITE

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(5) If cost or pricing data were not required in the case of any price negotiation exceeding the cost or pricing data threshold, the exception used and the basis for it
(6) If cost or pricing data were required, the extent to which the contracting officer -
(1) Relied on the cost or pricing data submitted and used them in negotiating the price, or
(ii) Recognized as inaccurate, incomplete, or noncurrent any cost or pricing data submitted, the action taken by the contracting officer and the contractor as a result, and the effect of the defective data on the price negotiated
(7) If cost or pricing data were required in the case of any price negotiation below the cost or pricing data threshold, the head of the contractug activity's written justification -
(i) Why the contracting officer could not determine the reasonableness of price without the cost or pricing data; and

## (ii) What efforts were taken to obtain the necessary data from sources other than the contractor.

## CODSIA ANALYSIS

The price negotiation memorandum should contain a complete record of why cost or pricing data were obtained on contract actions below the pertinent threshold
(7) (8) A summary of the contractor's proposal, any field pricing assistance recommendations, including the reasons for any pertinent variances from them, the Government's negotiation objective, and the negotiated position Where the determination of price reasonableness is based on cost analysis, the summary shall address each major cost element When determination of pice reasonableness is based on price analysis, the summary shall include the source and type of data used to support the determination
(8) (9) The most significant facts or considerations controlling the establishment of the prenegotation objectives and the negotiated agreement including an explanation of any significant differences between the two positions
(9) (10) To the extent such direction has a significant effect on the action, a discussion and quantification of the impact of direction given by Congress, other agencies, and higher-level officials (ie, officials who would not normally exercise authority during the award and review process for the instant contract action)
(10) (11) The basis for the profit or fee prenegotiation objective and the profit or fee negotiated
(b) Whenever field pricing assistance has been obtained, the contracting officer shall forward a copy of the analysis to the offices) providing assistance. When appropriate, information on how advisory field support can be made more effective should be provided separately

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

### 15.507 Special cost or pricing areas.

## 15 507-1 Defective cost or pricing data.

(a) If, before agreement on price, the contracting officer learns that any cost or pricing data submitted are maccurate, incomplete, or noncurrent, the contracting officer shall immediately bring the matter to the attention of the prospective contractor, whether the defective data increase or decrease the contract price The contracting officer shall consider any new data submitted to correct the deficiency, or consider the inaccuracy, incompleteness, or noncurrency of the data when negotiating the contract price The price negotiation memorandum shall reflect the adjustments made to the data or the corrected data used to negotiate the contract price
(b)(1) If, after award, cost or pricing data are found to be inaccurate, incomplete, or noncurrent as of the date of final agreement on price or an-earker another date agreed upon by the parties given on the contractor's or subcontractor's Certificate of Current Cost or Pricing Data, the Government is entitled to a price adjustment, including profit or fee, of any significant amount by which the price was increased because of the defective data This entitlement is ensured by including in the contract one of the clauses prescribed in 15508 (b) and (c) and set forth in the provision at 52215-22, Price Reduction for Defective Cost or Pricing Data, and 52 215-23, Price Reduction for Defective Cost or Pricing Data-Modifications The clauses give the Government the right to a price adjustment for defects in cost or pricing data submitted by the contractor, a prospective subcontractor, or an actual subcontractor
(2) In arriving at a price adjustment, the contracting officer shall consider the time by which the cost or pricing data became reasonably available to the contractor, and the extent to which the Government relied upon the defective data
(3) The clauses referred to in paragraph (b)(1) of this subsection recognize that the Government's right to a price adjustment is not affected by any of the following circumstances
(1) The contractor or subcontractor was a sole source supplier or otherwise was in a superior bargaining position,
(ii) The contracting officer should have known that the cost or pricing data in issue were defective even though the contractor or subcontractor took no affirmative action to bring the character of the data to the attention of the contracting officer,
(iii) The contract was based on an agreement about the total cost of the contract and there was no agreement about the cost of each item procured under such contract, or
(iv) Cost or pricing data were required, however, the prime contractor or subcontractor did not submit a Certificate of Current Cost or Pricing Data relating to the contract
(4) Subject to paragraphs (b) (5) and (6) of this subsection, the contracting officer shall allow an offset for any understated cost or pricing data submitted in support of price negotiations, up to the amount of the Government's claim for overstated pricing data arising out of the same pricing action (eg, the initial pricing of the same contract or the pricing of the same change order)


## CODSLA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(5) An offset shall be allowed only in an amount supported by the facts and if the contractor -
(1) Certifies to the contracting officer that, to the best of the contractor's knowledge and belief, the contractor is entitled to the offset in the amount requested, and
(i1) Proves that the cost or pricing data were available before the date of agreement on price but were not submitted Such offsets need not be in the same cost groupings (e g, material, direct labor, or indirect costs)
(6) An offset shall not be allowed if -
(1) The understated data was known by the contractor to be understated when the Certfficate of Current Cost or Prıcıng Data was signed, or
(11) The Government proves that the facts demonstrate that the price would not have uncreased in the amount to be offset even if the avarlable data had been submitted before the date of agreement on price
(7)(1) In addition to the price adjustment amount, the Government is entitled to interest on any overpayments The Government is also entitled to penalty amounts on certan of these overpayments Overpayment occurs only when payment is made for supplies or services accepted by the Government Overpayments do not result from amounts paid for contract financing, as defined in 32902
(11) In calculating the interest amount due, the contracting officer shall -
(A) Determine the defective pricing amounts that have been overpaid to the contractor,
(B) Consider the date of each overpayment (the date of overpayment for this interest calculation shall be the date payment was made for the related completed and accepted contract items, or for subcontract defective pricing, the date payment was made to the prime contractor, based on prime contract progress billings or deliveries, which included payments for a completed and accepted subcontract item), and
(C) Apply the underpayment interest rate(s) in effect for each quarter from the tume of overpayment to the time of repayment, utlizing rate(s) prescribed by the Secretary of the Treasury under 26 U S C $6621(\mathrm{a})(2)$
(ii1) In arriving at the amount due for penalties on contracts where the submission of defective cost or pricing data was a knowing submission, the contracting officer shall obtain an amount equal to the amount of overpayment made Before taking any contractual actions concerning penalties, the contracting officer shall obtain the advice of counsel
(iv) In the price reduction modification or demand, the contracting officer shall separately include -
(A) The repayment amount,
(B) The penalty amount (If any),
(C) The interest amount through a specified date, and
(D) A statement that interest will contmue to accrue until repayment is made

## CODSLA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(c) If, after award, the contracting officer learns or suspects that the data furnished were not accurate, complete, and current, or were not adequately verified by the contractor as of the tıme of negotiation, the contractıng officer shall request an audit to evaluate the accuracy, completeness, and currency of the data The Government may evaluate the profit-cost relationships only of the audit reveals that the data certified by the contractor were defective The contractung officer shall not reprice the contract solely because the profit was greater than forecast or because a contingency specified in the submission failed to materialize
(d) For each advisory audit received based on a postaward review that indicates defective pricing, the contracting officer shall make a determination as to whether or not the data submitted were defective and relied upon Before making such a determination, the contracting officer should give the contractor an opportunity to support the accuracy, completeness, and currency of the data in question The contracting officer shall prepare a memorandum documenting both the determination and any corrective action taken as a result The contracting officer shall send one copy of this memorandum to the auditor and, if the contract has been assigned for administration, one copy to the administrative contracting officer (ACO) A copy of the memorandum or other notice of the contracting officer's determination shall be provided to the contractor
(e) If both the contractor and subcontractor submitted, and the contractor certified, or should have certified, cost or pricing data, the Government has the right, under the clauses at 52 215-22, Price Reduction for Defective Cost or Pricing Data, and 52 215-23, Price Reduction for Defective Cost or Pricıng Data-Modıfications, to reduce the prıme contract price if it was significantly uncreased because a subcontractor submitted defective data This right applies whether these data supported subcontract cost estımates or supported firm agreements between subcontractor and contractor
(f) If Government audit discloses defective subcontractor cost or pricing data, the information necessary to support a reduction in prime contract and subcontract prices may be available only from the Government To the extent necessary to secure a prome contract price reduction, the contracting officer should make this information available to the prime contractor or appropriate subcontractors, upon request If release of the information would compromise Government security or disclose trade secrets or confidential business information, the contracting officer shall release it only under conditions that will protect it from improper disclosure Information made avalable under this paragraph shall be limited to that used as the basis for the prime contract price reduction In order to afford an opportunity for corrective action, the contracting officer should give the prime contractor reasonable advance notice before determining to reduce the prime contract price
(1) When a prime contractor includes defective subcontract data in arriving at the price but later awards the subcontract to a lower priced subcontractor (or does not subcontract for the work), any adjustment in the prime contract price due to defective subcontract data is limited to the difference (plus applicable indirect cost and profit markups) between the subcontract price used for pricing the prime contract, and either the actual subcontract price or the actual cost to the contractor, if not subcontracted, provided the data on which the actual subcontract price is based are not themselves defective
(2) Under cost-reimbursement contracts and under all fixed-price contracts except firm-fixed-price contracts, and fixed-price contracts with economic price adjustment, payments to subcontractors that are higher than they would be had there been no defective subcontractor cost or pricing data shall be the basis for disallowance or nonrecognition of costs under the clauses prescribed in 15508 (b) and (c) The Government has a continuing and direct financial interest in such payments that is unaffected by the initial agreement on prime contract price

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

### 15.507-2 Make-or-buy programs.

(a) General The prime contractor is responsible for managing contract performance, including planning, placing, and administering subcontracts as necessary to ensure the lowest overall cost and technical risk to the Government When make-or-buy programs are required, the Government may reserve the right to review and agree on the contractor's make-or-buy program when necessary to ensure negotiation of reasonable contract prices, satisfactory performance, or implementation of socioeconomic policies Consent to subcontracts and review of contractors' purchasing systems are separate actions covered in part 44 This section does not apply to contracts for commercial items.

## CODSIA ANALYSIS

CODSIA's suggests revision so that it is clear that FAR 15 507-2 does not apply to contracts for commercial items This is made necessary as a result of combining FAR Subpart 157,158 , and 159
(b) Definitions

Buy item means an item or work effort to be produced or performed by a subcontractor
Make item means an item or work effort to be produced or performed by the prime contractor or its affiliates, subsidiaries, or divisions

Make-or-buy program means that part of a contractor's written plan for a contract ddentifymg those major items to be produced or work efforts to be performed in the prime contractor's facilities and those to be subcontracted
(c) Acquisitions requiring make-or-buy programs (1) Contracting officers may require prospective contractors to submit make-or-buy program plans for negotiated acquisitions requiring cost or pricing data whose estimated value is $\$ 10$ million or more, except when the proposed contract is for research or development and, if prototypes or hardware are involved, no significant follow-on production is anticipated
(2) Contracting officers may require prospective contractors to submit make-or-buy programs for negotiated acquisitions whose estimated value is under $\$ 10$ million only if the contracting officer -
(1) Determines that the information is necessary, and
(ii) Documents the reasons in the contract file
(d) Solicitation requirements When prospective contractors are required to submit proposed make-or-buy programs, the solicitation shall include -
(1) A statement that the program and required supporting information must accompany the offer, and
(2) A description of factors to be used in evaluating the proposed program, such as capability, capacity, availability of small, small disadvantaged, and women-owned small business concerns for subcontracting, establishment of new facilities in or near labor surplus areas, delivery or performance schedules, control of technical and schedule interfaces, proprietary processes, technical superiority or exclusiveness, and technical risks involved
(e) Program requirements To support a make-or-buy program, the following information shall be supplied by the contractor in its proposal

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(1) Items and work included The information required from a contractor in a make-or-buy program shall be confined to those major items or work efforts that normally would require company management review of the make-or-buy decision because they are complex, costly, needed in large quantities, or require additional facilities to produce Raw materials, commercial tems (see 2 101), and off-the-shelf items (see 46 101) shall not be included, unless their potential impact on contract cost or schedule is critical As a rule, make-or-buy programs should not include items or work efforts estımated to cost less than 1 percent of the total estimated contract price or any minimum dollar amount set by the agency
(2) The offeror's program should include or be supported by the following information
(1) A description of each major item or work effort
(11) Categorization of each major item or work effort as "must make," "must buy" or "can either make or buy "
(ii1) For each item or work effort categorized as "can etther make or buy," a proposal etther to "make" or to "buy "
(iv) Reasons for categorizing items and work efforts as "must make" or "must buy," and proposing to "make" or to "buy" those categorized as "can either make or buy" The reasons must include the consideration given to the evaluation factors described in the solicitation and be in sufficient detail to permit the contracting officer to evaluate the categorization or proposal
(v) Designation of the plant or division proposed to make each item or perform each work effort, and a statement as to whether the existing or proposed new facility is in or near a labor surplus area
(vi) Identification of proposed subcontractors, if known, and their location and size status (see also subpart 197 for subcontracting pian requirements)
(vii) Any recommendations to defer make-or-buy decisions when categorization of some items or work efforts is impracticable at the tıme of submission
(viii) Any other information the contracting officer requires in order to evaluate the program
(f) Evaluation, negotiation, and agreement Contracting officers shall evaluate and negotrate proposed make-or-buy programs as soon as practicable after their receipt and before contract award
(1) When the program is to be incorporated in the contract and the design status of the product being acquired does not permit accurate precontract identification of major items or work efforts, the contracting officer shall notify the prospective contractor in writing that these items or efforts, when identifiable, shall be added under the clause at 52215-21, Changes or Additions to Make-or-Buy Program
(2) Contractung officers normally shall not agree to proposed "make 1 tems" when the products or services are not regularly manufactured or provided by the contractor and are available - quality, quantity, delivery, and other essential factors considered - from another firm at equal or lower prices or when they are regularly manufactured or provided by the contractor, but available - quality, quantity, delivery, and other essential factors considered - from another firm at lower prices However, the contracting officer may agree to these as "make items" if an overall lower Government wide cost would result or it is otherwise in the best interest of the Government If this situation occurs in any fixed-price incentive or cost-plus-incentive-fee contract, the contracting officer shall specify these Items in the contract and state that they are subject to paragraph (d) of the clause at $52215-21$, Changes or Additions to Make-or-Buy Program (see 15 508(a)) If the contractor proposes to reverse the categorization of such items during contract performance, the contract price shall be subject to equitable reduction

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(g) Incorporating make-or-buy programs in contracts The contracting officer may incorporate the make-or-buy program in negotiated contracts for -
(1) Major systems (see part 34) or their subsystems or components, regardless of contract type, or
(2) Other supplies and services if -
(1) The contract is a cost-remmbursable contract, or a cost-sharing contract in which the contractor's share of the cost ${ }_{15}$ less than 25 percent, and
(ii) The contracting officer determines that technical or cost risks justify Government review and approval of changes or additions to the make-or-buy program

### 15.507-3 Forward pricing rate agreements.

(a) When certified cost or pricing data are required, offeror are required to describe any forward pricing rate agreements (FPRA's) in each specific pricing proposal to which the rates apply and to identify the latest cost or pricing data already submitted in accordance with the agreement All data submitted in connection with the agreement, updated as necessary, form a part of the total data that the offeror certifies to be accurate, complete, and current at the time of agreement on price for an instal contract or for a contract modification
(b) Contracting officers will use FPRA rates as bases for pricing all contracts, modifications, and other contractual actions to be performed during the period covered by the agreement Conditions that may affect the agreement's validity shall be reported promptly to the ACO If the ACO determines that a changed condition invalidates the agreement, the ACO shall notify all interested parties of the extent of its effect and status of efforts to establish a revised FPRA
(c) Contracting officers shall not require certification at the time of agreement for data supplied in support of FPRA's or other advance agreements When a forward pricing rate agreement or other advance agreement is used to price a contract action that requires a certificate, the certificate supporting that contract action shall cover the data supplied to support the FPRA or other advance agreement, and all other data supporting the action
(d) When an FPRA is invalid, the contractor should submit and negotiate a new proposal to reflect the changed conditions If an FPRA has not been established or has been invalidated, the ACO will issue a forward pricing rate recommendation (FPRR) to buying activities with documentation to assist negotiators In the absence of a FPRA or FPRR, field pricing information will include support for rates utilized
(e) The ACO may negotiate contmuous updates to the FPRA The FPRA will provide specific terms and conditions covering notification, application, and data requirements for systematic monitoring to assure the validity of the rates

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

### 15.507-4 Should-cost review

(a) General (1) Should-cost reviews are a specialized form of cost analysis Should-cost reviews differ from traditional evaluation methods because they do not assume that a contractor's historical costs reflect efficient and economical operation Instead, these reviews evaluate the economy and efficiency of the contractor's existing work force, methods, materials, facilities, operating systems, and management These reviews are accomplished by a multı-functional team of Government contracting, contract administration, pricing, audit, and engineering representatives The objective of should-cost reviews is to promote both short and long-range improvements in the contractor's economy and efficiency in order to reduce the cost of performance of Government contracts In addition, by providing rationale for any recommendations and quantifying their impact on cost, the Government will be better able to develop realistic objectives for negotiation
(2) There are two types of should-cost reviews - program should-cost review (see paragraph (b) of this subsection) and overhead should-cost review (see paragraph (c) of this subsection) These should-cost reviews may be performed together or independently The scope of a should-cost review can range from a large-scale review examining the contractor's entire operation (including plant-wide overhead and selected major subcontractors) to a small-scale tailored review examining specific portions of a contractor's operation
(b) Program should-cost review (1) Program should-cost review is used to evaluate significant elements of direct costs, such as material and labor, and associated indirect costs, usually associated with the production of major systems When a program should-cost review is conducted relative to a contractor proposal, a separate audit report on the proposal is required
(2) A program should-cost review should be considered, particularly in the case of a major system acquisition (see part 34), when -
(1) Some initial production has already taken place,
(11) The contract will be awarded on a sole-source basis,
(iii) There are future-year production requirements for substantial quantities of like items,
(iv) The items being acquired have a history of increasing costs,
(v) The work is sufficiently defined to permit an effective analysis and major changes are unlikely,
(vi) Sufficient time is available to plan and adequately conduct the should-cost review, and
(vii) Personnel with the required skills are available or can be assigned for the duration of the should-cost review
(3) The contracting officer should decide which elements of the contractor's operation have the greatest potential for cost savings and assign the available personnel resources accordingly The expertise of on-site Government personnel should be used, when appropriate While the particular elements to be analyzed are a function of the contract work task, elements such as manufacturing, pricing and accounting, management and organization, and subcontract and vendor management are normally reviewed in a should-cost review

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(4) In acquisitions for which a program should-cost review is conducted, a separate program should-cost review team report, prepared in accordance with agency procedures, is required The contracting officer shall consider the findings and recommendations contained in the program should-cost review team report when negotiating the contract price After completing the negotiation, the contracting officer shall provide the ACO a report of any identified uneconomical or inefficient practices, together with a report of correction or disposition agreements reached with the contractor The contracting officer shall establish a follow-up plan to monitor the correction of the uneconomical or inefficient practices
(5) When a program should-cost review is planned, the contracting officer should state this fact in the acquisition plan or acquisition plan updates (see subpart 7 1) and in the solicitation
(c) Overhead should-cost review (1) An overhead should-cost review is used to evaluate indirect costs, such as fringe benefits, shipping and receiving, facilities and equipment, depreciation, plant maintenance and security, taxes, and general and administrative activities It is normally used to evaluate and negotiate an FPRA with the contractor When an overhead should-cost review is conducted, a separate audit report is required
(2) The following factors should be considered when selecting contractor sites for overhead should-cost reviews
(1) Dollar amount of Government busies
(11) Level of Government participation
(iii) Level of noncompetitive Government contracts
(iv) Volume of proposal activity
(v) Major system or program
(vi) Corporate reorganizations, mergers, acquisitions, or takeovers
(vil) Other conditions (e g, changes in accounting systems, management, or busies activity)
(3) The objective of the overhead should-cost review is to evaluate significant indirect cost elements in-depth, and identify and recommend corrective actions regarding inefficient and uneconomical practices If it is conducted in conjunction with a program should-cost review, a separate overhead should-cost review report is not required However, the findings and recommendations of the overhead should-cost team, or any separate overhead shouldcost review report, shall be provided to the ACO The ACO should use this information to form the basis for the Government position in negotiating an FPRA with the contractor The ACO shall establish a follow-up plan to monitor the correction of the uneconomical or inefficient practices

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

## 15 507-5 Estimating systems.

(a) Using an acceptable estimating system for proposal preparation benefits both the Government and the contractor by increasing the accuracy and reliability of individual proposals Cognizant audit activities, when it is appropriate to do so, shall establish and manage regular programs for reviewing selected contractors' estimating systems or methods, in order to reduce the scope of reviews to be performed on individual proposals, expedite the negotiation process, and increase the reliability of proposals The results of estimating system reviews shall be documented in survey reports
(b) The auditor shall send a copy of the estimating system survey report and a copy of the official notice of corrective action required to each contracting office and contract administration office having substantial business with that contractor Significant deficiencies not corrected by the contractor shall be a consideration in subsequent proposal analyses and negotiations

### 15.508 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert the clause at 52 215-21, Changes or Additions to Make-or-Buy Program, in solicitations and contracts when it is contemplated that a make-or-buy program will be incorporated in the contract If a less economical "make" or "buy" categorization is selected for one or more items of significant value, the contracting officer shall use the clause with -
(1) Its Alternate I, If a fixed-price incentive contract is contemplated, or
(2) Its Alternate II, If a cost-plus-Incentive-fee contract is contemplated
(b) The contracting officer shall, when contracting by negotiation, insert the clause at 52 215-22, Price Reduction for Defective Cost or Pricing Data, in solicitations and contracts when it is contemplated that cost or pricing data will be required from the contractor or any subcontractor (see 15 503-4)
(c) The contracting officer shall, when contracting by negotiation, insert the clause at 52 215-23, Price Reduction for Defective Cost or Pricing Data-Modifications, in solicitations and contracts when it is contemplated that cost or pricing data will be required from the contractor or any subcontractor (see 15 503-4) for the pricing of contract modifications, and the clause prescribed in paragraph (b) of this section has not been included
(d) The contracting officer shall insert the clause at 52 215-24, Subcontractor Cost or Pricing Data, in solicitations and contracts when the clause prescribed in paragraph (b) of this section is included
(e) The contracting officer shall insert the clause at 52 215-25, Subcontractor Cost or Pricing Data-Modifications, in solicitations and contracts when the clause prescribed in paragraph (c) of this section is included

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(f) The contracting officer shall insert the clause at 52 215-26, Integrity of Unit Prices, in solicitations and contracts for other than -
(1) Acquisitions at or below the simplified acquisition threshold,
(2) Construction or architect-engineer services under part 36,
(3) Utility services under part 41,
(4) Service contracts where supplies are not required,
(5) Acquisitions of commercial items, and
(6) Contracts for petroleum products The contracting officer shall insert the clause with its Alternate I when contracting without full and open competition or when prescribed by agency regulations
(g) The contracting officer shall insert the clause at 52215-27, Termination of Defined Benefit Pension Plans, in solicitations and contracts for which it is anticipated that cost or pricing data will be required or for which any preaward or postaward cost determinations will be subject to part 31
(h) The contracting officer shall insert the provision at $52215-30$, Facilities Capital Cost of Money, in solicitations expected to result in contracts that are subject to the cost principles for contracts with commercial organizations (see subpart 312 )
(i) If the prospective contractor does not propose facilities capital cost of money in its offer, the contracting officer shall insert the clause at 52215-31, Waver of Facilities Capital Cost of Money, in the resulting contract
(j) The contracting officer shall insert the clause at $52215-39$, Reversion or Adjustrnent of Plans for Postretirement Benefits (PRB) Other Than Pensions, in solicitations and contracts for which it is anticipated that cost or pricing data will be required or for which any preaward or postaward cost determinations will be subject to part 31
(k) The contracting officer shall insert the clause at $52215-40$, Notification of Ownership Changes, in solicitations and contracts for which it is contemplated that cost or pricing data will be required or for which any preaward or postaward cost determination will be subject to subpart 312
(1) Considering the hierarchy at 15502 , the contracting officer may insert the provision at 52215-41, Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data, in solicitations if it is reasonably certain that cost or pricing data or information other than cost or pricing data will be required This provision also provides instructions to offeror on how to request an exception The contracting officer shall -
(1) Use the provision with its Alternate I to specify a format for cost or pricing data other than the format required by Table $15-2$ of this section,
(2) Use the provision with its Alternate II if copies of the proposal are to be sent to the ACO and contract auditor,
(3) Use the provision with its Alternate III if submission via electronic media is required, and
(4) Replace the basic provision with its Alternate IV if cost or pricing data are not expected to be required because an exception may apply, but information other than cost or pricing data is required as described in 15 503-3

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(m) Considering the hierarchy at 15502 , the contracting officer may insert the clause at $52215-42$, Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data-Modifications, in solicitations and contracts if it is reasonably certain that cost or pricing data or information other than cost or pricing data will be required for modifications This clause also provides instructions to contractors on how to request an exception The contracting officer shall -
(1) Use the clause with its Alternate I to specify a format for cost or pricing data other than the format required by Table 15-2 of this section,
(2) Use the clause with its Alternate Il if copies of the proposal are to be sent to the ACO and contract auditor,
(3) Use the clause with its Alternate III if submission via electronic media is required, and
(4) Replace the basic clause with its Alternate IV if cost or pricing data are not expected to be required because an exception may apply, but information other than cost or pricing data is required as described in 15 503-3

## CODSLA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

## Table 15-2. Instructions for Submittmg Cost or Pricing Data

This document provides instructions for preparing a contract pricing proposal when cost or pricing data are required

## Notices

1 There is a clear distinction between submitting cost or pricing data and merely making available books, records, and other documents without identification The requirement for submission of cost or pricing data is met when all accurate cost or pricing data reasonably available to the offeror have been submitted, either actually or by specific identification, to the Contracting Officer or an authorized representative As later information comes into your possession, it should be promptly submitted to the Contracting Officer demonstrating how the information relates to your price proposal The requirement for submission of cost or pricing data continues up to the time of agreement on price, or an earner another date agreed upon between the parties of applicable

2 By submitting your proposal, you grant the Contracting Officer or an authorized representative the right to examine records that formed the basis for the pricing proposal That examination can take place at any time before award It may include those books, records, documents, and other types of factual information (regardless of form or whether the information is specifically referenced or included in the proposal as the basis for pricing) that will permit an adequate evaluation of the proposed price

## General Instructions

1 You must provide the following information on the first page of your pricing proposal
(a) Solicitation, contract and/or modification number,
(b) Name and address of offeror,
(c) Name and telephone number of point of contact,
(d) Name of contract administration office (if available),
(e) Type of contract action (that is, new contract, change order, price revision/redetermination, letter contract, unpriced order, or other),
(f) Proposed cost, profit or fee, and total,
(g) Whether you will require the use of Government property in the performance of the contract, and, if so, what property,
(h) Whether your organization is subject to cost accounting standards, whether the proposal is consistent with your established estimating and accounting principles and procedures and FAR part 31, Cost Principles, and, if not, an explanation,

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(1) The following statement

This proposal reflects our estimates and/or actual costs as of this date and conforms with the instructions in FAR 15 503-5(b)(1) and Table 15-2 By submitting this proposal, we grant the Contracting Officer and authorized representative(s) the right to examine, at any time before award, those records, which include books, documents, accounting procedures and practices, and other data, regardless of type and form or whether such supporting information is specifically referenced or included in the proposal as the basis for pricing, that will permit an adequate evaluation of the proposed price
(1) Date of submission, and
(k) Name, title and signature of authorized representative

2 In submitting your proposal, you must include an index, appropriately referenced, of all the cost or pricing data and information accompanying or identified in the proposal In addition, you must annotate any future additions and/or revisions, up to the date of agreement on price, or anearher another date agreed upon by the parties, on a supplemental index

3 As part of the specific information required, you must submit, with your proposal, cost or pricing data (that is, data that are verifiable and factual and otherwise as defined at FAR 15 501) You must clearly identify this data as "Cost or Pricing Data " In addition, you must submit with your proposal any information reasonably required to explain your estımatıng process, including -
a The judgmental factors applied and the mathematical or other methods used in the estımate, including those used in projecting from known data, and
b The nature and amount of any contingencies included in the proposed price
4 You must show the relationship between contract line item prices and the total contract price You must attach cost-element breakdowns for each proposed line item, using the appropriate format prescribed in the "Formats for Submission of Line Item Summaries" section of this table You must furnish supporting breakdowns for each cost element, consistent with your cost accounting system

5 When more than one contract line item is proposed, you must also provide summary total amounts covering all line items for each element of cost

6 Whenever you have incurred costs for work performed before submission of a proposal, you must identify those costs in your cost/price proposal

7 If you have reached an agreement with Government representatives on use of forward pricing rates/factors, identify the agreement, include a copy, and describe its nature

8 As soon as practicable after final agreement on price or an-arłer another date agreed to by the parties, but before the award resulting from the proposal, you must, under the conditions stated in FAR 15 506-2, submit a Certificate of Current Cost or Pricing Data

## CODSLA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

## Cost Elements

Depending on your system, you must provide breakdowns for the following basic cost elements, as applicable
A Materials and services Provide a consolidated priced summary of individual material quantities included in the various tasks, orders, or contract line items being proposed and the basis for pricing (vendor quotes, invoice prices, etc ) Include raw materials, parts, components, assemblies, and services to be produced or performed by others For all tems proposed, identify the item and show the source, quantity, and price Conduct price analyses of all subcontractor proposals Conduct cost analyses for all subcontracts when cost or pricing data are submitted by the subcontractor Include these analyses as part of your own cost or pricing data submissions for subcontracts expected to exceed the appropriate threshold in 15 503-4 Submit the subcontractor cost or pricing data as part of your own cost or pricing data as required in subparagraph $\mathrm{A}(2)$ of this table These requirements also apply to all subcontractors if required to submit cost or pricing data
(1) Adequate Price Competition Provide data showing the degree of competition and the basis for establishing the source and reasonableness of price for those acquisitions (such as subcontracts, purchase orders, material order, etc ) exceeding, or expected to exceed, the approprate threshold set forth at $15503-4$ priced on the basis of adequate price competition For interorganizational transfers priced at other than the cost of comparable competitive commercial work of the division, subsidary, or affiliate of the contractor, explain the pricing method (see 31 20526(e))
(2) All Other Obtain cost or pricing data from prospective sources for those acquisitions (such as subcontracts, purchase orders, material order, etc ) exceeding the threshold set forth in 15 503-4 and not otherwise exempt, in accordance with $15503-1$ (b) ( e e, adequate price competition, commercial tems, prices set by law or regulation or waiver) Also provide data showing the basis for establishing source and reasonableness of price In addition, provide a summary of your cost analysis and a copy of cost or pricing data submitted by the prospective source in support of each subcontract, or purchase order that is the lower of either $\$ 10,000,000$ or more, or both more than the pertinent cost or pricing data threshold and more than 10 percent of the prime contractor's proposed price The Contracting Officer may require you to submit cost or pricing data in support of proposals in lower amounts Subcontractor cost or pricing data must be accurate, complete and current as of the date of final price agreement, or anerher another date agreed upon by the parties, given on the prime contractor's Certificate of Current Cost or Pricing Data The prime contractor is responsible for updating a prospective subcontractor's data For standard commercial items fabricated by the offeror that are generally stocked in inventory, provide a separate cost breakdown, if priced based on cost For interorganizational transfers priced at cost, provide a separate breakdown of cost elements Analyze the cost or pricing data and submit the results of your analysis of the prospective source's proposal When submission of a prospective source's cost or pricing data is required, it must be included along with your own cost or pricing data submission, as part of your initial pricing proposal You must also submit any other cost or pricıng data obtained from a subcontractor, etther actually or by specific identification, along with the results of any analysis performed on that data

B Direct Labor Provide a time-phased (e $g$, monthly) breakdown of labor hours, rates, and cost by appropriate category, and furnsh bases for estumates

C Indirect Costs Indicate how you have computed and apphed your indirect costs, nncluding cost breakdowns Show trends and budgetary data to provide a basis for evaluating determining the reasonableness of proposed rates Indicate the rates used and provide an appropriate explanation

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

D Other Costs List all other costs not otherwise eluded in the categories described above (e $g$, special tooling, travel, computer and consultant services, preservation, packaging and packing, spoilage and rework, and Federal excise tax on finished articles) and provide bases for pricing

E Royalties If royalties exceed $\$ 1,500$, you must provide the following information on a separate page for each separate royalty or license fee
(1) Name and address of licensor
(2) Date of license agreement
(3) Patent numbers
(4) Patent application serial numbers, or other basis on which the royalty is payable
(5) Brief description (including any part or model numbers of each contract item or component on which the royalty is payable)
(6) Percentage or dollar rate of royalty per unit
(7) Unit price of contract item
(8) Number of units
(9) Total dollar amount of royalties
(10) If specifically requested by the Contracting Officer, a copy of the current license agreement and identification of applicable claims of specific patents (see FAR 27204 and 31 205-37)

F Facilities Capital Cost of Money When you elect to claim facilities capital cost of money as an allowable cost, you must submit Form CASB-CMF and show the calculation of the proposed amount (see 31 205-10)

## Formats for Submission of Line Item Summaries

A New Contracts (Including Letter Contracts)

|  | Proposed | Proposed |  |
| :---: | :---: | :---: | :---: |
| Cost | contract <br> estimate- <br> contract <br> estimate- |  |  |
| elements | total cost | uni cost | Reference |
| $(1)$ | $(2)$ | $(3)$ | $(4)$ |

## Column and Instruction

(1) Enter appropriate cost elements
(2) Enter those necessary and reasonable costs that, in your judgment, will properly be incurred in efficient contract performance When any of the costs in this column have already been incurred (e $g$, under a letter contract), describe them on an attached supporting page When preproduction or startup costs are significant, or when specifically requested to do so by the Contracting Officer, provide a full identification and explanation of them
(3) Optional, unless required by the Contracting Officer
(4) Identify the attachment in which the information supporting the specific cost element may be found Attach separate pages as necessary

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

B Change Orders, Modifications, and Claims

|  | Estimated | Cost of |  |  |  |  |
| :---: | :---: | :---: | :---: | :---: | :---: | :---: |
| deleted work |  |  |  |  |  |  |
| Cost | cost of all | already | Net cost to | Cost of work | Net cost of |  |
| elements | work deleted | performed | be deleted | added | change | Reference |
| $(1)$ | $(2)$ | $(3)$ | $(4)$ | $(5)$ | $(6)$ | $(7)$ |

## Column and Instruction

(1) Enter appropriate cost elements
(2) Include the current estimates of what the cost would have been to complete the deleted work not yet performed (not the original proposal estimates), and the cost of deleted work already performed
(3) Include the incurred cost of deleted work already performed, using actuals incurred if possible, or, if actual are not available, estimates from your accounting records Attach a detailed inventory of work, materials, parts, components, and hardware already purchased, manufactured, or performed and deleted by the change, indicating the cost and proposed disposition of each line item Also, if you desire to retain these items or any portion of them, indicate the amount offered for them
(4) Enter the net cost to be deleted, which is the estimated cost of all deleted work less the cost of deleted work already performed Column (2) - Column (3) := Column (4)
(5) Enter your estimate for cost of work added by the change When nonrecurring costs are significant, or when specifically requested to do so by the Contracting Officer, provide a full identification and explanation of them When any of the costs in this column have already been incurred, describe them on an attached supporting schedule
(6) Enter the net cost of change, which is the cost of work added, less the net cost to be deleted Column (5) Column (4) = Column (6) When this result is negative, place the amount in parentheses
(7) Identify the attachment in which the information supporting the specific cost element may be found Attach separate pages as necessary

|  |  |  |  |  |  |  | 95-02 |
| :---: | :---: | :---: | :---: | :---: | :---: | :---: | :---: |
| CODSIA ANALYSIS \& RECOMMENDATIONS FAR SUBPART 15.5 REWRITE FAR CASE 95-029 |  |  |  |  |  |  |  |
| CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS |  |  |  |  |  |  |  |
| C Price Revision/Redetermination |  |  |  |  |  |  |  |
|  | Cutoff date <br> (1) | Number of units completed <br> (2) | Number of unt to be completed <br> (3) | Contract amount | Redetermınatio <br> $\Omega$ <br> proposal <br> amount <br> $(5)$ | Difference <br> (6) |  |
| Cost elements <br> (7) | Incurred costs preproduction (8) | $\begin{gathered} \text { Incurred cost- } \\ \text { completede } \\ \text { units } \\ \text { (9) } \end{gathered}$ | Incurred cost- work in process (10) | Total incurred cost <br> (11) | Estimated cost to complete (12) | Estumated total cost <br> (13) | Reference <br> (14) |

(Use as applicable)

## Column and Instruction

(1) Enter the cutoff date required by the contract, if applicable
(2) Enter the number of units completed during the period for which experienced costs of production are being submitted
(3) Enter the number of units remaining to be completed under the contract
(4) Enter the cumulative contract amount
(5) Enter your redetermination proposal amount
(6) Enter the difference between the coniract amount and the redetermination proposal amount When this result is negative, place the amount in parentheses Column (4) - Column (5) = Column (6)
(7) Enter appropriate cost elements When residual nventory exists, the final costs estabhshed under fixed-priceincentive and fixed-price-redeterminable arrangements should be net of the farr market value of such inventory In support of subcontract costs, submit a listing of all subcontracts subject to repricing action, annotated as to their status
(8) Enter all costs incurred under the contract before starting production and other nonrecurring costs (usually referred to as startup costs) from your books and records as of the cutoff date These include such costs as preproduction engineering, special plant rearrangement, training program, and any identifiable nonrecurring costs such as initral rework, spoilage, pilot runs, etc In the event the amounts are not segregated in or otherwise available from your records, enter in this column your best estimates Explain the basis for each estimate and how the costs are charged on your accounting records (eg, included in production costs as direct engineering labor, charged to manufacturmg overhead) Also show how the costs would be allocated to the units at their various stages of contract completion
(9) Enter in Column (9) the production costs from your books and records (exclusive of preproduction costs reported in Column (8)) of the units completed as of the cutoff date

## CODSLA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(10) Enter in Column (10) the costs of work in process as determined from your records or inventories at the cutoff date When the amounts for work in process are not available in your records but reliable estimates for them can be made, enter the estimated amounts in Column (10) and enter in Column (9) the differences between the total incurred costs (exclusive of preproduction costs) as of the cutoff date and these estimates Explain the basis for the estimates, including identification of any provision for experienced or anticipated allowances, such as shrinkage, rework, design changes, etc Furnish experienced unit or lot costs (or labor hours) from meeption of contract to the cutoff date, improvement curves, and any other available production cost history pertaining to the item (s) to which your proposal relates
(11) Enter total incurred costs (Total of Columns (8), (9), and (10))
(12) Enter those necessary and reasonable costs that in your judgment will properly be incurred in completing the remaining work to be performed under the contract with respect to the items) to which your proposal relates
(13) Enter total estimated cost (Total of Columns (11) and (12))
(14) Identify the attachment in which the information supporting the specific cost element may be found Attach separate pages as necessary

## CODSIA RECOMMENDATIONS SHOWN IN ROLD/ITALICS

## PART 52 - SOLICITATION PROVISIONS AND CONTRACT CLAUSES

### 52.215-21 Changes or Additions to Make-or-Buy Program.

As prescribed in 15 508(a), insert the following clause

## Changes or Additions to Make-or-Buy Program (Date)

(a) The Contractor shall perform in accordance with the make-or-buy program incorporated in this contract If the Contractor proposes to change the program, the Contractor shall, reasonably in advance of the proposed change, (1) notify the Contracting Officer in writing, and (2) submit justification in sufficient detail to permit evaluation Changes in the place of performance of any "make" items in the program are subject to this requirement
(b) For items deferred at the time of negotiation of this contract for later addition to the program, the Contractor shall, at the earliest possible time -
(1) Notify the Contracting Officer of each proposed addition, and
(2) Provide justification in sufficient detail to permit evaluation
(c) Modification of the make-or-buy program to incorporate proposed changes or additions shall be effective upon the Contractor's receipt of the Contracting Officer's written approval

## (End of clause)

Alternate I (Date) As prescribed in 15 508(a)(1) add the following paragraph (d) to the basic clause
(d) If the Contractor desires to reverse the categorization of "make" or "buy" for any item or items designated in the contract as subject to this paragraph, it shall -
(1) Support its proposal with cost or pricing data when permitted and necessary to support evaluation, and
(2) After approval is granted, promptly negotiate with the Contracting Officer an equitable reduction in the contract price in accordance with paragraph ( $k$ ) of the Incentive Price Revision-Firm Target clause or paragraph (m) of the Incentive Price Revision-Successive Targets clause of this contract

Alternate II (Date) As prescribed in 15 508(a)(2), add the following paragraph (d) to the basic clause
(d) If the Contractor desires to reverse the categorization of "make" or "buy" for any item or items designated in the contract as subject to this paragraph, it shall -
(1) Support its proposal with cost or pricing data to permit evaluation, and
(2) After approval is granted, promptly negotiate with the Contracting Officer an equitable reduction in the contract's total estimated cost and fee in accordance with paragraph (e) of the Incentive Fee clause of this contract

## CODSLA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

### 52.215-22 Price Reduction for Defective Cost or Pricing Data.

As prescribed in $15508(\mathrm{~b})$, insert the following clause

## Price Reduction for Defective Cost or Pricing Data (Date)

(a) If any price, including profit or fee, negotiated in connection with this contract, or any cost reimbursable under this contract, was increased by any significant amount because -
(1) the Contractor or a subcontractor furnished cost or pricing data that were not complete, accurate, and current as certified in its Certificate of Current Cost or Pricing Data,
(2) a subcontractor or prospective subcontractor furnished the Contractor cost or pricing data that were not complete, accurate, and current as certified in the Contractor's Certificate of Current Cost or Pricing Data, or
(3) any of these parties furnished data of any description that were not accurate, the price or cost shall be reduced accordingly and the contract shall be modified to reflect the reduction
(b) Any reduction in the contract price under paragraph (a) of this clause due to defective data from a prospective subcontractor that was not subsequently awarded the subcontract shall be limited to the amount, plus applicable overhead and profit markup, by which -
(1) The actual subcontract, or
(2) The actual cost to the Contractor, if there was no subcontract, was less than the prospective subcontract cost estimate submitted by the Contractor, provided, that the actual subcontract price was not itself affected by defective cost or pricing data
(c)(1) If the Contracting Officer determines under paragraph (a) of this clause that a price or cost reduction should be made, the Contractor agrees not to raise the following matters as a defense
(1) The Contractor or subcontractor was a sole source supplier or otherwise was in a superior bargaining position and thus the price of the contract would not have been modified even of accurate, complete, and current cost or pricing data had been submitted
(11) The Contracting Officer should have known that the cost or pricing data in issue were defective even though the Contractor or subcontractor took no affirmative action to bring the character of the data to the attention of the Contracting Officer
(iii) The contract was based on an agreement about the total cost of the contract and there was no agreement about the cost of each item procured under the contract
(iv) The Contractor or subcontractor did not submit a Certificate of Current Cost or Pricing Data
(2)(1) Except as prohibited by subdivision (c)(2)(11) of this clause, an offset in an amount determined appropriate by the Contracting Officer based upon the facts shall be allowed against the amount of a contract price reduction if -
(A) The Contractor certifies to the Contracting Officer that, to the best of the Contractor's knowledge and belief, the Contractor is entitled to the offset un the amount requested, and

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(B) The Contractor proves that the cost or pricing data were available before the date of agreement on the price of the contract (or price of the modification), or an earlier date agreed upon by the parties, and that the data were not submitted before such date
(ii) An offset shall not be allowed if -
(A) The understated data were known by the Contractor to be understated when the Certificate of Current Cost or Pricing Data was signed, or
(B) The Government proves that the facts demonstrate that the contract price would not have increased in the amount to be offset even of the available data had been submitted before the date of agreement on price or an earlier date agreed upon by the parties
(d) If any reduction in the contract price under this clause reduces the price of items for which payment was made prior to the date of the modification reflecting the price reduction, the Contractor shall be liable to and shall pay the United States at the time such overpayment is repaid -
(1) Simple interest on the amount of such overpayment to be computed from the date (s) of overpayment to the Contractor to the date the Government is repaid by the Contractor at the applicable underpayment rate effective for each quarter prescribed by the Secretary of the Treasury under 26 US C 6621 (a)(2), and
(2) A penalty equal to the amount of the overpayment, if the Contractor or subcontractor knowingly submitted cost or pricing data that were incomplete, inaccurate, or noncurrent
(End of clause)

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

### 52.215-23 Price Reduction for Defective Cost or Pricing Data - Modifications

As prescribed in 15508 (c), insert the following clause

## Price Reduction for Defective Cost or Pricing Data - Modifications (Date)

(a) This clause shall become operative only for any modification to this contract involving a pricing adjustment expected to exceed the threshold for submission of cost or pricing data at FAR 15 503-4, except that this clause does not apply to any modification if an exception under FAR 15 503-1 applies
(b) If any price, including profit or fee, negotiated in connection with any modification under this clause, or any cost reimbursable under this contract, was increased by any significant amount because (1) the Contractor or a subcontractor furnished cost or pricing data that were not complete, accurate, and current as certified in its Certificate of Current Cost or Pricing Data, (2) a subcontractor or prospective subcontractor furnished the Contractor cost or pricing data that were not complete, accurate, and current as certified in the Contractor's Certificate of Current Cost or Pricing Data, or (3) any of these parties furnished data of any description that were not accurate, the price or cost shall be reduced accordingly and the contract shall be modified to reflect the reduction This right to a price reduction is limited to that resulting from defects in data relating to modifications for which this clause becomes operative under paragraph (a) of this clause
(c) Any reduction in the contract price under paragraph (b) of this clause due to defective data from a prospective subcontractor that was not subsequently awarded the subcontract shall be limited to the amount, plus applicable overhead and profit markup, by which -
(1) The actual subcontract, or
(2) The actual cost to the Contractor, if there was no subcontract, was less than the prospective subcontract cost estimate submitted by the Contractor, provided, that the actual subcontract price was not itself affected by defective cost or pricing data
(d)(1) If the Contracting Officer determines under paragraph (b) of this clause that a price or cost reduction should be made, the Contractor agrees not to raise the following matters as a defense
(1) The Contractor or subcontractor was a sole source supplier or otherwise was in a superior bargaining position and thus the price of the contract would not have been modified even of accurate, complete, and current cost or pricing data had been submitted
(in) The Contracting Officer should have known that the cost or pricing data in issue were defective even though the Contractor or subcontractor took no affirmative action to bring the character of the data to the attention of the Contracting Officer
(111) The contract was based on an agreement about the total cost of the contract and there was no agreement about the cost of each item procured under the contract
(iv) The Contractor or subcontractor did not submit a Certificate of Current Cost or Pricing Data
(2)(1) Except as prohibited by subdivision (d)(2)(11) of this clause, an offset in an amount determined appropriate by the Contracting Officer based upon the facts shall be allowed against the amount of a contract price reduction if -


## CODSLA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(A) The Contractor certifies to the Contracting Officer that, to the best of the Contractor's knowledge and belief, the Contractor is entitled to the offset in the amount requested, and
(B) The Contractor proves that the cost or pricing data were available before the date of agreement on the price of the contract (or price of the modification), or an earlier date agreed upon by the parties, and that the data were not submitted before such date
(1) An offset shall not be allowed if -
(A) The understated data were known by the Contractor to be understated when the Certificate of Current Cost or Pricing Data was signed, or
(B) The Government proves that the facts demonstrate that the contract price would not have increased in the amount to be offset even if the available data had been submitted before the date of agreement on price, or an earlier date agreed upon by the parties
(e) If any reduction in the contract price under this clause reduces the price of items for which payment was made prior to the date of the modification reflecting the price reduction, the Contractor shall be table to and shall pay the United States at the time such overpayment is repaid -
(1) Simple interest on the amount of such overpayment to be computed from the dates) of overpayment to the Contractor to the date the Government is repaid by the Contractor at the applicable underpayment rate effective for each quarter prescribed by the Secretary of the Treasury under 26 US C 6621 (a)(2), and
(2) A penalty equal to the amount of the overpayment, if the Contractor or subcontractor knowingly submitted cost or pricing data that were incomplete, accurate, or noncurrent


## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

### 52.215-24 Subcontractor Cost or Pricing Data.

As prescribed in 15508 (d), insert the following clause

## Subcontractor Cost or Pricing Data (Date)

(a) Before awardng any subcontract expected to exceed the threshold for submission of cost or pricing data at FAR 15 503-4, on the date of agreement on price or the date of award, whichever is later, or before pricing any subcontract modification involving a pricing adjustment expected to exceed the threshold for submission of cost or pricing data at FAR 15 503-4, the Contractor shall requre the subcontractor to submit cost or pricing data (actually or by specific identification un writng), unless an exception under FAR 15 503-1 apples
(b) The Contractor shall require the subcontractor to certify in substantally the form prescribed in FAR 15 506-2 that, to the best of its knowledge and belief, the data submitted under paragraph (a) of this clause were accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract or subcontract modification
(c) In each subcontract that exceeds the threshold for submission of cost or pricing data at FAR 15 503-4, when entered into, the Contractor shall insert etther -
(1) The substance of this clause, including this paragraph (c), if paragraph (a) of this clause requires submission of cost or pricing data for the subcontract, or
(2) The substance of the clause at FAR 52 215-25, Subcontractor Cost or Pricing Data - Modifications
(End of clause)

## CODSLA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

### 52.215-25 Subcontractor Cost or Pricing Data - Modifications.

As prescribed in 15 508(e), insert the following clause

## Subcontractor Cost or Pricing Data - Modifications (Date)

(a) The requirements of paragraphs (b) and (c) of this clause shall -
(1) Become operative only for any modification to this contract involving a pricing adjustment expected to exceed the threshold for submission of cost or pricing data at FAR 15 503-4, and
(2) Be limited to such modifications
(b) Before awarding any subcontract expected to exceed the threshold for submission of cost or pricing data at FAR 15 503-4, on the date of agreement on price or the date of award, whichever is later, or before pricing any subcontract modification involving a pricing adjustment expected to exceed the threshold for submission of cost or pricing data at FAR 15 503-4, the Contractor shall require the subcontractor to submit cost or pricing data (actually or by specific identification in writing), unless an exception under FAR $15503-1$ applies
(c) The Contractor shall require the subcontractor to certify in substantially the form prescribed in FAR 15 506-2 that, to the best of its knowledge and belief, the data submitted under paragraph (b) of this clause were accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract or subcontract modification
(d) The Contractor shall insert the substance of this clause, including this paragraph (d), in each subcontract that exceeds the threshold for submission of cost or pricing data at FAR $15503-4$ on the date of agreement on price or the date of award, whichever is later
(End of clause)

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

### 52.215-26 Integrity of Unit Prices.

As prescribed in 15 508(f), insert the following clause

## Integrity of Unit Prices (Date)

(a) Any proposal submitted for the negotiation of prices for items of supplies shall distribute costs within contracts on a basis that ensures that unit prices are in proportion to the items' base cost (eg, manufacturing or acquisition costs) Any method of distributing costs to line items that distorts unit prices shall not be used For example, distributing costs equally among line items is not acceptable except when there is little or no variation in base cost Nothing in this paragraph requires submission of cost or pricing data not otherwise required by law or regulation
(b) When requested by the Contracting Officer, the Offeror/Contractor shall also identify those supplies that it will not manufacture or to which it will not contribute significant value
(c) The Contractor shall insert the substance of this clause, less paragraph (b), in all subcontracts for other than acquisitions at or below the simplified acquisition threshold, construction or architect-engineer services under FAR Part 36, utility services under FAR Part 41, services where supplies are not required, commercial items, and petroleum products

## (End of clause)

Alternate I (Date) As prescribed in 15 508(f), substitute the following paragraph (b) for paragraph (b) of the basic clause
(b) The Offeror/Contractor shall also identify those supplies that it will not manufacture or to which it will not contribute significant value

## CODSLA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

### 52.215-27 Termination of Defined Benefit Pension Plans.

As prescribed in $15508(\mathrm{~g})$, insert the following clause

## Termination of Defined Benefit Pension Plans (Date)

The Contractor shall promptly notify the Contracting Officer in writing when it determines that it will terminate a defined benefit pension plan or otherwise recapture such pension fund assets If pension fund assets revert to the Contractor or are constructively received by it under a termination or otherwise, the Contractor shall make a refund or give a credit to the Government for its equitable share as required by FAR 31 205-6(J)(4) The Contractor shall include the substance of this clause in all subcontracts under this contract that meet the applicability requirement of FAR 15 508(c)
(End of clause)

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

### 52.215-41 Requirements for Cost or Prieng Data or Information Other Than Cost or Pricing Data.

As prescribed in 15 508(1), insert the following provision

Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data (Date)

(a) Exceptions from cost or pricing data (1) In leu of submitting cost or pricing data, offeror may submit a written request for exception by submitting the information other than cost or pricing data described in the following subparagraph The Contracting Officer may require additional supporting information, but only to the extent necessary to determine whether an exception should be granted, and whether the price is fair and reasonable
(i) Identification of the law or regulation establishing the price offered If the price is controlled under law by periodic rulings, reviews, or similar actions of a governmental body, attach a copy of the controlling document, unless it was previously submitted to the contracting office
(11) For a commercial item exception, the offeror shall submit, at a minimum, information on prices at which the same item or similar items have previously been sold in the commercial market that is adequate for evaluating the reasonableness of the price for this acquisition Such information may include -
(A) For catalog items, a copy of or identification of the catalog and its date, or the appropriate pages for the offered items, or a statement that the catalog is on file in the buying office to which the proposal is being submitted Provide a copy or describe current published discount policies and price lists (published or unpublished), e g, wholesale, original equipment manufacturer, or reseller Also explain the basis of each offered price and its relationship to the established catalog price, including how the proposed price relates to the price of recent sales in quantities similar to the proposed quantities,

## CODSIA ANALYSIS

See CODSIA's comment at FAR 15501 If the DAR Council and CAA Council decides not to provide a workable definition of discount, the offeror's obligation to disclose unpublished discounts should be removed It is unfair to impose such disclose risks on industry) This is a high-risk concern to industry
(B) For market-priced items, the source and date or period of the market quotation or other basis for market price, the base amount, and applicable discounts In addition, describe the nature of the market,
(C) For items included on an active Federal Supply Service or Information Technology Service Multiple Award Schedule contract, proof that an exception has been granted for the schedule item
(2) In submitting information other than cost or pricing data, the offeror grants the Contracting Officer or an authorized representative the right to examine, at any time before award, books, records, documents, or other directly pertinent records to verify any request for an exception under this provision, and the reasonableness of price Access does not extend to cost or profit information or other data relevant solely to the offeror's determination of the prices to be offered in the catalog or marketplace

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(b) Requirements for cost or pricing data If the offeror is not granted an exception from the requirement to submit cost or pricing data, the following apples
(1) The offeror shall prepare and submit cost or pricing data and supporting attachments in accordance with FAR Table 15-2
(2) As soon as practicable after agreement on price, but before contract award (except for unpriced actions such as letter contracts), the offeror shall submit a Certificate of Current Cost or Pricing Data, as prescribed by FAR 15 5062
(3) In submitting cost or pricing data, the offeror grants the Contracting Officer or an authorized representative the right to examine books, records, documents, or other directly pertinent records in accordance with the provisions of 52.215-2.

> | CODSIA ANALYSIS |
| :--- |
| See CODSIA's comment at FAR 15 503-5 and FAR $15503-6$ CODSIA |
| believes that the access to records and audit rights must be absolutely clear, |
| particularly if Table 15-3 and Standard Form 1448 are elmmated |

(End of clause)
Alternate I (DATE) As prescribed in 15 508(1), substitute the following paragraph (b)(1) for paragraph (b)(1) of the basic provision
(b)(1) The offeror shall submit cost or pricing data and supporting attachments in the following format

Alternate II (DATE) As prescribed in 15 508(1), add the following paragraph (c) to the basic provision
(c) When the proposal is submitted, also submit one copy each to (1) The Administrative Contracting Officer, and
(2) the Contract Auditor

Alternate 1 II (DATE) As prescribed in 15 508(I), add the following paragraph (c) to the basic provision (if Alternate II is also used, redesıgnate as paragraph (d))
(c) Submit the cost portion of the proposal via the following electronic media [Insert media format, e g , electronic spreadsheet format, electronic mall, etc ]

Alternate IV (DATE) As prescribed in 15 508(1), replace the text of the basic provision with the following
(a) Submission of cost or pricing data is not required
(b) Provide information described below [Insert description of the information and the format that are required, including access to records necessary to permit an adequate evaluation of the proposed price in accordance with 15 503-3 ]

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

### 52.215-42 Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing DataModifications.

As prescribed in $15508(\mathrm{~m})$, insert the following clause

## Requirements for Cost or Pricing Data or Information Other 'Than Cost or Pricing Data - Modifications (Date)

(a) Exceptions from cost or pricing data (1) In lieu of submitting cost or pricing data for modifications under this contract, for price adjustments expected to exceed the threshold set forth at FAR 15 503-4 on the date of the agreement on price or the date of the award, whichever is later, the Contractor may submit a written request for exception by submitting the information other than cost or pricing data described in the following subparagraph The Contracting Officer may require additional supporting information, but only to the extent necessary to determine whether an exception should be granted, and whether the price is fair and reasonable-
(1) Identification of the law or regulation establishing the price offered If the price 15 controlled under law by periodic rulings, reviews, or similar actions of a governmental body, attach a copy of the controlling document, unless it was previously submitted to the contracting office
(ii) Information on modifications of contracts or subcontracts for commercial items (A) If-
(1) The original contract or subcontract was granted an exception from cost or pricing data requirements because the price agreed upon was based on adequate price competition or prices set by law or regulation, or was a contract or subcontract for the acquisition of a commercial item, and
(2) The modification (to the contract or subcontract) is not exempted based on one of these exceptions, then the Contractor may provide information to establish that the modification would not change the contract or subcontract from a contract or subcontract for the acquisition of a commercial item to a contract or subcontract for the acquisition of an item other than a commercial item
(B) For a commercial item exception, the Contractor shall provide, at a minium, information on prices at which the same item or similar items have previously been sold that is adequate for evaluating the reasonableness of the price of the modification Such information may include -
(1) For catalog items, a copy of or identification of the catalog and its date, or the appropriate pages for the offered items, or a statement that the catalog is on file in the buying office to which the proposal is being submitted Provide a copy or describe current published discount policies and price lists (publeshed-or mpubtished), e $g$, wholesale, original equipment manufacturer, or reseller Also explain the basis of each offered price and its relationship to the established catalog price, including how the proposed price relates to the price of recent sales in quantities similar to the proposed quantities
(2) For market-priced items, the source and date or period of the market quotation or other basis for market price, the base amount, and applicable discounts In addition, describe the nature of the market
(3) For items included on an active Federal Supply Service or Information Technology Service Multiple Award Schedule contract, proof that an exception has been granted for the schedule item

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(2) In submitting information other than cost or pricing data, the Contractor grants the Contracting Officer or an authorized representative the right to examine, at any time before award, books, records, documents, or other directly pertinent records to verify any request for an exception under this clause, and the reasonableness of price Access does not extend to cost or profit information or other data relevant solely to the Contractor's determination of the prices to be offered in the catalog or marketplace
(b) Requirements for cost or pricing data If the Contractor is not granted an exception from the requirement to submit cost or pricing data, the following applies
(1) The Contractor shall submit cost or pricing data and supporting attachments in accordance with FAR Table 15-2
(2) As soon as practicable after agreement on price, but before award (except for unpriced actions), the Contractor shall submit a Certificate of Current Cost or Pricing Data, as prescribed by FAR 15 506-2
(3) In submitting cost or pricing data, the offeror grants the Contracting Officer or an authorized representative the right to examine books, records, documents, or other directly pertinent records in accordance with the provisions of 52.215-2.
(End of clause)
Alternate I (DATE) As prescribed in $15508(\mathrm{~m})$, substitute the following paragraph (b)(1) for paragraph (b)(1) of the basic clause
(b)(1) The Contractor shall submit cost or pricing data and supporting attachments prepared in the following format

Alternate II (DATE) As prescribed in $15508(\mathrm{~m})$, add the following paragraph (c) to the basic clause
(c) When the proposal is submitted, also submit one copy each to (1) the Administrative Contracting Officer, and (2) the Contract Auditor

Alternate III (DATE) As prescribed in $15508(\mathrm{~m})$, add the following paragraph (c) to the basic clause (if Alternate II is also used, redesignate as paragraph (d))
(c) Submit the cost portion of the proposal via the following electronic media [Insert media format]

Alternate IV (DATE) As prescribed in $15508(\mathrm{~m})$, replace the text of the basic clause with the following
(a) Submission of cost or pricing data is not required
(b) Provide information described below [Insert description of the information and the format that are required, including access to records necessary to permit an adequate evaluation of the proposed price in accordance with 15 503-3]

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

## PART 53 -FORMS

## CODSIA ANALYSIS

See CODSIA's comment at FAR 15 503-5, FAR 15 503-6, FAR 52 215-41, and FAR 52 215-42 CODSIA is concerned that the proposed rewrite obscures the bright-line test which was created as a result of FASA CODSIA supports elimmating the Standard Form 1448 only if it is replaced with clear guidance in FAR Subpart 155 and the solicitation provision at FAR 52 215-41 and contract clause at FAR 52 215-42 This is a high-risk concern to industry

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

## PART 99 -COST ACCOUNTING STANDARDS

CODSIA understands that the DAR Council and CAA Council are not responsible for the regulations promulgated by the CAS Board However, CODSIA believes it is important use all related opportunities to continue expressing its concern with the Board's failure to implement necessary reforms and to coordinate its activities with the Government's changing pricing rules CODSIA urges the DAR Council and CAA Council to not implement the guidance at FAR 15 504-1(d) on cost realism unless and until the CAS Board has exempted at 48 CPR 9903 2011(b)(15) for firm fixed price contracts that do not involve the submission of certified cost or pricing data

## GROUP B

15.502(b). Recognizing the lead-in text under 15.502, recommend that paragraph (b) be rephrased to read "(b) Price each contract separately and independently and shall not --"
15.503-1(c). In subparagraph (c)(iii)(4), clarify the fourth sentence "For example, if cost or pricing data were furnished on previous production buys and the contracting officer determines such data are sufficient for the current acquisition, when "
15.504-3(c)(1). In paragraph (c)(1), what does "the lower of" mean? Does thus require a calculation in relation to subparagraph (ii) and a comparison between the amounts in subparagraph (1) and (il)? Or does it simply mean that if either one of the two tests applies, subcontractor cost or pricing data is to be submitted?

In addition, does the phrase "unless the contracting officer behaves such submission is not necessary" at the end of subparagraph (c)(1)(ii) apply to subparagraph (ii) only? Or is it intended to apply to both subparagraph (i) and (ii)?

Subparagraph (c)(3) should be revised to read as follows: "Subcontractor cost or pricing data may be submitted in the format provided in Table 15-2 of 15508 or in the format specified in the solicitation" This conforms to subparagraph 15.503-5(b) in the proposed rule, which allows submission of cost or pricing data in the Table 15-2 format, an alternate format specified by the contracting office, or in the contractor's format

Subparagraph (c)(5) should be rewritten to properly place the phrase "to the Government", such as " . the contractor need only submit to the Government cost or pricing data for ."
15.506-1(a). Reword the second sentence of paragraph (a) to read." Such objectives assist the contracting officer in making $a$ determination of fair and reasonable price."
15.507. The sections on Should-Cost Review (15.507-4) and Estimating Systems (15 507-5) should be moved to a separate section entitled "Related Matters" to avoid the perception that these areas are to be treated as cost or pricing data.
15.507-2(f)(2). At the end of this subparagraph, a downward only change "reduction" is noted for a make-or-buy decision reversal. Recommend that the phrase ". . . shall be subject to equitable reduction" be revised to " . . shall be subject to equitable adjustment"

Table 15-2. Table 15-2, Paragraph 1, of the rewrite should be changed to conform to the current FAR standard (FAR 15 804-6, Table 15-2), which requires that later cost or pricing information be submitted to the Contracting Officer in a manner that clearly shows how the information relates to the offeror's price proposal The rewrite now requires that the contractor demonstrate how the information relates to the price proposal.

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95-029-43
$$

# Comments of <br> The Multi-Association Small Business Task Force 

in response to the

# Federal Acquisition Regulation Part 15 Rewrite (62 Fed. Reg. 26639, May 14, 1997) 

July 14, 1997

Task Force Members<br>Computing Technology Industry Association<br>American Defense Preparedness Association/ National Security Industrial Association<br>The Electronics Industries Association

David M Nader, Counsel
Dicksteın Shapiro Morin \& Oshinsky LLP

# COMMENTS OF <br> THE MULTI-ASSOCLATION SMALL BUSINESS TASK FORCE ON THE FEDERAL ACQUISITION REGULATION PART 15 REWRITE 

The Multu-Association Small Business Task Force (Task Force) is pleased to submit these comments on the proposed rewrite of Federal Acquisition Regulation (FAR) Part 15, as published in the May 14, 1997 Federal Register ( 62 Fed Reg 26639) Task Force members are national trade associations whose members are predominantly small businesses They include

The Computing Technology Industry Association, which represents more than 6,000 microcomputer resellers, software publishers, distributors, integrators, service companies, and manufacturers of computers, peripheral equipment, and semiconductors

ADPA/NSIA, which merged on March 1, 1997, represents over 900 companies, these businesses, the majonty of which are smaller companies, are involved in all sectors of the industrial base, including defense, aerospace, electronics, shipbuilding and services

The Electronic Industries Association (EIA) was established in 1924 and is the national trade organization representing US electronics manufacturers Committed to the competitiveness of the Amencan producer, ELA represents the entire spectrum of companies involved in the manufacture of electronic components, parts, systems and equipment for communications, industrial, government and consumer-end users

In our previous comments concerning the September 12, 1996 proposed FAR Part 15 Rewrite, the Task Force expressed its encouragement over the new procedures that establish common-sense procurement methods that are, m many ways, similar to those used by a vast majority of our commercial members The proposed regulations simplified the process of negotiated procurements and eliminated regulations that imposed unnecessary burdens on both industry and the government In those comments, the Task Force recognized that the rewrite should entice more private companies to compete to fulfill the government's needs As a result, the government would be able to receive the best products and services, at the best prices, in an environment of robust competition

In those comments, the Task Force also noted some points that needed clarification to ensure that industry -- particularly small businesses -- would be treated fairy in the government's new regime of procurement efficiency and effectiveness The May 14 , 1997 rewrite addressed many of the Task Force's concerns We are heartened particularly by the revised provisions that

- Permit enhanced communications between the government and industry, thus enabling industry to better understand
the government's requirements and the government to better understand industry's proposals,
- Emphasize that no offeror, otherwise eligible to submit a proposal in response to a government solicitation, will be excluded from the competitive range without its proposal being initially reviewed and evaluated,
- Emphasize that the government must evaluate all proposals received based upon the criteria in the solicitation,
- Reduce industry's bid and proposal preparation costs by providing feedback as early as possible as to whether submitted proposals are competitive,
- Clarify the standard for admission into the competitive range,
- Delete the language concerning limiting the estimated number of proposals in the competitive range for reasons of efficiency,
- Establish a common cut-off date and time for receipt of final proposals, which promotes fairness among competing offeror

Although the Task Force believes that the May 14, 1997 rewrite is a sigmficant step forward in the government's move towards a more commercial purchasing model, there are a few items that need to be clarified or refined Thus, the Task Force submits the following comments and suggestions for consideration by the Rewnte Committee to further assist the Committee in implementing its goals

I Multiphase Acquisition Technique The Task Force endorses, in certain circumstances, the proposed "multiphase acquisition technique," which authorizes the government to conduct "downselects" based on limited information under FAR 15102 The rewrite should, however, explain the substantive differences between "single phase acquisition" and multiphase acquisition, as well as provide government contracting officials with guidance in determining which technique best suits the government's needs in a given procurement

For example, single phase acquisition is apropos if cost or price is the dominant evaluation factor, and it may be appropriate for those procurements requiring limited tradeoffs between cost and non-cost factors Under such circumstances, communications between the government and offeror should be few in number and limited in scope On
the other hand, multiphase acquisition may be appropriate when submission of detailed proposals at the beginning of source selection would be burdensome for offeror to prepare and for the government to evaluate

2 Communications With Offeror s The Task Force is encouraged by the proposed FAR 15406 , which gives the government latitude to communicate with offeror openly about their proposals and the government's needs prior to competitive range determinations By enabling contractors and the government to establish a free flow of information about perceived strengths and shortcomings of offers, as well as government needs, the proposed rule should save both industry and the government considerable time, money and effort

The Task Force recommends that the Committee consider clarifying when proposal revisions by offerors are permitted in the context of communications and discussions FAR 15406 (b) clearly prohibits proposal revisions that result from communications prior to establishment of the competitive range However, FAR 15406 (d) does not make clear that proposal revisions can result from discussions between the government and offeror This is an important distinction that should be highlighted in the FAR

3 Past Performance The Task Force recognizes the importance of past performance evaluations that allow the government to assess the performance risk of offerors and lauds the Committee's decision to consider private contracts in assessing past performance However, in light of the government's increasing use of past performance evaluation as a key consideration for award, we are concerned that offeror lacking a relevant past performance history may be categoncally excluded from competing for government requirements

The proposed past performance evaluation under FAR I5 405(a)(2) gives those companies with no relevant experience a "neutral" past performance rating As the Committee acknowledges, this rating should not affect the evaluation of the inexperienced contractor unless all other contractors are more expenenced (or all less experienced, which is highly improbable) The Task Force believes that the current revision has a disproportionate impact on small businesses and may run afoul of the SBA's Certificate of Competency (COC) program Under the COC program, the government must accept the SBA's determination of competency -1 e , that a company is responsible The proposed rule seems to be inconsistent with the program because the government could still clam that the company's past performance is lacking $v t s-a(v i s$ other offeror and, thus, is not the "best value "

4 Preaward Debriefings The Task Force lauds the government's abolition of previous procurement laws that prohibited preaward debriefings. The Task Force beheves that preaward debriefings should be mandatory for offeror requesting them The
current proposed rule allows the contracting officer to refuse preaward debriefing requests for "compelling reasons" We beheve that this "exception" is unnecessary and should be removed because of the specific limitations already placed on preaward debnefings by $\mathrm{P} L$ 104-106 ( $\$ 4104$ ) These statutory limitations will be sufficient to ensure that conducting a preaward debriefing prior to contract award does not compromise the integrity of the procurement process

In addition, the Committee should ensure that the preaward debriefing provisions are consistent with the General Accounting Office's (GAO) bid protest regulations For example, the proposed rule permits offeror to request a delay of the preaward debriefing until after contract award (when more information can be provided by the government) However, the proposed rule also states that bid protest timeliness will be measured from the date the offeror knew of its exclusion from the competition Because GAO's bid protest regulations require that protests be made with specificity, a delayed debriefing under the proposed rule may place the aggneved offeror between a rock and a hard place a delayed debnefing may adversely affect the protest's timeliness, whereas an "early" debriefing may impact the offeror's ability to protest with specificity, which could lead to summary dismissal of the protest

The Task Force urges the Rewrite Committee and the FAR Council to vigilantly monitor the implementation of the final regulations As SBA Chief Counsel for Advocacy, Jere Glover pointed out at the April 10, 1997 House Small Business Committee hearing, the government's increased use of blanket purchase agreements, ID/IQ contracts, the multiple award schedule, and GWACS has resulted in a smaller share of federal contract dollars for small businesses To the extent that these contract methods result in the best value for the taxpayer, they should continue to be used Some portion of the expanded "large" business market share will flow down to small supphers and subcontractors anyway

However, while the convenience of these procurement methods alone may appeal to many overworked contracting officers, convenience does not always equate to efficiency or best value We should ensure that streamlining results in efficiency and best value to the government and should not simply be an avenue of convenience for contracting officers

For these reasons, we urge ongoing careful review of the results of the implementation of the final FAR regulations, with modifications made where needed to assure that competitive small businesses continue to be afforded the opportunity to have their proposals considered and evaluated objectively

The Task Force appreciates this opportunity to submit these comments to the Rewnte Committee The Task Force looks forward to working with government representatives to finalize and implement this keystone of the administration's acquisition reform initiatives

## FAX TRANSMITTAL



TO．FAR Secretanat（VRS）Re CASe 95－029

1 We understand you are looking for information to document FAR rewrite Enclosed Information Paper provides a view into our expenence with Oral Presentations

## Linda H Smith

Principal Assistant Responsible for
Contracting

## INFORMATION PAPER

SUBJECT: Oral Presentations
i. Purpose. To document the Central Contracting Office's (CCO's) experience with oral presentations.
2. Points of major interest and facts.
a. We have successfully used oral presentations to award contracts, conduct market research, and select awardees for individual orders under multiple award task order contracts. We initially wanted to use oral presentations to do a better job of selecting the "right" contractor. Several of our contractors had hared of developed expert proposal writers who were much better at preparing proposals than they were at performing. Evert though we had applied the latest "best value" techniques, we still found ourselves awarding to other then the best possible contractor. Some folks initially said that with oral presentations contractors would simply replace the "proposal writers" with "actors" and we would still be awarding to other than the "best" contractors. That has not been the case because we require the offerors to have the actual people who will be performing the contract, if awarded, make the oral presentations. We have found oral presentations to be the best contracting innovation in years. We are getting the right contractors and significantly reduced lead times. Additionally, all the stakeholders--contractors, government customers, and government contracting personnel--end up with a much better understanding of exactly what the contractor is going to do.
b. Our interest in the use of oral presentations actually goes back 3 or 4 years. It began with concerns about providing urgently needed health care services in a fast-changing environment in addition to the need to select the very best contractors.
c. In this environment of searching for better ways to meet customers' needs, we concluded that the existing Defense acquisition/contracting courses simply did not get us there. We began a comprehensive training program to stay abreast of current acquisition initiatives and innovations. Our personnel attend commercially available courses on contemporary topics that are not taught by government schools. They return to CCO to train others during regularly scheduled training sessions. They have disseminated information about use of oral presentations in lieu
of portions of written technical proposals. During oral presentations, we have continually required other contract specialists and contracting officers to sit in and observiz the proceedings. This has done wonders to decrease staff zeststance.
d. We first used oral presentations for a contract award in December 1995 to expedite an urgently needed requirement For the movement of equipment, supplies, automated systems, etcetran from the old buildings to the newly -constructed Brooke Army Medical Center. For this initial trial, we used oral presentations to facilitate understanding of the technical proposals and expedite the process. This first initiative took only 55 days for the entire contracting process and resulted in a consensus that we had selected the very best contractor following seven separate presentations.
e. Later, we contracted with Federal Publications to have a nationally recognized and widely published legal authority on government contracting conduct a 2 day on-site class on oral presentations at Fort Sam Houston for CCO and Medical Command personnel. The course reinforced and institutionalized the use of oral presentations in CCO.
f. We then used oral presentations to expedite other significant high dollar value procurements, such as:
(1) The contract for the Primary Care Outpatient Cinnucs at Fort Belvoir (total value of $\$ 70.6 \mathrm{mililon}$ ). Contracting average lead time (CALT) for this acquisition was 5 months. While being extremely short for a project of this magnitude, it $1 s$ particularly noteworthy since CAJT for contracted clinics was generally 13-IS months on previous procurements.
(2) A requirement for integrated modular medical support system (total value of $\$ 20$ million). This ls an "open-ended" contract for use by CONUS and OCONUS medical treatment facilities: CALT was 91 days.
(3) Four indefinite delivery indefinite quantity contracts (one each for Pacific, Southeast, North Atlantic, and Great Plains regions) for emergency room services. Contracts allow for addition of indefinite requirements when they become known. Only written past performance and cost information were required prior to the oral presentation.
(4) Competitive task orders issued under multiple award contracts for automatic data processing and contracted advisory and assistance services. In all cases, oral presentations have resulted $1 n$ expedited awards and better understanding by all stakeholders.
g. Oral presentations have proven invaluabie in researchang the market for commercual market practuces.
(l) One example 15 maintenance of medical $1 m a g i n g$ equipment. Obtalning contract malntenance for such equipment had been a problem for meny years. Contracts throughout the command were either awarded on a questionable sole source basis to the original equipment manufacturer (OEM) or were awarded to third parties who then often falled to perform because they could not obtain the parts or technical expertise requlred for the mazntenance. Since these maintenance contracts were vital to the delivery of health care, we sought to fand solutions to the contracting problems through market research.
(2) Through oral presentations by potential contractors, we learned that the market had changed significantly to the extent that all the OEMs are now malntaining each other's equapment, or are willing to subcontract with each other as needed. This represents a "breakthrough" because a single contract can be awarded to a single contractor to manntain all equipment in a medical treatment Eacılıty. We are now negotiating command-wide majntenance contracts very similar to those used in the cuviluan sector by large hospital chains. 周e Eirst learned about these through the market research oral presentations.
h. We have used oral presentations on over 20 separate actions for market research; 10 contract awards, whth 6 pending; and competition of several task orders. We have evolved by continualiy decreasing the extent of written proposals. Possibly, the most significant demonstration of the value and savings was when the Federal Express truck pulled up in front of our building to bring in a proposal for the operation of a primary care clinic. The driver walked anto our building with one envelope. Previously, the same proposal would have involved at least two trlps wath a two-wheel dolly stacked as high as possible wath boxes.

1. Favorable comments have been recelved Erom hugh level officers of major corporations about our use of oral
presentations. The consensus seems to be that both partles saved tame and money by using ozal presentations rather than adinering to voluminous written proposals, and that the process is falr to all competing offerors. In thls regard, no protests have been fıled about oral presentatıons
J. The CCO continues to increase the use of oral presentations. The numerous benefits include:
(1) Selection of the most advantageous offer in best value procurements and fachlitated review and understanding of complex technical issues.
(2) Facilitated awards because proposals can be erraluated with the submission of extremely limited pilnted material. With the use of oral presentations, proposals can be evaluated on as little wrutten information as past performance and financial capability. This reduces the number of evaluation factors, simplifies the evaluations, and saves time and money.
(3) Significant sarings in administrative lead time, resulting in reduced costs to competing contractors and the government.
(4) Greatly enhanced communications among customers, contracting personnel, legal and policy support, and compeing offerors. In fact, the customer plays a much more significant role in the source selection process.
$k$. The best practices for oral presentations that we have identified include:
(1) Limiting written proposals to a certain number of pages and requiring evaluators to read and become familiaz with them beforehand.
(2) Requiring past performance submission with wittten proposal and performing the actual review of that informathon beforehand.
(3) Video taping the presentations.
(4) Limiting attendance.
(5) Limiting the process, normaliy to somewhere between 1 and 2 hours.
(6) Limiting the presentation media to black and white overhead transparencies.
(7) Including required topics an the solicitation instructions.
2. We are continually improving out oral presentations process. Currentiy, we are experimenting wath obtaining presentations by both videoconference and telephone conference. In appropriate cases, this may create further savings for both the government and prospective contractors.

M上. Richard Towers/22I-903B

RONALD G. COULSTON
Chief, Central Contracting Office


ACOIISITIDN AND TECHNOLOG:

General Services Admınistratıon
FAR Secretarlat (VRS)
1800 F Street NW
Washington, D C 20405
Dear Mr Edward Loeb
This letter is in reference to FAR Case 95-029 A review of approximately 60 contracts awarded by the Air Force during FY96 and FY97 reveals no instance where the award was made to a small business when the small business was not in the top three after initial evaluations If any additional information is required please contact Mr Tim Denhardt in my
office at (703)693-7789


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Author Joyce Malner at HQS2
Date 7/14/97 3 17 PM
Frlarity Normal
Recelpt Requested
T0 95-029B@www gea gov ar SMTP
CC Milo Fogle at SCA1
CC Dale Siman at scAl
CC EIyC Mena at HQS4
CC DIANE MCKAIN at SCA1
CC JoyFe Mrlner
subject DISA Comments on Case 95-029, FAR 25 Proposed Rule
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    TO GSA, FAR Secretariat
    Atcached is the Defense Information Syetems Agency's comments on Case
    95-029, FAR 15 proposed vule as publiahed in the 14MAYg7 Federal
    Regmster
    Questions on the actached may be addressed Eo Joyoe Milmer on
    703-607-6917
    Attachment a/s
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## NORTHROP GRUMMAN



Northrop Grumman Corporation 1840 Century Park East
Los Angeles California 900672199
Telephone 3105536262

(310) 201-3346

July 14, 1997

Person: General Services Administration
FAR Secretariat (VRS)
1800 F Streets NW
Washington, DC 20405

Subject: FAR Part 15 Rewrite
FAR Case 95-029

Dear FAR Secretariat
Northrop Grumman Corporation appreciates the opportunity to comment on this very 1 important Acquisition Language You are to be commended for the improvements that have been made during Phases I and II Attached you will find our comments for your consideration

Sincerely,


I J McCoy, Director
Corporate Contracts

Northrop Grumman Comments on

FAR PART 15 REWRITE

July 14, 1997

- Section 41001 Policy - It is recommended this policy be expanded to allow contractors to propose CLIN structures which improve contractor cash flow without the Government seeking consideration
- Section 15102 Tradeoff Process - Northrop Grumman recommends that the kinds of tradeoffs that will be considered in the acquisition and the relative importance of key parameters be identified in the solicitation The Multı-Step Source Selection technique must be utilized judiciously to avoid the resurrection of multiple BAFO's There needs to be some policy limits on the use of this technique
- Section 15203 Requests for Proposals - (a)(2)(1) - see comments to 41001 above
- Section 15206 Amending the Solicitation - Northrop Grumman concurs in the principle of modifying the solicitation reflected in paragraph (g) but does not feel the reason or basis is sufficiently clear
- Section 15309 - Limited use of Data (Unsolicited Proposals) and 15207 (Solicitations) - Provide for safeguards of source selection information at the time of proposal submittal These clauses do not provide protection of additional information submitted up to contract award by way of discussions, CR's and DR's This point should be addressed
- Section 15404 Evaluation Factors and Subfactors - Northrop Grumman does not believe reducing the Past Performance threshold to $\$ 100,00$ in 1999 to be in either the Government or Industry's best interest This change will significantly increase the administrative time required to compile, maintain, evaluate and verify reference information It is recommended that the threshold remain at $\$ 1,000,000$ Additionally, 15 404(d)(3)(1) says "past performance shall be evaluated ." However, 15 404(d)(3)(111) states "Past performance need not be evaluated of the contracting officer documents the reason past performance is not an appropriate evaluation factor for the acquisition "It is recommended that the clause be rewritten to clarify where the contracting officer is then required to inform the contractors in the solicitation that past performance will NOT be an evaluation factor And, if the RFP so states, will it tell us "why not"?
- Section 15405 Proposal Evaluation - (a)(2) Past performance It is recommended that offeror be notified of any negative past performance information that will be used in the source selection process and that the offeror be provided an opportunity to comment on that information prior to its use. In addition, the source of the negative information should be identified (a)(2)(11 and iv)

Offeror with no relevant past performance history It is considered unreasonable for an offeror with no relevant past performance to be given a neutral evaluation An offeror with no relevant past performance experience should be given a negative rating on some type of sliding scale based on the complexity of the item or service being procured, the more complex the item the more severe the rating Northrop Grumman endorses the position of AIA regarding the Contracting Officer's use of information related to a contract that is in dispute or litigation Specific restrictions should be imposed against utilizing information related to a contract that is the subject of a dispute or litigation.

- Section 15406 Communications with offerors - It is recommended paragraph (b)(4) be changed to read "Shall address adverse past performance information " and delete the remainder of that sentence (ie., "on which the offeror has not previously had an opportunity to comment") The latter wording is, at best, vague Regarding paragraph (e)(2) it is recommended that the phrase "innovative and unique uses" be deleted, this should not be restricted or limited in any way Nothing regarding a competitor's solution should be revealed
- Section 15501 Definitions - 15501 - At the end of the first paragraph of this section there is reference to parametric estimates using validated, calibrated parametric models The provisions for price adjustment for defective cost or pricing data should limit their application to cost or pricing data used to validate and calibrate parametric models if that is the estimating technique used by the contractor and accepted by the Government for any particular pricing action Just as the Government is encouraged to mutually agree to cut-off dates (see for example 15 506-2(c) or 15 504-3(c)(4)), the Government should also be encouraged to adopt parametric techniques The last paragraph of Section 15-501 treats the transfer of commercial items between divisions as a subcontract It should be made clear that these transfers are at price as opposed to those dealt with in Table 15-2 Cost Element A(2)
- Section 15502 Pricing Policy - (a)(3) Consistent with the phraseology of 15 503-1 (a), it is believed that the Contracting Officer "must" or "shall" use every means to assure a fair and reasonable price can be determined before requesting cost or pricing data
- Section 15 504-3(b)(2) and (3) It is recommended that these paragraphs be rewritten to require submission of the contractor's analysis of proposed subcontract prices and the subcontractor's cost or pricing data submission as a part of the Contractor's Cost and Pricing data submission, not as a part of the contractor's price proposal
- Section 15.507-5 Estimating Systems - It is recommended the criteria contained in current FAR 15811 , which the auditor should consider in determining whether a contractor's estimating system is acceptable, should be included in the rewrite of this paragraph
- Section 15605 Are award Debriefing of Offeror - Paragraph (a)(2) The offeror should be given the opportunity to have both a pre and post award debriefing or if the offeror opts to have the post award debriefing, the time for protest should be based on the time in which he received the debriefing as opposed to "the date the offeror knew or should have known " Paragraph © Preaward debriefings should not be left completely to the discretion of the Contracting Officer

Contractors spend significant sums of money in preparing and supporting a proposal and they should be assured of a complete and adequate debriefing

- Section 15606 - Postaward Debriefing of Offerors - As reflected above for Preaward debriefings, Postaward debriefings should not be left completely to the discretion of the Contracting Officer Contractors spend significant sums of money in preparing and supporting a proposal and they should be assured of a complete and adequate debriefing
- Table 15-2 Cost Element (A)(2) - There is language in this section which seems to indicate that the contractor needs to conduct a cost or price analysis (see 15 504-1) on interorganizational transfers at cost and submit that analysis with the initial pricing proposal Since interorganızational transfers at cost are not subcontracts (contra 15501 last paragraph), a cost or price analysis should not be required. Interorganizational transfers at cost should require no more cost element breakdown than any other "make" item included in the contractor's proposal



# Electronic Data Systems Corporation Contracts and Legal Division 13600 EDS Drive Mail Stop A6N-D48 Herndon, Virginia 20171-3225 

Date: July 14, 1997
To: Beverly Fayson
Fax: (202) 501-4067
From: Fred Geldon
Phone: (703) 742-1270
Fax: (703) 742-2674
Comments: Please see enclosed.

Number of pages (including cover): 2

## EDS

July 14, 1997

## BY TELECOPY

General Services Admınıstratıon
FAR Secretariat (VRS)
Room 4035
$18^{\text {th }}$ and F Streets, NW
Washington, DC 20405
Attn Ms Beverly Fayson
Re FAR Case No 95-029 (Group A)
Dear Ms Fayson
Electronic Data Systems has reviewed the revised rewrite of FAR Part 15 (Group A), and is pleased that the revised rewrite is responsive to comments submitted by EDS in November, 1996 EDS supports the revised rewrite and we urge you to proceed promptly with publication

Sincerely yours,


Fred W Geldon

General Services Administration
FAR Secretanat (VRS)
Room 4035
18th \& P Streets, NW
Washington, D.C 20405
RE: FAR CASE 95-029
The National Association of Surety Bond Producers is an organization of 560 insurance agencies and brokerages recognized as specialists in providing surety bonds and insurance to construction contractors. Our chief concern is that competitive negotiation cannot be satisfactonly applied to construction contracts. The sealed competitive bidding system an which bid bonds are required of all offerors and Miller Act performance and payment bonds are required of the final offeror is the best system for the award of construction contracts.

We thank you for the attention this revised proposal now gives to private sector concerns. Especially with respect to our concerns about "efficiency" being the driving force for the inclusion or exclusion of proposals in the compeutive range


#### Abstract

We still fear however, that the May 14 proposal's competitive range provisions will lead to unfair competition in which contracting officers may engage in favoritism, exclusion of worthy proposals and political influence over contract awards. In addition, your concepts of rok aversion and usk management are not clear to us. We're concemed that a federal policy on ask management favors large contractors because they are perceived as being able to absorb problems when things go wrong


The FAR Part 15 rewrite calls for oral discussions to help work out problems with change orders and revisions. We argue that these result from acquisition planning problems and not from contracting problems. Contracting officers should be required to decide what they want up front and not be allowed to change the nature of the acquisition just because one of the offeror exceeded the contract specifications The fact that contracting officers can extend the award date for every bidder merely favors the one contractor who has requested an extension. This is unfair to the offeror who was ready to go on bid date.

We have a stable procurement system now in which the protections that are in the law are not subject to changes made at the discretion of contracting officers. The federal procurement system should avoid a constant shifting of standards in the negotiation process A fluid system can only be effective of the fluidity is understandable


Theodore M. Pierce
Vice President of Government Affairs

400 Seventh St SW Washington, DC 20590

## U.S. Department of Transportation

Office of the Secretary of Transportation

July 14, 1997

Ms. Beverly Fayson
FAR Secretariat
General Services Administration
18th \& F Streets N.W., Room 4035
Washington, DC 20405
Dear Ms Fayson:
The Department of Transportation (DOT) has reviewed the second Iteration of Federal Acquisition Regulation (FAR) Case 95-029, Phase I Rewrite of FAR Part 15, Contracting by Negotiation, published in the Federal Register on May 14, 1997

We would like to commend the committee for making improvements to this latest version, giving consideration to many of our concerns, and adopting some of our recommended changes to the september 1996 version of the proposed rule. The rewrite ls such a fundamental change in the way the Government does business, we believe lt ls important that the Government have a well thought out implementation strategy, including adequate training for the work force, before the new procedures become effective. We, therefore, recommend that the final rule not become effective until at least 6 months after the final rule is published in the Federal Register or that you give agencies the option to delay implementation until training can be accomplished.

We had a team, consisting of both policy experts and front line professionals from our operating elements, review the proposed coverage. Therefore, these comments reflect an operational perspective The comments are primarily requests for clarifications in those areas we perceive to be critical in the source selection techniques and processes. Please feel free to contact Charlotte Hackley of this office should you have questions. She may be reached at (202) 366-4267


David JサLitman
Director of Acquisition and Grant Management

## DEPARTMENT OF TRANSPORTATION COMMENTS

4.1001. We believe this coverage would be more appropriate under 15.204-2, Part 1- The Schedule (Section B) which sets forth the formatting requirements for a solicitation
15.001. Defınıtıons.
a. As written, this paragraph leads the reader to believe that all definitions for Part 15 are listed under 15.001 which is not the case. We do recommend that all definitions for Part 15 be shown under 15.001 to facilitate use of the Part by contracting personnel.
b. We recommend the term "negotiation" be deleted to reduce confusion between this definition and the concepts of "negotiated procedures" and "negotiated contract." Also, this definition is no longer critical since the proposed 15 506-3 does not require preparation of a price negotiation memorandum "at the conclusion of each negotiation". Since we believe this was the primary reason the term "negotiation" is included in the current FAR, we do not see the need to retain the definition. Please also be advised that the Truth in Negotiation Act (10 U.S.C. 2306 a and 41 U.S.C. 254b) does not use the term "negotiation" concerning the requirements to submit certified cost or pricing data.
15.101-1. Add a new paragraph to read. (c) "Communications may occur (see 15.406)". This language duplicates that in 15.1012 (b) (4) for the "lowest price technically acceptable source selection process." Since "communications" can occur under the "tradeoff process," we believe it is appropriate to include it also in 15.101-1.
15.101-1(b) (1). Change paragraph (2) to read (b): This process permits tradeoffs among cost or price and non-cost factors as required under 15.404(f).
15.101-2. We recommend the title of this subsection be changed to read: "Lowest price acceptable quality source selection." This conforms the title to the requirement of 15.404 (ie, evaluate the quality of the product or service which includes all of the non-cost evaluation factors, including technical excellence and past performance). We believe the title of this subsection could erroneously be interpreted to mean that technical excellence is the only non-cost evaluation factor.
15.101-2 (a). For the reasons stated in the preceding paragraph, we recommend changing 15.101-2 (a) to read: "This process is appropriate when best value is expected to result from selection of the proposal with the lowest evaluated price from amongst those proposals which are evaluated as having acceptable quality (see 15.404)."
15.102(b). Change the second sentence to read "While the solicitation will not require the submission of full proposals in the first step, it shall require, at a minimum, submission of price or cost and quality information (see 15.404)." This change makes the policy consistent with 15.404 and allows the contracting officer the option to not evaluate past performance. As written, the contracting officer is required to evaluate past performance which is contrary to 15.404 (d) (3) (111).
15.103. "Oral presentations" is a relatively new technique. Therefore, we recommend the coverage clarify that use of oral presentations prior to determining the competitive range does not preclude awarding without discussions.
$15.103(c)(6)$. The coverage requires that the solicitation state "whether or not discussions will be permitted during oral presentations (see $15.406(\mathrm{~d})$ )" We are concerned that readers may misinterpret this to mean that oral presentations may include discussions prior to establishment of the competitive range. We therefore recommend that the caveat "after establishment of the competitive range" be added. Change 15.103(c)(6) to read.
"state whether or not discussions will be permitted during oral presentations conducted after establishment of the competitive range (see $15.406(\mathrm{~d})$ )".
15201.
a. Subparagraph (c) (5). To ald the reader, add reference to 5.204 which requires presolicitation notices.
b. Under current FAR 5.204, correct the reference (15.404) to read (15.201(c)(5))
c. We believe specific guidance should be provided regarding the appropriate timeframe for releasing the information publicly. Therefore, in the second sentence of $15.201(f)$, after the word "possible", add the following. usually no later than 10 days after disclosure.
d. The current FAR coverage at $15.404(b)(2)$ should be retained and shown at 5.204 since $1 t$ describes what should be in a presolicitation notice.
15.202. The title "Advisory multi-step source selection" should be changed to read "Presolicitation advisory process". Our recommended title is a more accurate description of the process and it makes a clear distinction between these procedures and the "multi-step source selection technique" discussed under 15102. In fact, we recommend moving 15.202 to Subpart 15.1 (i.e, change 15.202 to read 15.102 and renumber 15.102 to read 15.103).
15.203(a)(4). Add the words "and their relative order of importance" at the end of the sentence.
15.203(f)(1)(Ii). We recommend deleting the requirement for a written Justification to support an oral solicitation. Reasons for requesting an oral RFP is clearly stated in this paragraph, therefore, the contracting officer should be trusted to comply with the FAR requirements. In addition, this documentation requirement imposes an additional administrative burden on contracting personnel.
15.204.
a. We recommend changing the words "standard contract format" to "uniform contract format (UCF)" throughout this subpart for consistency since the UCF is mandatory.
b. We recommend that the level of approval for exemption from the uniform contract format be changed from the "agency head or designee" to the senior procurement executive (SPE) or designee." The SPE is responsible for management direction of the procurement system of the agency, including implementation of the procurement policies, regulations, and standards of the agency.
15.204-2. The prescription for use of standard Form 33 is not in this subsection but this form is cited under Part 53. Please correct the discrepancy.
15.204-2 (a) (3) (viol). This paragraph and others (e.g, 15.2045(b), 52.215-3 and other clauses) uses a new term "respondent." If it is intended that a "respondent" be treated the same as a "quoter" in response to a request for quotation", we recommend that it be clearly stated that a response to an RFI is not an offer and as such, the data submitted can be only accepted as information and is not binding. Also, the term "respondent" should be defined to mean "one who submits data in response to a request for information." This would be in consonance with 13108 which covers the legal effect of an offer in response to a request for quotation.
$15206(a)$. We recommend rearranging the paragraphs as indicated below for clarity.
(a) A solicitation shall be amended:
(1) When, either before or after receipt of proposals, the Government changes, relaxes, increases or otherwise modifies its requirements or terms and conditions;
(2) When (in accordance with the evaluation criteria) a proposal that is considered to be most advantageous to the Government, involves a departure from the stated requirements, provided the solicitation can be amended without revealing to the other offerors) the alternate solution proposed or any other information that $1 s$ entitled to protection (see $15.207(\mathrm{~b})$ );
(3) When, based on market research or in the judgment of the contracting officer, an amendment issued after offers are received is so substantial that it is beyond what prospective offerors could have reasonably anticıpated and that additional sources likely would have submitted offers, the original solicitation shall be canceled and a new one issued, regardless of the stage of the acquisition;
(b) Amendment to solicitations issued before the established time and date for receipt of proposals shall be issued to all parties who receive the solicitation.
(c) Amendments to solucytations lssued after the established time and date for receipt of proposals shall be sent to all offerors who have not been eliminated from the competition.
(d) Oral notices of changes to the solicitation may be issued when time is of the essence. The contracting officer shall document the contract file and confirm the oral notice with a written amendment to the solicytation.
(e) At a mınımum, the following information should be included in each amendment: etc....
15.207. The processes for responding to RFPs and RFIs are commingled. We recommend a clear distinction be made between the two processes.
15.207(b). This paragraph refers the reader to $3.104(5)$ (b) which references 15.411 and 15.413 These FAR Part 15 references should be corrected to read 15.207 .
$15.208(a)$. As currently written, section $15.208(a)$ does not appear to provide for situations where multı-step source selection technlques are used, or where oral presentations may comprise part of the proposal. Accordingly, we suggest revising (changes are bolded) the last sentence to read "Unless the solicitation states a specific time, the time for receipt of written proposal information is 4:30 p.m., local tıme, ... etc. Also, add new paragraph (b) to 15.208 to read: "(b) Where multi-step source selection techniques are used (see 15.102 and 15.202), the solicitation shall, as a minimum, state the specific time and date for submission of first-step information. The Contracting Officer shall establish common cut-off dates for subsequent steps." These recommended changes will require the subsequent subparagraphs to be renumbered.

15.208(e). The proposal should be withdrawn by "an authorized representative of the offeror". Therefore, we recommend the £ollowing substrtution for the second sentence It may be withdrawn in person by an authorızed representative of the offeror, if the identity of the person requesting withdrawal is established by the contracting officer and the authorızed representative signs a receipt for the proposal". If our proposed change is not amenable, we recommend that the text of 52.2151 (c) (2) (v) be repeated under 15.208 (e).
15.209(h). A new order of precedence clause is cited here; therefore, the old clause 52.215-33, Order of Precedence, should be deleted.
15.302. This paragraph implıes that the Government's policy is only to encourage new and innovative ldeas by responses to Broad Agency Announcements, etc. which is not the case. To make the policy clear and unconditional, we recommend changing this paragraph to read: "It is the policy of the Government to encourage the submission of new and innovative ideas. To promote submission of these ideas, the Government uses Broad Agency Announcements,.... When new and innovative ideas do not fall under these....."
15.3. This subpart on Unsolicıted Proposals disrupts the flow of Part 15, Contracting by Negotiation. We recommend moving the entire Part 15.3 to the end of Part 15 or relocating it to Part 17, Special Contracting Methods.
15.401. Delete the first sentence of the last paragraph because there isn't a clear distinction between a "weakness" and a "signifıcant weakness."
15.403(a). Insert the acronym "SSA" after the term "source selection authority" so the acronym in lieu of the term may be shown wherever it appears in $15.403(\mathrm{~b})$.
15.403. We believe that all major source selection decision making responsibılities should be identified and assigned to either the contracting officer or source selection authorıty under this subsection. These responsibilities include determination of the competitive range(s) and selection of those respondents who will be advised they are unlıkely to be viable competitors under the advisory multi-step source selection process.
15.405(a). Change the last sentence to read: The relative strengths, significant weaknesses, and deficiencres, and risks shall be documented in the contract file. Please also see $15.406(\mathrm{~d})(3)$ and $15.606(\mathrm{~d})(1)$ and make the coverages consistent with our recommended change.
15.406. The title of this subsection leads the reader to believe that the coverage only pertains to "communications with offerors"; however, it includes the procedures for establishing the "competitive range." We recommend changing the title of the subsection to read: Communccations with offerors and establishment of the competitıve range.
$15.406(a)(2)$, second sentence. We recommend deletion of the requirement to document the file with the rationale for holding discussions because 41 U.S.C. 253 b (d) (1) (B) does not require it and it adds no value.
15.406(b)(3)(i). Change to read. "Perceived deficlencies, signifucant weaknesses, ambiguities, errors, omissions, mistakes (see 14.407), etc.".
15.406(c) (2) Correct the FAR cite to read 52.215-(1)(f)(4)
15.406-(d) (3). Please clarify the word "performance". This can be inferred to mean "past performance" or "technical performance".
15.407(a). Move the first sentence to 15.406(d), after paragraph (3) and number it paragraph (4). At the end of the new paragraph (4), reference 15.605 and reference the paragraph that requires a rationale for eliminating offerors. Adjust other paragraphs accordingly.
15.408. We believe a more approprıate caption for this subsection is "source selection decision" so as not to confuse it with the subpart title "source selection" Also, we recommend that the decision of the SSA shall be documented and signed by the SSA.
15.502(a)(1). After the words "adequate price competition", add the words: (see 15.503-1(c)).
15.503-1(c)(3). The proposed coverage exempts commercial items from the requirement for cost or pricing data but the FAR does not promulgate commercial pricing techniques. The term "commercial item" is broadly defined under FAR 2.101 and includes atems of a type customarily used for nongovernment purposes, but which do not necessarıly have prices establıshed in the nongovernment market. This poses a signıfıcant pricing situation which has not been addressed. Overall, the pricing approach proposed in the FAR 15 rewrite is to use the "old" price analysis policies in the "new" world of pricing commercial items as though those policles are still appropriate.
15.503-2. We recommend deleting this entire coverage since there is no value added. However, if $1 t$ is retained, the exemption for the exercise of options could be of value if the coverage is expanded to include all circumstances (e.g., the exercise of negotiated prıced options added by modıfication of an existing contract). If 15.503-2(b) 1s retained, the decision to request cost and pricing data for overrun funding should be left to the discretion of the contracting officer.
15.503-4 (a). Delete the words "expected to exceed" and replace with the words "valued at or above" because the threshold is at , not above $\$ 500,000$. Other sentences in this subsection also must be adjusted to correct this error.
15.503-5(a). By inclusion of the word "and" in subparagraph (3), the contracting officer is required to address each of the four cited areas. This is not logical in some instances. For instance, if cost or pricing data is not requested, there is no need to state in the solicitation that the offeror may submat a request for exception to the requirement. We therefore recommend this coverage be revised for consistency.
15.504-4(c)(4)ii). It should be noted that there is not a requirement for the contracting officer to determine, in writing, that the price is fair and reasonable. Also, there is no requirement to have a document titled "price negotiation memorandum". This sentence should be revised to be consistent with the requirements of 15.506-3.
15.505(a). We recommend the words "negotiated settlement" be changed to read: "negotiated agreement".
15.506-1. There are three concerns regarding documentation of prenegotiation objectives. Flrst, if the price is determined to be farr and reasonable based on adequate price competition without bargaining, it should be clear there is not a requirement to establish a prenegotiation objective. Second, the policy should state the contracting officer shall approve the prenegotiation objectives. Third, a sentence should be added in paragraph (b) to address the documentation requirements when only price analysis is required.
15.506-3(a). The first two sentences should be changed to read. "The contracting officer shall approve by slgnature documentation the principal elements of the negotiated agreement. This documentation (e.g., price negotation memorandum (PNM)) shall be part of the contract file and it shall include the following:" Our change requires signatory approval of the documentation by the contracting officer which is consistent wath 15.504-4(c)(4)(ii) As written, the contract file, in lieu of a person, is required to provide the documentation.
$15.603(\mathrm{~b})(\mathrm{i})$. When using electronic comerce (i.e., internet), the contracting officer can not determine the number of offeror's solicited. Therefore, delete this sentence or if the sentence is determined necessary, modify it as follows: (i) the number of offerors solicrted except when the sollcitation is posted electronically.
15.606(a) (1). We recommend it be stated "the Government may presume the offeror received the notice of contract award three days after the notice is mailed by the Government."
36.520. Clause 52.236-28(d) states "alternate proposals will not be considered unless this solicutation authorizes thelr submission". We recommend modifying 36.520 to include the statement that "the evaluation approach for alternate proposals shall be described in the solicıtation."

OF'-307--
a Block 11, part IV, should be deleted in its entrrety because sections $K, L$, and $M$ do not apply to contract award This also applies to the SF 26 . Please be aware that changing the SF 26 will require changes to current electronic systems.
b. Block 14a. Delete the word "four" and replace with a blank for insertion by the contracting officer.
c. It is unclear whether an OF 307 may be used for sealed bid solicitations. If the OF 307 Is intended only for negotiated acquisitions, the title of the form should be changed to read: Contract Award - Negotiated Acquisitions.

SMALL BUSINESS ROUNDTABLE<br>1000 Potomac Street, N,W.<br>The Flour Mill, Suite 300<br>Washington, D.C. 20007<br>Phone: (202) 337-6200<br>FAX: (202) 333-0871

## MA FACSMMILE (202) 501-4067

July 14, 1997
General Services Administration
FAR Secretariat (VRS)
Room 4035
1800 F Street, NW
Washington, D.C 20405

RI: FAR Case 95-029 Federal Acquisition Regulation: Part 15 Rewrite

The Small Business Roundtable ("SBR") endorses the comments submitted July 14, 1997 by the Free and Open Competition Coalition ("FOCC")

In preparing those comments, time did not permit the FOCC to complete the development and coordination required to provide specific language changes to the FAR 15 Rewrite The FOCC believes specific revisions to the proposed FAR 15 Rewrite are important and has requested the SBR to submit its enclosed recommended language revisions on the subject of Past Performance for the FAR Councils' consideration.

However, the FOCC and SBR have not, as requested by the Notice, been able to separate their comments into the three groups. Groups $\mathbf{A}$ and $\mathbf{B}$, into distinct groupings on selected FAR 15 Subparts and provide conforming analysis and comments on the revisions to fourteen (14) separate FAR Parts In addition, the Notice requested small entities provide their comments separately To do justice to these three requests would be a mammoth task to undertake successfully within the sixiy-day period given for comments to achieve a meaningful result; neither the SBR nor the FOCC has undertaken to do so It is our understanding that such a detailed analysis was to be undertaken by OFPP, but has not been made available. Therefore, it is hoped that OFPP concludes that such an analysis should still be undertaken and completed before the finalization of FAR 15.

The SBR encloses its comments on the requested segmentation as Enclosure A The SBR's suggested changes to the proposed FAR 15 Rewrite are limited to past performance and are set out in Enclosure B as revisions to proposed FAR 15 101-1, Tradeoff Processes, 15.101-2, Lowest Price Technically Acceptable Source Selection Process; 15.404 (d)(3)(i)-(iii), 15.404 (e), Evaluation Factors And Subfactora, 15 405(2), Proposal Evaluation-Paxt Performance Evaluation; and 15.406(a), Communications With Offerors-Communications And Award Without Discussions.

The SBR is also concerned with OFPP's conclusions and recommendations in its Initial Regulatory Flexibility Analysis Report ("Reg/Flex Report") as well as OFPP's summary as set for the FAR 15 Rewrite That Reg/Flex Report raises serious questions regarding the OFPP's conclusions that the FAR 15 changes are good for small business, are consistent with the policies of the Clinger-Cohen Act, and that "the past performance requirements use plain English" and therefore "no alternatives to this approach were considered," OFPR Regulatory Flexibility A xt Report at Paragraph B. Although the Reg/Flex Report makes numerous questionable conclusions that are favorable to small businesses' future under the proposed regulations, there are few if any specific references to small businesses' historical participatory role in the acquisition process in the proposed rewritten rule.

The FOCC and SBR do not understand or agree with the Reg/Flex Report's conclusion that only 7,000 small businesses will be affected by the FAR 15 Rewrite. The computations are completely misleading. OFPP's conclusions appear to be based on the Federal Procurement Data System's FY 95 Records Those records are based on awards, and do not reflect the number of small businesses that competed for those awards in both unrestricted and restricted competitive acquisitions, ie. The Department of Defense alone has 28,000-30,000 small businesses on its lists that have received contracts On a total executive branch estimate, there may be as many as 200,000 to 500,000 small businesses successfully involved in the acquisition process that will be directly and/or indirectly affected by the past performance provisions in FAR 15 as now proposed However, as the Government continues to move forward with its commercial acquisition policies, the pool of small businesses that may be affected will increase substantially or possibly double.

Small entities and the SBR, as well as the General Accounting Office, are concerned that FAR 15 as proposed does not fully emphasize that the contracting officers, by statute and regulation, must be aware of the provisions of FAR Subpart 196 , the Certificate of Competency ("COC") Program in applying any past performance evaluations that result in the elimination of small businesses from consideration without first requesting the SBA review That COC Program was established in accordance with a national policy to assist and protect small businesses With reference to the General Accounting Office's ("GAO") June 26, 1997 letter to FAR Secretanat at page 2, Section 15.101-2, Lower Price Technically Acceptable Source Selection Process The GAO recommends the reference to the COC process be emphasized by adding to Section 15.1012 We concur with that recommendation and suggest the emphasis also be added to $15.405(\mathrm{a})(2)(\mathrm{i})$.

Letter to General Services AdministrationFAR Secretariat (VRS) July 14, 1997


We recognize and commend the efforts taken to achieve the current status of the project, and fully appreciate the opportunity to participate in the comment process We are also prepared to provide further input, should the opportunity arise

Sincerely,


Denial R. Gill
Coordinator, Small Business Roundtable

## Enclosures

cc Jody Olmer, Chairperson, FOCC SBR Members
David M.F. Lambert, Counsel, SBR

Enclosure A
Page 1 of 1
July 14, 1997

## Request for Comments on Listed Conforming Sections of FAR

The requested segmentation of comments on the proposed revision to FAR 15 and conforming comments on seven separate FAR subparts, plus providing separate comments from small business, is a massive undertaking. Although required by FASA and Executive Order \#12818, October 13, 1994, such a broad request cannot be considered as discharging OFPP's statutory requirement to make its own review, identify and report on any inconsistencies between the implementing FASA and FARA regulations and the Small Business Act and implementing regulations, including those already in the FAR. There is no public record that such an analysis and report has been made by OFPP or any other organization.

The notice for comment published in the May 14, 1997 Federal Register requested comments on the Proposed Revisions to FAR Part 15 be segmented into three (or more) distinct Groupings.
(1) Group A - comments were requested that related to six (6) designated Far 15 Subpart (along with comments on conforming regulations for seven separate FAR Parts) The FAR 15 Subparts are 15,0, SCOPE, 151 , SOURCE SELECTION PROCESSES AND TECHNIQUES, 15.2 , SOLICITATION AND RECIEFT OF PROPOSALS AND INFORMATION, 15,3, UNSOLICITED PROPOSALS, 15 4, SOURCE SELECTION, and 15.6, PRE-AWARD, AWARD AND POST-AWARD NOTIFICATIONS, PROTESTS AND MISTAKES, as well as seven (7) specified conforming provisions to FAR. Part 1, FEDERAL ACQUISITION REGULATIONS SYSTEMS; Part 5, PUBLICIZING CONTRACT ACTIONS; Part 6, COMPETITION REQUREMENTS; Part 14, SEALED BIDS, Part 36, CONSTRUCTION AND ARCHITECT-ENGNEER CONTRACTS, Part S2, SOLICITATION PROVISIONS AND CONIRACT CLAUSES; and Part 53, FORMS
(2) Group B - requested separate comments on Sub-Part 15.5, Contract Pricing and seven (7) conforming provisions to FAR Parts 4, ADMINISTRATION MATTERS; Part 7, ACQUISITION PLANNING; Part 11, DESCRIBING AGENCY NEEDS, Part 16, TYPES OF CONTRACTS, Part 42, CONTRACT ADMINISTRATION, Part 43, CONTRACT MODIFICATIONS, and Part 52, SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Many of these segmented FAR Parts for which the notice requested conforming analysis have been revised several times since OFPP began implementing FASA (October 1994) and FAR (January 1996) -some without providing for public comment Without such an analysis, each of these piecemeal amendments to the referenced GARs singularly and collectively may have adversely affected the institutionalized Congressional small business mandates in 15 US C 631, et seq and implementing FAR regulations including FAR 19, SMALL BLSINESS, SMALL DISADVANTAGED BUSINESS (WOMEN OWNED BUSNEES) Time did not permit OFCC and/or SBR to provide such an analysis for OFPP and the FAR Councils' consideration SBR has limited its comments to FOCC's July 14, 1997 letter at Paragraph 7, Past Performance

## RECOMMENDED LANGUAGE CHANGES

1) Recommended at 15,101-2.

Delete last sentence in proposed $15,101-2(b)(1)$, "[U]nless the contracting officer has determined that the evaluation of past performance is not appropriate" 15 404(d)(3)(ii1) Also delete the first part of the sentences in $15404(\mathrm{~d})(3)(\mathrm{i})$ and (ii) that states "[E]xcept as set forth in paragraph (d)(3)(iii) of this section." Section (iii) provides that ". [plast performance need not be evaluated if the contracting officer documents the reason past performance is not an appropriate evaluation factor for the acquisition." OFPP Policy Letter No 92-5

The OFPP Policy Letter No. 92-5 does not provide any criteria for the contracting officer to justify taking such action in the face of OFPP's presently stated policy to "make past performance major selection criterion in the award of contracts." See OFPP's May 1995 Guide to Best Practices for Past Performance for implementing OFPP Policy Letter No. 92-5
2) Recommended at 15.404(e). Evaluation Factors and Subfactors

Delete: "The rating method need not be disclosed in the solicitation The general approach to evaluating past performance shall be described." Replace with "The details of the rating method, including the specific evaluation of past performance, shall be described in each solicitation, as set forth in 15,101-1(b)(1), Tradeoff Policies and 15.101-2(b)(1), Lowest Price Technically Acceptable Source Selection Process"

The last sentence in Section (e) as proposed conflicts with the proposed language in 15 101(b)(1), Tradeoff Processes, which states "[AIl evaluation factors and significant subfactors that will affect contras awards and their relative importance shall be clearly stated in the solicitation", and (2) "[ the solicitation shall state whether evaluation factors other than cost or price when combined are significantly more important than, approximately equal to, or significantly less important to cost or price." The proposed language recommended for deletion in the FAR 15 Rewrite of 15 404(e) also conflicts with 15.101-2(b)(1), Lowest Price Technically Acceptable Source Selection Process

Recommended replacement language is consistent with the policy that the "source selection evaluation criteria be clearly stated" 15 404(e).
3) Recommended at 15,405(a)(2)(i), Proposed Evaluation-Past Performance Evaluation

The meaning of the first two sentences in the proposed regulation does not provide authority for contracting officers to use comparative past performance assessments to
eliminate small businesses from the competitive range based on a negative past performance rating, nor does 15 U.S.C. 637(b)(7) and FAR Subpart 19.6 permit exclusion without first submitting the adverse finding to the Small Business Administration ("SBA") under the Certificate of Competency ("COC") Program Past performance (capacity, tenacity, perseverance, integrity, etc ) by definition is one of the elements of the affirmative responsibility determination, and cannot be merged into technical evaluations that obscure other institutionalized Congressionally mandated statutory provisions to assist and protect small businesses from subjective determinations of non-responsibility that are unsupported by the record and that result in elimination of a small business from being the recipient of an award

OFPP's authorization proscribes that it is Congressional Policy and the ". . policy of the United States Government to promote economic, efficient and effectiveness in the procurement of property and services by the executive branch or the Federal Government by ...(2) establishing policies and procedures that encourage the consideration of offerors' past performance in the selection of contractors." 41 U S.C 409(14) However, the cited language of OFPP's authorizing statute does not in and of itself authorize use of past performance to expand the required affirmative responsibility determination to encompass a comparative process of determining as between offeror the degree to which one is the more responsible based on past performance

The proposed FAR 15 regulations must be fully harmonized with the Small Business Act and FAR 19 due to the proposed regulations' numerous conflicts, inconsistencies and noncompliance with existing FAR small business provisions and the Small Business Act with its regulations. Unless this harmonization is made, or in the alternative, OFPP requests a change in the COC statutory provisions and the other provisions affected in the Small Business Act, the resulting chaos will be left to Courts and/or the Comptroller General to resolve In either alternative, small businesses will be put to great expense to resolve these conflicts due in part to the lack of attention to resolving those conflicts before the proposed FAR 15 regulations are issued in their final form

With the signing of Public Law No 103-355, the President's Executive Order charged the Administrator of OFPP to "identify major inconsistencies in law and policies relating to procurement that impose unnecessary burdens on the private sector and Federal procurement officials, and, following the coordination with executive agencies, submitting necessary legislative initiatives to the Office of Management and Budget for the resolution of such inconsistencies." Executive Order No 12818, Sec. 3(d), Oct. 13, 1994 Clear direction is the preferable way to resolve the issues of past performance and small business.

If OFPP on review considers the Small Business Act provisions to be inconsistent with FASA and FARA, and/or the implementing regulations, the Administrator is to initiate authorized procedures to harmonize the statutes and regulations. Otherwise, OFPP implementing regulations are in direct conflict with the specific Congressional mandates in the Small Business Act

If, on the other hand, OFPP wishes to make source selection decisions based on past performance, without conflicting with the Small Business Act, the recommended language may accomplish that worthwhile objective.

## 4) Recommended at $15,405(a)(2)(i i)$.

The last sentence in $15405(\mathrm{a})(2)$ (ii) should be changed to read
"The contracting officer may determine the relevancy of similar past performance information if the limits of relevancy are fully set out in the solicitation"

The Comptroller General decisions on past performance are decided on the degree of specificity of the source selection evaluation criteria
5) Recommended at $15,405(\mathrm{a})(2)(\mathrm{iii})$.

The following should be added as 15 405(a)(2)(iii)
"All offeror must be advised and given an opportunity to comment on any past performance information used by the contracting officer in any acquisition where the information results in the offeror's ranking or other quality qualifications required under FAR 15 that may be the basis for the elimination of the offeror from the competitive range and/or the award (including an award made without discussion 15 406(a)) if the offeror was otherwise qualified for such award In the absence of notice to the offeror and with the opportunity to provide comments, the contracting officer must identify for the record and exclude that adverse information from any source selection evaluation *
[Current (iii) becomes (iv); current (iv) becomes (v)]

FAR Council,
We appreciates the acquisition streamlining changes that the FAR Council has implemented under FASA 94 and are recommending under the proposed rule, FQAR Case 95-029 This proposal seeks to rewrite Federal Acquisition Regulation (FAR) Part 15, contracting by negotiation Attached are our comments and recommendations in response to this proposal Although our attached recommendations may seem insignificant compared to those sweeping acquisition reform changes. countless resources are wasted by government and mdustry personnel debating this interpretation of certain paragraphs of the FAR language

We thank you for the opportunity to submit these comments in response to the rewrite of FAR Part 15

Sincerely,

Douglas D Lien
Manager, Cost Estimating
Alliant Techsystems Inc
Defense Systems and Ammunition Groups
(612) 931-6247

Enclosure

## FAR PART 15 RECOMMENDATIONS

15.501 Definitions

- Cost or Pricing Data Paragraph

Delete "Cost or pricing data may include parametric estimates of elements of cost or price, from appropriate validated calibrated parametric models" Add factual data elements of parametric estimates "

## The revised wording would read as follows:

....such factors as: vendor quotations; non-recurring costs; factual data elements of parametric estimates; information on .... That could have a significant bearing on costs.

Rationale As with any estimating technique, only the factual information is considered cost or pricing data Although is it encouraging for FAR to recognize parametric techniques, only the factual data, not judgmental data (parametnc estimates) should be defined as cost or pricing data The requirement for appropriately validated calibrated parametric models is an estimating systems requirement that could be more appropriately handled in the Defense Contract Audit Manual or in the DFARS section on Estimating Systems

### 15.504-1 Proposal Analysis Techniques

- Paragraph (a) (2)

Add the words "for all significant subcontracts"

## The revised wording would read as follows:

(2) Price analysis shall be used for all significant subcontracts when cost or pricing data are not required.....

Rationale The proposed rewrite eliminated the word "significant when referring to the preparation of price analysis on subcontracts where cost or pricing data is not required This would increase the data to be provided and is contrary to the streamline process
15.504-1 Proposal Analysis Techniques

- Paragraph (a) (6)

Add the words "and the contractor's attention"
The revised wording would read as follows:
(a) (6) Any discrepancy or mistake of fact.... shall be brought to the contracting officer's attention and the contractor's attention for appropriate action.

Rationale Factual errors should not be considered part of the contracting officer's negotiation strategy When they are concealed until negotiations, the contractor must verify the error during negotiations, thus prolonging the negotiation process The alleged error could be resolved prior to negotiations The current wording does not seem consistent with the IPT process

- Paragraph (g) (3)

Add "If an offer appears to include unbalanced pricing, the contracting officer shall contact the offeror to obtain an explanation and shall consider this explanation in determining the risk posed to the Government

The revised wording would read:
(g) (3) If an offer appears to include unbalanced pricing, the contracting officer shall contact the offeror to obtain an explanation and shall consider this explanation in determining the risk posed to the Government. An offer may be rejected if the contracting officer determines....

Rationale The proposed rewrite allows a highly subjective opinion to result in an offer being rejected or not considered without requinng the Government to ascertain of the risk is real or perceived, offeror's should not be rejected because of differences caused by following their disclosed accounting practices

### 15.504-3 Subcontract Pricing Consideration

- Paragraph (b) (2)

Delete the words "the price proposal" and add "their own cost or pricing data submissions"

## The revised wording would read as follows:

## (2) Include the results of these analyses in their own cost or pricing data submissions.

Rationale The requirement to obtain subcontractor cost or pricing data, to perform cost analyses and to submit subcontractor data appears a number of times in part 15 Each time it is stated slightly differently It is not possible to obtain subcontractor cost or pricing data for every proposal in time to be submitted with the initial pricing proposal In most cases the contracting officer, local oversight and the contractor agree that of the cost analyses are performed and the data are submitted prior to agreement on price the requirement is satisfied (reference table 15-2, Cost Elements, paragraph A) In order to preclude local interpretations, it is recommended that the FAR requirements for subcontractor data be made consistent throughout part 15

- Paragraph (b) (3)

Delete the words "price proposal" and add the words "cost or pricing data submissions"
The revised wording would read as follows:
(3) When required by paragraph (c) of this subsection, submit subcontractor cost or pricing data to the government as part of its cost or pricing data submissions.

Rationale Same as 15 504-3 (b) (2)

- Paragraph (c) (1) (11)

Delete the words "the pertinent cost or pricing threshold," change $10 \%$ to $20 \%$, and add $\$ 5,000,000$

The revised wording would read as follows:
(c) (1) (ii) Both more than $\$ 5,000,000$ and more than 20 percent of the prime contractor's proposed price, unless the contracting officer...

Ratıonale The previous $\$ 1,000,000$ threshold was raised ten times to $\$ 10,000,000$, however the other thresholds of the pertinent cost or pricing data threshold (currently $\$ 500,000$ ) or $10 \%$ were not adjusted If the desired affect of the revised wording was to reduce the amount of subcontractor cost or pricing data that is required to be submitted the remaining thresholds should be revised appropriately or the $\$ 10,000,000$ change will have no positive impact on streamlining the process
15.504-3 Subcontract Pricing Consideration

- Paragraph (c) (3)

Change the word "shall" to "may" and add "in a similar contractor format, or in the format specified in the solicitation"

## The revised wording would read as follows:

(3) Subcontractor cost or pricing data may be submitted in the format provided on Table 15-2 of 15.508, in a similar contractor format, or in the format specified in the solicitation.

Rationale With table 15-3 eliminated, provision should be made to allow the contracting officer to specify the format they beheve is required to adequately evaluate the data Contractors should not be required to develop data that is not required

- Paragraph (c) (4)

Delete the last sentence "The contractor shall update during source selection and negotiations"

Rationale This sentence is redundant to the first sentence and could be interpreted to require updates from "the earlier date agreed upon" to "the date of price agreement", which would negate the benefit of cut-off dates
15.506-3 Documenting the Negotiation

- Paragraph (a) (6)

Add "the PNM should specifically identify the extent on which cost or pricing data were relied upon for each element of cost General statements should be avoided"

The revised wording would read as follows:
(6) If cost or pricing data were required, the PNM should specifically identify the extent on which the cost or pricing data were relied upon for each element of cost. General statements should be avoided. The contracting officer ...

Rationale The contracting officer has many sources of data avalable to determine their position (IE DCMC, DCAA, Independent cost analyses, contractor cost or pricing data, etc ) When contracting officers use blanket statements such as "all cost or pricing data was used or rehed on", industry and government representatives waste resources trying to recreate the circumstances of negotiations years later In many instances the Contracting Officer has moved on to another location
15.507-5 Estimating Systems

- Paragraph (b)

Add the words "the contractor's responses and the Administratıve Contractıng Officer's resolution"

The revised wording would read as follows:
(b) The auditor shall send a copy of the estimating system survey report, a copy of the official notice of corrective action required, the contractor's responses and the Administrative Contracting Officer's resolution to each contracting office...

Rationale This would insure that the contracting officer receives the complete information on the significance and resolution of the deficiencies noted

Table 15-2 Instructions for Submitting Cost or Pricing Data

- General Instructions, paragraph (3)

Add the words "on the proposal cover sheet"
The revised wording would read as follows:
You must clearly identify this data as "Cost or Pricing Data" on the proposal cover sheet.

Rationale This would clarify that the phrase "Cost or Pricing Data" is only required on the proposal cover sheet and not on each page of a cost proposal submitted

- General Instructions, paragraph (4)

Add the words "or otherwise directed by the RFP"
The revised wording would read as follows:
(4) ....You must attach cost element breakdowns for each proposed line item, using the appropriate format prescribed in the "Format for Submission of Line Item Summaries" section of this table, or otherwise directed by the RFP.

Rationale The RFP direction would override the format prescribed to in FAR

Table 15-2 Instructions for Submitting Cost or Pricing Data

- Cost Elements, Paragraph A Materials and Services

Add wordıng that allows for estımating techniques other than the detailed bottoms-up methodology

The revised wording would read as follows:
"Materials - Provide a priced summary of the various tasks, orders, or contract line items being proposed and a description of the estimating method or technique used to estimate material costs. When the detailed estimating method is used, provide a consolidated priced summary of individual material quantities included in the various tasks, orders, or contract line items being proposed and the basis for the pricing (vendor quotes, invoice prices, estimates, etc.) Include raw materials, parts, components, assemblies, and services to be produced or performed by others. For all items proposed, identify the item and show the source, quantity, and price. When techniques other than the detailed estimating method are used, provide a detailed explanation as to how the cost estimate was derived and furnish supporting data and documentation suitable for a detailed analysis of the proposed cost. $\qquad$ "

Rationale Other estımatıng techniques have been widely used and accepted by both government and industry for years, however, this paragraph in the FAR specifies the requirements for the bottoms-up methodology only

- Cost Elements, Paragraph A

Add "When comparatıve price data exists" and "significant"
The revised wording would read as follows:
A. When comparative price data exists, conduct price analyses of all significant subcontractor proposals.

Rationale On new development and change order proposals, price analysis data will not exist

- Cost Elements, Paragraph A

Add the word "submissions"

The revised wording would read as follows:
A. Submit the subcontractor cost or pricing data as part of your own cost or pricing data submissions as required in subparagraph $A$ (2) of this table.

Table 15-2 Instructions for Submitting Cost or Pricing Data

- Cost Elements, Paragraph A (2)

Delete the words "the pertinent cost or pricing threshold," change $10 \%$ to $20 \%$, and add \$5,000,000

The revised wording would read as follows:
A (2) Or purchase order that is the lower of either $\$ 10,000,000$ or more, or both more than $\$ 5,000,000$ and more than 20 percent of the prime contractor's proposed price.

Rationale The previous $\$ 1,000,000$ threshold was raised ten times to $\$ 10,000,000$, however, the other thresholds of the pertinent cost or pricing data threshold (currently $\$ 500,000$ ) or $10 \%$ were not adjusted If the desired affect of the revised wording was to reduce the amount of subcontractor cost or pricing data that is required to be submitted, the remanning thresholds should be revised appropnately or the $\$ 10,000,000$ change will have no positive impact on streamlining the process

- Cost Elements, Paragraph A (2)

Delete the word "source's" replace with the word "subcontractor's" add the words "As required by 15 504-3,"

The revised wording would read as follows:
(2) ....In addition, provide a summary of you cost analysis and a copy of cost or pricing data submitted by the prospective subcontractor in support of each subcontract, or purchase order. $\qquad$
and
(2) As required by 15.504-3, analyze the cost or pricing data and submit the results of your analysis of the prospective subcontractor's proposal. When submission of a prospective subcontractor's cost or pricing data is required, ....

Rationale This clarifies that subcontractor's cost or pricing data are required to be analyzed and submitted, when required by $15504-3$, but, interorganizational transfers, that are a make items ( 15 507-2), do not require cost analysis To require cost analyses on interorganizational transfers, would represent a new requirement, cause additional burden to contractors, protract the acquisition cycle time and could represent a conflict of interest

Table 15-2 Instructions for Submitting Cost or Pricing Data

## $95-029-52$

- Cost Elements, Paragraph A (2)

Add an " $s$ " to the word submission and delete the words "as part of your initial pricing proposal"

The revised wording would read as follows:
A (2) When submission of a prospective source's cost or pricing data is required, it must be included along with your own cost or pricing data submissions.

Rationale Same as 15 504-3 (b) (2)

- Cost Elements, Paragraphs B, C, D

Add the words "When the detailed estimating method is used
The revised wording would read as follows:
A. Direct Labor. When the detailed estimating method is used, provide a time phased....
B. Indirect costs. When the detailed estimating method is used, indicate how....
C. Other costs. When the detailed estimating method is used list all...

Rationale Same as 15 508, Table 15-2, Cost Elements, paragraph A Material and Services

July 14, 1997

General Services Administration
FAR Secretariat (VRS)
Room 4035
18th \& F Streets, NW.
Washington, D.C. 20405
Re: FAR CASE 95-029
FEDERAL ACQUISITION REGULATION; PART 15 REWRITE
The undersigned organizations and businesses comprising the Full and Open Competition Coalition ("FOCC") are pleased to submit these comments on the proposed rule published jointly by the Department of Defense ("DoD"), the General Services Administration ("GSA") and the National Aeronautics and Space Administration ("NASA") concerning the combined Phases I and II of the rewrite of Federal Acquisition Regulation ("FAR") Part 15. This proposed draft of the rule was published in the Federal Register on May 14, 1997 (62 F.R. 26640).

The FOCC is comprised of more than 100 small business associations and corporations with an underlying membership of more than three million businesses. The FOCC is committed to ensuring that full and open competition remains the standard and guiding principle of the federal procurement system.

These comments are intended to represent the views of both the small business community and large corporations and should be considered as such. The ability of small business to participate in the $\$ 200$ billion spent annually by the federal government has been identified as a priority issue in 1980, 1986 and 1995 at each of the three White House Conference on Small Business. Through the Small Business Act of 1953, Congress specifically stated that: "The Government should ensure that a fair proportion of the total purchases and contracts or subcontracts for property and services - be placed with small business enterprises." Since the enactment of that important legislation, the percentage of federal contracts awarded to small business has hovered between $20.3 \%$ in 1967 to 22 2\% in 1979 and $22 \%$ in $1995 .{ }^{1}$

The small business community has consistently embraced streamlining the procurement process and made specific
${ }^{1}$ Building the Foundation for a New Century, First Annual Report on Implementation of the Recommendations of the 1995 White House Conference on Small Business (1996) at 18, America's Small Business Economy; Agenda for Action, Report to the President, White House Conference on Small Business (April 1986) at 76
recommendations in the 1986 Conference report. The small business community is joined by larger corporations, however, when streamlining initiatives vest discretion in the contracting officer without appropriate guidelines and internal checkpoints to guard against erosion of full and open competition through the exclusion of valid proposals for vague efficiency purposes and the funneling of contract money on partisan or personal bases

## SUMMARY

Only a very small portion of the May 14 proposed rule is designed to implement provisions of the Federal Acquisition Reform Act, hereafter "FARA" (Public Law 104-106). Moreover, there is no documented need for the proposed changes nor any study that concludes that these changes will result in the benefits claimed by the office of Federal Procurement Policy.

The FAR Council originally published the more narrow regulations directly related to the implementation of FARA in its proposed rule published July 31, 1996. The FAR Council subsequently asked for comments on the July 31 rule to be submitted by taking into account the expanded coverage in FAR Part 15 included in the Phase I rewrite of Part 15 published September 12,1996 . In response to public comments, the FAR Council further revised the Part 15 rewrite and published the new proposed rule on May 14, 1997.

We appreciate the attention the FAR Council has given to private sector concerns. We specifically note that while some accommodation was made regarding our concern that efficiency was the driver for the inclusion or exclusion of proposals in the competitive range, we maintain that the May 14 proposed rule still is not consistent with FARA. Quite simply, rather than write the proposed rule in language tracking the statutory language and specific documented intent of Congress, the proposed rule in its various three drafts has employed creative, crafty, or contrary language in the regulations to enable the practice of full and open competition to be narrowed or unfairly whittled.

We do not believe that the July 31, 1996, the September 12, 1996 or the May 14, 1997 proposed rules are in compliance with FARA, but in fact, attempt to implement via regulation a competitive system specifically rejected by Congress. At a minimum, the competitive range provisions leave the basic determination of fair competition open to such wide discretion by the contracting officer that it will almost certainly at times lead to favoritism, political funnelling
of contract money, or the exclusion of valid and worthy proposals at the convenience of the officer.

The balance of the May 14 proposed rule comprises Executive Branch initıatives to rewrıte this critical chapter of the federal acquisitıon process. Several of these initiatıves make beneficial changes to the federal acquisition process that we support. However, these limited number of beneficial changes remain overshadowed by provisions that upset the basic tenets of federal procurement policy. Thus, we do not support many provisions of this rule and once again cannot support the implementation of this rule and recommend that the rule not be adopted in its present form. In our view, the rule is inconsistent with FARA, will fundamentally alter the principles that are the foundation of the federal procurement system, and will have significant adverse consequences for all business, but particularly small businesses, that seek an opportunlty to do business under the Federal Acquisition Regulations with federal agencies.

Notwithstanding the assertions of the FAR Council in the Federal Register notice, we also strongly believe that the May 14 rule is a "major rule" under the definitions of the Congressıonal Accountabılıty Act (5 U.S.C. Sectıon 804). The refusal to declare any of the three versions of the proposed Part 15 rule a "major rule" as mandated by the Small Business Regulatory Enforcement Fairness Act ("SBREFA") is a blatant attempt by the Office of Management and Budget ("OMB") to circumvent the statutory review and approval scheme enacted by Congress. Mr. Raines, Director of $O M B$, has publicly stated that he belıeves the proposed Part 15 rule is necessary to streamline government and balance the federal budget. Therefore, the proposed rule must have an impact of $\$ 100$ million or more on the economy and meets the criteria for a major rule We urge the FAR Council to reconsider this important aspect of the rule-making process and urge the OMB Office of Information and Regulatory Affalrs to declare the proposed rule a major rule.

We appreciate the recognition that this rule is a "significant regulatory action" pursuant to Executive Order 12866. We applaud the improvement in the flexibility analysis performed pursuant to the Regulatory Flexıbılity Act on the May 14 rule.

The Full and Open Competation Coalition believes that, if mplemented as published, the proposed rule will lead to the following consequences:

* Arbitrary discretion vested $1 n$ contracting officers enable them to funnel money to favorıte states or
contractors.
* Piecemeal promulgation of regulations makes assessment of the impact of all the changes impossible. FAR Part 15 and other FAR regulations are being issued in "pieces" so the total impact is impossible to assess
* Arbitrary discretion vested in contracting officer lowers incentives to increase competition, rather it offers an incentive to the contracting officer to decrease competition.
* Moves the locus from the best possible price/quallty of service or good to the best possible marketing of the contracting officer or the best "relationship" with the contracting officer. "Long term relationships" as such translate to favoritism.
* The proposed rule upsets the basic tenets of the federal procurement process. Therefore it wall lead to considerable litigation that would not have otherwise occurred and will be counterproductive to the Administrations's efforts to reduce litigation.


## 1. PRIOR RULEMAKING AND COMMENTS

The FOCC submitted comments regarding the July 31 and September 12 proposed rules On September 30, eight trade and professional associations, including many who are members of the FOCC, submitted extensive comments in opposition to the July 31 proposal. The September 12 proposed rule incorporated the same changes to the FAR in the proposed rule entitled "Competitive Range Determinations" published in the Federal Register on July 31, 1996 (61 F R 40116). Since the subject matter and the proposed coverage of the two rules overlapped, on November 26, 1996, these concerns were reiterated in comments submitted by members of the FOCC on the September 12 rule.

## 2. MAJOR RULE

The proposed rule was not declared a "major rule" as mandated by the Small Business Regulatory Enforcement Fairness Act (SBREFA). SBREFA specifically defines a major rule as any proposed rule which (1) has an annual impact on the economy of $\$ 100$ million or more, (2) has adverse effects on competition, employment, investment, productivity, and
innovation, or (3) causes a major increase in costs or prices. Frank Raines, Director of the Office of Management and Budget, has specifically stated that the FAR 15 proposed rule is a necessary step to balancing the federal budget, thus admitting that the proposed rule will have a $\$ 100$ million or more impact on the economy. Yet his own department, OMB, refuses to classify it as such.

The Administration should declare the proposed rule a "major rule" as mandated by SBREFA.

## 3. PORTIONS OF THE MAY 14 PROPOSED RULE ARE NOT CONSISTENT WITH PARA

As we indicated in our previous two comments submitted regarding the July 31 and September 12 proposed rules, the coverage under the May 14 proposed rule also falls to properly 1 mplement the two key provisions of FARA affecting competition and the competitive range determination. Likewise, the expanded coverage of the proposed rule fails to properly implement the statute, undercutting the bedrock procurement principle of full and open competition.

## Competitive Range

(1) The rule allows contracting officers to limit the number of proposals in the competitive range to those proposals "most highly rated." This would enable the contracting officer to only allow the top two proposals in the competitive range.

FARA mandates that the contracting officer can 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 offeror rated most highly in accordance with such criteria." The rewrite eliminates the requirement to include the "greatest number" of proposals in its primary definition of the competitive range, by stating that "the contracting officer shall establish a competitive range comprised of those proposals most highly rated.

Thus, the contracting officer can always limit the competitive range to as few as two proposals because the top two proposals would have the greatest likelihood of award. The Full and Open Competition Coalition recommends 15.406(c) be amended to read as follows: "(1). . Based on the ratings of each proposal against all evaluation criteria, the contracting officer shall establish a competitive range comprised of all of those proposals most highly rated, unless
the range is further reduced for purposes of efficiency pursuant to paragraph (c) (2) of this section."

The use of the word "all" also has the advantage of establishing a "bright line" test that wall be easy to apply. The proposed rule does not require a "bright line" test for determining the proposals with the greatest likelihood of award as those within the competitive range. Thus, the competitive range for proposals ranked 98, 96, 94, 92, 89, 72,70 could be drawn between 94 and 92 or between 92 and 89 rather than between the "bright line" of between 89 and 72 .

## Efficient Competition Provisions of FARA

The proposed rule fails to 1 implement the provisions of "competition" as required by FARA. Section 4101 of FARA states, in part, that:
"The Federal Acquisition Regulation shall ensure that the requirement to obtain full and open competition is implemented in a manner that is consistent with the need to efficiently fulfill the Government's requirements."

The statement of the managers accompanying the conference report explains clearly that:
"This provision [FARA Section 4101] makes no change to the requirement for full and open competition or to the definition of full and open competition."

The proposed rule states that the "(2). 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." Thus, instead of the FAR ensuring that the requirement of full and open competition is implemented in a manner consistent with the need to efficiently fulfill the government's requirements, the contracting officer is allowed to select procedures to meet this requirement.

The Full and Open Competition Coalition recommends that 15.406(c)(2) be amended to ensure that the contracting officer considers the greatest number of proposals most highly rated: "the contracting officer may determine that the greatest number of proposals that might otherwise be included. . . ."

The FAR should specify the factors to be considered in making efficiency determinations for purposes of the elimination of proposals from the competitive range. The FAR should also specify the documentation required when proposals are
eliminated for reasons of efficiency. The Full and Open Competition Coalition recommends the addition of a definition for "efficient competition" in 2.101. The FAR could also require agencies to first streamline their procurement process, for example, utilizing electronic mechanisms, such as the SBA pilot inItiative PRONET. Small business would be opposed, however, to mandated electronic submissions. See discussion, Infra, regarding Participation Through Electronic Contracting. Agencies should not be able to use lack of advance planning for the procurement to justify limiting the number of proposals in the competitive range. See FAR 6 301(c).

As written, the proposed rule works against market forces by eliminating proposals that would otherwise be competitive and considered but for "efficiency" reasons or contracting officer discretion. We recognize that the federal workforce is being reduced, and acknowledge that the downsizing of the workforce will also impact on the number of acquisition personnel available. In light of these reductions, we have previously supported legislation and regulations that will simplify the acquisition process, reduce unnecessary work on both the government's and contractors' part, and joined with efforts to streamline the acquisition process. Many of these actions have already been put into place.

However, absent any definition or clarıfıcatıon of what $1 s$ an "efficient procurement," this proposed rule vests unchecked discretion in the contracting officers ability to arbitrarily limit the number of proposals in the competitive range based solely on unfair factors, such as how the officer feels, how hard he/she wants to work on that procurement, or resources available to conduct the procurement (even summer/holiday vacation schedules).

## 4. COMMUNICATIONS

Prior to deciding the competitive range, the contracting officer can take into consideration an oral representation that is made in "communications" with offeror whose exclusion from or inclusion in the competitive range is uncertain. There is no requirement that the contracting officer talk to all offeror in this range. Thus, a contracting officer could talk to one or a few and decide not to talk to the others similarly situated, thus precluding fair competition among these offerors.

The Full and Open Competition Coalition recommends that the FAR require the contracting officer to hold communications with all such offeror before making a competitive range determination. Moreover, the contracting officer should be
specifically precluded from considering an oral offer to make one or more material modifications to a proposal if it is accepted in the competitive range.

## 5. PAST PERFORMANCE

Proposals may be eliminated from the competitive range based upon factors including "past performance." The source of the past performance information does not have to be revealed. Thus, proposals could be eliminated by someone holding a "grudge" or by another competitor, and the blackmarked company would not be able to defend itself or rebut the allegations.

The Full and Open Competition Coalıtion recommends the full disclosure to the offeror of all past performance considerations, including the percentage of weight given to the information, the sources, and a clear statement of what can be considered. The offeror shall be allowed to respond to any past performance information relied upon by the contracting officer or used to rank the offeror. The contracting officer should be prohibited from using any past performance information unless such information has been fully disclosed to the offeror and the offeror has had an opportunity to respond or comment upon such information.

## Use of Past Performance

The Full and Open Competition Coalition ("FOCC") is concerned that offeror may be eliminated from the competitive range based on an adverse "past performance" record that they are unaware of or have not been given the opportunity to comment on as required by FAR 42.1503.

To date, the contracting officers' use of past performance to eliminate offeror from the competitive range has raised the number of past performance protests to the Comptroller General to an estimated 100 per year, largely as a result of a lack of definitive regulatory direction to the contracting officer on the limitations of the use of past performance in the source selection process.

A recent review reported in the Nash Cibınic Report (Vol. II, No 5 at page 70) questioned whether past performance evaluations were "far," noting that as far as protesters were concerned, "there are not many winners" due in part to the Comptroller General's narrow scope of review in holding that
[E]valuation of an offeror's past performance is a matter within the discretion of the contracting agency,
and we the Comptroller General] will not substitute our judgement for the agency's so long as the rating is reasonably based and documented. ... Mere disagrement with the agency's evaluation does not of itself render the evaluation unreasonable.
H.L.C. Industries, Inc., B-274374 (enphasis added), Dec. 6, 1996, and cases cited thereln.

There has been considerable controversy about OFPP"s efforts to circumvent the SBA's responsibilities under the Certificate of Competency Act, where offerors are small businesses.

Past performance has always been a responsibility factor to be cansidered by a contracting officer in making the requisite "affimative" detemination of responsibility. Under the regulations, anythung short of an affimative detemmation is a nonresponsibility determunation, and the offeror is not eligible for that award. There are no degrees of responsibility pemitted under the regulations. While it $1 s$ allowable to rank offerors based on their present technmeal capabilıtıes, past performance is permissible in considering an award except where a small business 23 involved. Then, the statute and regulations require that all non-responsibility factors, including past performance, be referred by the contracting officer to SBA for a binding detemination on responsibility. The contracting officer cannot proceed with an award until SBA has acted. The Comptroller General's decisions support this process.

Many of these Comptroller General decisions have been characterized as being "fact specific," that is, dependent on the specificity of evaluation terms in the solicitation and the quality, accuracy and relevance of the past performance information relied upon by the contracting officer to make the source selection decision. There is also concern whether the offeror was made aware of the adverse or incomplete record and had the opportunnty to respond.

The Comptroller General's decisions in granting or denying the protests revolved around the presence or lack of specificity in the solucitation's evaluation criteria, the use of price and past performance as a pricemrelated factor, or when specifying "relevant" past performance, the absence of a definition of same or sumiar contract performance experience.

In a recent decision on a protest involving past performance, the Conptroller General granted a protest where the RFP called for "demonstrated successful performance on sımilaf efforts" and defined "similar experience" as "providing support to similar type mail and
courier efforts andor ackninistrative support service type efforts." The Comptroller General concluded that the agency had ranked two offeror high and as equal when one clearly did not have "similar" experience called for in the Statement of work. The record indicated no "identifying major strengths that would support such a rating for past performance." Ogden Support Services, Inc., B-270012.2, March 19, 1996; B-270012.4, October 3, 1996, 96-2 CPD, II 137.

The point to be made in the Comptroller General's "fact specific" decisions is that where the solicitation is specific and detailed in specifying the requisite significant and relevant past performance information to be evaluated, the Comptroller General's policy is to review that evaluation criteria spelled out in the solicitation to ensure the criteria were fairly applied in the protesting offeror's case. However, in a similar case, the Comptroller General has held that a contracting officer was not required to contact all five of the contracting officers that were given by the offeror in response to a solicitation request for past performance references.

If the contracting officers follow the proposed regulations, the specificity $1 s s u e$ may be resolved. In two sections of the proposed regulations, 15.403 (b) (4) and $15.404(\mathrm{e})$, where the competitive acquisition is expected to exceed $\$ 1,000,000$, "all factors and significant subfactors that will affect contract award and their relative importance shall be stated clearly in the solicitation. 10 U.S.C. $2305(\mathrm{a})(2)(\mathrm{A})(\mathrm{i})$ and 41 U.S.C. $253 \mathrm{a}(\mathrm{b})(1)(\mathrm{A})$, See: Sec. 15.204-5 (c)." (emphasis added) When using past performance as an evaluation factor:

The solicitation shall also state, at a minimum, whether all evaluation factors other than cost or price, when combined, are
(1) Significantly more important than cost or price;
(2) Approximately equal to cost or price; or
(3) Significantly less important than cost or price

10 U.S.C. $2305(\mathrm{a})(3)(\mathrm{A})(111)$ and 41 U.S.C. 253a(c) (1) (C). 15.404 (f).

The current proposed regulations provide that prior to establishing the competitive range, communications may be held with those offeror whose exclusion from, or inclusion $1 n$, the competitive range is uncertain (15.406(b) (1)) and "may" address "information relating to relevant past performance." The FOCC recommends this provision be amended to say "shall address any past performance information that may be used or relied upon by the contracting officer in
determining if the offeror will be included in the competitive range."

## Notice of Past Performance

As presently drafted, the contracting officer is not required to advise the offeror of adverse past performance information during the selection process FAR Subpart 4215 Contractor Performance Information requires contracting officer evaluation reports on every contract in excess of $\$ 1$ million, with copies of the agency's evaluation, be provided to the contractor "as soon as practicable after completion of the evaluation." Contractors have a minimum of thirty (30) days to submit comments, rebutting statements or additional information. Agencies shall provide for a review at a level above the contracting officer to consider the offeror's disagreements. The offeror's comments are required to be made a part of the contract file. However, the FOCC is concerned that the report could include biased and/or adverse or incomplete information that the contractor is unaware of and that could, at a later date, result in the offeror being eliminated from the competitive range without the offeror having had the opportunity to correct or contest such adverse or incomplete information.

The FOCC is still concerned about the offeror not being aware of adverse past performance information. As presently drafted, Proposal Evaluation-Past Performance Evaluation provides that the "Government shall consider this [FAR 42.1503] information as well as information obtained from any other source when evaluating the offeror's past performance, [adding] the contracting officer shall determine the relevancy of similar past performance information." $15.405(\mathrm{a})(2)(\mathrm{ii})$ (emphasis added). If the contracting officers follow these source selection procedures, the Comptroller General will have better guidance in reviewing protests involving past performance.

Because of this justified concern, the FOCC strongly recommends that in the source selection process, the contracting officer be denied the use of any adverse past performance information that the offeror or bidder is not aware of or has not been given an opportunity to comment on. In those instances, the adverse information cannot be used for any purpose until the offeror has had a reasonable opportunity to provide all comments. This would apply to all acquisitions below or above $\$ 1,000,000$.

The FOCC remains concerned that the FAR also currently provide that the identity of the Government (and other)
sources of past performance information is not to be revealed.

The FOCC belıeves strongly that without regulatory checks, the adverse past performance information that the contractor is unaware of and has not been given the opportunity to refute is completely unacceptable. The Office of Federal Procurement Policy (OFPP) Admınistrator's responsibility is "to provide guldance that include standards for evaluating past performance .. and other relevant performance factors that facilitate consistent and faır evaluation by all executive agencles." 41 U.S.C. 405(J)(1) (A) (emphasis added)

With regard to past performance, the drafters of the proposed regulations have failed to meet the prior standard of defining the contracting officers' authorıties and accountability The proposed use of past performance crıterıa whıch are largely subjective will only lead to confusion and uncertainty that is already adversely affecting small busıness Congressionally-mandated maxımum partıcıpation in order to recelve a "fair share" of the procurement dollars.

## 6. DISCUSSIONS

Proposed FAR 1.102-2(c) (3) faıls to specıfy an acceptable standard to measure the performance of the federal acquisition system, or individual members of the acquisition team, such as contracting officers, regarding the treatment of actual and prospective contractors. The proposed rule allows very flexible discussions with offerors, and a contracting officer can treat offerors unequally in discussions. The new proposed rule is significantly worse than the previous version. It is vague and open-ended, without any clear parameters, even arbitrary and capricious. The Full and Open Competition Coalıtion recommends the following:
(3) All offerors and contractors are entitled to fair treatment. Fair treatment requires that the members of the acquisition team abide by the solicitation and acquisition plan (if any) and comply with applicable laws and regulations in dealing with offerors and contractors. All offerors and contractors shall be treated fairly and impartıally.

The FOCC proposal represents an unambiguous standard of falr treatment and includes fixed standards against which to measure such treatment. In addıtion to providing a firm standard, inclusion of the reference to "applicable laws
and regulations" recognizes that offerors and contractors may be treated differently in certain circumstances to attain statutorily-sanctioned public policy objectives. For example, an individual procurement may be restricted to competition exclusively among a specified class of offeror or a specified class of contractors may be entitled to a higher rate of progress payments, for example, small businesses

In discussions, a contracting officer can disclose that an offer is too high or unrealistic based upon their own price analysis or "other reviews," enabling an officer to "suggest" that a lower price might win the award. The offeror can then adjust his price in submitting his revised proposal.

The proposed rule does not retain the current FAR 15.610 (e) (2) prohibition on "auction techniques." Proposed FAR $15.406(e)(3)$ prohibits the contracting officer from revealing "an offeror's price without that offeror's permission." The provision goes on, however, to authorize the contracting officer to communicate to an offeror that the government considers that offeror's price to be too high.

When coupled with the discretion granted the contracting officer by proposed FAR 15.407 (Proposal revisions) to have multiple discussions with each offeror, the discretion provided by proposed FAR $15.406(e)(3)$, in practical terms, authorize "auctioning." The Full and Open Competition Coalition is adamantly opposed to granting, either directly or indirectly, the authority for a contracting officer to conduct a price auction among competing offerors

We do not believe that the government should be engaged in an "auction" when conducting source selections. The FOCC suspects the exclusion of the auction provisions were intentionally omitted from the Part 15 rewrite (particularly in light of the affirmative approval of such "auction techniques" in dealing with the September 6, 1966 FARA proposed rule on simplified acquisition procedures). The Full and Open Competition Coalition strongly urges the retention of the auction prohibition provisions in the FAR Part 15

## 7. INTERIM PROPOSAL REVISIONS

The proposed rule does not ensure offeror equal time for interim proposal revisions. Although the new draft does require a common cut-off date for BAFO, it does not require equal time for all offeror to make interim proposal
revisions. 15208 allows late interim proposals and could
undercut fair competition. The contracting officer can talk more to one offeror and give him more time to submit a revised proposal. Thus, an officer could allow the preferred offeror more time to get his proposal "right" before requesting BAFO.

Proposed FAR $15.407(b)$ permits a contracting officer, during the course of negotiations with an offeror, to request that offeror to revise its proposal to "clarify and document understandings reached during negotiations." Under this authority, a "favored" offeror could be accorded multiple opportunities to revise its proposal after multiple discussions with the contracting officer In practical effect, the "favored" offeror would be accorded more opportunities to revise its proposal, while other offeror might be denied this opportunity. All offeror in the competitive range should be accorded an equal number of opportunities with equal time to revise their proposal

## 8. MULTI-STEP SOURCE SELECTION

Proposed FAR 15.102 seeks to establish a multi-step source selection procedure which authorizes the buying agency to eliminate an offeror from further participation in the competition for the award of the contract (including the ability to even submit a full proposal) on the basis of an evaluation of "Information" submitted in response to the "fırst-step solicitation." Commonly referred to as the "mandatory downselect" multı-step source selection, this proposal process would be in addition to the proposed advisory multi-step source selection process set forth in proposed FAR 15.202. Proposed FAR 15.102 should be deleted in ats entirety.

The multi-step source selection process in the proposed rule is a regulatory attempt to impose a mandatory downselect. This was specifically rejected by the Congress during the deliberation of the Committee of Conference between the U.S. Senate and House of Representatives Conference on the disagreeing votes of the two Houses regarding the provisions of the House-passed version of the National Defense Authorization Act for Fiscal Year 1996 (H.R. 1530), which included an amended version of the "Federal Acquisition Reform Act of 1995," HR. 1670.

The legislative record pertaining to H.R. 1670 contains extensive discussion of the opposition of the small business community to such a multi-step source selection process, if it includes a mandatory down-select component." See e.g., "Small Business Participation in Federal Contracting: Assessing H.R. 1670, the 'Federal Acquisition Reform Act of 1995'", Part II, Hearing Record

No. 104-46 (August 3, 1995), Committee on Small Business, U.S. House of Representatives. The process becomes no less objectionable when implemented by regulation without any statutory basis.

Section 15.202 provides the advisory downselect and should be the only provision for the multi-step source selection for competitive range determinations. This provision attains the objective of minimizing the burdens on offerors to make the business decision to submit a full proposal, after investing the time and effort to effectively remedy the weaknesses identified during the first phase. The Full and Open Competition Coalition further recommends that the government advise all offeror regarding their relative ranking in the procurement.

The advisory downselect process puts the decision on whether to proceed in competition for the award squarely in the hands of the business, which is in the best position to determine $1 t s$ capabilities to compete for the contract Revealing the offerors' rankings -- a process already successfully in place in New York state -- would clearly help offeror decide whether to proceed in the competition.

When the government takes the steps to provide a clear statement of its need (which is not an essential element of this rule or of the existing FAR) and the key evaluation criteria that it will use in making its award decisions, as well as notifies offeror of their ranking, we believe that interested offerors will make the most of that information by competing only where they believe they have a reasonable chance of success, or where they are willing to invest their own resources.

Although paragraph (d) (2) (iii) of the proposed rule properly acknowledges that "advisory" downselects are not entitled to a debriefing pursuant to 15.805 and 15.806, we strongly recommend that language be included in this section of the proposed rule which encourages contracting officers to provide such de briefings in a timely manner wherever possible. Both the government and the private sector benefit from meaningful and timely debriefings, even under circumstances such as here where the business person has made his or her own decision not to go forward in the competition.

## 9. CHARGES FOR SOLICITATION SETS

Section 15.205 allows agencies to charge for solicitation sets. In accordance with Section $8(1)$ of the Small Business Act (15 U.S.C. Section 637(1)), small business concerns are guaranteed access to copies of the
solicitation package, with certain exceptions. The proposal purports to authorize an agency to charge for such solicitation sets, if permitted by agency regulations Section $8(1)$ of the Small Business Act specifically limits those charges to the cost of duplication. The Full and Open Competition Coalition recommends that this fee should be specifically stated in Section 15.205.

## 10. PARTICIPATION THROUGH ELECTRONIC CONTRACTING

Proposed FAR 15.203(c) permits the contracting officer to issue Request for Proposals (RPs) and recelve offeror' proposals (and modifications and revisions to such proposals) using electronic commerce. FAR Part 15 does not contain any explicit requirement that offeror can be required to use electronic commerce methods, if the contracting officer selects electronic commerce as the preferred method of issuing the solicitation and receiving responses. The FOCC is concerned, however, that two provisions in the proposed rule strongly imply that the offerors may be compelled to use electronic commerce Proposed FAR 15.204-5 - Part IV (Representations and Instructions) authorizes the contracting officer to specify the required "format" for an offeror's response to a solicitation. Paragraph FAR 15.205(a) (issuing solicitations) limits the statutory right of a small business to be furnished a copy of any solicitation to those solicitations issued through "other than electronic contracting methods."

Given the failure of the procuring agencies to effectively implement the uniform Federal Acquisition Computer Network (FACNET) System and the growing proliferation of nonuniform procurement bulletin boards, the FOCC strongly recommends that paragraph 15.204 (a) be modified to explicitly reserve the right of a small business offeror to obtain a solicitation and submit a proposal in a paper format. The buying agency is more likely to have ready access to the necessary computer hardware and software to print any needed copies of an electronic solicitation and could easily scan any small business paper-based offer into electronic format.

## CONCLUSION

Based upon the foregoing, the proposed rule should be revised as discussed and recommended. We appreciate the changes made to date to the FAR 15 rewrite and the careful consideration the FAR Council has given to our concerns. We believe the proposed recommendations, if implemented, will enhance the proposed rule in such a manner as to
wall enhance the proposed rule in such a manner as to ensure the integrity of the federal procurement process and the involvement of small business and all business in the competition for federal contracts, and will result in a streamlıned procurement system. We emphasıze, however, that our concerns go to the core tenets of the procurement process and that, absent the changes recommended, the proposed rule will immediately and detrimentally alter the certainty and integrity of government procurement.

For these reasons, the proposed rule must be revised to conform to the minimal FARA changes that were enacted, to minimize diversion from the current FAR unless there is justification for doing so, to ensure the supremacy of the FAR as the uniform guiding rules of the federal procurement process, and to preserve full and open competition for government contracts. We also recommend that the FAR Councrl urge OMB to declare the proposed rule a major rule under 5 U.S.C. Sectıon 804 and publish a notice to that effect in the Federal Register.

Thank you for your consideration of these views.
Sincerely,

Amerıcan Gear Manufacturers Assocıation
American Movers Conference
American Soclety of Interior Designers
Amerıcan Small Businesses Assoclation
American Subcontractors Association
Assoclated Builders and Contractors, Inc.
Computer \& Communications Industry Association
Household Goods Forwarders Assoclation of America
Minority Business Enterprise Legal Defense and Education Fund
Natıonal Associatıon of Perishable Agrıcultural Receivers
National Association of Surety Bond Producers
National Small Business Unıted
Small Business Legıslative Council
Small Business Roundtable
Soclety of Travel Agents in Government
U.S. Chamber of Commerce

General Services Admınıstration

FAR Secretarıat (MVRS)
18th \& F Streets, N W
Room 4037
Washington, D C 20405

## Re: Proposed FAR Part 15 Rewrite -- Phases I and II FAR Case No. 95-029 (62 Fed. Reg. 26649)

## Dear Sir or Madam

On behalf of the Section of Public Contract Law of the American Bar Association ("Section"), I am submitting comments on the above-referenced matter The Public Contract Law Section consists of attorneys and associated professionals in private practice, industry and Government service The Section's governing council and substantive committees contain a balance of members representing these three segments, to ensure that all points of view are considered In this manner, the Section seeks to improve the process of public contracting for needed supplies, services and public works

The Section is authorized to submit comments on acquisition regulations under special authonty granted by the Association's Board of Governors The views expressed herem have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association

## INTRODUCTION

The Section, in its letter dated November 27, 1996, commented on Phase I of the FAR Rewrite The captioned revised proposed rule reflects changes made as a result of public comments on Phase I as well as proposed changes in previously unpublished Phase

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II The stated goals of the rewnte are "to infuse innovative techniques into the source selection process, simplify the process, and facilitate the acquisition of best value," but to do so without altering the full and open competition provisions of FAR Part 662 Fed Reg at 26640 The Section appreciates the effort that has been made to accommodate concerns expressed in public comments, including those of the Section, on the initial rewrite of Phase I The drafters should be commended for their substantial efforts in striking a workable balance between the Government's need for flexibility and the equally important need for fair and equal of treatment of offeror In any project of this magnitude, the need for further revisions should be expected, and the Section sets forth below its suggestions and concerns with the current version of the FAR 15 rewrite

In its comments, the Section has set forth proposed alternate text where it is needed We have also responded to the FAR Council's request for a more rigorous definition of "neutral" past performance rating

## SPECIFIC COMMENTS

Specific comments and recommendations on the proposed revisions are discussed in the following sections

## Proposed FAR 2.101-Definnitions

Proposed FAR 2101 adds the following definition of Best Value
Best value means the outcome of an acquisition that, in the Government's estimation, provides the greatest overall benefit in response to the requirement

This definition is so broad that it bears no relationship to the traditional and wellestablished meaning of best value as that term has been used and interpreted The initial FAR Part 15 Rewrite defined best value as "an offer or quote which is most advantageous to the Government, cost and price and other factors considered " The Section expressed concern that this definition made inadequate reference to evaluating the proposals in regard to meeting the Government's stated requirements Although the definition now references the "requirement," it is so broad and general that it could be applied to almost any procurement, including one using the sealed bid process Thus, the newly proposed definition of "best value" as proposed is essentially meaningless

Furthermore, the definition is susceptible to an interpretation never intended by the drafters In essence, if "best value means the outcome provides the greatest

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overall benefit in response to the requirement," logic suggests that best value must be the best technical proposal, completely aside from price, because requirements typically refer to non-cost/non-price factors It is not clear that a definition of best value is needed However, if a definition of best value is to be included, it should be consistent with longstanding decisions of the GAO The Section recommends that if a definition is maintained the definition be modified to reflect the traditional meaning of a trade-off process considering both cost or price and non-cost factors The Section proposes the following "Best value means the outcome of an acquisition that is most advantageous to the Government, considering the stated requirements, cost, price and other factors "

## Proposed FAR 15.101-2 - Lowest price technically acceptable source selection process (treatment as best value procurement)

In its comments on the initial FAR Part 15 Rewrite, the Section expressed concern regarding the inclusion of the lowest price technically acceptable process in the general category of best value This process is inconsistent with GAO and federal court precedent regarding best value procurements Traditionally, these decisions have equated best value with the greatest value method of source selection described in the current FAR 15605 (c), where the source selection authority can trade off the cost or price against the non-cost factors to select the proposal that represents the greatest value to the government This process is now embodied in the trade-off process described in proposed FAR 15 101-1

In a procurement where the selection criteria is lowest price, tcchnically acceptable, however, the agency has already performed the essential cost-technical tradeoff before the solicitation is issued, rather than after proposals are received and evaluated Yet, the proposed rule provides no rationale why the lowest price technically acceptable process must be considered as a best value procurement as that term traditionally has been used The Section's previous comments identified areas where the lowest price technicaily acceptable approach, with its lack of a trade-off during proposal evaluation between price and non-price factors, was inconsistent with the wording of various sections of the FAR Part 15 Rewnte One solution is to delete this process in this Part Nevertheless, if the process is retaned in Part 15, additional clanfications and modifications are required to avoid confusion and litigation For example proposed FAR 15405 (a) requires agencies in evaluating competitive proposals to "assess their relative qualities solely on the factors and subfactors specified in the solicitation" This is not apphcable to the lowest price technically acceptable approach and proposed FAR 15 1012 should be amended to reflect that FAR 15 405(a) does not apply The Section also recommends that proposed FAR 15 101-2(a) be amended to state the circumstances in which the best value is expected to result from the selection of the lowest price, technically acceptable proposal

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## Proposed FAR 15.101-2 - Lowest price technically acceptable source selection process (treatment of past performance)

The use of past performance as a non-cost evaluation factor in a lowest price technically acceptable offer process is problematic Non-cost factors are to be evaluated on a pass/fail basis either the offeror is acceptable or not Accordingly, the Section pointed out in its comments on the initial version of the FAR Part 15 Rewrite that past performance is required to be evaluated in a lowest price technically acceptable process and must be considered on a pass/fail basis

Although proposed FAR 15 101-2(b)(1) now specifically states that past performance will be considered as a non-cost factor, it does not address the situation raised by a neutral past performance rating Proposed FAR $15405(\mathrm{a})(2)(1 \mathrm{v})$ generally attempts to address situations where a firm lacks relevant past expenence by stating that the resulting neutral evaluation will not affect an offeror's rating, but it may affect its ranking Thus, the solution for dealing with neutral performance ratings would be inapplicable to the lowest price technically acceptable process, where there is no ranking according to non-cost factors See the discussion of the proper evaluation of "past performance" under FAR $15405(\mathrm{a})(2)$ infra

## Proposed FAR 15.102-Multi-step source selection technique

The initial version included a comprehensive multiphase acquisition technique that encompassed both mandatory and advisory downselect procedures The Section endorsed the use of the multiphase procurement technique, indicating that it is currently being used successfully by various agencies Nevertheless, the Section also identified aspects of the proposed technique that may result in unfair treatment and failure of the Government to achieve the desired efficiencies The present version has separated the mandatory from the advisory downselect procedures, including the latter (proposed FAR 15 202) in a separate subpart dealing with sohctation procedures Although the current version addresses some concerns, others remain

The proposed FAR 15 102(b) now includes a requirement that the initial solicitation in a multi-step procurement identify the ultimate evaluation cntena to be used in making the final source selection decision The Section in its comments on the initial version recommended the inclusion of both the evaluation criteria and the evaluation process in the initial solicitation The evaluation process is an important consideration in whether a particular company decides to participate in an acquisition Accordingly we recommend that proposed FAR 15 102(b) be changed to read "[ t]he agency shall issue a solicitation that describes the supplies or services to be acquired, identifies the criteria and the evaluation process that will be used in making the source selection decision

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Proposed FAR 15 102(b) requires that the solicitation disclose "all sıgnificant factors and subfactors " This indicates that not all evaluation factors need be disclosed, and is inconsistent with the requirement elsewhere in the proposed FAR Part 15 Rewrite to disclose "all factors and sıgnificant subfactors" in solicitations See proposed FAR 15 203(a)(4) Proposed FAR 15 102(b) is also inconsistent with the specific requirement in proposed FAR 15404 (c) that if a multi-step procurement is used, all evaluation factors must be disclosed There is no offered explanation for limiting the disclosure of all evaluation factors in proposed FAR 15 102(b) Accordingly, the Section recommends that proposed FAR 15 102(b) be changed to require disclosure of "all factors and significant subfactors"

The initial version of the mandatory downselect technique required that sufficient information be requested to constitute binding offers This requirement is absent from the current proposed FAR 15102 It is an appropriate mmmum requirement for the initial proposals that should be included to ensure that initial proposals constitute binding offers The Section recommends that proposed FAR 15 102(b) require sufficient information in the initial proposals to make them binding offers Otherwise, the mandatory downselect technıque contınues to allow for the submıssion of the same limited information as in the initial version Indeed the information required in the initial step of the mandatory procedures is the same limited information that the advisory procedures require See FAR 15 202(a) While recognizing the efficiencies to be gained by mitally requesting less than a full proposal, the Section contmues to believe that basing a mandatory downselect on such limited information raises significant concerns The agency may not have sufficient information to conduct an analysis of the proposals that is both adequate and fair, and consequently this could potentially lead to an increased number of protests

In addition, downselects based on limited "qualification" type information could lead to an improper prequalification process Undue emphasis on qualification type information makes the process more like a basic responsibility determination performed by the contracting officer This could result in abuses such as attempts to bypass the protections for small business found in the Small Business Admınıstration's Certificate of Competency procedures Therefore the Section continues to recommend that more information be required in the intial downselect step, including, for example, more technical information about the offeror's actual proposal

## Proposed FAR 15.103-Oral presentations

The present version dealing with oral presentations reorganizes but retains the essential language of the initial version Nevertheless, two new paragraphs have been added that address concerns rased by the Section in commenting on the initial version

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The Section endorsed the use of oral presentations as a valuable tool in the source selection process The Section, however, expressed concern over the use of oral presentations on key proposal information without its being reduced to writing or otherwise recorded For example, an oral presentation should not substitute for the resumes of key personnel, information that is traditionally reduced to writing The initial version of the oral presentation section encouraged oral presentations "to substitute for, rather than augment, written information" See initial proposed FAR 15 104(a) Without restrictions on the use of oral presentations, there may be an increased number of disputes over what the offeror actually proposed and the Government evaluated, and over the understanding of the parties regarding what is required for contract performance

The current version adequately addresses these concerns by adding specific language in proposed FAR 15103 Subsection (d) requires that the contract file contain a record of the oral presentation to document what the Government relied upon in evaluating the competing proposals and making the source selection decision Likewise, subsection (e) requires that when an oral presentation contains information that the parties intend to include in the contract as material terms and conditions, that information must be reduced to writing The Section recommends that additional language be included in subsection (e) to require that the written record of an offeror's oral presentation be promptly provided to the concerned offeror, if requested

## Proposed Subpart 15.2 - Solicitation and Receipt of Proposals and Information

The Section's comments on proposed subpart 152 are essentially the same as its comments on the initial version

With regard to proposed FAR 15 201(f) the Section supports the early disclosure of general information about agency needs, but it is concerned that if such information is released to an offeror and not made public in a timely fashion, the result may be an increased number of bid protests The initial version of FAR 15 201(f) provided "If Government personnel disclose specific information about a proposed acquisition which is necessary for the preparation of proposals, that information shall be made available to the public as soon as possible, but no later than the next release of information " The current version deletes the phrase "but no later than the next release of information " The Section believes this change will encourage delay rather than promote timely disclosure of the information in the contracting community The Section proposes that either "but not later than the second business day following the initial release of the information" or "but no later than the next release of the information" be inserted after "as soon as possible" Also, "possible" should read "practicable"

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The Section supports the proposed rule's deletion of the Model Contract Format from subpart 15203 and the proposal to ad the Model Contract Format to the DFARS as a "test" The Section, however, notes that the DFARS "test" may not be dispositive and could, in fact, lead to additional confusion The FAR seeks to provide a "single face to industry" and use of a different contract format by DoD or components of DoD could create significant problems Nevertheless, as noted in our prior Part 15 rewrite comments, a change should not be made to the Model Contract Format untıl it has been subjected to a cost/benefit analysis

With regard to the standard contract format, the subject of proposed subpart 15 204, "basic agreements" and "shipbuilding (including design, construction and conversion), ship overhauls, and ship repairs," which currently appear on the list of items in FAR 15 406-1 and are exempt from the uniform contract format, should be added to the list of items exempt from the standard contract format in proposed FAR 15204

Proposed FAR 15207 (c) provides that "if a proposal received by the contracting officer electronically or by facsmile is unreadable to the degree that conformance to the essential requirements of the solicitation cannot be ascertaned from the document, the contracting officer immediately shall notify the offeror to resubmit the proposal" at a time and by a method prescribed by the contracting officer The Section believes the contracting officer should permit the resubmission of any portion of the proposal that is unreadable, not only when the proposal falls to demonstrate "conformance to the essential requirements of the solicitation " To prevent abuse the offeror should be permitted to resubmit only the unreadable pages, not the entire proposal The first sentence of proposed 15207 (c) should be rewnitten as follows "If any portion of a proposal received by the contracting officer electronically or by facsimile is unreadable, the contracting officer may notify the offeror to resubmit the unreadable portion of the proposal " This change should also be made to paragraph (d) of proposed FAR 52 215-5, "Facsimıle Proposals "

Proposed FAR 15208 (c) provides
Late proposals, modifications, and final revisions may be accepted by the contracting officer provided-
(1) The contracting officer extends the due date for all offerors, or
(i1) The contracting officer determines in writing on the basis of a review of the circumstances that the lateness was caused by actions, or mactions, of the Government, or

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(i11) In the judgment of the contracting officer, the offeror demonstrates by submission of factual information that the circumstances causing the late submission were beyond the immediate control of the offeror

Although it is an improvement over the previous rewrite of FAR 15 207(b), subparagraph (111) should be eliminated The offeror must accept ultimate responsibility for ensuring that its proposal is delivered to the Government in a timely fashion and item (i11), especially the ambiguous phrase "immediate control," undermines that requirement Absent any Government fault, if one offeror is given additional time, the proposal cutoff date should be extended for all offeror This change should also be incorporated into proposed FAR 52 212-1(f) and $52215-1$ (c)(3)

Proposed FAR 15 209(b) sets forth the exceptions to including in solicitations and contracts the provision at FAR 52 215-2, "Audit and Records-Negotiation" The current FAR 15 106(b)(2) exempts solicitations and contracts "for commercial items exempted under 15 804-1" from the 52 215-2 requirement, which does not appear in the proposed 15 209(b) The Section believes this exemption should be added to the list of exemptions in proposed 15 209(b)

## Proposed FAR 15.202 - Advisory multi-step source selection

Proposed FAR 15202 is the advisory downselect portion of the previously combined downselect technique The present version includes this section in the subpart dealing with solicitations Thus it arguably could be used with any solicitation, meluding a multi-step procurement under proposed FAR 15102 Nevertheless, proposed FAR 15 202(a) requests from each offeror similar information to what would be required under the mandatory multi-step source selection technique As does FAR 15 102(b), proposed FAR 15 202(a) requests submission of "statements of qualifications and other appropriate information (eg, proposed technical concept, past performance, and limited pricing information) " In certain instances, such as where the Government reasonably anticipates a large number of interested firms, an advisory down-select may be an appropriate way to minimize offerors' bid and proposal costs and the Government's evaluation processes This would contemplate that the same information not be required twice, but the initial advisory down-select would be based on materially less information than the next phase of the procurement It would seem inappropriate and unduly burdensome to combine an advisory downselect process with a mandatory multi-step procurement and request essentially the same information twice Accordingly, the Section recommends that the proposed regulation state that the use of the advisory downselect procedure in a mandatory multi-step procurement be prohibited where it would result in offerors being required to submit the same information twice, but not in

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those situations where the initial down-select is based on materially less information than that involved in the procurement's next step

## Proposed Subpart 15.3-Unsolicited Proposals

The Section concurs with the proposed clarifications to the rules regarding "unsolicited proposals" These changes will reduce misunderstandıngs regarding when a submission constitutes an "unsolicited proposal" and the Government's obligations with regard to it

The preamble to the proposed rule indicates the coverage on unsolicited proposals has been "revised to focus on submission of new ideas and concepts in response to Broad Agency Announcements, Small Business Innovation Research Topics, Small Business Technology Research Topics, or Program Research and Development Announcements and to highlight the use of communications between industry and the Government" This quotation is somewhat misleading Proposed FAR 15301 defines an unsolicited proposal as "a written proposal that is submitted to an agency on the intiative of the offeror for the purpose of obtaining a contract with the Government, and that is not in response to a request for proposal, Broad Agency Announcement, Small Business Innovation Research topic, Small Business Technology Transfer Research topic, Program Research and Development Announcement, or any other Government-mitiated solicitation or program " (Emphasis added) Thus, the proposed revised definition of "unsolicited proposal" expands upon the exclusion of proposals submitted in response to "formal or informal Government requests" in the current FAR 15 501, to specifically exclude from consideration those proposals responding to the referenced programs Proposed FAR 15302 further explains that it is the Government's policy to encourage submission of ideas in response to the above-mentioned programs and only when new and innovative ideas do not fall under topics publicized under these programs, may the ideas be submitted as unsolicited proposals

The proposed rule also adds the definition requirement that the proposal be for a "new or innovative idea" This addition is an extension of the requrement in the current FAR $15502(\mathrm{c})(1)$ that unsolicited proposals must be "innovative and unique"

The definition of "advertising material" has also been revised to more properly reflect the true nature of advertising and to indicate that services as well as supplies may be the subject of advertising The distinction between "advertising material" and an "unsolicited proposal" can be critical Several bid protests have involved this issue The Government may freely disclose information contained in "advertising material," an "unsolicited proposal" is subject to the information disclosure prohibitions in FAR 15308 and 15309 The revised defintion replaces "designed to determine the

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Government's interests in buying these products" (which in many cases, would not be true advertising but rather marketing intelligence), with "designed to stimulate the Government's interests in buying such products or services," a more appropriate indicator of advertising

## Proposed FAR 15.404 - Evaluation factors and subfactors

The text of proposed FAR 15404 is internally inconsistent and conflicts with other sections of the Rewrite As indicated earlier the requirement in proposed FAR 15 404(c) is inconsistent with 15 102(b) The Section recommended that proposed FAR 15102 (b) be changed to reflect the requirement throughout the FAR 15 Rewrite to disclose in the solicitation "all factors and significant subfactors" that will be used to evaluate the proposals Nevertheless, proposed FAR 15404 (c) is also inconsistent with these other sections in that it requires disclosure of "all factors and subfactors " To be consistent with the rest of FAR 15404 and 15 203(a)(4), proposed FAR 15 404(c) should be changed to read "all factors and significant subfactors"

## Proposed FAR 15.405-Proposal evaluation

The Section raised several concerns about the inttal version For example, the initial wording appeared to allow an agency to take into account the relative qualities of the proposals at the same time the agency is evaluating each proposal against the announced evaluation cntena The current version responds to this concern in proposed FAR 15 405(a) by specifying that an agency must first evaluate each proposal against the announced evaluation criteria and then "assess therr relative qualities"

The Section also cautioned that the initial version allowed cost information to be provided to members of the technical team The present version of proposed FAR $15405(a)(4)$ retains the earler language without modification This provision would reverse the practice of keeping cost data from the technical team to ensure proper focus on the technical merts without being influenced by cost considerations Typically cost or price has been separately evaluated, and that evaluation combined with the technical evaluation is considered for the first time in an integrated process at the SSEB level

No rationale has been presented for overturning this approach As suggested in the Section's earlier comments, allowing the technical team members to have access to cost data after they complete their technical evaluation against the technical requirements in the solicitation could benefit the source selection process This might be helpful especially in estimating the cost impact of understated technical effort or additional testing or development identified by the government technical evaluators Moreover,

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providing cost data after the completion of the technical evaluation would not lead to any significant inefficiencies in the evaluation process Accordingly the Section reiterates its earlier recommendation that language be added to proposed FAR 15405 restricting access to cost data by the technical evaluators until after the technical evaluation is complete

## Proposed FAR 15.405(a)(2) - The Proposed Past Performance Evaluation Requirement Should Be Amended To Better Address "Relevance" and "Neutrality" And To Prevent The Use of Past Performance As A Price Related Factor

The Section commends the expanded guidance on the consideration of past performance in the proposed regulation This builds upon the guidance in current FAR 15 605(b) and further implements OFPP Policy Letter No 92-5, Past Performance Information See 58 Fed Reg 3573 (January 11, 1993) Some of the problem areas discussed in the Section's November 27, 1996 comments have been addressed in the revised proposed regulation Nevertheless, certain issues remain that require further attention

Proposed FAR 15 405(a)(2)(iv) provides that "[firms lacking relevant past performance history shall receive a neutral evaluation for past performance" The proposed regulation states further "A neutral evaluation is one that nether rewards nor penalizes offerors without relevant past performance history (41 US C 405) " In addition the proposed regulation provides that

> [w]hile a neutral evaluation will not affect an offeror's rating, it may affect the offeror's ranking if a significant number of the other offerors participating in the acquisition have past performance ratings either above or below satisfactory

The Section believes that this "neutrality" provision requires further clarification If an offeror lacks relevant past performance history it remains unclear whether the offeror (a) is not to be rated in this area, (b) is to receive a moderate rating or (c) is to be assigned the average rating of other offeror If the offeror does not receive any rating in the past performance category, this would appear to violate the CICA requirement that agencies evaluate all offerors in accordance with the stated evaluation criteria Given the emphasis agencies are placing on past performance as an evaluation criteria, further guidance should be provided regarding neutral past performance evaluations See, e g., American Combustion Industries. Inc., B-275057 2, March 5, 1997, 97-1 CPD § 105 (Past performance constituted 80 percent of the scored, non-price

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evaluation criteria), DIGICON Corp, B-275060 et al, January 21, 1997, 97-1 CPD 64 (Past performance was the most important evaluation criteria)

The FAR Council has requested suggestions from the public for a "more rigorous" definition of what constitutes "neutral" past performance The Section proposes that the following language be considered for insertion as FAR $15405(\mathrm{a})(2)(\mathrm{v})$

> A "neutral" past performance rating shall be used for offerors that do not have any relevant past performance An offeror whose predecessor companies, relevant affiliates, key personnel or major subcontractors have relevant past performance information shall not receive a "neutral" past performance rating but shall receive a rating appropriate to such party(1es)

GAO has held that where an offeror has no relevant past performance an "unknown" past performance rating, characterized by the solicitation as "neutral and acceptable," is not objectionable Hughes Georgia, Inc. B-272526, October 21, 1996, 96-2 CPD \| 151 See also, Excalibur Systems, Inc, B-272017, July 12, 1996, 96-2 CPD I 13 (Agency could properly award the contract to a lower-priced offeror with no past performance history where solicitation provided that price alone would be considered in evaluating first-time offerors) In Excalibur Systems, a "neutral" past performance rating equated to "green/low risk " Under the RFP evaluation scheme a green rating was only to be given greater weight when compared to a red or yellow rating, and was not to be given greater weight when compared to an offeror's insufficient data rating In other words the evaluation scheme was intended to differentiate between those offerors with good past performance and those with less than good past performance GAO found this scheme reasonable and stated
the use of a neutral rating approach, to avoid penalizing a vendor without prior experience and thereby enhance competition, does not preclude, in a best value procurement, a determination to award to a higher-priced offeror with a good past performance record over a lowercost vendor with a neutral past performance rating

Excalibur Systems, supra, 96-2 CPD I 13 at 3
In addition, as noted above, proposed FAR 15 101-2(b)(1) now states that past performance will be considered as a non-cost factor The Section previously commented that under the lowest price technically acceptable process, the past performance evaluation should be limited to a "pass/fall" rating Proposed FAR 15 101-2(b)(1) still

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does not address the problem raised by a neutral past performance rating If all of the offeror have some relevant past performance history, then use of past performance as a pass/fanl factor under the lowest price technically acceptable process would not be objectionable The problem arses where an otherwise acceptable offeror has no relevant past performance history

The pass/farl scheme required or non-cost factors under the lowest price technically acceptable process is inconsistent with proposed FAR $15405(\mathrm{a})(2)(\mathrm{iv})$, which requires that offeror lacking relevant past performance history be provided a "neutral" evaluation on past performance The "pass/fall" evaluation scheme can never constitute or permit a "neutral" evaluation, because it requires ether an affirmative determination of relevant past experience denoted by a "pass," or a negative evaluation of past performance denoted by a "fail" Deliberately choosing not to grade past performance for certain offeror lacking a past performance history is not a neutral evaluation Rather, it is, in effect (1) a relaxation of the solicitation requirements for the offeror lacking a relevant past performance history (and, accordingly, a violation of 10 US C 2305(b)(1) and 41 US C $253 \mathrm{~b}(\mathrm{a})$ ), and (2) an added risk, and possible penalty, for offerors with relevant past performance histones

The Section previously noted a problem regarding the "relevance" of the past performance information Proposed FAR 15 405(a)(2)(1) states "The currency and relevance of the information, source of the information, context of the data, and general trends in contractor's performance shall be considered " Similarly, proposed FAR $15405(\mathrm{a})(2)(\mathrm{iv})$ refers to a neutral evaluation for firms lacking "relevant" history

Additional regulatory guidance was provided in revised proposed FAR $15405(\mathrm{a})(2)(111)$, which states

The evaluation may take into account past performance information regarding predecessor companies, key personnel who have relevant experience, or subcontractors that will perform major or critical aspects of the requirement Such information may be relevant to the instant acquisition

The additional guidance provided by proposed FAR 15 405(a)(2)(111), however, addresses only a few of the problematic situations created by the issue of "relevancy" of past performance

GAO has sustained several recent protests regarding the contracting agency's application of "relevant" information For example, in ST Aerospace Engines Pie, Ltd, B-275725, March 19, 1997, 1997 WI 223977 (CG ), GAO sustained a protest where the

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agency erroneously downgraded the protester on the basis of negative past performance of its affiliate The record did not establish the relevance of the affiliate's past performance to the RFP requirements, and because the affiliate's negative past performance was the determinative factor in the agency's decision not to award to the protester, the agency's failure to raise the issue during discussions was unreasonable In Ogden Support Services, Inc, B-270012 4, October 3, 1996, GAO sustained for a second time a protest alleging that the Central Intelligence Agency improperly evaluated an offeror's past performance because it applied an unreasonably broad definition of "similar experience" GAO noted "Since the RFP indicated that the proposals would be qualitatively evaluated, it follows that a proposal reflecting more relevant successful past performance should be rated higher than a proposal reflecting clearly less relevant past performance " See also, NavCom Defense Electronics, Inc, B-276163, May 19, 1997, 1997 WL 279140 (CG ) (Agency unreasonably assigned low performance risk ratings to both offerors, there was no reasonable basis for the agency's determination that the awardee's demonstrated performance was the "same" as or "similar" to the solicitation requirements for which protester was the incumbent contractor)

The difficulties agencies have experienced in determining what constitutes "relevant" information suggest that additional guidance is needed in this area Proposed FAR 15 405(a)(2)(11) provides that "the contracting officer shall determine the relevancy of similar past performance information" The Section recommends that proposed FAR 15 404(d)(3) be amended to require the contracting officer to include in the solicitation a definition of "relevant past performance" based on the particular RFP requirements

The Section previously recommended that proposed FAR 15 405(a)(2) be clarified to indicate that past performance may not be used as a cost or price-related factor, even when delays due to performance problems can be reduced to quantifiable costs The Section again urges that an express prohibition against the use of past performance as a cost or price-related factor be included in proposed FAR 15 405(a)(2)

Some agencies have proposed that such use of past performance as a cost or pricerelated factor is appropriate See 60 Fed Reg 57691, 57692 (Nov 17, 1995)(proposed DFARS Part 214 coverage allows contracting officers to quantify past performance as a price-related factor in sealed bidding procurements) It is difficult to envision a rational basis for a specific price decrement as an appropriate "downgrade" for an offeror's potential performance on a contemplated contract due to questioned cost history on different contracts Accordingly, permitting past performance to be used as a quantified cost or price-related factor is not sound and should be expressly prohibited in proposed FAR 15 405(a)(2) Rather, the past performance information must be considered under the non-cost or price-related factors Of course, if an offeror has negative past

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performance history related to questioned costs on different contracts, that information could be taken into account under the past performance factor

## Proposed FAR 15.406(b) - Communications With Offerors Before Establishment Of The Competitive Range

Proposed FAR 15 406(b) replaces the mittal proposed FAR 15 407(b) The present version addresses many of the concerns the Section expressed with respect to the initial version For example, the Section's November 27, 1996 comments recommended that offerors be permitted to address past performance information in pre-competitive range communications if the information could affect their inclusion in the competitive range The proposed rule expressly permits past performance information to be addressed in pre-competıtive range communications Proposed FAR 15 406(b)(3)(11)

The Section also expressed a concern that under the initial version an agency was not required to conduct pre-competitive range communications with all offerors, yet the information obtamed in such communications could be used in the evaluation of proposals Thus the Section's November 27, 1996 comments noted that the proposed rule mught afford agencies an opportunity to coach favored offerors to improve their proposals or to ignore disfavored offerors to justify their exclusion from the competitive range

The present version of the proposed rule addresses this concern by limiting precompetitive range communications to those offerors whose exclusion from, or inclusion in, the competitive range is uncertain FAR 15406 (b)(1) The proposed rule also clarffies that pre-competitive range communcations shall not be used to cure proposal deficiencies or materially alter proposals FAR 15 406(b)(2) These changes should significantly curtall the opportunity for an agency to improperly favor one offeror or disfavor another offeror

Nevertheless, even under the present version, there is room for unequal treatment of offerors Although the rule limits pre-competitive range discussions to offerors whose exclusion or inclusion in the competitive range is uncertain, it does not require the agency to have such discussions with all similarly situated offerors The Section therefore recommends that proposed FAR 15406 (b)(1) be revised to read as follows

If a competitive range is to be established, these communications
(1) May only be held with those offerors whose exclusion from, or inclusion in, the competitive range is uncertain, if such communications are held, they will be held with all

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offerors whose exclusion from, or inclusion in, the competitive range is uncertain,

## Proposed FAR 15.406(c) - Competitive Range

Proposed FAR 15 406(c) replaces the initial proposed FAR 15406 1/ The present version addresses the Section's comments on the initial version by eliminating the provision permitting the agency to identify in the solicitation either the actual number or an estimate of the number of offers that will be included in the competitive range For the reasons discussed in the Section's November 27, 1996 comments, the Section believes that this change eliminates an inconsistency with the Federal Acquisition Reform Act (FARA), and therefore the Section applauds the change

The present version also incorporates changes that appear to track the language of FARA concerning the proposals that should be included in the competitive range However, the Section believes that the revised changes still may be inconsistent with the language and intent of FARA

Section 4103 of FARA permits an agency to limit the competitive range "to the greatest number that will permit an efficient competition among the offers rated most highly in accordance with" the evaluation criteria in the solicitation 10 U S C $\S 2305(\mathrm{~b})(4)(\mathrm{C}), 41$ U S C § $253 \mathrm{~b}(\mathrm{~d})(2)$ (emphasis added) The purpose of this provision was to allow agencies to limit the size of the competitive range if necessary to conduct an efficient competition In so doing, however, an agency is required to select the competitive range from among the offers most highly rated In other words, if the agency does not have efficiency concerns arising from the number of offerors in the competitive range that would otherwise be included, it may not limit the competitive range only to the most highly rated proposals

The proposed FAR 15 406(c)(1) provides that "[b]ased on the ratıngs of each proposal aganst all evaluation criteria, the contracting officer shall establish a competitive range comprised of those proposals most highly rated, unless the range is further reduced for purposes of efficiency " This provision appears inconsistent with

1/ The initial version, as well as the present version also replaces proposed FAR 15609 , published in the July 31, 1996 Federal Regıster and assıgned FAR Case No 96-303

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FARA in that it would allow an agency to limit the competitive range to the "most highly rated" proposals regardless of efficiency considerations The Section believes that this could result in a restriction on the size of the competitive range beyond what FARA intended

For this reason, the Section recommends that proposed FAR $15406(\mathrm{c})(1)$ and (2) be revised to read as follows
(1) Agencies shall evaluate all proposals in accordance with $15405(\mathrm{a})$, 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 proposals that have a reasonable chance of being selected for award, 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 15 405(a) and 15 406(c)(1), the contracting officer may determine that the number of 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 the provision at 52215-1(f)), 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 $2305(\mathrm{~b})(4)(\mathrm{C})$ and 41 U S C $253 \mathrm{~b}(\mathrm{~d})(2)$ )

## Proposed FAR 15.406(d) - Communications With Offerors After Establishment Of The Competitive Range

Proposed FAR 15 406(d) replaces the initial proposed FAR 15 407(c) The present version addresses most of the Section's concerns with the initial version For example, the present version eliminates the prohibition on discussing deficiencies relating to past performance on which the offeror already has had an opportunity to comment The present version also eliminates the language permitting an offeror to confirm agreements reached during discussions in proposal revisions before contract award (which presumably could be submitted after the offeror has been selected for award) In this regard the Section commends new proposed FAR 15407 (b), which requires that all

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offeror be given an opportunity to submit a final proposal revision at the conclusion of discussions This rule should substantially mitigate the potential inefficiencies and unfairness that could have occurred under the initial version, which permitted the agency to selectively request proposal revisions from offeror

There are, however, some remaining concerns Under the current regulation, the purpose of such discussions is to identify deficiencies in a proposal and resolve uncertainties and mistakes See FAR 15610 (c) Under proposed FAR 15 406(d)(3), however, the apparent purpose of discussions is to assist offerors in enhancing their potential for award

The Section is concerned that these provisions create a subjective process that affords opportunities for unequal treatment and technical leveling Unlike the current rule, which attempts to create objective criteria for conducting discussions by limiting the content of discussions to clearly defined topics, the proposed rule would permit an agency to discuss virtually any topic -- even areas of a proposal that already are highly rated -that would permit an offeror to improve its standing Given the subjective nature of the process, the agency might not be required to discuss similar areas of proposals submitted by other offerors, which could result in unequal treatment Further, although proposed FAR 15 406(e) prohibits technical leveling, the broad scope of discussions permitted by the proposed rule creates a greater risk of intentional or inadvertent technical leveling

The Section therefore recommends that the proposed rule be modified to limit the scope of discussions to the topics permitted in the current version of the FAR, but nevertheless to encourage offerors and Government personnel to communicate during discussions to ensure that all parties have a clear understanding of how the proposal is perceived and the areas in which it could be improved Specifically, as currently provided in FAR 15 610(c), discussions should advise offeror of deficiencies, attempt to resolve uncertainties in the proposal, and resolve suspected mistakes by calling them to the offeror's attention Contmued objective treatment of these topics, balanced with the need to provide offerors with sufficient information, will require an agency to treat all offeror equally and minimize the potential for unfair treatment

## Proposed FAR 15.406(e) - Limits on Communications

Proposed FAR 15 406(e) replaces initial proposed FAR 15 407(d) The proposed rule addresses one of the Section's concerns with the initial version by making clear that an agency may not reveal to one offeror another offeror's unique technology, innovative and unique uses of commercial items, or any information that would compromise an offeror's intellectual property Proposed FAR $15406(\mathrm{e})(2)$ Nevertheless, other than this change, the present version is virtually identical to the initial version Accordingly, the

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Section attaches a copy of its November 27, 1996, comments on FAR Case No 95-029, which address the initial version of the rule at pages 25-27

## Proposed FAR 15.5 -Contract Pricing

The Section generally welcomes the changes in proposed FAR 15 5, which consolidates the provisions of current FAR 157 Make-or-buy programs, FAR 158 Contract pricing and FAR 159 Profit With respect to the provisions concerning proposal analysis, for example, the rewrite would eliminate the unnecessary definition of terms in current FAR 15 801, add a definition of cost reahsm analysis to proposed FAR $15504-1(\mathrm{~d})$, and generally 1 improve the organization and readability of the description of proposal analysis, while making clear that the goal of proposal analysis is to obtain a "fair and reasonable" price

The rewrite would make a number of other minor changes, most of which appear to have no substantive impact on the requirements pertaining to contract pricing The requirements relating to when cost or pricing data are required are largely unchanged Similarly, although the proposed rewrite would delete Standard Forms 1411 and 1448, most of the substantive requirements that are currently reflected in the forms would continue to be applicable

Two substantive changes are worth special comment First, the Section supports the increase in the threshold for submission of subcontract cost or pricing data from $\$ 1$ million to $\$ 10$ million See proposed FAR 15 504-3(c) Although unexplained in the preamble to the proposed rule, the increase in the threshold would reduce the burdens on both subcontractors and prime contractors and focus the Government's review of cost or pricing data on contracts of greater significance

Second, the Section is concerned with the addition of new and unexplained language to the definition of cost or pricing data The proposed rule would add the following text

Cost or pricing data may include parametric estimates of elements of cost or price, from appropnate validated cahbrated parametric models

Proposed FAR 15501 The same concept is added, in a similar fashion and without explanation, to the list of the types of cost analysis in proposed FAR 15 504$1(c)(2)(1)(C)$

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Reasonableness of estimates generated by appropriately validated/calibrated parametric models or cost-estimating relationships

## Proposed FAR 15.504-1(c)(2)(i)(C)

The proposed new language introduces several unknowns to the definition of cost or pricing data First, although there may be some general understanding of the term "parametric model," it is undefined Second, none of the key terms used in the definition -- appropriate, validated and calibrated -- is defined in the rule or otherwise wellestablished Thus, it is unclear what constitutes a "calibrated" parametric model Nor it is explained how such a "cahbrated" parametric model can be "validated" Nor does the proposed rule describe which "validation" methods used to "calibrate" a parametric model might be considered "appropriate "

More fundamentally, the definition of cost or pricing data should not include "black boxes" without regard to the nature of the factual and judgmental nature of the model within At bottom, a parametric estimate, however defined, is simply an estimating technique Whether the estimating technique is an "appropriate validated calibrated" technique will be open to valid and substantial debate in most cases

Moreover, the addition of this language is unnecessary and inappropriate It is well-established that cost or pricing data are factual and verifiable -- not judgmental -information At its best the proposed rewrite language adds confusion to the issue of what constitutes cost or pricing data At its worst the proposed new language appears to attempt to create a presumption that both the factual and judgmental inputs to a parametric model are per se cost or pricing data

The statutory definition of "cost or pricing data" states that the term "does not include information that is judgmental, but does include the factual information from which a judgment was derived " 10 U S C 2306a(1), 10 U S C 254b(1) This aspect of the definition of cost or pricing data is embodied in current FAR 15801 and would remain unchanged in proposed FAR 15501

When this definition was added in the mid-1980s, Congress made clear that it only intended "to codify, without substantive change, the definition of 'cost or pricing data' as it [had] existed in applicable acquisition regulations for many years" H Conf Rep No 446, 100th Cong, 1st Sess, at 657 (1987) The FAR has echoed the statutory language and further explained that "cost or pricing data are factual, not judgmental, and are therefore verifiable " Current FAR § 15801 (emphasis added) The definition in the FAR offers several specific examples of cost or pricing data

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Congress also recognized and addressed the problem that arses when documents and other information contain elements of both fact and judgment when it amended the definition of cost or pricing data to its present form in the FY 1988 Defense Authorization Act Thus, Congress indicated that
a Factual data underlying judgments must be disclosed
b Judgmental information must be disclosed when it is necessary to give meaning to associated facts
c If judgmental information is disclosed, however, the certification of current cost or pricing data does not apply to it
d Management judgments become facts that must be disclosed at the moment that management decides to implement them $\underline{2} /$

2/ The legislative history states
The conferees acknowledge that such "cost or pricing data" must in some instances include information that would be considered judgmental Although "cost or pricing data" do not indicate the accuracy of the contractor's judgment about estimated future costs or projections, they do include the data forming the basis for that judgment The factual data underlying judgments have been and should remain subject to disclosure Furthermore, "cost or pricing data" may molude facts and data so intertwined with judgments that the judgments must be disclosed in order to make the facts or data meaningful As such, the conferees believe that a contractor should disclose a decision to act on judgmental data, even though it has not been implemented As currently provided in the regulations, when a contractor is required to disclose judgmental information, the certification should not be taken to mean that the judgment

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This understanding of the definition of cost or pricing data is also supported by numerous case decisions interpreting the fact versus judgment distinction 3 /

Finally, the Section notes two minor clarifications that should be included in the final rule First, the phrase "prime or subcontracts" in the title of proposed FAR 15 504-2(c) should read "prime contracts or subcontracts " Second, the language in proposed FAR 15 504-3(c)(1), concerning the threshold for the submission of subcontract cost or pricing data, is confusing The Section suggests the following changes to the proposed language
(1) The contractor shall submit, or cause to be submitted by the subcontractors), cost or pricing data to the Government for subcontracts that the contractor estimates to be are the lower en ether --
(1) $\$ 10,000,000$ or more, or
(il) Both more than the pertinent cost or pricing data threshold and more than 10 percent of the prime contractor's proposed price, unless the
(Footnote contd from previous page)
is correct, only that the contractor has accurately and completely disclosed its current estimate

H Rep No 923, 101st Cong, ed Less 657 (1990)
3/ See, eg, PAE International, ASBCA No 20595, 76-2 BCA 12,044 (July 27, 1976) (factual information that provides the basis for estimates must be disclosed), Texas Instruments, Inc, ASBCA No 30836, 89-1 BCA \| 21,489 (November 7, 1988) ("pure" estimates are judgmental, and are not cost or pricing data that must be disclosed), Texas Instruments, Inc, ASBCA No 23678, 87-3 BCA $\mathbb{1} 20,195$ (September 28, 1987) (judgmental factors included in estimates must be disclosed when they give meaning to underlying facts), Millepore Corp, GSBCA No 9453, 91-1 BCA $\mathbb{1}$ 23,345
(September 20, 1990) (a management decision that, if known, could affect price negotiations must be disclosed even if it is not implemented until after award), Texas Instruments, Inc, ASBCA No 30836, 89-1 BCA $\mathbb{1} 21,489$ (November 7, 1988) (estimates of future G\&A and other burden rates themselves are not cost or pricing data)


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contracting officer believes such submission is unnecessary

## Proposed FAR 15.504-1(d) - Cost Realism

The Section applauds the decision to address cost realism in the FAR The existing FAR has no meaningful guidance on cost realism Clearly, there is a need for such guidance as reflected in the many Comptroller General decisions on cost realism The Section believes that the proposed revisions can be improved to remove much of the existing confusion about cost realism One of the Section's recommendations is to distinguish between cost realism and price realism

The Section fully agrees with proposed FAR 15 504-1(d)(2), which states that "[c]ost realism analyses shall be performed on competitive cost-reimbursement contracts to determine the probable costs of performance for each offeror " The proposed FAR, however, does little to alleviate the existing confusion about cost realism Among other things, it does not adequately explain the principal reason for cost realism analysis That reason is explained in the existing FAR but, inexplicably, has been omitted from the proposed FAR

In awarding a cost-reımbursement contract, the cost proposal should not be controlling, since advance estimates of cost may not be valid indicators of final actual costs There is no requirement that cost-reimbursement contracts be awarded on the basis of lowest proposed cost, lowest proposed fee, or lowest total proposed cost plus fee The award of cost-rembursement contracts primarily on the basis of estimated costs may encourage the submission of unrealistically low estimates and increase the likelihood of cost overruns

## FAR 15 605(d) (emphasis added)

In summary, cost realism analysis should be mandatory for competitive costreimbursement contracts because, where there is competition, the offeror are not required to submit certified cost or pricing data Also, competitive pressure can entice offeror to propose unrealistically low estimates Without cost realism analysis, offeror have little incentive to resist the pressure to submit unrealistically low estimates, because the awardee generally does not bear the direct economic consequences of a cost overrun Thus, to make an informed decision as to which proposal offers the best value, the


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Government must frequently adjust, for evaluation purposes, an offeror's proposed costs to reflect cost realism

Additionally, the existing confusion could be reduced if cost realism is made a subset of cost analysis Hence, the proposed FAR 15 504-1(d) should be restructured to be a subset of proposed FAR 15 504-1(c) The Section recommends the following definition "Cost realism analysis is the process of independently reviewing and evaluating specific elements of each offeror's proposed cost estımate to determine whether the estımated proposed cost elements (a) are realistic for the work to be performed, (b) reflect a clear understanding of the requirements and (c) are consistent with the elements of the technical proposal "This definition reflects the substance of proposed FAR 15 504-1(d)(1) and is consistent with the Defense Contract Audit Agency ("DCAA") Contract Audit Manual ("CAM") 9-311 4 FAR 15 504-1(d)(2) and (3) thus would change to FAR 15 504-1(c)(4) and (5)

Another significant cause of confusion involves trying to apply cost realism analysis to fixed-price contracts See proposed FAR 15 504-1(d)((3) It is widely recognized that the concept of cost realism is not easily reconciled to fixed-price contracts See generally, SMC Information Systems, Inc, B-224466, Oct 31, 1986, 86-2 CPD $\$ 505$ ("A cost realism analysis serves no purpose where, as here, fixed prices are bid '), Corporate Health Examiners, Inc, B-220399, June 16, 1986, 86-1 CPD § 552 ("cost reahsm bears little relationship to a firm, fixed-price contract where the prime concern is cost quantum"', and Chesapeake \& Potomac Telephone, GSBCA No 9297-P, $90-1$ BCA I 22335 ("Cost realısm bears little relationship to a fixed-price contract, except in those instances in which an agency may want to evaluate price proposals in terms of cost realism in order to measure an offeror's understanding")

Conceptually, cost realısm and price reahsm are fundamentally different For a fixed-price contract, because the awardee generally must bear the economic consequences of a cost overrun, the incentive is not as great for offerors to submit unreahstically low estimates Nevertheless, vendors occasionally propose unrealistically low offers for fixed-price solicitations For fixed-price solicitations, there are two circumstances in which offerors submit unrealistically low offers The first circumstance involves the offeror knowing that its prices are unrealistically low In short, the first circumstance involves an offeror "buying-ın" The FAR already provides ample guidance regardıng buying-in See FAR Subpart 35

In the second circumstance, the offeror is unaware that its proposed prices are unrealistically low GAO has consistently held that, since the risk of poor performance often increases when a contractor is forced to provide supplies or services at little or no profit, "an agency in its discretion may provide for a price reahsm analysis in the

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solicitation of fixed-price proposals " Volmar Construction, Inc, B-272188, Sept 18, 1996, 96-2 CPD \| 119, Cardunal Scientific, Inc, B-270309, Feb 12, 1996, 96-1 CPD \| 70, Oshkosh Truck Corp, B-252708, Aug 24, 1993, 93-2 CPD If 115, and PHP Healthcare Corp, B-251799, May 4, 1993, 93-1 CPD \| 366 The Government's price analysis should be provided to the offeror to enable the offeror to determine whether it has made a mistake in its proposed price

The Section recommends the following definition of price realism analysis "Price realism analysis is a means by which the Government protects itself from the risk of poor performance where an offeror would incur a financial loss to properly perform the contract because its proposed price is unreasonably low" See CAM 9-3114 Also, for the same reasons that the Section recommends making cost realism analysis a subset of cost analysis in proposed FAR 15 504-1 (c), the Section recommends that price realism analysis be made a subset of price analysis in proposed FAR 15 504-1(b)

To implement the Section's recommendations to remove much of the confusion involving cost realism, as well as to distinguish between cost realism and price realism, the Section suggests the following textual changes

- Change the definition of cost realism to cost realism analysis in FAR 15 501, and substitute the following "Cost realusm analysis is the process of independently reviewing and evaluating specific elements of each offeror's proposed cost estimate to determine whether the estimated proposed cost elements are realistic for the work to be performed and reflect a clear understanding of the requirements"
- Insert the following definition of price realism analysis into FAR 15501 "Price realism analysus is a means by which the Government protects itself from the risk of poor performance where an offeror would incur a financial loss to properly perform the contract because its proposed price is unreasonably low "
- Under FAR 15 504-1(c) Cost analysis, insert the following
(3) Cost realism analysis
(1) Cost realism analysis is a process of independently reviewing and evaluating

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specific elements of an offeror's cost proposal to ascertain whether the offeror submitted unrealistically low estimates
(11) In awarding a cost-rembursement contract, the cost proposal should not be controlling, since advance estimates of cost may not be valid indicators of final actual costs There is no requirement that cost-reimbursement contracts be awarded on the basis of lowest proposed cost, lowest proposed fee, or lowest total proposed cost plus fee The award of cost-rembursement contracts primarily on the basis of estimated costs may encourage the submission of unrealistically low estimates and increase the likelihood of cost overruns
(111) Cost realism analyses shall be performed on competitive cost-reımbursement contracts to determine the probable costs of performance for each offeror Cost realism analyses may be performed on non-competitive costreimbursement contracts
(iv) A probable cost should reflect the Government's best estimate of the cost to the Government that is most likely to result from an offeror's proposal Where the probable cost differs from the offeror's proposed cost, the probable cost shall be considered in making the source selection decision
(v) Although not part of the cost realism analysis, nothing in this subpart prohibits technical evaluators, from reviewing an offeror's allocation of financial resources in its cost proposal, to gain insight into whether the offeror understands the complexity and magnitude of the requirements

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- Under FAR 15 504-1(b) Price Analysis insert the following
(3) Price realism analysis
(1) Price realism analysis is a process of independently reviewing and evaluating specific elements of an offeror's price proposal to ascertain whether the offeror submitted unrealistically low prices for the work to be performed If necessary, cost analysis may be used on specific elements of a price proposal
(11) Price realism analysis should be performed on any fixed price contract in which the contracting officer perceives a risk of poor performance of the offeror were to incur a financial loss to properly perform the contract, because the offeror's proposed price is unrealistically low
(i11) Where the probable price is signuficantly higher than the proposed price, the contracting officer should scek to ascertain whether the offeror is buying in See FAR Subpart 35
(1v) Regardless of whether the offeror is buying m , the source selection authority may consider the results of the price realism analysis in making the source selection decision
(v) Although not part of the price realism analysis, nothing in this subpart prohibits technical evaluators from reviewing the offeror's allocation of financial resources in its price proposal, to gain insight into whether the offeror understands the complexity and magnitude of the requirements

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- Entirely delete FAR 15 504-1(d) Cost realism analysis
- Insert the following in proposed FAR 52 215-1(f)(9) and renumber the existing proposed FAR 52 215$1(f)(9)$ and (10)
(9) If a price realism analysis is performed, price realism may be considered by the source selection authority in evaluating performance or schedule risk


## Proposed FAR 15.605 and 15.606 - Pre-award and Post-award Debriefings

Proposed FAR 15605 and 15606 replaces initial proposed FAR 15805 and 15 806, respectively The Section's November 27, 1996, comments addressed certain provisions of the initial proposed rules relating to pre-award and post-award debriefings Those provisions are essentially unchanged in the present versions Accordingly, the Section attaches a copy of its November 27, 1996 comments on FAR Case No 95-029, which address the initial version of these rules at pages 29-30

The present version, however, contains new provisions allowing an offeror to request that a preaward debriefing be delayed until after award Proposed FAR $15605(\mathrm{a})(2)$ Further, proposed FAR $15605(\mathrm{a})(2)$ and $15606(\mathrm{a})(4)(11)$ and (111) define the timeliness of protests (provided in GAO rules at 4 C F R § $212(\mathrm{a})(2)$ ) as triggered by the date the offeror could have received a debnefing rather than when the offeror actually receives the debnefing Current GAO regulations do not address this situation To avoid conflict with GAO's jurisdiction to determine timeliness of protests, the Section recommends that the language in proposed FAR $15605(\mathrm{a})(2)$ and $15606(\mathrm{a})(4)(11)$ and (iii) relating to timeliness of a protest to GAO be deleted, and that the following language be inserted "Procedures for protests to GAO are found at 4 CF R Part 21 (GAO Bid Protest Regulations) In the event guidance concerning GAO procedures in FAR Part 15 conflicts with 4 CF R Part 21, 4 CF R Part 21 governs"

## Part 52 (Clauses) Provisions

The proposed rule substantially reorganizes and consolidates the requirements of the Part 15 clauses contained in both the current FAR and in the initial version of the FAR Rewrite Although the proposed rule eliminates FAR 52 215-9 through 52 215-20, the requirements of those clauses, modified to reflect any changes by the proposed rule,

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are largely contained in proposed FAR 52 215-1 Several clauses have been renumbered without any other significant change FAR 52 215-6 is now 52 215-4, 52 215-18 is now 52 215-5, and 52 215-20 is now 52 215-6 FAR 52 216-38, "Preparation of OffersConstruction" is exactly the same (except for the number) as "52 236-XX," which was added by the initial version

Several clauses are also listed as revised but these revisions are, for the most part, to update the citations to the FAR Part 15 provisions that have been renumbered as a result of the proposed rule These include proposed FAR 52 215-2, 52 215-3, 52 215-4, $52215-6$ and 52 215-7, all of which appeared in the initial version Proposed FAR 52 215-21, 52 215-22, 52 215-23, 52 215-24, 52 215-25, 52 215-27, 52 215-30, $52215-$ $31,52215-40,52215-41$, and $52215-42$, which appear only in the present version, also contain no significant changes other than updated references to Part 15 provisions

Proposed FAR 52 215-1, "Instructions to Offerors-Competitive Acquisitions", 52 215-5, "Facsimile Proposals" and 52 215-8, "Order of Precedence-Unıform Contract Format" all of which appeared in the initial version, have been substantially modified to reflect the significant changes occurring from the initial to the present version

The present proposed FAR 52 215-1, unlike the ital version, distinguishes between "proposal revision," which is a proposal change made after the solicitation closing and "proposal modification" which occurs before the solicitation has closed The definition of "discussions" also reflects the differences in the definition of that term that has occurred between the two versions And what were denoted as "offers" under the earlier version of 52215-1 are designated as "proposals" under the present version The Section concurs with the expanded treatment afforded by the present version

Proposed FAR 52 215-5, "Facsimile Proposals," is substantially different from the current provision, 52 215-18, because of the proposed change in treatment of both faxes and electronic media by FAR 52 207(c) from not only the current FAR but the initial version of the proposed rule as well As previously noted, FAR 52 215-5 will require modification to be consistent with comments on proposed FAR 15 207(c)

FAR 52 215-8, "Order of Precedence," as proposed in the initial version, provided that precedence would be given in the following order "The Acquisition Description (excluding the specifications), (b) tailored clauses, (c) performance requirements (including the specifications), (d) other contract clauses, and (e) other parts of the contract, including attachments " In the present version, the order would be "The Schedule (excluding the specifications), (b) performance requirements (including the specifications and special terms and conditions negotiated for the contract), (c) other documents, exhibits, and attachments, (d) contract clauses, and (e) representations and


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other instructions " A problem andes where a contract provision conflicts with a standard FAR or DFARS clause because absent an approved deviation no contract provision may supersede a FAR or DFARS clause Revere Electric Co, ASBCA No 46413, 95-1 BCA - 27,385 Consequently, standard contract clauses should have the highest precedential value, which is not the case in the existing FAR 52 215-33 or the initial or present versions of FAR $52215-8$, all of which grant the Schedule the highest order of precedence This problem with the Order of Precedence clause has been acknowledged by the ASBCA See Cessna Aircraft Co, ASBCA No 43196, 96-1 BCA ${ }^{\text {T } 27,966}$

The Section recommends FAR $52215-8$ be modified to give precedence in the following order (1) standard contract clauses and approved deviations, (2) special contract requirements and other contract clauses, (3) the Schedule (excluding the Specification), (4) representations and other instructions, (5) other documents, exhibits and attachments, and (6) the specifications"

One clause containing a significant change from the current version is proposed FAR 52 215-26, "Integnty of Uni Prices, " which contains a new paragraph (c) that requires the clause, less paragraph (b), to be flowed down into all subcontracts except those (1) below $\$ 100,000$, (2) for construction or architect engineer services, (3) for utility services, (4) for services where supplies are not required, and (5) petroleum services " These additional flowdown requirements appear to be contrary to the goal of acquisition streamlining and for that reason, paragraph (c) should be deleted in its entirety

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## Part 53 (Forms) Provisions

The proposed rule would eliminate the forms currently used as cover sheets for submitting cost or pricing data (SF 1411) and information other than cost or pricing data (SF 1448) "in the interest of providing flexibility in preparing solicitations and offers" and because "neither provides much information, beyond identification of the offeror and general information about the accompanying proposal " The Section concurs that these forms were of limited usefulness and endorses their elimination

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as may be required

Sincerely,


Char, Section of Public Contract Law

cc Marcia G Madsen<br>David A Churchill<br>Rand L Allen<br>Lynda Troutman O'Sullivan<br>Marshall J Dike, Jr<br>Frank H Menaker, Jr<br>John B Miller<br>Alan C Brown<br>Council Members<br>FAR Rewrite Working Group<br>Alexander J Brıttın

## DEPARTMENT OF THE ARMY

HEADQUARTERS US ARMY INDUSTRIAL OPERATIONS COMMAND
ROCK ISLAND ILLINOIS 612996000
July 10, 1997
REPLY TO ATTENTION OF

Acquisition Policy Branch

General Services Administration
FAR Secretariat (MVRS)
1800 F Street NW
Room 4035
Washington DC 20405
Dear Sir:
Enclosed are comments and questions concerning FAR case 97-029, Part 15 Rewrite: Contracting by Negotiation.

Further questions or comments may be addressed to Mrs. Bambi Mitchell, at (309)782-4288 or electron ic mall, dmıtchelarıaemh2. army.mıl.

Sincerely,


Randall J. Bartholome
Chief, Acquisition Policy Branch
2 Enclosures


Comments

2101 Definitions

This describes the "outcome" in lieu of providing a definition After all this time--are we saying that after rational thought any method that provides the benefit that the customer desires is best value?

15406 Communications with offerors
(c) Competitive Range talks about efficient competition, however there is no guidance on what is meant by that term

Sue Crisp
AMSIO-ACC

Comment No. $1 \quad 15505(\mathrm{~b})$ states ?Therefore, the Contracting officer should not become preoccupied with any single element and should balance the contract type, cost and profit or fee negotiated to achieve a total result- a price that is fair and reasonable to both the government and the contractor.? $15504-1(\mathrm{~g})$ discusses the issue of ?unbalanced pricing? which requires the Contracting officer to considers the risks with unbalanced pricing (15 504-1 (g) (2) (1) in making the source selection and continues in 15 504-1 (g)(3) where an offer may be rejected if the Contracting Officer determines the lack of balance poses an unacceptable risk to the government on the one hand the Contracting Officer is not to be preoccupied with any single element (15.505(b)), but on the other hand the contracting officer is to prevent unbalanced pricing (15 504-1 (g)) These two sections conflict with each other Which section takes priority?

Comment No 2 15 504-1 (d) Cost realism analysis Is a cost realism/probable cost analysis required for each task order issued against a Cost plus Fixed Fee (CPFF) type contract If the basic or original (CPFF) contract is reviewed for cost realism analysis, does that eliminate the need to do a separate cost realism/probable cost analysis for each sucessive task order?

July 10, 1997<br>9811 Dorval Avenue<br>Upper Marlboro, MD 20772

General Services Administration
FAR Secretariat (VRS)
1800 F Street, N W, Room 4035
Washington, DC 20405
RE. FAR Case 95-029 - Short-tıtled, Part 15 Rewrite ("Rewrite")

Dear Sir or Madam

I am a contracting officer at the Department of Transportation (DOT). Federal Railroad Admınistration (FRA) I recently particlpated with other DOT contracting professionals in a round table discussion and analysis of the proposed rule, and you should be recelving our official comments in a letter from the Transportation Administrative Services Center (TASC), Office of the Secretary (OST) I would like to recount one recommendation in particular from those meetings that $I$ belleve deserves repeating The recommendation is to move FAR Subpart 153 - Unsolicited Proposals to elther Part 17 - Special Contracting Methods or at the very least, to the end of Part 15 - Contracting by Negotiation The rationale being that in lts present location, the subpart is disruptive to the flow of the processes and techniques discussed in the preceding and succeeding subparts In fact I would venture to say that it has little to do with Part 15 at all untul the polnt of acceptance by the Government and the commencement of negotiations and as such, if placed in Part 17, the appropriate negotiation procedures of Part 15 could be crossreferenced as is currently done for other contracting methods, e $g$, Part 35 Research and Development Contracting, Part 36 - Construction and ArchitectEnglneer Contracts, etc I was a bit hesitant to put this suggestion before the review group speculating they would find the notion lacking in merit, but I was pleasantly surprised to recelve almost immediate acceptance and concurrences from most if not all participants I've since checked wath others in the procurement field and they too have always found the placement of the subpart to be a nulsance and I'm confident your own inquirles would reveal similar results This recommendation also appears to be in keeping whth the concept described in the proposed rule supplementary Information B Regulatory Flexibility Act, to adopt --in order to facilitate usage-- "a more appropriate sequencing of information " Since sweeping changes to Part 15 are already in the works, the time $1 s$ ripe to act on such a recommendation

Below are a few comments I did not have an opportunity to present for consideration for inclusion $u n$ the TASC/OST comment letter

Item: 2101 Recomendation Revise proposed definition to read "Best value means . provides the greatest overall benefit or most advantageous alternative (s) in response to the requirement " [Added text underlined ] Rationale The suggested language is similar to that used in the introduction and body of GSA's source Selection Greatest Value Approach (FIP Resources) [July 1993, KMP-92-5-P] The concept there appears to be that the most advantageous alternative is a consideration of or a choice based on the " . varying value across solutions offered" Additional arguments for the
added language are that it more fully embraces the intent and principles of value-added cholce or opting for the greater good that are often employed in negotlated awards made in support of Subchapter D - Socloeconomic Programs, 6202 - Establishing or maintaining alternative sources, and the preferences or economic advantages of making multiple-awards (see FAR 16504 (c) Multiple award preference and 52 215-34 - Evaluation of Offers for Multiple Awards -which incidentally did not appear in the Rewrite nor was it deleted (Note the same "nonstatus" condition applies to FAR clauses 52 215-32 trough 52 215-38)

Item 15 204-1 Recomendation Reinstate a simplified contract format as currently prescribed in FAR 15416 for $F F P$ and FFP w/EPA contracts
Rationale Removal of this down-scaled contract format 1 s contradictory to the goal to "simplıfy the [source selection] process " as identified an the proposed rule Supplementary Information $B$ Regulatory Flexibility Act It would also seem a bit odd to permit a simplified contract format under sealed bidding procedures (see FAR $14201-1$ and 14 201-9) but not under negotiated acquisitions of the same contract type

Item OF 307 Recommendation 1 Add Block [preferably 7 a] to include checkmark space, directing the contractor to identify its remittance address in the schedule if different from block 7 Rationale This would negate the requirement for the Contracting officer to include such direction in section $G$ of the sollcitation as required under the proposed 15 204-2(g) This is similar to Block 15 C on the SF 33 Recommendation 2 Revise Block 9 to read 9 a DUNS NUMBER and 9 b TIN Rationale Although offerors will typically provide the Taxpayer Identification Number in response to FAR clause 52 204-3, since section $K$ will only be incorporated by reference, the $T I N$ is buried in documentation outside of the core award document To put it on the face of the award document --as many contracting shops currently do-- is a convenience for the contracting and finance/accounting offices, and a small reminder to the contractor of the Government's tracking of taxable moneys obligated

Item: OF 308 Recommendatıon Add a Block entıtled, Acknowledgment of Amendments Rationale Here or elsewhere, prospective offerors should be put on notice of the need to affirm the recelpt of amendments or otherwise confirm their knowledge of the change (s) to the solicitation/requirement This is particularly important given that the proposed Rewrite seems to have shifted $180^{\circ}$ from a present day preferred strategy in which the Government's inıtial intent is to evaluate proposals and conduct discussions but reserves the right not to do so (see current FAR 15610 ), to one $1 n$ which the new order of the day will be an initial intent to evaluate proposals and award a contract whthout discussions (see proposed FAR $15406(a)(2)$ and 52 215-1)
added language are that it more fully embraces the intent and principles of value-added cholce or opting for the greater good that are often employed in negotiated awards made in support of Subchapter D - Socıoeconomic Programs, 6202 - Establashing or maintaining alternative sources, and the preferences or economic advantages of making multiple-awards (see FAR 16504 (c) Multiple award preference and 52 215-34 - Evaluation of Offers for Multiple Awards -which incidentally did not appear in the Rewrite nor was it deleted (Note the same "nonstatus" condition applies to FAR clauses 52 215-32 trough 52 215-38)

Item 15 204-1 Recommendation Reinstate a simplified contract format as currently prescribed in FAR 15416 for FFP and FFP w/EPA contracts
Rationale Removal of this down-scaled contract format is contradictory to the goal to "simplify the [source selection] process " as identified in the proposed rule Supplementary Information B Regulatory Flexibalaty Act. It would also seem a bit odd to permit a simplıfied contract format under sealed bıddıng procedures (see FAR 14 201-1 and 14 201-9) but not under negotiated acquisitions of the same contract type

Item OF 307 Recommendation 1 Add Block [preferably 7 a] to include checkmark space, directing the contractor to 1 dentify its remittance address in the schedule if different from block 7 Rationale This would negate the requirement for the Contracting offacer to anclude such direction in Section $G$ of the solucitation as required under the proposed 15 204-2 (g) This is simılar to Block 15C on the SF 33 Recommendation 2 Revise Block 9 to read 9 a DUNS NUMBER and 9 b TIN Rationale Although offerors will typically provide the Taxpayer Identification Number in response to FAR clause 52 204-3, since Section $K$ will only be incorporated by reference, the TiN is buried in documentation outside of the core award document $T o$ put it on the face of the award document --as many contracting shops currently do-- is a convenience for the contracting and finance/accounting offices, and a small remınder to the contractor of the Government's tracking of taxable moneys obligated

Item: OF 308 Reconmendation Add a Block entıtled, Acknowledgment of Amendments Rationale Here or elsewhere, prospective offerors should be put on notice of the need to affirm the recelpt of amendments or otherwise confirm their knowledge of the change(s) to the solicitation/requirement This is
 $180^{\circ}$ from a present day preferred strategy in which the Government's initial intent is to evaluate proposals and conduct discussions but reserves the right not to do so (see current FAR 15610 ), to one in which the new order of the day will be an initial intent to evaluate proposals and award a contract without discussions (see proposed FAR $15406(a)(2)$ and 52 215-1)

Your team has done an admırable job thus far and I wish you the best of luck on completing the Rewrite

Sincerely


Thomas L Riddle

08 JULY 1997

## MEMORANDUM

From Mr. Christopher H. Beck, Contract Specialist, NAVFACENGCOM, PACDIV
To: FAR Secretariat

## Subject • PERSONAL EXPERIENCES REGARDING COMBINED SYNOPSIS/SOLICITATION PROCEDURES FOR YOUR CONSIDERATION REGARDING FAR CASE 95-029

On 28 December 1995, NAVSUP's first and possibly the Navy's first Combined Synopsis/Solicitation was published in the Commerce Business Daily On 18 January 1996, two competitive proposals were received from 2 businesses capable of providing the desperately required roofing repair supplies needed to repair damage to NTC Orlando's Capehart Military IIousing Complex which was caused by Hurricane Andrew Use of this Combined Synopsis/Solicitation methodology drastically reduced PALT time In just 21 days from the preparation of a complete requirement request, the requiring activity had received competitive proposals from 2 businesses with whom the activity had not previously dealt with The winning contractor Bradco Supply Inc of Orlando, FL delivered the required products on schedule on 14 March, 1996 -- just 76 days after the activities initial requirement was generated

Sould you have any questions regarding the above, please feel free to contact me at (808) 474-8134.

V/R,


CHRISTOPHER H BECK Contract Specialist

# DEFENSE LOGISTICS AGENCY 

in REPLY
REFER TO

MAP

JUL 141997

Mr Edward Loeb
General Services Administration
FAR Secretanat (VRS)
1800 F Streets NW
Room 4035
Washington, DC 20405

## Dear Mr Loeb

The Defense Logistics Agency offers the following comments with regard to the Proposed Rule (Federal Acquisition Regulation (FAR) coverage, Case 95-029) published in the Federal Register (Volume 62, No 93) on May 14, 1997

We behove the revised proposed rule will add considerably to the flexibility and efficiency of the overall negotiation process by simplifying and streamlining certain procedural requirements and enhancing communication between the Government and offeror We strongly support the emphasis on increased discretion to make best value decisions for the Government, and believe that the changes made since the initial proposed rule have done much to allay any fears that fairness is being sacrificed to efficiency We do continue, however, to have concerns about the inclusion of certain material which we perceive to be better suited for a procedural guidebook, and other issues where we believe further clarification is needed as detailed below

## 15.1 -Source Selection Processes and Techniques

We continue to believe the some of the coverage in this subsection is unnecessary and may prove overly restrictive It is best to leave flexibility with the agencies, where flexibility can be provided, rather than create unnecessary regulatory restrictions A best practices guide is the best repository for information on techniques and processes In particular, we recommend that -

### 15.101-2 Low price technically acceptable (LPTA) source selection process

We recommend that coverage be removed The evaluation of past performance on a "go-no go" basis is extremely problematic and to exclude the use of past performance 1 s contrary to $15404(\mathrm{~d})(3)(1)$ and statutes that mandate the evaluation of offeror's past performance unless the contracting officer documents the file If this coverage remains in FAR, it should be made clear that the inability to make a trade off decision may result in awards that are not best value


### 15.102 Multi-step source selection techniques

The language under this coverage mandates processes and steps necessary to use multi-step techniques and inhibit agencies' flexibility to tailor source selection techniques and processes. The DLA has used multi-step methods successfully without change to the exising FAR coverage. We strongly recommend the removal of any mandatory requirements in this coverage and recommend it should merely describe a process that can be used, not dictate how it is done

### 15.103 Oral Presentation

15.103(f) should be revised to clearly preclude discussions during oral presentations in the presolicitation phase and prior to establishing the competitive range

### 15.2 Solicitation and Receipt of Proposals and Information

### 15.201 Presolicitation exchanges with Industry

15.201(f) allows "government personnel" to disclose general information about a selected acquisition There is a potential conflict with FAR Part 3 and the release of source selection information and whether it is an authorized release It is unclear which "government personnel" are authorized to release information Do they need authonzation from the Contracting Officer to release information? Suggest 15 201(f) specifically refer to FAR Part 3

### 15.204 Contract Format

### 15.204-3 Contract clauses

There should be a specific reference to the FAR part 12 format and forms in this section

### 15.209 Solicitation provisions and contract clauses

15.209(b) seems to be in error in requiring the clause at 52 215-2, Audit and Records Negotiation, in acquisitions for commercial items In the current FAR at 15 106(b)(2), commercial buys are listed among the exceptions for the use of this clause Proposed paragraph 15209 (b) should contmue this exception


### 15.3 Unsolicited Proposals

### 15.301 Definitions

The new definition of unsolicited proposals in 15301 and the policy statement in 15302 narrow the scope of what could be termed an "unsolicited proposal" to new and innovative ideas not falling under topic areas publicized under any Government-initiated solicitation or program In light of this narrowing of the definition, the statement in 15303 (d), which is carried over from the current 15503 (d), that unsolicited proposals in response to a publicized general statement of agency needs are considered to be independently developed is confusing and needs clarification

### 15.306 Agency procedures

15.306-1(a)(2) The new requirement in 15 306-1(a)(2) that the agency contact point determine if the proposal should have been submitted in response to an existing agency requirement is beyond the contact point's knowledge in many cases, but can be identified more readily by the evaluator Recommend this requirement be moved to $15306-2$, Evaluation
15.306-1(a)(4) The requirement in 15 306-1(a)(4), which is carried over from the current 15 506-1(a)(1), that the agency contact point determine that the proposal contains sufficient technical and cost information is misplaced The adequacy of technical information is a matter which should be determined by the evaluator, the adequacy of cost information should be determined by the contracting officer after evaluation, if the evaluation is favorable and results in negotiation of the unsolicited proposal Recommend these determinations be moved to $15306-1$, Evaluation, and 15307 , Criteria for acceptance and negotiation of an unsolicited proposal, respectively
15.306-1(a)(5) The requirement in 15 306-1(a)(5), which is carried over from the current $15506-1(a)(2)$, that the agency contact point determine if the proposal has been approved by a responsible official or other representative authorized to obligate the offeror contractually is also misplaced This determination should be made by the contracting officer as part of the normal contracting process Recommend this requirement be deleted from this subsection
15.306-2(b) The requirement in 15 306-2(b) that requires inclusion of the contracting officer in the evaluation and disposition process is unnecessary The involvement of the contracting officer is necessary only if the proposal receives a favorable evaluation Recommend deletion of this requirement from this subsection

### 15.307 Criteria for acceptance and negotiation of an unsolicited proposal

15.307(b)(2) The statement in 15 307(b)(2) appears to be a restatement of the current 15507 (b)(5) The proposed new wording is confusing Recommend retention of the current wording

### 15.4 Source selection

### 15.403 Responsibilities

Under 15 403(b)(2) the term "strategy" is used Clarification is needed of the difference, if any between "strategy" and "plan"

### 15.405 Proposal evaluation

### 15.405(a)(2) Past performance evaluation

It should be made clear that the evaluation of past performance includes the ability to assess neutral past performance in the context of an integrated assessment of proposals against the Government's requirement Past performance evaluation need not be restricted to a single evaluation factor Instead, past performance can be evaluated in the context of cost and other relevant evaluation criteria, without rewarding or penalizing an offeror that lacks past performance

### 15.406 Communications with offerors

$15.406(\mathrm{~b})(4), 15.406(\mathrm{e})(4)$, and $15.606(\mathrm{e})(4)$ If the source (s) of adverse performance information agrees to the release of their identity, it should be provided to the offeror upon request

### 15.5 Contract Pricing

15.503 Obtaining cost or pricing data.
15.503-1 Prohibitions on obtaining cost or pricing data

Because of the significance of this change, we suggest the elimination of the SF 1448 cover sheet be given greater emphasis in the coverage

### 15.503-3 Instructions for submission of cost or pricing data or information other than cost or pricing data

Suggest that $15503-5(\mathrm{~b})(2)$ and $15503-3(\mathrm{a})(2)$ be combined to show that while use of the contractor's format for information other than cost or pricing data is preferable, the contracting officer may decide to use a specific format and the specific format must be described in the solicitation

We appreciate the opportunity to comment on the Proposed Rule Should you have any questions about the foregoing, please contact Ms Stephanie Pennello, MMPPP, who can be reached at (703)767-1355 or via Internet message addressed to stephanie_pennello @hq da mil

Sincerely,


From • Commander, Naval Ar Systems Command
To FAR Secretariat (VRS), General Services Administration
Subj PART 15 REWRITE
Ref FAR Part 15 Proposed Rule
1 In response to reference (a), we have reviewed subject proposed FAR rewnte We have summarized our concerns with the proposed revision on enclosure (1) comment sheets
2. If you have any questions, please contact Jan Wisor at (703) 604-2005 extension 6125.

1 FAR 14404-1 The proposed FAR 14 404-1f should be modified to allow the head of the contracting activity rather than the head off the agency to make the determination that it is appropriate to allow a contracting officer to enter into negotiations with offeror after the agency cancels an IFB The head of the contracting activity is of a level high enough to ensure the integrity of the IFB process

2 FAR 15001 The definition for Negotiations includes the term of Bargaining that appears to be describing the process of negotiations The word bargaining should be deleted from the description

The definition for Proposal modification states that a mistake can be corrected at any time before award The mistake should be clarified as to who, either the government or offeror is responsible for the mistake If the government is the responsible party for the change, then the correction action would be a proposal revision

3 FAR 15103 The proposed language for Oral presentations states that "oral presentations by offerors to the Government may be used to substitute for, or augment, written information" should be restated to address the " Oral presentations by offeror as requested by the Government may be used to " The government needs to drive the streamlining in its own best interest There are many potential problems with the use of oral presentations such as the lack of record, misunderstandings due to the nature of the communication process and the rask of inadvertently engaging in discussions

The pre-recorded video taped presentations that lack real time interactive dialogue suggest that the venue would be more appropriate in the requirements exploration phase and should be amended to read "pre-recorded, videotaped presentations that lack realtime interactive dialogue may be included in offeror submissions when appropriate and requested"

4 FAR $15103(b)(4)$ The impact of oral presentations on small business is not an appropriate item to list as being one of the considerations to obtain information through oral presentations. The contracting officer cannot describe the impact, the offeror need to describe the impact

5 FAR 15 201(c) The statement "some techniques to promote early exchanges of information are" should be restated to include "not limited to and can be used alone or in conjunction with other such techniques" This gives clarification to the process

6 FAR 15 203(e) The statement "and other appropriate circumstances" needs to be clarified. Is it for sole source actions or other than sole source actions? This would provide clarification to users up front rather than have the particular circumstance buried in the body

7 FAR $15205(\mathrm{~g})$ This whole section allows the government to accept proposals to be most advantageous to the Government and amending the solicitation to reflect the

FAR 15 REWRITE
change, this change should protect the fairness standard and provide other offeror the opportunity to take extra time to revise their proposal to meet the governments best interest

8 FAR 15 306-1 (2) The statement the proposal "should have been submitted in response to an existing agency requirement (see 15302 )" contradicts the 15302 for the submission of new and innovative ideas that do not fall under topic areas publicized This statement should be revised to include "or as an unsolicited proposal"

FAR 15 306-1(c) states the agency point of contact shall promptly inform the offeror The method of informing should be stated to ensure a consistent record of treatment is established

9 FAR 15 308(a) The statement "this prohibition does not preclude using other data etc in the proposal that is available from another source without restriction" is unclear Is it talking about other than unsolicited proposals? If it means simply unrestricted data then it is unnecessary to state

10 FAR 15 309(h)(3) 3 104-9 no longer requires certifications and listings
11 FAR $15403(b)(2)$ states the SSA shall approve the source selection strategy before solicitation release, should state source selection plan which is a product of the source selection strategy and is completed before the solicitation is release

FAR 15403 (c)(5) makes the assumption the source selection authority is the contracting officer This would need to consider if another individual has appointed other than the contracting officer

12 FAR 15 404(b)(2)_states the factors and subfactors should "support meaningful comparison and discrimination between and among competing proposal " The initial evaluation should be measured and evaluated against the criteria in the solicitation The process of measuring the proposal against each other should be performed only after this type of measurement against the solicitation has been completed

FAR 15 404(e) describes the what and how the factors and subfactors shall be stated in the solicitation Paragraph 15 404(f) restates paragraph (e) and should be deleted
13. FAR $15405(\mathrm{a})(2)(11)$ the last sentence assumes the contracting officer as the source selection authority, needs to be revised to read source selection authority vice contracting officer

FAR 15 405(a)(2) (iv) describes the evaluation approach for neutral past performance. To preclude awarding a contract to a neutrally rated contractor one day that goes out of business shortly thereafter, it is recommended the neutral past performance rating be deleted for Part 12 commercial items acquisitions or as a minimum, the past performance
be expanded to look at the major individuals composing the commercial contractor's operation

FAR $15405(4)$ states that cost information may be provided to members of the technical evaluation team In order to preclude the opportunity for the technical team to be unduly influenced by the cost side, it is recommended the statement be revised to include "at the discretion of the source selection authority"

14 FAR 15 406(b) this section is ambiguous and has the potential to create the basis for many protests Paragraph (2) states that these 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 ", while paragraph (3) allows for addressing ambiguities for placement consideration in the competitive range This is clearly a contradiction Are the communications in writing or oral, clarification of communications needs to be defined

FAR 15 406(d) makes the assumption is paragraph (1) and (3) that the contracting officer is the source selection authority The contracting officer should be changed to read source selection authority

15 FAR 15408 the last sentence states that specific tradeoff need not be quantified in terms the decisions that lead to the tradeoff, however this seems to conflict with an earlier statement in the same paragraph that states the SSA decisions shall be documented with benefits including those associated with cost

16 FAR 15 503-3(3) states the contracting officer is responsible for ensuring the information used to support price negotiations sufficiently current This needs to be clarified as to what is considered sufficiently current

FAR 15 503-3(c)(1) should be amended to include a statement "information on prices at which the same or similar items have previously been sold that is adequate for evaluating the reasonableness of the price for the acquisition" This will allow the contracting officer the flexibility to obtain the data they need for evaluation of a sole source commercial item acquisition that uses "catalog prices" versus the same items that were previously bought using cost or pricing data

17 FAR 15 503-4© states that if the cost or pricing data are requested and submitted but an exception is later found to apply, the data shall not be considered cost or pricing data This information needs to further be documented in the contract file by the contracting officer
18. FAR 15 504○ (2) should amend the statement "the Government" to say "the Contracting Officer" for clarification as to who is responsible

FAR $15504(\mathrm{~d})$ states cost realism analysis is the process of "independently" reviewing, this is much to confusing as to what independently refers too If it is the offeror proposals that are to be independently reviewed it should be so stated The paragraph goes on to state "with the unique methods" is overkill If the proposal is evaluated separately, no further definition is required as to the methods proposed

19 FAR15 504-2C(1) the statement that the auditor may discuss statements of facts with the contractor should be clarified to include "after obtaining concurrence with the contracting officer" This allows the contracting officer to have the same facts as the contractor A pure definition of facts versus conclusions or recommendations is not obvious, a fact could be ether

FAR 15 504-2C(11) the statement "if necessary" should be clarified to include as requested by the contracting officer

20 FAR 15 507-2 delete the whole section on Make-or-Buy programs The whole purpose of the FAR 15 rewrite is to modify concepts and processes in the current FAR 15 and introduce new policies The new policy incorporates changes in pricing and unsolicited proposal policy Make-or-Buy is an admınıstratıvely complex process that is not primary in the evaluation of a best value The competitive arena, best value and striving for less arduous and value added evaluating tools precludes the use of Make-or-Buy

21 FAR 15 507-4(a)(1) the statement "these reviews are accomplished by a multifunctional team of Government contracting "Should be amended to include the contractor The government defense contractors are now considered to be a vital part of the team and should be represented as an equal player in Should-cost reviews

22 FAR 15.606(d)(3) states the debriefing information shall include the "overall ranking of all offerors . "This whole paragraph should be deleted Ranking of the offerors and providing at a minimum the information in debriefing serves no useful purpose The offerors deserve to know how they did and how it compares with the winner, but to provide insight into how the rest of the competitors scored adds no value and would create unneeded controversy and open the government up to protest

EXECUIIVF OFFICL OF THF PRESIDEN'I
 OFFICE OF MANAGEMFNI AND BUIXGLI Natonal Sccurnty \& International Affans

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MEMORANDUM FOR: The Federal Acquasition Regulation (FAR) Council
FROM: Front-Line Procurement Professional's Forum
Subject: Forun Comments Concerming FAR Fart 15 Rewrite, far Case 95-029

The Front-Line Procurement Professional's Forum is a group of 36 contract specialists, contract negotiators and contracting officers from multiple Government agencles. The Forum is a diverse group of contracting profossionals involved in procurements ranging from common commercial products to complex services and weapon systems. The Forum meets periodically with the Administrator, Office of Federal Procurement Pojacy and Under Secretary of Defense for Acquisition Reform. The Forum has previously revaewed and provided wiatten comments to the FAR Council on FAR Case 95-029. The Forum has recontly reviewed the follow-up document, "lear Part 15 Rewrite: Contracting by Negotiation: Competitave Kange Determinations" proposcd rule, published in the Federal Registor at 62 FR 76600 , dated May 14, 1997.

The Forum belleves the May 14, 1997 rewrite resolves our previously providod comments. The Forum does not have any additional comments or suggestions to forward to the EAR Council.

SUBMITTED BY:
The Members of tho Front-Jine Procurement Professional's Forum

# DEFENSE PERSONNEL SUPPORT CENTER 2800 SOUTH 20TH ST. PHILADELPHIA PA 19145-5099 

DPSC-PM Comments on the FAR Part 15 Rewrite Contracting by Negotiation --Group A--

### 2.101 Definitions - Page 7. Recommend the definition of best value be revised

Suggestion: "Best value means the outcome of an acquisition process that, in the Government's most informed business judgment, is expected to provide the greatest overall benefit in response to the requirement "

Rationale: In accordance with the definition of acquisition in FAR Part 2, among other things it also includes contractor performance and contract administration Relying on this definition, we cannot determine the actual "outcome of an acquisition" as it is used in this proposed definition We do consider contractor performance information on previous contracts during the source selection process, however in making a best value determination, one can only use this information to assess the expected outcome of an acquisition 1) Since Best value approaches are described in 151 Source Selection Processes and Techniques as "used to design competitive acquisition strategies", one can only anticipate the outcome of an acquisition when selecting one of the processes/techniques described therein 2) Due to the significant dollars and resources invested in this process, I prefer a more professional approach of using our most informed business judgment in selecting a prospective contractor "In the Government's estimation" sounds too much like a guess and we receive enough criticism from the American taxpayers without adding fuel to the fire

### 15.0 Scope - Page 11

--15.001 Definitions Recommend the term "discussions" not be used in the definition of communications

Rationale: There is already enough confusion over communications vs discussions For streamlining purposes we do need to make a distinction between the two, which 1 believe is the intent of the proposed final rewrite Using both terms under one definition will only add to the confusion over this issue Please consider the following instead

Suggestion: Communications are the act or process of interchanging thoughts, opinions, or information between the Government and an offeror after the receipt of proposals Communications may take place prior to or after establishment of the competitive range and is achieved by explanation or substitution of something not known or clearly understood by the Government it does not allow an offeror the
opportunity to revise its proposal, except for the correction of apparent clerical mistakes

### 15.1 Source Selection Processes and Techniques - Page 12

15.101 Best Value continuum. Recommend the term "continuum" be changed to "approaches" since it makes more sense when you related it to the follow-on paragraphs Also, the last sentence does not seem to flow properly, suggest it be revised as follows

Suggestion: "The less definitive the requirement, the more development work required, or the greater the performance risk, the more technical or past performance considerations may play a dominant role in source selection"

### 15.102 Multi-step source selection technique - Page 13

Replace the term technique with process The coverage here describes a process (eg , step 1, subsequent step, next step) not a technique

Comment: I am not sure what or who prompted this coverage, but I do not see any added value in this process at all Perhaps the writers) can further clarify the existing language after considering the following
--In the first step [para (b)] it states that full proposals are not required but goes on to address minimal submissions consisting of 1) statements of qualifications, 2) proposed technical concepts, 3) past performance information, and 4) pricing information Excuse me, but isn't this a full proposal? Paragraph (c) seems to confirm my interpretation that full proposals are required in the first step, by limiting agencies to only seek additional information in any subsequent step sufficient to permit an award without further discussion or another competitive range determination. When may I conduct meaningful discussions? in the first step?

Suggestion: Eliminate this coverage altogether or use the language in the first rewrite instead If this coverage cannot be eliminated or substituted, here are some additional suggestions

1) Include a statement in paragraph (a) that states that this process is more conducive to acquisitions with complex or less definitive technical requirements
2) The language in paragraph (b) needs to be clarified or rewritten to eliminate any inference that full proposals are not required in the first step Perhaps the statements of qualifications and past performance information could be the minimum information initially submitted Then the proposed technical concepts and pricing information could
be submitted in the second step which would form the basis for the initial competitive range determination and communications/discussions
3) The third sentence of paragraph (b) beginning with "The solicitation also "is a lead in sentence to subsequent steps and therefore belongs at the end of paragraph (b)
4) Either delete the last sentence in paragraph (c), since it adds no value and is the outcome of any acquisition process or add the same sentence to each of the two other processes/techniques

### 15.103 Oral presentation [technique] - Page 13

Suggestion: Since Subpart 151 is titled processes and techniques and for consistency purposes, drop the " $s$ " off of presentation and add the term "technique" to the title

Comment: In the first paragraph it states that oral presentations may occur at any time in the acquisition process I disagree with the way this is stated since anytime in the acquisition process may include before the closing date. Is this really possible?

In the third line of paragraph (a) after the word representations, suggest you incorporate [past performance information,] In paragraph (b) change [past performance] as it appears in the second line to [past experience]

Rationale: An offeror does not need to address in the oral presentation contract numbers, phone numbers, points of contact, and dollar values but does need to address experience as it relates to the type of work he has performed in the past

Comment: In paragraph (c)(1) it states that the solicitation may describe--the associated evaluation factors that will be used, yet the FAR is very clear in stating that "all factors and significant subfactors that will affect contract award and their relative importance shall be stated clearly in the solicitation" (FAR rewrite 15 404(e)) Suggest you make a distinction for paragraph (1)

Comment: Delete paragraph (6) in its entirety as it adds no value it is impossible to determine the scope and content of communications in advance of receiving offers'l The solicitation must state whether or not discussions will be held and there is a clause to cover this Discussions should not be held during oral presentations since they are considered negotiations and only held after competitive range determination A competitive range determination is not made during oral presentations, but after all presentations have been conducted

### 15.202 Advisory multi-step source selection - Page 16

Suggestion: In paragraph (a), line 7, add a period after evaluation and delete "and should invite responses " This is redundant since it already appears in the third line

### 15.404 Evaluation factors and subfactors - Page 30

Suggestion: In paragraph (c), first line, change the word technique to process, to comply with a previously recommended change

Thankyou for the opportunity to comment!


July 14, 1997

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Ms. Sharon A. Kaiser
FAR Secretariat (MVRS)
General Services Administration 1800 F Street, N.W., Rm. 4037
Washington, D.C. 20405
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RE. FAR CASE 95-029
FAR Part 15 Rewrite

## Dear FAR Secretariat

On behalf of the Information Technology Association of America, ITAA, I would like to express our view that the proposed rulemakıng, "FAR Part 15 Rewrite. Contracting by Negotiation; Competitive Range Determinations," as published in the May $14^{\text {th }}$ Federal Register was substantially revised to our satisfaction

ITAA had filed comprehensive comments on the $1 n ı t ı a l$ rulemakıng, and we are pleased with the changes made by the FAR Council We commend you for the tremendous amount of time and effort put into this recent revision and we believe that our major concerns were suitably addressed in the May $14^{\text {th }}$ rewrite.

Thank you for your fine work in this area.
Sincerely,


Olga Grkavac
Sr Vice President
Systems Integration Division


## JUL | | 1997

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General Services Admınıstration
FAR Secretaniat (VRS)
1800 F Street, NW, Room 4035
Washington, DC 20405

SUBJECT Part 15 Rewnte

We apprecrate the opportunty to comment on the subject proposed rule We strongly support the aims of the Part 15 rewrite, however, we have some comments which are as follows

## Group A:

## 1. 15.603(b)(1)(iv):

The last sentence is related to the parenthetical in the previous sentence Grammatically, it should be part of the parenthetical This can be corrected by removing the parenthesis after "notice" and adding one after "request" A better solution would be to remove the parentheses and have that language as a separate sentence

## Group B:

## 1. $\mathbf{1 5 . 5 0 1}$ Definitions:

The last sentence of the Cost or pricing data definition, dealing with parametrics, should be revised to replace the phrase "appropriate validated calıbrated parametric models" with "appropriately calibrated and validated parametric models" The order of validated and calibrated should be changed to reflect the order in which those processes are performed Also, the word "appropriately" refers to the calibrated and validated processes, while "appropriate" refers to the models

Also, there is no reason to retain the awkward term "Information other than cost or pricing data" This term was only created to deal with a statutory problem in FASA that was removed by FARA The term is confusing at best It has a plain and obvious meaning that is much broader than the limitations specified in the definition For instance,
where FAR Part 27 discusses nights in data, it clearly excludes cost or pricing data, but it is difficult to form phraseology to say that "data" also excludes information other than cost or pricing data To the non-expert reader, "information other than cost or pricing data" would appear to be all data, including technical data, that is not cost or pricing data It makes no sense to inflict this misunderstanding on the public when it is no longer required It would be a substantial improvement to use the term "uncertified cost or pricing data"

## 2. $15.503-1(\mathrm{c})(1)(\mathrm{ii})(\mathrm{B}):$

The sentence syntax is incorrect It reads "The determination and is approved "The word "and" does not belong in front of "is approved" in the sentence The sentence would read better if reworded, eg, "A determination is made (with approval at a level above the contracting officer) that the proposed price is based on adequate price competition and is reasonable"

## 3. $15.504-1(a)(3)$ :

The last sentence states "When appropriate, price analysis shall also be used to venfy the overall price as fair and reasonable" The phrase "when appropriate" is unclear since the general rule has been that a price analysis should be performed to ensure the overall price is reasonable when cost or pricing data are required The implication by the change is that a price analysis is not always appropriate in that situation The question is then when would it be? We believe the proposed wording is unclear and will result in a price analysis rarely being performed Recommend the current language in $15805-1$ be retained, unless clarification is provided as to when a price analysis should be performed when cost or pricing data are involved

## 4. $15.504-1(c)(2)(i)(C):$

As stated in comment 1 above, "validated/calibrated" should be changed to "calibrated and validated" to reflect the order in which those separate processes are performed

## 5. $15.504-1(d)(1)$ :

The wording should be revised to be closer to that used in the definition of cost realism, appearing in 15501 , in order to prevent misinterpretation We recommend the end of the subparagraph be modified to read " and are consistent with the various elements of the offeror's technical proposal, particularly where unique methods of performance and materials are described in the proposal"

## 6. $15.504-1(f)(2):$

This mandates certain make-or-buy information in all acquisitions other than for commercial items, or where adequate price competition exists The last sentence of the
paragraph suggests that some other exceptions were contemplated, but none are included The current FAR 15 812-21 lists a number of exceptions, none of which are carried into the rewrite Contracts for services in which there are incidental supplies, eg cleaning materials in a janitorial contract, should be exempt Other contracts should be exempt if the cost of supplies is anticipated to be too low to make a breakout feasible We should not be mandating the collection of data we are unlikely to use As apparently contemplated in the last sentence, the CO should have an option to request the data for exempted acquisitions

## 7. $15.504-1(\mathrm{~g}):$

This paragraph does not clearly state that "unbalanced" refers to prices being adjusted by raising some and lowering others Under the proposed language, if a price for a single line item is understated, the entre price would be considered unbalanced Such a situation might be a buy-in, but it is not unbalanced until another line item's price is raised to compensate for the loss The second sentence of the paragraph should be modified by adding "and another line item has a price that offsets the over or understated amount" Also, the paragraph imphes that separately priced line items are bad and should be avoided, because they have a great risk of being unbalanced The third sentence in (g)(1) should be reworded to read "There is more potential for unbalanced pricing when

## 8. $15.504-2(d)$ :

The first sentence has deleted the reference to demal of access to records as a reason for notification to the contractor, although the second sentence refers to denied records as one of the things to be documented in writing to the contracting officer That second sentence also clearly distinguishes between data and records, so that one could not interpret records to be encompassed by the term data Access to records supporting the basis for the offeror's proposal may be critical in evaluatıng the proposal We recommend that denial of access to records be retained in the first sentence

## 9. 15.504-3(c)(5):

The words "to the Government" at the end of the sentence appear out of place and result in the sentence being awkward and unclear We recommend that the sentence be revised to insert "to the Government" between "submit" and "cost"
10. 15.507-3(a):

Delete the word "certfified" in the first sentence as it is redundant

## 11. 15.508(f):

The last sentence, which prescribes Alternate I of the clause, appears to be part of subparagraph (6) We recommend either renumbering the paragraph so that this sentence
is $(f)(2)$ and the rest is $(f)(1)$, or deleting the sentence and revising the beginning of the paragraph to read "The contracting officer shall insert the clause at 52 215-26, Integrity of Unit Prices, in solicitations and contracts, and shall insert the clause with its Alternate I when contracting without full and open competition or when prescribed by agency regulation The clause is not required for --"

## 12. Table 15-2:

The Table is titled "Instructions for Submitting Cost or Pricing Data," however, these are instructions for submitting a cost/price proposal The information described in the instructions is not necessarily all that would have to be submitted and certified, and includes some items in the General Instructions, such as type of action in $1 e$ and judgmental factors in 3 a , that are not cost or pricing data Therefore, the title is misleading and should be changed to "Instructions for Submitting Cost/Price Proposals When Cost or Pricing Data Are Required" If a shorter title is desired, it could be revised to "Instructions for Submitting Cost/Pnce Proposals"

## 13. Table 15-2, Cost Elements, A(2):

The first sentence of the paragraph requires that subcontractor cost or pricing data be obtained unless an exemption applies The third and fourth sentences indicate that subcontractor cost or pricing data is only required to be submitted to the CO for subcontracts over $\$ 10 \mathrm{M}$, but the last sentence of the same paragraph requires submittal to the CO of all cost or pricing data obtained from subcontractors Thus, the last sentence has the effect of overriding the third sentence We recommend the removal of this inconsistency by deleting the last sentence

## 14. Table 15-2, Cost Elements, B:

In the parenthetical, the current FAR example "eg, monthly, quarterly, etc " was changed to "eg, monthly" Some people may misinterpret the change to mean that data should normally be obtained for monthly periods It is rare that we would find a breakdown useful in less than an annual period, and almost inconceivable that we would want a monthly breakdown, because the labor rates and apphcable overhead rates do not change that frequently The current FAR example should be reinstated to allow the contracting officer to determine the appropriate period
15. $\mathbf{5 2 . 2 1 5 - 2 2 ( c ) ( 2 ) ( i ) ( B ) : ~}$

This subparagraph has been revised from the current FAR by the addition of the phrase "or an earlier date agreed upon by the parties" This phrase is not appropriate in this paragraph, because there is no reference in the paragraph to the date of certification (which this phrase is normally associated with) Without such a reference, it implies that the contracting officer can agree to a new date for the purposes of defective pricing (although it is hard to conceive of the contractor wanting to use any date earlier than the

date of price agreement) If the intent is to change the subparagraph to refer to the date of certification as well as the date of price agreement, it would have to read something like "(B) The Contractor proves that the cost or pricing data were available before the date of agreement on the price (or before the date of certification of the cost or pricing data, if an earher date is agreed upon by the parties) of the contract (or modification), and that the data were not submitted before such date"

However, this raises an issue with the next paragraph, (c)(2)(i1)(A), which states that an offset is not allowed if the data was known to be understated on the date the data was certified Since data available to the contractor is presumed to be known by the contractor, the only data for which the contractor can get an offset is data that became available after the certification and before the date of agreement on price Therefore, it serves no purpose to refer to the date of certification in subparagraph $(\mathrm{c})(2)(1)(B)$, and the phrase "or an earlier date agreed upon by the parties" should be deleted

## 16. 52.215-22(c)(2)(ii)(B):

This subparagraph has been revised by addition of the phrase "or an earlier date agreed upon by the parties" This phrase is not appropnate and should be deleted (see comment for subparagraph (c)(2)(1)(B)) As a side issue, the contractor would probably want to have the earliest possible date in this subparagraph, and the latest possible date in subparagraph $(c)(2)(1)(B)$, while the Government would prefer the reverse In the interest of fairness and administrative simplicity, the date (or language referring to it) should be the same in both places

## 17. 52.215-23: Subparagraph (d)(2)(i)(B) and (d)(2)(ii)(B):

See the comments above for 52 215-22 subparagraph (c)(2)(1)(B) and (c)(2)(11)(B)

## 18. 52.215-27:

The last sentence cites FAR 15 508(c) The current FAR version cites FAR 15 804(e), which appears at $15508(\mathrm{~g})$ in the proposed rule The cite should be changed to 15 508(g)
19. 52.215-39:

The next-to-last sentence cites FAR 15 508(c) The current FAR version cites FAR 15 804(f), which appears at 15 508(J) in the proposed rule The cite should be changed to 15 508(J)

Also, a new sentence has been added at the end of the clause, indicating that pror-year cost adjustments will be determined and applied in accordance with FAR 31 205-6(o) There is nothing at that cite discussing prior-year adjustments Therefore, it is unclear
what the sentence refers to The clause should be revised to provide such a clarification or this sentence should be deleted
20. 52.215-41(a)(1)(i):

This subparagraph has a title, but none of the other subparagraphs in (a) have titles Etther the title should be deleted, or a title added for (a)(1)(ii), such as "Information on commercial items "


Deidre A Lee
Associate Administrator
for Procurement

DEPARTMENT OF THE NAVY OFFICE OF NAVAL RESEARCH gOO NORTH QUINCY STREET ARLINGTON, VA 222175680

4200
Ser 02/9720
14 July 1997
General Services Administration
FAR Secretariat (VRS)
1800 F St., NW, Room 4035
Washington, DC 20405

Subject FAR Case Number 95-029; FAR 15 Proposed Final Rule

Dear Sir:
The Office of Naval Research (ONR), Acquisition Department (ONR O2) wishes to submit comments on the subject FAR case, a proposed final rule on Federal Acquisition Regulation Part 15 - Contracting by Negotiation

The proposed rewrite of Part 15 should recognize that cost analysis may be the most appropriate type of analysis for some proposals below the $\$ 500,000$ threshold for obtaining cost or pricing data.

The definition of "information other than cost or pricing data" at 15801 (which is retained at 15501 of the proposed rewrite) includes "cost information" The definition of "cost analysis" also at 15801 (and retained in slightly modified form at 15.504-1(c) of the proposed rewrite) includes review and evaluation of the separate cost elements of an offeror's or contractor's information other than cost or pricing data it is clear from these two definitions that cost analysis may be performed when cost or pricing data are not obtained

15 805-1(b), however, links the type of analysis to whether or not cost or pricing data are required: when cost or pricing data are required, the contracting officer must perform a cost analysis and should perform a price analysis, when cost or pricing data are not required, the contracting officer must perform a price analysis (These same prescriptions are retained at 15 504-1(a)(2) and (3) of the proposed rewrite.)

However, there are situations where, although cost or pricing data is not required, cost analysis is the most appropriate analytical technique For example, an unsolicited research proposal for less that $\$ 500,000$ is not a commercial item, is not subject to adequate price competition, and typically has a unique statement of work developed by the offeror The price analysis techniques at 15 805-2 (retained in slightly modified form at 15 504-1(b)(2) of the proposed rewrite) are of limited usefulness in this example The most useful proposal analysis would be a cost analysis of the proposed cost elements in conjunction with a technical analysis.

Under the current Part 15 and the proposed rewrite, however, only a price analysis would be required in the above example The proposed language at 15 504-1(a)(2) should be revised to include " . . unless the proposal is below the threshold for obtaining cost or pricing data and the contracting officer determines that cost analysis is in the best interests of the government." If more precise guidance is preferred, the following sentence could be added instead. "A cost analysis may be used in lieu of, or in conjunction with, a price analysis for proposals for noncommercial items or services below the threshold for obtaining cost or pricing data if there is not adequate price competition and information other than cost or pricing data adequate for cost analysis is available "

Thank you for the opportunity to comment Should there be any questions or requirements for further information, please contact Philip Harless at (703) 696-2580, FAX (703) 696-4430 or e-mail http'//harlesp@onr.navy mil

Sincerely,


CHARLES R PAOLETTI
Executive Director, Acquisition Management

General Services Administration
FAR Secretanat (VRS)
1800 F Street, NW Room 4035
Washington, DC 20405

## Dear FAR Secretariat

On behalf of the Small Business Admimstration (SBA), I would like to take this opportunity to respond to proposed rule, FAR Case 95-029, Federal Acquisition Regulation Part 15 Rewrite Contracting by Negotiation Competitive Range Determinations, published for comment in the Federal Register on May 14, 1997

## Part 2--DEFINITIONS OF WORDS AND TERMS

The proposed definition of "best value" as presented in the proposed rule needs to be enhanced Best value contracting is a method used in Federal procurement to define the trade-offs utilized in the award decision process These trade-offs permit the Government to develop a risk/benefit assessment which compares the offeror's proposed cost against the merits of the offeror's proposed resources to be utilized in achieving the required performance

Subpart 11 8--Testing

11801 Preaward testing This paragraph goes too far in the use of discretionary authonty concerning where, when and how test results will be considered Where a solicitation mandates preaward testing or product demonstration, it should be incumbent upon the Government to state the type of tests or demonstration to be utilized This is essential to maintain a level playing field for all offerors These tests can be developed from generally accepted industry standards, or the offeror's in-house written procedures, or conformance to the salient characteristics developed within an industry or by the Government In addition, the proposed paragraph states that "The results of such tests may be used to rate the proposal "We feel that this is too open-ended and the term "will be" needs to be substituted for "may be"

## Part 14-SEALED BIDDING

14 404-1 (e)(1) pertains to the conversion of a sealed bid to a negotiated procurement We feel that this requirement should remain as referenced in 15103 The language proposed at 14 4041 (f) should be substituted in its place In addition, add the words "a reasonable" after " conducted and has been given an [a reasonable] opportunity to participate " to 14404 1(f)(1)


FAR Case 95-029
Page 2

15001 Definitions The following revisions are suggested
Discussions-add []" revise [or modify] its proposal" at the end of the sentence
Bargaining should be a separate definition and should begin "Bargaining is a process which includes

Proposal modification Add [] "is a change made [by the offeror] closing date and time, made in response to

Proposal revision Add [] "is a change [made by the offeror] to a proposal made after the solication

15 101 Best value continuum The example used " in acquisitions where the requirement is clearly definable and the risk of unsuccessful contract performance is minimal, cost or price may play a dominant role in source selection" seems to define the use of sealed bidding under 6401 (a) It is suggested another example be used

15102 Multi-step source selection technique This appears to be an expeditious way of eliminating from consideration, those companies that don't measure up to the initial expectations of the buying activity Why request pricing information, when pricing can be negotiated further in the procurement process (see $15406(\mathrm{~d})(3)$ )? Why request past performance information at this juncture, if not to disqualify those with no relevant past performance history from further consideration? Multiple competitive range determinations only serve as a means of allowing a down select and serve to limit competition

15103 Oral presentations
We continue to be concerned with the potential financial impact oral presentations pose to small businesses Proposal preparation has always been an inherent part of doing business However, we are concerned that the added burden presented by an oral presentation will be cost prohibitive for many small businesses Since oral proposals will be used to supplement written proposals, an added expense will be incurred for transportation, accommodations and salaries for key employees paid for time on the road In addition, an offeror could also have to incur these costs for key subcontractor's and consultants Current workload could also be affected if key employees are required for an oral presentation We would like to see the Office of Federal Procurement Policy develop guidelines to be used by Federal Agencies contemplating oral presentations We would also suggest that teleconferencing or video teleconferencing be explored an alternatives to onsite oral presentations

FAR Case 95-029
Page 3

15201 Presolicitation exchanges with industry
We have reservations in regard to 15201 (4) One-on-one meetings with contractors raises the specter of impropriety, no matter how innocent We feel that the integrity of the procurement process can be better preserved by avoiding one-on-one meetings

15202 Advisory multi-step source selection
See our comment for 15102 A response to information presented by the Government in such a manner as to provide a general description of the scope or purpose of the acquisition will solicit a response in kind from a potential offeror To take that information and make a decision on whether or not that offeror has the potential to become a viable competitor casts doubt on the purpose of the exercise Pricing data can be negotiated later in the process Past performance data could only be used at this point to advise an offeror that his perceived lack of relevant past performance would prevent the award of a contract Worse, would be to use that data to advise an offeror of not having the potential to be a viable source, and then in general terms explain how that decision was reached We feel that this advisory method will be used primarily to dissuade and otherwise limit the potential universe of offeror to a manageable few In our opinion, this does not promote full and open competition in the contracting arena Rather, it makes the administrative burden placed on contracting officers more manageable at the expense of competition

## 15206 Amending the solicitation

15 206(e) add at the end of the sentence " unless the amendment will effect the standing of a previously eliminated offeror Where an amendment will alter the standing of an offeror previously eliminated from the competitive range, the contracting officer shall send a copy of the amendment to that offeror and permit that offeror to submit another proposal " If this comment is accepted 15 407(a) will need to be revised
$15206(\mathrm{~g})$ contains two misreferenced paragraphs in the parenthetical at the end of the sentence We are not sure what 15 208(b) should be and the reference to 15407 (d) should be 15407 (b) interpreted to mean only two offeror Is this the intent of establishing competitive range? Will a contracting officer be driven by the number of backlogged procurements awaiting action? Or will it be driven by the opportunity to develop new sources offering a competitive price?

15406 Communications with offeror
15 406(a) The relevancy of an offeror past performance information and communication relative to unknown adverse past performance is not minor in nature Where communication results in the inclusion of an offeror in the competitive range due to information submitted in reference to adverse unknown past performance

15 406(c)(1) - This paragraph discusses establishing competitive range using those proposals that are "most highly rated" unless the range is further "reduced for purposes of efficiency" The criteria used to establish "most highly rated" and "efficiency" need to be defined

15406 (c)(2) - The term "efficient competition" is used in this paragraph What criteria defines "efficient competition"?

Thank you for this opportunity to comment


Date: 7/15/97
Sender: mosesృ@cc tacom army mil
To: farcase 95-029
cc: lichoror@cc tacom army mil, sivalelr@cc tacom army mil
Priority: Normal
Subject:FAR Part 15 Rewrite
TACOM, Warren, MI, Acquisition Center comments:
Group A --

1. FAR 15.001, Definitions, Proposal modification.

Problem: The term "proposal modification" can cause confusion because
the
term "modifications" refers specifically to post-award actions in acquisition usage.

Recommendation: Change the term "proposal modıfıcatıon" to "proposal amendment."
2. FAR 15.102, Multı-step source selection technique.
a. $15.102(\mathrm{~b})$, second sentence. Recommend that the words "the" and "limated" be added as follows: "While the solicitation will not require the submission of full proposals in "the" first step...and past performance and "limited" pricing information. This makes this sentence more consistent with $15.202(a)$.
b. $15.102(\mathrm{~b}), \mathrm{fifth}$ sentence, "The solicitation must contain sufficient information..." This sentence could leave the government vulnerable to protests. Recommend that the word "must" be substituted
with

## "will."

c. $15.102(c)$, third sentence, "The agency shall seek additional information..." This sentence may be misconstrued to mean that only one competitive range determination may be made, which would be a direct contradiction to $15.102(\mathrm{a})$. Recommend changing the word "shall" to "may" in order to clarify the intent of this sentence.

Group B:

1. FAR 15.504-2(c) (2).

Problem: PCOs or ACOs may interpret this to mean that an indırect costs audit can never be requested wathin 12 months from the previous indirect cost audit. A contractor's fiscal year or budget cycle could invalidate an indirect cost audit in less than 12 months.

Recommendation - Recommend a statement be added asking the PCO to verıfy with the auditor $\quad i f$ indirect costs audit results are still valid before requesting such an audit.
2. 15.504-2 (c)(3). Recommendation: Add the following sentence after the first sentence. "Notwithstanding the above, the PCO may request
the audit be tailored to include only certain elements of cost." This will save time and resources and eliminate any possible unnecessary information.
3. 15.504-3(c) (5), states "If there is more than one prospective subcontractor...the contractor need only submit...data for the prospective subcontractor most likely to receive award to the Government". What if the subcontractor most likely to recieve the award changes prior to award but after conclusion of negotiations?
4. 15.504-4(c)(3), fourth sentence ("If the prospective contractor falls to identify or propose facılıtıes ...""). Recommend that the sentence be changed to "If the prospective contractor falls to propose facilities capital..." This would make it consistent with the language at 15.508(1).
5. 15.506-3, Documenting the negotiation.

Problem: 15.506-3(7) Audit reconciliation needs to be specifically addressed.

RECOMMENDATION: Insert the phrase "and audit recommendation" after each "major cost element" in the first sentence of FAR 15.506-3(7).
6. 15.506-3(b). The PCO must send a copy of the PNM to the cognizant audit office and to the cognizant ACO administering the contract. This is not just a post-award requirement. Recommend the following wording, "Whenever field pricing assistance has been obtained, the contracting officer shall forward a copy of the price negotiation memorandum to the cognizant audit office (if an audit has been performed) and to the cognizant ACO."
7. 15.507-3(d). Recommendation: In the event of an FPRA, the ACO should be required to furnish a copy of the price negotiation memorandum (PNM) to the Contracting Officer along with the recommended rates. The PNM should reconcile to respective DCAA input.
8. 15.507-1 (b) "..., the Government is entitled to a price adjustment, including profit or fee, of any significant amount by which the price was increased because of the defective data."

Problem: This is not true. The Gov't is entitled to a price adjustment on ANY defective pricing overpayment, whether
"significant" or not, for DOD contracts, IAW Section 952, TINA Amendments, 10 USS $2306(a)(e)$. This statute gives NO limitation on the amount of a defective pricing overpayment. The law gives us no relief on this by specifying a threshold limitation.

RECOMMENDATION: Remove the term "significant" from the sentence.
9. EAR 15.507-1(b) (5) deals with offsets. However, any offset submitted by a contractor must be sent to DCAA for audit review before a CO can issue a finding on its validity. The DODIG issued guidance in their TINA Handbook, 1 Apr 93, requiring COs to request an audit on proposed offsets for validity and verification.

RECOMMENDATION: Include guidance for cos to obtain audit review on offsets per DODIG guidance.
10. 15.507-1(b) (7) (1). Problem: There are major concerns with this part. Nowhere in this section on interest is guidance given governing interest collection. This is a problem area that is short on regulation and big on visibility from OSD and the DODIG. Specific guidance received from OSD cites TINA (10 USC 2306(a)(e)) and FAR Part 32. FAR Part 15 needs language addressing debt recoupment and interest procedures. We're not giving our POs the legal information they must adhere to.

RECOMMENDATION: Incorporate OSD and FAR Part 32 guidance on debt recoupment and interest collection procedures into FAR 15.507. Include after the last sentence in the first paragraph of FAR 15.507-1(7) (1) the following: "The Truth in Negotiations Act (Title 10 United States Code 2306(a)(e) requires the contractor to pay interest (and a possible penalty) on any amount overpaid as a result of defective cost or pricing data. Contracting officers do not have the authority to waive or offset charges required by statute. Defective pricing interest (and penalties) are not negotiable and cannot be waived, offset against amounts owed the contractor, or included in "bottominne" settlements. Contracting officers may not accept credits or adjustments on contracts not affected by defective pricing, instead of obtaining price reductions on the affected contract. Such action could result in illegal augmentation of appropriations."
11. FAR 15-507. This section contains no guidance for demand letters. Guidance is contained in FAR Part 32, 32.606 and 32.614 and from OSD guidance.

RECOMMENDATION: Include guidance on demand letters for defective pricing debt recoupment be given, either by reference to FAR part 32 or specific instructions in this part.

POC: Joan Moses/Rochelle Lichoroblec, AMSTA-AQ-E, (810) 574-8087
US Army TACOM
ATTN: AMSTA-AQ-E
Warren, MI 48397-5000

AMERICAN CONSULTING

ENGINEERS COUNCIL
July 14, 1997
General Services Administration
FAR Secretariat (VRS)
1800 F St , NW
Room 4035
Washington, DC 20405
Ref FAR Case 95-029-Group A
To whom it may concern
The American Consulting Engineers Council (ACEC) and the Hazardous Waste Action Coalition (HWAC) would like to provide these comments in response to the May 14, 1997 issuance of revised rulemaking on Part 1 of the proposed rewrite of the Federal Acquisition Regulations (FAR) Part 15, Contracting by Negotiations

In general, ACEC and HWAC are very pleased about the substantial revisions that have been made to the proposal since its original issuance on September 12, 1996 In particular, the improvements made to the sections on best-value, past performance and limitations on the competitive range, clarify and provide needed criteria and guidance that will enhance the performance of these contracting tools The FAR Council is to be commended for these efforts

Although both of our organizations endorse the proposal, we would like to point out a number of issues that we believe warrant some further revision In particular we would point out the following sections

Subpart 15.201: Information Exchanges: Although efforts have been made to promote information exchanges with industry, we believe that a stronger emphasis needs to be placed not just in pre-solicitation consultations, but in acquisition strategy planning In this way, industry can assist the agency in developing the best project before it even reaches the RFP or RFQ stage By allowing industry to assist in developing the scope of work, before the project is put out for proposal, the agency will be better aware of innovations in the industry and will be able to put out a more up to date and effective request.

Subpart 15.203: Electronic Commerce: Although the federal government is continuing to increase its emphasis on utilizing electronic commerce, the lack of a common electronic procurement server and the ever increasing number of individual agency procurement sites makes it very difficult to find available solicitations Firms do not have the resources to go into dozens of different servers on a daily basis to
track down opportunities. The current CBD format is designed to allow contractors to look in one place, saving them a tremendous amount of time Any electronic effort should mirror the current CBD format.

Subpart 15.403: Source Selection Strategy: Source selection strategy should be public information from the earliest possible moment, or it constitutes additional criteria In a number of cases, input to the agency's on selection strategy, has averted potential contractor liability and accountability problems As in the previous comment, early communications with industry will allow the government to base their source selection strategy on information from the market that will likely help them formulate a better informed source selection strategy These discussions will enable the government to structure the RFP to maximize industry competition and inturn, the government will receive a better value for their proposal

Subpart 15.404(d)(1): Cost Consideration: The proposal still calls price or cost to be evaluated in every source selection Although some care is taken to mention non-cost based procurements, particularly those under the Brooks A/E Act, it is important that it be clarified that this clause is not meant to affect non-cost based procurements. A specific cross reference to FAR Part 36 for treatment of cost (through negotiation with top technically-ranked firm) in A/E Selection is necessary It is also important that any weight that costs may account for in this context be clearly defined

Subpart 15.405(a): Negative Past Performance: Although efforts have been made to allow offerors to rebut negative past performance information, it is important that they be able to also rebut negative information provided by other offerors or other sources outside of past performance history The government should cite specific sources of past performance information being considered, and provide offerors the opportunity to rebut negative information.

Subpart 15.405 (a) (1): Price Comparisons: The section should be revised so that it does not limit comparison of prices as a price analysis technique to firm fixed price contracts with economic price adjustment FAR 15.503-1 indicates that cost or pricing data are not required of there is adequate price competition and then paragraph( c)(1) defines adequate price competition. Adequate price competition in this paragraph is not limited to certain contract types. Therefore, the second sentence under subpart $15.405(\mathrm{a})(10)$ should be deleted

Subpart 15.606(d) (1) \& (3) :Disclosure of rankings: Although we support offerors receiving proposal evaluations and a review of the relative strength and weakness, including their ranking in the solicitation, we continue to believe that it is
inappropriate to disclose the ranking of other competitors, except to firms in the final cut.

Subpart 15.606(b): Debriefings: We continue to believe that the method of debriefing should be left to the offeror The offeror should have the ability to determine how thorough a debnefing they would like to receive In addition, many agencies continue to consider debriefings optional These should be considered mandatory We also reiterate our support for pre-award debriefings based on SEB evaluations of the offeror

Finally, ACEC and HWAC continue to encourage the FAR Council to provide increased guidance to Contracting Officers on the utilization of these new procurement rules. The purpose of these rules is clearly designed to improve the value received by the government. Providing Contracting Officers with latitude and incentives for creativity is an admirable goal, but it must be within the requirements of the FAR It is important that full disclosure of solicitation strategy and selection criteria not be diluted for the sake of contracting officer empowerment We urge caution and clear and detailed guidance and training of contracting officials.

Thank you for the opportunity to comment and we look forward to the release of the final rule If you have any further questions, please do not hesitate to contact me at (202) 347-7474.

Sincerely,


James R Thomas, Jr., P.E., FACEC President ACED

Pat O'Hara
President
WAC

## $95-1529-67$

AMERICAN CONSULTING
ENGINEERS COUNCIL
July 14, 1997
General Services Admunustration
FAR Secretariat (VRS)
1800 F St , NW
Room 4035
Washington, DC 20405

## Ref: FAR Case 95-029 - Group B

To whom it may concern.
The American Consulting Engineers Council (ACEC) and the Hazardous Waste Action Coalition (HWAC) would like to provide these comments in response to the May 14, 1997 issuance of rulemaking for FAR Part 15 Subpart 155 - Contract Pricing, which was released as part of the revised rulemaking on FAR Part 15 Contracting by Negotiations

The following are our recommended changes
Subpart 15.501 - Definitions (Parametric Estimates): There is some concern that Parametric estimates should not be considered cost or pricing data By their nature, estimates developed under this technique will vary from actual results, and may well lead to imperfect assumptions

Subpart 15.501 - Definitions (Published and Unpublished discounts): Although the government has published a disclosure obligation for published and unpublished discounts, the FAR Council has yet to provide a workable definition to satisfy this obligation

Subpart 15.502 - Pricing Policy (Fair and Reasonable): The DAR and CAA Council's should adopt a rule which makes it clear that the contracting officer should not seek or otherwise require commercial companies to offer or accept, most favored pricing terms The Government's pricing goal should be "fair and reasonable" as all other procurements are currently dealt with

## Subpart 15.503.1 - Prohibition on obtaining cost or pricing data (Adequate Price

 Competition):There is a concern that the proposed change alters an established and accepted meaning of adequate price competition This change should be removed

## Subpart 15.503.3 -Requiring Information other than cost or pricing data

 (Definitions): When using terms such as price reasonableness, cost realism, cost analysis, and price analysis, it is critical that the rewrite remain consistent Inconsistencies can lead to conflicts over required data, access to records and audit rightsSubpart 15.503.3 (c)(3 )-Lowest Price: Consistent with procedure in Part 52, an offeror not compelled to disclose its lowest pace, especially for customer classes and circumstances unrelated to the Government's position as a purchaser

Subpart 15.503.5 -Access to records: As in earlier comments by industry on debriefing rights, we do not support having the contracting officer determine the extent of access to records and audit rights It is critical that this language be clarified to determine the division between information related to the pertinent contract and those related to the contractors offerings in the general marketplace Contracting officers should have limited authority to review non-related information

Subpart 15.504-1(d)(2) - Cost Realism: The language confuses cost-realism with past performance evaluations which should require the submission of information other than cost or pricing data. In addition, the DAR Council and the CAA Council should not apply cost realism to firm fixed price contracts unless and until the CAS Board has exempted firm fixed price contracts that do not involve the submission of certified cost or pricing data

Overall, this is a far ranging and thorough proposal However, in an effort of this size it is important to keep in mind that many inconsistencies may occur. Of particular mention are a number of inconsistencies with some of the definitions used and the need for further clarification Finally, we would note that there also appear to be some conflicts with the Truth in Negotiations Act (TINA)

We would ask the Council to note these general and specific suggestions and request that the appropriate changes be made before a final rule is issued ACEC and HWAC would also like to support the comments being submitted by the Council on Defense and Space Industry Associations (CODSIA), which has conducted much of the analysis of Subpart 15.5. We have included CODSIA's detailed comments for your review along with this letter

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95-029-67
$$

Thank you for your attention to our comments Please do not hesitate to contact Felix Martinez at ACEC and David Frazier at HWAC, at (202) 347-7474 with any questions that you might have.

Sincerely,


## SUBPART 15.5-CONTRACT PRICING

### 15.500 Scope of subpart.

This subpart prescribes the cost and price negotiation policies and procedures for pricing negotiated prime contracts (including subcontracts) and contract modifications, including modifications to contracts awarded by sealed bidding.

### 15.501 Definitions.

Cost or pricing data (10 U S C 2306a(h)(1) and 41 U.S C 254(d)) means all facts that, as of the date of pnce agreement or, if applicable, an-earher another date agreed upon between the parties that is as close as practicable to the date of agreement on price, prudent buyers and sellers would reasonably expect to affect price negotrations signuficantly

## CODSIA ANALYSIS

CODSIA does not believe the proposed change to "an earher date" is consıstent with the amendments made to Truth in Negotiations Act (TINA) under sections 1207 and 1251 of the Federal Acquisition Streamining Act of 1994 (FASA) which specifies "another date" The proposed rewrite offered no explanation for the change

Sumular changes were made throughout FAR Subpart 155 and related solicitation provisions and contract clauses

Cost or pncing data are data requiring certrfication in accordance with 15.506 -2 Cost or pricing data are factual, not judgmental, and are verfiable While they do not indicate the accuracy of the prospective contractor's judgment about estumated future costs or projections, they do include the data forming the basis for that judgment. Cost or pricing data are more than histoncal accountung data, they are all the facts that can be reasonably expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred. They also include such factors as. vendor quotations, nonrecurning costs; information on changes in production methods and in production or purchasing volume, data supporting projections of business prospects and objectives and related operations costs, unit-cost trends such as those associated with labor efficiency, make-or-buy decisions, estumated resources to attain business goals, and information on management decisions that could have a significant bearing on costs. Gest er priong data may melude parametrie estimates ef elements ef eest or priee, frem approprate-valudated ealibrated parametrie models

## CODSIA ANALYSIS

CODSIA disagrees that parametric estimates are cost or pricing data. By their nature, estumates produced by this modeling technique will vary from actual results, and the vanances arre traceable to imperfect assumptions and cause and effect relationships. It is unreasonable to view such imperfections as a basis for defective pricing allegations As a minimum, this change should be not be part of the Part 15 rewrite project and should, instead, be considered within the broader context of parametric estimating policies and procedures.

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/TTALICS


#### Abstract

 perfermed, refleet eleer understanding of therequrrements, and-are-enststent whthe warious elements of the efferor's teehntent propesal.


## CODSIA ANALYSIS

Definition duplicates coverage at FAR 15.504-1(d). Defintion should be deleted for same reasons definitions of "commercial item,"" "cost analysis," field pricing support," "price analysis," and "techntcal analysis" were deleted


#### Abstract

Discount means a price reducton regularly apphed in the normal course of business in accordance with a commercial company's estableshed written policies or customary practices. Examples include purchase volume discounts, reseller discounts, onginal equtpment manufacturer discounts, national account discounts, educational instututhon discounts, state and local government discounts, etc. Price discounts do not unclude concessions, such as trade-ins; nonmonetary incentwes (e.g., extended warrantues, free supplies or services); discounts contingent upon other events (e.g., coupons); and temporary promotoonal discounts (e.g, inventory clearance sales, special marketing incentwes)


## CODSIA ANALYSIS

CODSIA has been disappointed that the FAR Council has yet to provide a workable defimition of published discounts and unpublished discounts, particularly if the Government persists in imposing a disclosure obligation at FAR 52 215-41 and FAR 52 215-42. This is a high-risk concern to industry because the FAR's ambiguity creates an environment for unfounded allegations of failure to disclose ( t e , what is an unpublished discount?)

Forward pricing rate agreement means a written agreement negotuated between a contractor and the Government to make certann rates available during a specified period for use in pricing contracts or modifications. Such rates represent reasonable projections of specific costs that are not easily estumated for, identufied with, or generated by a specific contract, contract end item, or task These projections may include rates for such things as labor, indurect costs, material obsolescence and usage, spare parts provistoning, and maternal handling

Forward pricing rate recommendation means a rate set unulaterally by the administrative contracting officer for use by the Government in negotiations or other contract actions when forward pricing rate agreement negotaations have not been completed or when the contractor will not agree to a forward pricing rate agreement.

Information other than cost or pricing data means any type of information that is not required to be certufied in accordance with 15.506-2 and is necessary to determune price reasonableness or assess cost realism. For example, such information may include pricing, sales, or cost information, and includes cost or pricing data for which certufication is determined unaplicable after submission

CODSIA ANALYSIS
See CODSIA comment at FAR 15 503-3

Price, as used in this subpari, means cost plus any fee or profit applicable to the contract type
Subcontract, as used in this subpart, also inciudes a transfer of commercial items between divisions, subsidianes, or affiliates of a contractor or a subcontractor

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

### 15.502 Pricing policy.

Contractung officers shall -
(a) Purchase suppines and services from responsible sources at fair and reasonable prices In estabishing the reasonableness of the offered prices, the contracting officer shall not obtain more information than is necessary. To the extent that cost or pricing data are not required by $15503-4$, the contractung officer shall generally use the following order of preference in determining the type of information required
(1) No additional information from the offeror, if the price is based on adequate pnce compettion, except as provided by 15.503-3(b)
(2) Information other than cost or pncing data
(i) Information related to prices (e g., established catalog or market prices), relying first on information available within the Government, second, on information obtained from sources other than the offeror, and, if necessary, on information obtained from the offeror When obtaining information from the offeror is necessary, unless an exception under 15 503-1(b) (1) or (2) apples, such information submitted by the offeror shall include, at a munimum, appropnate information on the prices at which the same or simular items have been sold previously, adequate for evaluatigg determining the reasonableness of the price

## CODSIA ANALYSIS

See CODSIA comment at FAR 15.503-3
(ii) Cost information, that does not meet the definition of cost or pricing data at 15501
(3) Cost or pricing data. The contracting officer should use every means avalable to ascertain whether a fair and reasonable pnce can be determined before requesting cost or pricing data. Contracting officers shall not require unnecessarily the submission of cost or pricing data, because it leads to increased proposal preparation costs, generally extends acquisition lead-tıme, and consumes additional contractor and Government resources
(b) Pnce each contract separately and independently and not -
(1) Use proposed price reductions under other contracts as an evaluation factor, or
(2) Consider losses or profits realized or anticipated under other contracts.
(c) Not include in a contract price any amount for a specified contungency to the extent that the contract provides for a price adjustment based upon the occurrence of that contungency

## CODSLA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(d) When acquuring a commercual item, the contracting officer shall seek a price that is faur and reasonable based on prices at which same or similar utems have been sold in the commercial market wuth approprate constderation given to differences in terms, conditions, and circumstances. The contracting officer shall not require the offeror to either propose or agree to the lowest price at which a commercial item was sold or will be sold to the general public. Solictation notuces and contract clauses which impose most favored customer pricing are prohubited.

## CODSIA ANALYSIS

CODSIA contunues to recommend strongly that the DAR Council and CAA Council adopt a rule which makes it clear that the contracting officer should not seek or otherwise require commercial companies to offer or accept most favored customer pricing terms The Government's pricing goal should be "faur and reasonable," as with all other Government procurements. This is a signuficant risk area for commercial companes which, as yet, has not been adequately dealt with by the Government
15.503 Obtaining cost or pricing data (10 U.S C. $2306 a$ and 41 U.S.C. 254b).

(a) Cost of pricing data should not be obtanted for contract actions below the pertinent threshold at 15.5031(a)(1). However, the head of the contracting activty, wuthout power of delegation, may authorrze the contractung officer to obtaun cost or pricing data below the pertunent threshold upon making a written finding that cost or pricing data are necessary to determune whether the price is fair and reasonable and the facts supportung that finding. Cost or pricing data shall not be obtained for acquistions at or below the simplified acquistion threshold.

## CODSIA ANALYSIS

CODSIA recommends relocatung provision at 15.503(a)(2) in order to make it clear that obtanung cost or pricing data below the TINA threshold is prohibited, unless the HCA makes a written determination that such data is necessary
(b) Exceptions to cost or pricing data requirements The contractung officer shall not require submussion of cost or pricing data to support any contract actuon (but may require information other than cost or pricing data to support a determinatuon of pnce reasonableness or assess cost reaism) -

CODSIA ANALYSIS
"Contract action" has already been defined at FAR 2.101.
See CODSIA comment at FAR 15.503-3
(1) When the contracting officer determines that prices agreed upon are based on adequate price competition (see standards at paragraph (c)(1) of this subsection),
(2) When the contracting officer determines that prices agreed upon are based on pnces set by law or regulation (see standards at paragraph (c)(2) of this subsection),
(3) When a commercial item is being acquired (see standards at paragraph (c)(3) of this subsectuon),

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(4) When a waver has been granted (see standards at paragraph (c)(4) of this subsection), or
(5) When modifying a contract or subcontract for commerctal items (see standards at paragraph (c)(3) of this subsection)
(c) Standards for exceptions from cost or pricing data requirements - (1) Adequate price competition A price is based on adequate price competition if -
(1) Two or more responsible offerors, competing independently, submut pnced offers in respense responstve to the Government's expressed requirement and if -

## CODSIA ANALYSIS

CODSIA is concerned that the proposed change alters an established meaning of adequate price compettion it has been generally understood that an offeror's proposal must be capable of being accepted by the Government. Merely responding to the solictation has not been sufficient.
 seuree seletion the award deciston, and

> CODSIA ANALYSIS
> CODSIA recommends that the DAR Council and CAA Council adopt the Comptroller General's long-standing positon that price must be a substantial factor in the award decision
(B) There is no finding that the price of the otherwise successful offeror is unreasonable. Any finding that the pnce is unreasonable must be supported by a statement of the facts and approved at a level above the contractung officer;
(i1) There was a reasonable expectation, based on market research or other assessment, that two or more responsible offerors, competing independently, would submit priced offers mfespense responsive to the solicitation's expressed requirement, even though only one offer is received from a responsible offeror and if -
(A) Based on the offer recerved, the contractung officer can reasonably conclude that the offer was submitted with the expectation of competition, e g , curcumstances indicate that -
(1) The offeror believed that at least one other offeror was capable of submitung a meangrat responsive offer; and
(2) The offeror had no reason to believe that other potental offerors did not intend to submut an offer, and
(B) The determunation that the proposed price is based on adequate price compettion and is reasonable and is approved at a level above the contracting officer, or

## CODSIA ANALYSIS \& RECOMMENDATIONS FAR SUBPART 15.5 REWRITE FAR CASE 95-029

## CODSLA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(iii) Price analysis clearly demonstrates that the proposed price is reasonable in comparison with current or recent pnces for the same or simular items, adjusted to reflect changes in market conditions, economic conditions, quantitues, or terms and conditions under eontrats that resuted fremadequate priee empetition

## CODSIA ANALYSIS

Whether or not comparable contracts resuited from adequate price competition should not be a criterion It needlessly limits the contracting officer's discretion to use otherwise acceptable means of performing a price analysis, as provided at FAR 15 504-1(b)
(2) Prices set by law or regulation. Pronouncements in the form of periodic rulings, reviews, or simular actions of a governmental body, or embodied in the laws are sufficient to set a price
(3) Commercial items Any acquisition for antem that the a commercial item definition in 2.101, or any medifieatron, as defined th paragraph (e) (1) er (2) of that defintion, that-dees not ohange the item frema commerenthem to neneomerethitem, is exempt from the requirement for cost or pricing data Also exempt are modifications to contracts for commercial items, exempted under this section, as long as the modification does not change the contract to an acquisition of a noncommercial item

## CODSIA ANALYSIS

Rewnte confuses the meanungs of product modification and contract modification. Both were expressly addressed by FASA
(4) Waivers The head of the contracting activity (HCA) may, without power of delegation, waive the requirement for submission of cost or pricing data in exceptional cases The authonzation for the waver and the supporting rationale shall be in writing. The HCA may eonster-warwng waive the requirement if the price can be determmed to be fair and reasonable without submission of cost or pricing data. For example, if cost or pricing data were furnushed on previous production buys and the contracting officer determines such data are sufficient, when combined with updated information, a waiver may be granted If the HCA has waived the requirement for submission of cost or pncing data, the contractor or higher-tuer subcontractor to whom the waiver relates shall be considered as having been required to provide cost or pricing data Consequently, award of any lower-tier subcontract expected to exceed the cost or pricing data threshold requires the submission of cost or pricing data unless an exception otherwise applies to the subcontract or the waiver specifically includes that subcontract

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

## 15503-2-Other-erreunstantees where-ent-or-pricing-data are not requiredr

(a) The-exerese of an-optron-at the price-stablished at centfret-award-or inthal negetration-dees-netreature submision ef cost-or prieng-iata:
(b) Cect or premedata are net requred for prepesals used selely for-overfun funding or interm billing price edjustments.

## CODSIA ANALYSIS

The examples provided are obvious instances where cost or pricing data are not required and do not warrant expressed coverage. CODSIA is concerned that examples might be misinterpreted as the only circumstances. There certanly are many other instances which could be listed (e g., incremental funding actions, structuring contract financing arrangements, CAS cost impact analyses, preparation of Government budget estumates, etc.)

Renumbering of succeeding provisions is assumed
15.503-3 Requiring information other than cost or pricing data.
(a) General (1) The contracting officer is responsible for obtaining information that is adequate for evaluating determining the reasonableness of the price or detemming assessing cost realism However, the contractung officer should not obtain more information than is necessary for determining the reasonableness of the price or eveluating assessing cost realism To the extent necessary to determme the reasonableness of the price the contracting officer shall require submission of information from the offeror Unless an exception under 15 503-1(b) (1) or (2) applies, such information submitted by the offeror shall include, at a minumum, appropriate information on the prices at which the same item or simular items have previously been sold, adequate for determining the reasonableness of the price (10US-C. 2306a(d)(1) and-41USG-254b(8)(2))

> CODSIA ANALYSIS
> CODSIA urges the DAR Council and CAA Council to exercise greater care in maintaining a consistency in terms related to the concepts of price reasonableness, cost realism, cost analysis, and price anaiysts In several places the proposed rewrite creates confusion, and this will no doubt lead to conflicts over required data, access to records, and audit rights
> Similar changes were made throughout FAR Subpart 155
(2) The contractor's format for submitting such information should be used (see 15 503-5(b)(2))
(3) The contracting officer shall ensure that information used to support price negotiations is sufficiently current to permit negotiation of a fair and reasonable pnce Requests for updated offeror information should be limited to information that affects the adequacy of the proposal for negotations, such as changes in price lists Such data shall not be certified in accordance with 15 506-2

## CODSLA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(b) Adequate price competition When adequate price competition exists (see 15 503-1(c)(1)), generally no additional information is necessary to determune the reasonableness of price However, if there are unusual circumstances where it is concluded that additional information is necessary to deternine the reasonableness of pnce, the contracting officer shall, to the maximum extent practicable, obtain the additional information from sources other than the offeror In addition, the contracting officer may request information to detemfneassess the cost realism of competing offers or tovalunteompeting appronehes

## CODSIA ANALYSIS

CODSLA appreciates efforts to add clanty to the Government's intent to restrict submission of cost or pricing data or information other than cost or pricing data where adequate pnce competition is expected. This contunues to be a problem in private industry, especially in the area of cost realism (see CODSIA comment at FAR 15 504-1(d))
(c) Limitations relatung to commercial items (H0USC $2306(\mathrm{U})(2)$ (1) Requests for sales data relating to commercial items shall be limited to data for the same or similar items during a relevant time period
(2) The contractung officer shall, to the maximum extent practicable, limit the scope of the request for information relating to commercial items to include only information that is in the form regularly mantaned by the offeror as part of its commercial operations
(3) The contractung officer shall not require an offeror to dusclose and certfy or otherwise represent as accurate the lowest pruces pard to the offeror by the general public for same or simular ttems.

> CODSIA ANALYSIS
> CODSIA urges the DAR Council and CAA Council to clanify that, consistent with the provisions at FAR $52.215-41$, an offeror is not compelled to disclose its lowest prices, especially for customer classes and circumstances unrelated to the Government's position as a purchaser (e g., reseller, orginal equipment manufacturer) This is a high-risk concern to industry because many companies do not have the infrastructure necessary to identify the lowest prices paid on individual transactions
(4) Information obtained relating to commercial iterns that is exempt from disclosure under the Freedom of Information Act (5 U S C 552(b)) shall not be disciosed outside the Government.

### 15.503-4 Requiring cost or pricing data (10Us.G. 2306anad-41-U.S.G-254b).

(a)(1) Cost or pncing data shall be obtamed 'only if the contractung officer concludes that none of the exceptrons in 15 503-1 (b) applies However, if the contractung officer has sufficient information avalable to determine price reasonableness, then a waver under the exception at 15503 -1(b)(4) should be considered. The threshold for obtaining cost or pricing data is $\$ 500,000$ Unless an exception applies, cost or pricing data are required before accomplishing any of the following actions expected to exceed the current threshold or, in the case of existing contracts, the threshold specified in the contract
(I) The award of any negotiated contract (except for undefintized actions such as letter contracts)

## CODSLA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(i) The award of a subcontract at any tuer, if the contractor and each higher-tuer subcontractor have been required to furmish cost or pricing data (but see waivers at 15.503 -1(b)(4))
(1i1) The modification of any sealed bid or negotiated contract (whether or not cost or pricing data were initially required) or any subcontract covered by paragraph (a)(1)(n) of this subsection Price adjustment amounts shall consider both increases and decreases (e $\mathrm{g}, \mathrm{a} \$ 150,000$ modification resulting from a reduction of $\$ 350,000$ and an increase of $\$ 200,000$ is a pricing adjustment exceeding $\$ 500,000$ ). This requrement does not apply when unrelated and separately priced changes for which cost or pricing data would not otherwise be required are included for administrative convenence in the same modification. Negotiated final pricing actions (such as termination settlements and total final price agreements for fixed-price incentive and redeterminable contracts) are contract modifications requiring cost or pricing data if the total final price agreement for such settlements or agreements exceeds the pertunent threshold set forth at paragraph (a)(1) of this subsection, or the partal termination settlement plus the estumate to complete the contunued portion of the contract exceeds the pertinent threshold set forth at paragraph (a)(1) of this subsection (see 49 105(c)(15))
(2) Unless prohibited beeause an-exeeptren-at-15-503-1(b) apphes, the heed of theoentraeting aetruty, witheut pewer of-delegation,-may authernze the contraeting offifer to obtan oest-or prictig data for prieng actens below the pertnent threshold in paragraph (a)(1) of thus subseetion, provided the netreneweeds the simphified aequstien thresheld The heat of the entracting aetrwiy-shall justufy the requtrement-for of pritug data-The deeumentation shall melude-whitten finding that eost-er-preing data-are neeessary to determme whether the priee is farr and reasonable and the facts supporting that findmer

> CODSIA ANALYSIS
> CODSIA recommends relocating provision at $15503-4(\mathrm{a})(2)$ to $15503-1(\mathrm{a})$ in order to make it clear that cost or pncing data should not be required below the TINA threshold
(b) When cost or pricing data are required, the contracting officer shall require the contractor or prospective contractor to submit to the contracting officer (and to have any subcontractor or prospective subcontractor submit to the prime contractor or appropnate subcontractor tier) the following in support of any proposal
(1) The cost or pricing data
(2) A cerificate of current cost or pricing data, in the format specified in $15506-2$, certifying that to the best of its knowledge and behef, the cost or pricing data were accurate, complete, and current as of the date of agreement on price or, if applicable, anearther another date agreed upon between the parties that is as close as practucable to the date of agreement on price
(c) If cost or pning data are requested and submitted by an offeror, but an exception is later found to apply, the data shall not be considered cost or pricing data as-defined in 15.501 and shall not be certified in accordance with 15506 2.
(d) The requirements of this section also apply to contracts entered into by an agency on behalf of a foreign government

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

15.503-5 Instructions for submission of cost or pricing data or mformation other than cost or pricing data.
(a) Taking into consideration the policy at 15.502 , the contracting officer shall speeffy insert the solucitation provision at 52.215-41 and contract clause at 52.215-42 in the solicitation (see 15508 (1) and (m)) when either cost or pricing data or informatton other than cost or pricing data are requared -
(1) Whether eest-or pricing data-are-required,
(2) That, in lieu-ef-submitting eost or-prieng data, the fferor-may submit-a request forexeeptien from-the requirement to submt oost or-pryeng data;
(3) Anly information-other than orst or prieng datat that is requifed, and
(4) Neeessazy preaward or pestaward aeeess to efferer's reeerds

## CODSIA ANALYSIS

Guidance is generally unnecessary since it duplicates instructions contained in FAR 52 215-41 and FAR 52 215-42

CODSIA is greatiy concerned with the structure of any policy that allows the contracting officer to determine the extent of access to records and audit rights Coupled with the proposed elimination of Table 15-3 and Standard Form 1448, the proposed rewnte obscures the bnght-line test which was created as a result of FASA See CODSIA's proposed FAR 15 503-6
(b)(1) Unless required to be submitted on one of the termination forms specified in subpart 496 , the contractung officer may require submission of cost or pricing data in the format indicated at Table $15-2$ of 15508 , specify an alternative format, or permit submussion in the contractor's format
(2) Information other than cost or pricing data may be submitted in the offeror's own format unless the contracting officer decides that use of a specific format is essentral and the format has been described in the solicitation

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

### 15.503-6 Access to records and audt rights.

(a) Where cost or pricing data are submitted, the contractung officer or an authonzed representative has the right to examine books, records, documents, or other directly pertinent records to evaluate the accuracy, completeness, and currency of the cost or pricing data for a period ending 3 years after final payment under the contract (see 52.214-26 and 52.215-2).
(b) Where informatoon other than cost or pricing data are submutted, the contracting officer or an authorized representative has the limited right to examine, at any tume before award, books, records, documents, or other dwectly pertinent records to verify any request for an exception under this proviswon and the reasonableness of price (see 52.215-41 and 52.215-42). Access does not extend to cost or profit information or other data relevant solely to the offeror's determination of the prices to be offered in the catalog or marketplace.

## CODSIA ANALYSIS

Although CODSIA understands and supports the FAR rewnte goals to be economical in wording, this is one area where clanty is absolutely critical Heretofore, the Governments policies and procedures have been fractured and inconsistent. This is a high-risk concern to industry
15.504 Proposal analysis.
15.504-1 Proposal analysis techniques.
(a) General The objective of proposal analysis is to ensure that the finagreed agreen price is far and reasonable
(1) The contractung officer is responsible for evaluatag determinung the reasonableness of the offered prices The analytical techniques and procedures described in this section may be used, singly ensure that the finat agreed upon pnce is farr and reasonable The complexity and curcumstances of each acquistion should determine the level of detall of the analysts required
(2) Price analysis shall be used when cost or pricing data are not required (see paragraph (b) of this subsection and 15 504-3)
(3) Cost analysis shall be used to evaluate the reasonableness of indıvidual cost elements when cost or pncing data are required. When appropriate, price analysis shall be used to verify that the overall price offered is farr and reasonable

## CODSIA ANALYSIS

CODSIA agrees with proposal but wishes to note this changes a long-standing polncy that price analysis is always performed As presented, when would a price analysis be appropriate?

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(4) Cost analysis may alse be used to evaluate infermation other that eost or-prieng data to determmeent reasenableness ereest realism-

## CODSIA ANALYSIS

As written, this guidance is meaningless and will confuse the relationships between cost analysis and information other than cost or pricing data. Moreover, it fails to adequately differentrate between a cost analysis and cost realism assessment A clear differentration is important because it affects provisions on TINA, CAS, access to records, and audit nghts

Renumbering of succeeding provisions is assumed
(5) The contractung officer may request the advice and assistance of other experts to assure an appropriate analysis is performed
(6) Recommendations or conclusions regarding the Government's review or analysis of an offeror's or contractor's proposal shall not be disclosed to the offeror or contractor without the concurrence of the contractung officer Any discrepancy or mistake of fact (such as duplications, omissions, and errors in computation) contained in the cost or pricing data or information other than cost or pricing data submitted in support of a proposal shall be brought to the contracting officer's attention for appropriate action
(7) The Aur Force Institute of Technology (AFIT) and the Federal Acquisition Instutute (FAI) jointly prepared a senes of five desk references to gude pricing and negotiation personnel. The five desk references are. Price Analysis, Cost Analysis, Quantitative Techniques for Contract Pricing, Advanced Issues in Contract Pricing, and Federal Contract Negotiation Techniques The references provide detailed discussion and examples applying pricing policies to pncing problems. They are to be used for instruction and professional guidance. However, they are not directive and should be considered informational only Copies of the desk references are available on CD-ROM which also contans the FAR, the FTR and vanous other regulations and tranning matenals The CD-ROM may be purchased by annual subscription (updated quarterly), or indıvidually (reference "List ID GSAFF," Stock No 722-009-0000-2) The individual CD-ROMs or subscription to the CD-ROM may be purchased from the Superintendent of Documents, U S Government Printing Office, by telephone (202) 512-1800 or facsimule (202) 512-2550, or by mall order from the Superintendent of Documents, P O Box 371954, Pittsburgh, PA 15250-7954. Free copies of the desk references are avaulable on the World Wide Web, Internet address
http.//www gsa.gov/staff/v/guides/instructions htm
(b) Price analysis (1) Price analysis is the process.ff examnung and evaluating a proposed price without evaluating its separate cost elements and proposed profit.
(2) The Government may use various price analysis techniques and procedures to ensure a fair and reasonable price, given the circumstances surrounding the acquisition Examples of such techniques include, but are not limited to the following
(1) Companison of proposed prices received in response to the solicitation
(ii) Comparison of previously proposed prices and contract prices with current proposed pnces for the same or simular end items, if both the validity of the comparison and the reasonableness of the previous price(s) can be established

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(iii) Application of rough yardstucks (such as dollars per pound or per horsepower, or other units) to highlight signuficant inconsistencies that warrant additional pricing inquiry
(iv) Comparison with competutuve published price lists, pubished market prices of commodities, sımilar indexes, and discount or rebate arrangements
(v) Comparison of proposed prices with independent Government cost estumates
(vi) Companson of proposed prices with prices obtaned through market research for the same or simular items.
(c) Cost analysis. (1) Cost analysis is the review and evaluation of the separate cost elements and profit in an
 the appication of judgment to determine how well the proposed costs represent what the cost of the contract should be, assuming reasonable economy and efficiency
(2) The Government contracting officer may use vanous cost analysis techniques and procedures to ensure a faur and reasonable pnce, given the circumstances of the acquistion Such techniques and procedures include the following
(I) Verfication of cost or pricing data and evaluation of cost elements, including -
(A) The necessity for, and reasonableness of, proposed costs, inciuding allowances for contungencies,
(B) Projection of the offeror's cost trends, on the basis of current and historical cost or prieng data,
(C) Reasonableness of estumates generated by appropriately validated/calibrated parametric models or costestumatung relationshups; and
(D) The application of audited or negotrated indirect cost rates, labor rates, and cost of money or other factors
(ii) Evaluatung the effect of the offeror's current practuces on future costs In conductung this evaluation, the contracting officer shall ensure that the effects of inefficient or uneconomical past pracuces are not projected into the future In pricing production of recently developed complex equipment, the contractung officer should perform a trend analysis of basic labor and materials, even in periods of relative price stability
(iii) Companson of costs proposed by the offeror for individual cost elements with -
(A) Actual costs previously incurred by the same cfferor;-
(B) Previous cost estimates from the offeror or from other offerors for the same or simular items,
(C) Other cost estumates received in response to the Government's request,
(D) Independent Government cost estumates by technical personnel, and
(E) Forecasts of planned expenditures

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(iv) Verfication that the offeror's cost submissions are in accordance with the contract cost principles and procedures in part 31 and, when applicable, the requirements and procedures in 48 CFR Chapter 99 (Appendix of the FAR looseleaf edition), Cost Accountung Standards
(v) Review to determine whether any cost or pncing data necessary to make the contractor's proposal accurate, complete, and current have not been etther submitted or identified in writung by the contractor If there are such data, the contractung officer shall attempt to obtain them and negotate, using them or making satisfactory allowance for the incomplete data
(vi) Analysis of the results of any make-or-buy program reviews, in evaluating subcontract costs (see 15 507-2)
 and evaluatung specific elements of each offeror's proposed cost estumate to determine whether the estumated propesed cost elements are realistic for the work to be performed, reflect a clear understanding of the requirements; and are consistent with the unique methods of performance and matenals described in the offeror's technical proposal
(2) Cost realism assessments shall be performed on significant competitive cost-rembursement contracts to deterntine the probable eest of perfermanee for eneh efferor
(t) The probable mast differ frem the propesed eost and should reflect the Government's bestestmat of the est ef any contrae that ts mest likely to resull from the ifferer's preposal The probablo est shall be used for purpeses of evaluation to deterfint the best-value-
(H) The probable is determined by adjustang eaeh ifferer's propesed cost, and fee when approprtate, torefleet


## CODSIA ANALYSIS

The purpose of a cost realism assessment should not be to determine the probable cost of performance (or life cycle cost) and best value Those are distanctly different concepts and have no role in determining whether an offeror understands the solicitation requirements. The purpose of cost realism is adequately stated in FAR 15 504-1(d)(1)

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

 other cempetitwe fixed pree-ypeeontracts- when new requtroments may net be fully understeed by-competng offerers, there arequatity eencerns, or past expernence indteates that eentraeters' propesed-eests have resulted in quality-ar servee cherfalls. Resultis of the malysts may be used in performanee risk assesments and respensibytity determtnations-However-propesals-shall beevaluated using the-rfteritint the seltertation, and the-offered priees shall netbe-adjusted aserecult of the analysis

## CODSLA ANALYSIS

Cost realism is being confused with a past performance evaluation which should not require the submission of information other than cost or pricing data. Furthermore, the DAR Council and CAA Councll should not apply cost realism to firm fixed price contracts unless and untul the CAS Board has exempted firm fixed price contracts that do not involve the submission of certified cost or pricing data. CODISA was disappointed that, despite its repeated suggestions, the activitues of the FAR Council (or FASA implementation teams) and the CAS Board have not been adequately coordinated This lack of coordination has led to a well-known problem where firm fixed pnce contracts have been exempted from TINA but not CAS For many companies, CAS is a key criterion for declining Government business

## (3) Cost realsm assessments shall not be performed on contracts for commercual items.

## CODSIA ANALYSIS

The provision on cost realism should be clarfied to state that such assessments shall not be made on contracts for commercial items. The acceptance of a commercial item in the marketplace should be sufficient to satisfy the concerns expressed in FAR 15 504-1(d)(1)
(e) Technical analysis (1) The contracting officer may request that personnel having specialized knowledge, skills, expenence, or capability in engineering, science, or management perform a technical analysis of the proposed types and quantitues of materials, labor, processes, special tooling, facilittes, the reasonableness of scrap and spoilage, and other associated factors set forth in the proposal(s) in order to determine the need for and reasonableness of the proposed resources, assuming reasonable economy and efficiency
(2) At a minumum, the technical analysis should examine the types and quantities of materatuprosesed-wad the need for the types and quantutres of labor hours and the labor mix. Any other data that may be pertinent to an assessment of the offeror's ability to accomplish the technical requirements or to the cost or price analysis of the service or product being proposed should also be included in the analysis.
(f) Unit prices. (1) Unit prices shall reflect the intrinsic value of an item or service and shall be in proportion to an item's base cost (e.g, manufacturing or acquisition costs). Any method of distributing costs to line items that distorts the unit pnices shall not be used For example, distributing costs equally among line items is not acceptable except when there is little or no variation in base cost
(2) Exeept for thequstion of commerial htems Contracting officers shall require that offerors identify in their proposals those items of supply that they will not manufacture or to which they will not contribute significant value, unless adequate price competition is expected (10 U S C. 2304 and 41 U S C. 254(d)(5)(A)(1)) Such information shall be used to determine whether the intrinsic value of an item has been distorted through application of overhead

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

and whether such items should be considered for breakout. The contracting officer may require such information in all other negotuated contracts when appropnate
(3) This section does not apply to contracts for commerctal items.

## CODSIA ANALYSIS

CODSIA's suggests revision so that it is clear that all FAR 15 504-1(f) does not apply to contracts for commercial items
(g) Unbalanced pricing (1) Unbalanced pricing may increase performance nsk and could result in payment of unreasonably high prices Unbalanced pricing exists when, despite an acceptable total evaluated price, the price of one or more contract line items is significantly over or understated as indicated by the application of cost or price analysis techniques The greatest nsks associated with unbalanced pncing occur when -

## CODSIA ANALYSIS

CODSIA finds this substantally rewritten provision to be very confusing (eg, over or understated compared to what?)
(i) Startup work, mobilization, first articles, or first article testing are separate hine items,

## CODSIA ANALYSIS

It is not clear why separately priced startup work, mobilization, first artucles, or first article testing give rise to unbalanced pricing conditions The example should be clanfied or deleted
(i1) Base quantities and option quantitues are separate line items, or
(iii) The evaluated price is the aggregate of estimated quantities to be ordered under separate line items of an indefinite-delivery contract
(2) All offers with separately priced line items or subline items shall be analyzed to determine if the prices are unbalanced If cost or price analysis techniques indicate that an offer is unbalanced, the contracting officer shall -

## CODSLA ANALYSIS

That all offers with separately priced line items or subline tems be analyzed for unbalanced pncing is probably not a workable requirement to impose on contractung officers It also creates potential new grounds for bid protests if a contractung officer falled top analyze each line item or subline item Some reasonable limits should be applied
(i) Consider the nisks to the Government associated with the unbalanced pnoing in determining the competitive range and in making the source selection decision, and
(11) Consider whether award of the contract will result in paying unreasonably high prices for contract performance
(3) An offer may be rejected if the contractung officer determines the lack of balance poses an unacceptable risk to the Government

## CODSIA ANALYSIS \& RECOMMENDATIONS FAR SUBPART 15.5 REWRITE FAR CASE $95-029$

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

### 15.504-2 Information to support proposal analysis.

(a) Field pricing assistance (1) The contracting officer should request field pricing assistance when the information available at the buying activity is inadequate to determine a fair and reasonable price Such requests shall be tailored to reflect the minumum essential supplementary information needed to conduct a technical or cost or pricing analysis.
(2) Field pricing assistance generally is directed at obtaining technical, audit, and special reports associated with the cost elements of a proposal, including subcontracts Field pricing assistance may also include information relative to the business, technical, production or other capabilites and practices of an offeror. The type of information and level of detall requested will vary in accordance with the specialized resources available at the buying activity and the magnitude and complexity of the required analysis
(3) When fieid pricing assistance is requested, contracting officers are encouraged to team with appropnate field experts throughout the acquisition process, including negotiations. Early communication with these experts will assist in determining the extent of assistance required, the specific areas for which assistance is needed, a realistic review schedule, and the information necessary to perform the review
(4) When requestung field pricing assistance on a contractor's request for equitable adjustment, the contractung officer shall provide the information listed in 43 204(b)(5)
(5) Field pricing information and other reports may include proprietary or source selection information (see 3 104-4
(J) and (k)) Such information shall be appropriately identried and protected accordingly
(b) Reporting field pricing information (1) Depending upon the extent and complexity of the field pricing review, results, including supporting rationaie, may be reported directly to the contracting officer orally, in writing, or by any other method acceptable to the contracting officer
(1) Whenever circumstances permit, the contracting officer and field pricing experts are encouraged to use telephonic and/or electronic means to request and transmit pricing information.
(i1) When it is necessary to have written technical and audit reports, the contracting officer shall request that the audit agency concurrently forward the audit report to the requesting contracting officer and the administrative contractung officer (ACO) The completed field pnicing assistance results may reference audit information, but need not reconcile the audit recommendations and technical recommendations A copy of the information submitted to the contracting officer by field pnoing personnel shall be provided to the audit agency
(2) Audit and field pricing information, whether wntten or reported telephonically or electromically, shall be made a part of the official contract file (see 4 807(f))
(c) Audit assistance for prime or subcontracts (1) The contracting officer may contact the cognizant audrt office directly, particularly when an audit is the only field pricing support required. The audit office shall send the audit report, or otherwise transmit the audit recommendations, directly to the contracting officer
(1) The auditor shall not reveal the audit conclusions or recommendations to the offeror/contractor without obtaining the concurrence of the contracting officer However, the auditor may discuss statements of facts with the contractor
(1i) The contracting officer should be notified immediately of any information disclosed to the auditor after submission of a report that may significantly affect the audit findings and, if necessary, a supplemental audit report shall be issued

## CODSIA ANALYSIS \& RECOMMENDATIONS FAR SUBPART 15.5 REWRITE

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/TTALICS

(2) The contractung officer shall not request a separate preaward audit of indrect costs unless the information already available from an existing audit, completed within the preceding 12 months, is considered inadequate for determining the reasonableness of the proposed indirect costs ( 41 U.S C. 254d and 10 U S C 2313)
(3) The auditor Is responsible for the scope and depth of the audit. Coples of updated information that will stgnuficantly affect the audit should be provided to the auditor by the contractung officer
(4) General access to the offeror's books and financial records is limuted to the auditor This limitation does not preclude the contracting officer or the ACO, or their representatives from requestung that the offeror provide or make available any data or records necessary to analyze the offeror's proposal
(d) Deficient proposals. The ACO or the auditor, as appropnate, shall notify the contractung officer immedrately if the data provided for review is so deficient as to preclude review or audit, or if the contractor or offeror has denied access to any cost or pncing data considered essential to conduct a satisfactory review or audit. Oral notifications shall be confirmed promptly in writung, including a description of deficient or denied data or records The contracting officer immedıately shall take appropriate action to obtan the required data. Should the offeror/contractor again refuse to provide adequate data, or provide access to necessary data, the contracting officer shall withhold the award or price adjustment and refer the contract action to a higher authonty, providing details of the attempts made to resolve the matter and a statement of the practucability of obtaning the supplies or services from another source
(e) Subcontractor refusal to grant access to records. The contracting officer shall be informed of circumstances where a prume contractor or higher-tier contractor has been denied access to subcontractor records, including the subcontractor's reasons. In such cases, the contracting officer shall determine the necessary field pricing assistance to be performed directly by the Government. Upon completion of the field pricing assistance, the contracting officer shall disclose the results to the prime contractor or higher-tier contractor only after obtaining permission from the subcontractor. If the subcontractor withholds permission on disclosure, the contracting officer shall perform a cost analysis or price analysis and provide general results to the prime contractor or higher-ther contractor wthout disclosing subcontractor proprietary data (e.g., range of fair and reasonable prices) If the subcontractor requested an exception under 15.503-1(b), the contractung officer shall indıcate to the prime contractor or higher-ther contractor whether the exception is approved.

## CODSIA ANALYSIS

CODSIA does not agree that the long-standing policy on subcontractor refusal to grant a hugher-tuer contractor access to records, previously described at FAR 15.806, is understood well enough to be removed. This guidance was highly relevant, especially as competitors began teaming on partucular projects but had to substantally limit access to records. Wersis case, it has been recognized that the Government's interests would be served if the Government intervened and performed field preing actions on behalf of the prime contractor or hugher-tuer contractor CODSIA urgesthe DAR Council and CAA Council to retam thas policy

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/TTALICS

### 15.504-3 Subcontract pricing considerations.

(a) The contractung officer is responsible for the determination of price reasonableness for the prime contract, including subcontractung costs The contractung officer should consider whether a contractor or subcontractor has an approved purchasing system, has performed cost or price analysis of proposed subcontractor prices, or has negotated the subcontract prices before negotiation of the prume contract, in determining the reasonableness of the prime contract price. This does not relieve the contractung officer from the responsibility to analyze the contractor's submission, including subcontractor's cost or pricing data.
(b) The prime contractor or subcontractor shall -
(1) Conduct appropriate cost or price analyses to establish the reasonableness of proposed subcontract prices,
(2) Include the results of these analyses in the price proposal, and
(3) When required by paragraph (c) of this subsection, submit subcontractor cost or pricing data to the Government as part of its price proposal
(c) Any contractor or subcontractor that is required to submut cost or pricing data also shall obtain and analyze cost or pricing data before awarding any subcontract, purchase order, or modification expected to exceed the cost or pricing data threshoid, unless an exemption in 15 503-1(b) apphes to that action
(1) The contractor shall sumat forward, or cause to be sumated forwarded by the subcontractor(s), cost or pricing data to the Government for subcontracts that are the lower of ether -
(1) $\$ 10,000,000$ or more, or
(11) Both more than the pertunent cost or pricing data threshoid and more than 10 percent of the prime contractor's proposed pnce, unless the contractung officer beheves such submission is unnecessary
(2) The contracung officer may require the contractor or subcontractor to subnif forward to the Government (or cause sorwarding of) subcontractor cost or pricing data below the threshoids in paragraph (c)(1) of this subsection that the contracting officer considers necessary for adequately pncing the prime contract

$$
\begin{array}{|l|}
\text { CODSIA ANALYSIS } \\
\text { CODSIA recommend clarification to preclude potentual misunderstanding } \\
\text { between the submission of subcontractor preposals and the submission of cost or } \\
\text { pricing data and the application of relatedt thresholds }
\end{array}
$$

(3) Subcontractor cost or pncing data shall be submitted in the format provided in Table 15-2 of 15508
(4) Subcontractor cost or pricing data shall be current, accurate, and complete as of the date of price agreement, or, if applicable, anther date agreed upon by the parties and specified on the contractor's Certuficate of Current Cost or Pricing Data The contractor shall update subcontractor's data, as appropriate, during source selection and negotations
(5) If there is more than one prospective subcontractor for any given work, the contractor need only submit cost or pricing data for the prospectuve subcontractor most likely to recerve award to the Government

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

### 15.504-4 Profit.

(a) General. Thus section prescribes policies for establishing the profit or fee portion of the Government prenegotation objective in pnce negotations based on cost analysis This section does not apply to contracts for commercial items.
CODSIA ANALYSIS
CODSIA's suggests revision so that it is clear that FAR 15 504-4 does not apply
to contracts for commercial items This is made necessary as a result of
combinmg FAR Subparts 157,158 , and 159
(1) Profit or fee prenegotation objectives do not necessanly represent net income to contractors Rather, they represent that element of the potentral total remuneration that contractors may receive for contract performance over and above allowable costs. This potentral remuneration element and the Government's estumate of allowable costs to be incurred in contract performance together equal the Government's total prenegotiation objective Just as actual costs may vary from estumated costs, the contractor's actual realized profit or fee may vary from negotuated profit or fee, because of such factors as efficiency of performance, incurrence of costs the Government does not recognize as allowable, and the contract type
(2) It is in the Government's interest to offer contractors opportuntres for financial rewards sufficient to stumulate efficient contract performance, attract the best capabilities of quainfied large and small business concerns to Government contracts, and maintain a viable industrial base
(3) Both the Government and contractors should be concerned with profit as a motuvator of efficient and effective contract perfomance Negotations aimed merely at reducing prices by reducing profit, without proper recognition of the function of profit, are not in the Government's interest. Negotiation of extremely low profits, use of histoncal averages, or automatic application of predetermined percentages to total estımated costs do not provide proper motrvation for optumum contract performance
(b) Policy. (1) Structured approaches (see paragraph (d) of this subsection) for determining profit or fee prenegotuation objectives provide a discipline for ensuring that all relevant factors are considered Subject to the authonties in 1301 (c), agencies making noncompetitive contract awards over $\$ 100,000$ totaling $\$ 50$ milhon or more a year -
(1) Shall use a structured approach for determining the profit or fee objective in those acquisitions that require cost analysis; and
(ii) May prescribe specific exemptions for situations in which mandatory use of a structured approach would be clearly inappropnate.
(2) Agencies may use another agency's structured approach
(c) Contractung officer responsibilities (1) When the price negotiation is not based on cost analysis, contracting officers are not required to analyze profit
(2) When the pnce negotiation is based on cost analysis, contracting officers in agencies that have a structured approach shail use it to analyze profit When not using a structured approach, contracting officers shall comply with paragraph (d)(1) of this subsection in developing profit or fee prenegotiation objectives

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(3) Contractung officers shall use the Government prenegotiation cost objective amounts as the basis for calculating the profit or fee prenegottation objective Before the allowability of facilities capital cost of money, this cost was included in profits or fees. Therefore, before applying profit or fee factors, the contracting officer shall exclude any facilities capital cost of money included in the cost objective amounts. If the prospective contractor fails to identufy or propose facilities capital cost of money in a proposal for a contract that will be subject to the cost principles for contracts with commercial organizations (see subpart 31.2), facilities capital cost of money wili not be an allowable cost in any resulting contract (see 15 508(1))
(4)(1) The contracting officer shall not negotnate a price or fee that exceeds the following statutory limitations, mposed by 10 U S C. 2306(e) and 41 U S.C 254(b).
(A) For experimental, developmental, or research work performed under a cost-plus-fixed-fee contract, the fee shall not exceed 15 percent of the contract's estımated cost, excluding fee
(B) For architect-engineering services for public works or utilitues, the contract price or the estimated cost and fee for productron and delivery of designs, plans, drawings, and specifications shall not exceed 6 percent of the estumated cost of construction of the public work or utility, excluding fees
(C) For other cost-plus-fixed-fee contracts, the fee shall not exceed 10 percent of the contract's estimated cost. excluding fee
(ii) The contracting officer's signature on the price negotiation memorandum or other documentation supporting determunation of fair and reasonable pnce documents the contractung officer's determination that the statutory price or fee limitations have not been exceeded

## (iii) Agencies shall not establish admmustrative cellngs or create administratuve procedures that could be

 represented to contractors as de facto ceilings.
## CODSIA ANALYSIS

CODSIA does not agree that the long-standing prohibitions on agency limitations, previously described at FAR 15901 , should be removed
(5) The contracting officer shall not require any prospective contractor to submit breakouts or supporting rationale for its profit or fee objective
(6) If a change or modification calls for essentally the same type and mix of work as the hasse contract and is of relatively small dollar value compared to the total contract value, the conoracting officer proyate the basic contract's profit or fee rate as the prenegotiation objective for that change or modification.

## CODSIA RECOMMENDATIONS SHOWN IN BOLDIITALICS

(d) Profit-analysis factors - (1) Common factors. Unless it is clearly inappropriate or not applicable, each factor outined in paragraphs (d)(1) (i) through (vi) of this subsection shall be considered by agencies in developing their structured approaches and by contracting officers in analyzing profit, whether or not using a structured approach
(1) Contractor effort. This factor measures the complexity of the work and the resources required of the prospective contractor for contract performance Greater profit opportunity should be provided under contracts requining a high degree of professional and managernal skill and to prospective contractors whose skills, faciltues, and technical assets can be expected to lead to efficient and economical contract performance The subfactors in paragraphs (d)(1)(1) (A) through (D) of this subsection shall be considered in determining contractor effort, but they may be modified in specific situations to accommodate differences in the categones used by prospective contractors for listung costs -
(A) Material acquisition This subfactor measures the managenal and technical effort needed to obtain the requred purchased parts and materal, subcontracted items, and special tooling. Considerations include the complexity of the items required, the number of purchase orders and subcontracts to be awarded and administered, whether established sources are avaulable or new or second sources must be developed, and whether material will be obtained through routine purchase orders or through complex subcontracts requinng detailed specifications. Profit consideration should correspond to the managerial and technical effort invoived
(B) Conversion direct labor This subfactor measures the contribution of direct engineering, manufacturing, and other labor to converting the raw materials, data, and subcontracted items into the contract items Consideratrons include the diversity of engineering, scientific, and manufacturing labor skils required and the amount and quality of supervision and coordination needed to perform the contract task
(C) Conversion-related indrect costs This subfactor measures how much the indirect costs contribute to contract performance The labor elements in the allocable indrect costs shouid be given the profit consideration they would receive if treated as direct labor The other elements of indirect costs should be evaluated to determune whether they ment only limited profit consideration because of their routine nature, or are elements that contribute significantly to the proposed contract
(D) General management. This subfactor measures the prospective contractor's other indirect costs and general and administrative (G\&A) expense, their composition, and how much they contribute to contract performance. Considerations include how labor in the overhead pools would be treated if it were direct labor, whether elements within the pools are routune expenses or instead are elements that contribute significantly to the proposed contract, and whether the elements require routine as opposed to unusual managerial effort and attention
(i1) Contract cost nisk. (A) This factor measures the degree of cost responsibility and associated nsk that the prospective contractor will assume as a result of the contract type conteroplated and oonsidering the reliability of the cost estumate in relation to the complexity and duration of the contract task. Determination of contract type should be closely related to the risks involved in tumely, cost-effective, and efficient performance. This factor should compensate contractors proportionately for assuming greater cost risks

## CODSIA RECOMMENDATIONS SHOWN IN BOLDIITALICS

(B) The contractor assumes the greatest cost nsk in a closely priced firm-fixed-price contract under which it agrees to perform a complex undertaking on tume and at a predetermuned price. Some firm-fixed-price contracts may entarl substantally less cost risk than others because, for example, the contract task is less complex or many of the contractor's costs are known at the tume of pnce agreement, in which case the risk factor should be reduced accordingly The contractor assumes the least cost nsk in a cost-plus-fixed-fee level-of-effort contract, under which it is rembursed those costs determined to be allocable and allowable, plus the fixed fee
(C) In evaluating assumption of cost nsk, contractung officers shall, except in unusual circumstances, treat tume-andmatenals, labor-hour, and firm-fixed-price, level-of-effort term contracts as cost-plus-fixed-fee contracts
(iil) Federal socioeconomic programs This factor measures the degree of support given by the prospective contractor to Federal socioeconomic programs, such as those involving small business concerns, small business concerns owned and controlied by socially and economically disadvantaged individuals, women-owned small busınesses, handicapped sheltered workshops, and energy conservation Greater profit opportunity should be provided contractors that have displayed unusual intuative in these programs
(iv) Capital investments This factor takes into account the contribution of contractor investments to efficient and economical contract performance
(v) Cost-control and other past accomplishments This factor allows additional profit opportuntues to a prospectuve contractor that has previously demonstrated nts ability to perform simular tasks effectively and economicaily In addition, consideration should be given to measures taken by the prospective contractor that result in productivity improvements, and other cost-reduction accomplishments that will benefit the Government in follow-on contracts
(vi) Independent development. Under this factor, the contractor may be provided additional profit opportunities in recogntion of independent development efforts relevant to the contract end item without Government assistance. The contractung officer should consider whether the development cost was recovered directly or indirectly from Government sources
(2) Additional factors. In order to foster achievement of program objectuves, each agency may include additional factors in its structured approach or take them into account in the profit analysis of individual contract actions

### 15.505 Price negotiation.

(a) The purpose of performing cost or price analysis is to develop a negotation position that permuts the contracting officer and the offeror an opportunty to reach agreement on a farr and reasonable price A farr and reasonable price does not require that agreement be reached on every element of cost, nor is it mandatory that the agreed price be within the contractung officer's initral negotation postaon Takang into consideration the advisory recommendations, reports of contrbutung specialists, and the current status of the contractor's purchasing system, the contractung officer is responsible for exercising the requisite judgment needed to reach a negotiated settlement with the offeror and is solely responsible for the final pnce agreement. However, when sıgnuficant audit or other specialist recommendations are not adopted, the contractung officer should provide rationale that supports the negotation result in the price negotiation documentation

## CODSLA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(b) The contractung officer's pnmary concern is the overail price the Government will actually pay The contractung officer's objective is to negotiate a contract of a type and with a price providing the contractor the greatest incentive for effictent and economical performance The negottation of a contract type and a price are related and should be considered together with the issues of risk and uncertanty to the contractor and the Government. Therefore, the contractung officer should not become preoccupied with any single element and should balance the contract type, cost, and profit or fee negotiated to acheve a total result - a price that is faur and reasonable to both the Government and the contractor
(c) The Government's cost objective and proposed pricing arrangement directly affect the profit or fee objective Because profit or fee is only one of several interrelated variables, the contracting officer shall not agree on profit or fee without concurrent agreement on cost and type of contract.
(d) If, however, the contractor insists on a price or demands a profit or fee that the contractung officer considers unreasonable, and the contracting officer has taken all authonzed actions (including determining the feasibility of developing an altemative source) without success, the contracting officer shall refer the contract action to a level above the contracting officer Disposition of the action should be documented

### 15.506 Documentation.

### 15.506-1 Prenegotation objectives.

(a) The prenegotiation objectives establish the Government's mitual negotation position They assist in the contractung officer's determinatron of farr and reasonable price They should be based on the results of the contracting officer's analysis of the offeror's proposal, taking into consideration all pertinent information including field pricing assistance, audit reports and technical analysis, fact-finding results, independent Government cost estumates and price histones
(b) The contractung officer shall establish prenegotation objectrves before the negotuation of any 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, the contracting officer shall document the pertunent issues to be negotuated, the cost objectives, and a profit or fee objective

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

### 15.506-2 Certificate of Current Cost or Pricing Data.

(a) When cost or pricing data are required, the contractung officer shall require the contractor to execute a Certificate of Current Cost or Pricing Data, using the format in this paragraph, and shall melude the executed certuficate in the contract file $A$ certficate shall not be required where information other than cost or pricing data is submutted.

## CODSIA ANALYSIS

CODSIA believes additional clarity is needed

## Certificate of Current Cost or Pricing Data

This is to certufy that, to the best of my knowledge and behef, the cost or pricing data (as defined in section 15.501 of the Federal Acquisition Regulation (FAR) and requred under FAR subsection 15.503-4) submitted, etther actually or by specific identification in writing, to the Contracting Officer or to the Contracting Officer's representative in support of $\qquad$ * are accurate, complete, and current as of $\qquad$ ** This certification includes the cost or pricing data supporting any advance agreements and forward pricing rate agreements between the offeror and the Government that are part of the proposal

Firm
Signature
Name
Title
Date of execution***

* Identafy the proposal, quotation, request for price adjustment, or other submission involved, giving the appropriate identıfying number (e g, RFP No )
** Insert the day, month, and year when price negotations were concluded and price agreement was reached or, if applicable, anerner another date agreed upon between the parties that is as close as practicable to the date of agreement on price
*** Insert the day, month, and year of signing, which should be as close as practicable to the date when the price negotiations were concluded and the contract pnce was agreed to

> (End of certificate)
(b) The certificate does not constutute a representation as to the accuracy of the contractor's judgment on the estumate of future costs or projections It applies to the data upon which the judgment or estrmate was based. This distunction between fact and judgment should be clearly understood. If the contractor had information reasonably avalable at the trme of agreement showng that the negotaated pnce was not based on accurate, complete, and current data, the contractor's responsibility is not limited by any lack of personal knowledge of the information on the part of its negotators

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(c) The contracting officer and contractor are encouraged to reach a prior agreement on criteria for estabishing closing or cutoff dates when appropnate in order to munimuze delays associated with proposai updates Closing or cutoff dates should be included as part of the data submitted with the proposal and, before agreement on price, data should be updated by the contractor to the latest closing or cutoff dates for which the data are avalabie Use of cutoff dates coincidng with reports is acceptable, as certan data may not be reasonably available before nommal penodic closing dates (e g., actual indrect costs) Data withun the contractor's or a subcontractor's organization on matters significant to contractor management and to the Govemment will be treated as reasonably avallable What is sigaficant depends upon the curcumstances of each acquisition
(d) Possession of a Certuficate of Current Cost or Pring Data is not a substutute for examining and analyzing the contractor's proposal.
(e) If cost or pncing data are requested by the Government contracting officer and submitted by an offeror; but an exception is later found to apply, the data shall not be considered cost or pricing data and shall not be regarded as certufied in accordance with this subsection Instead, the data shall be considered to be information other than cost or pricing data. Examples include:
(1) Contractor erroneously submutted cost or pricing data when price was based on adequate price compettion.
(2) Contractor submutted cost or pricing data when price was expected to exceed the pertinent threshold, but resultung contract action was less than the pertinent threshold
(3) Contractung officer required submussion of cost or pricing data below the pertinent threshold without the written approval of the head of the contractung activity.

## CODSIA ANALYSIS

CODSIA believes additional clanty is needed, including examples of circumstances where certufied cost or pricing data would be subsequently determined to be uncerufied
15.506-3 Documenting the negotiation.
(a) The contract file shall document the principal elements of the negotated agreement The documentation (eg, price negotation memorandum (PNM)) shall include the following
(1) The purpose of the negotation
(2) A description of the acquisition, including appropriate identifying numbers (e g, RFP No ).
(3) The name, position, and organization of each person representung the contractor and the Government in the negotation.
(4) The current status of any contractor systems (e $g$, purchasing, estumating, accounting, and compensation) to the extent they affected and were considered in the negotation

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(5) If cost or pricing data were not required in the case of any price negotiation exceeding the cost or pring data threshold, the exception used and the basis for it
(6) If cost or pricing data were required, the extent to which the contracting officer -
(i) Relied on the cost or pricing data submitted and used them in negotiating the price, or
(i1) Recognized as inaccurate, incomplete, or noncurrent any cost or pricing data submitted, the action taken by the contractung officer and the contractor as a result, and the effect of the defective data on the price negotated.

## (7) If cost or pricing data were required in the case of any price negotiation below the cost or pricing data threshold, the head of the contracting activity's wrutten justification -

(i) Why the contractung officer could not determune the reasonableness of prace wuth the cost or pricing data; and
(ii) What efforts were taken to obtain the necessary data from sources other than the contractor.

## CODSIA ANALYSIS

The price negotiation memorandum should contain a complete record of why cost or pricing data were obtained on contract actions below the pertinent threshold
(7) (8) A summary of the contractor's proposal, any field pricing assistance recommendations, including the reasons for any pertment variances from them, the Government's negotiation objective, and the negotiated position Where the determination of price reasonableness is based on cost analysis, the summary shall address each major cost element. When determination of price reasonableness is based on price analysis, the summary shall include the source and type of data used to support the determination
(8) (9) The most signuficant facts or considerations controlling the establishment of the prenegotiation objectuves and the negotiated agreement including an explanation of any significant differences between the two positions
(9) (10) To the extent such direction has a significant effect on the action, a discussion and quantification of the impact of drection given by Congress, other agencies, and higher-level officials ( 1 e , officials who would not normally exercise authority during the award and review process for the instant contract action)
$(10)$ (11) The basis for the profit or fee prenegotration objective and the profit or fee negotuated
(b) Whenever field pricing assistance has been obtained, the contracting officer shall forward a copy of the analysis to the office(s) providing assistance When appropnate, information on how advisory field support can be made more effective should be provided separately

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

### 15.507 Spectal cost or pricıng areas.

### 15.507-1 Defective cost or pricing data.

(a) If, before agreement on pnce, the contractung officer learns that any cost or pricing data submitted are inaccurate, incompiete, or noncurrent, the contractung officer shall immediately bring the matter to the attention of the prospective contractor, whether the defective data increase or decrease the contract price The contractung officer shall consider any new data submutted to correct the deficiency, or consider the inaccuracy, incompleteness, or noncurrency of the data when negotrating the contract price. The price negotation memorandum shall reflect the adjustments made to the data or the corrected data used to negotate the contract price.
(b)(1) If, after award, cost or pricing data are found to be inaccurate, incomplete, or noncurrent as of the date of final agreement on price or earfler another date agreed upon by the partues given on the contractor's or subcontractor's Certuficate of Current Cost or Pricing Data, the Government is entutled to a price adjustment, including profit or fee, of any signuficant amount by which the price was increased because of the defective data This entulement is ensured by including in the contract one of the clauses prescribed in 15508 (b) and (c) and set forth in the provision at 52 215-22, Price Reduction for Defective Cost or Pricing Data, and 52 215-23, Price Reduction for Defective Cost or Pricing Data-Modifications The clauses give the Government the right to a price adjustment for defects in cost or pricing data submitted by the contractor, a prospective subcontractor, or an actual subcontractor
(2) In arriving at a price adjustment, the contracting officer shall consider the tume by which the cost or pricing data became reasonably available to the contractor, and the extent to which the Govermment relted upon the defective data.
(3) The clauses referred to in paragraph (b)(1) of this subsection recognize that the Government's right to a price adjustment is not affected by any of the following circumstances
(1) The contractor or subcontractor was a sole source suppher or otherwise was in a superior barganing position,
(in) The contractung officer should have known that the cost or pricing data in issue were defective even though the contractor or subcontractor took no affirmative action to bring the character of the data to the attention of the contractung officer,
(iil) The contract was based on an agreement about the total cost of the contract and there was no agreement about the cost of each item procured under such contract, or
(iv) Cost or pricing data were requred, howeves, the prime contractor or subcontractor did not submit a Certuficate of Current Cost or Pncing Data relatung io the contract.
(4) Subject to paragraphs (b) (5) and (6) of this subsection, the contractung officer shall allow an offset for any understated cost or pricing data submitted inrsupport of price negotiations, up to the amount of the Government's claum for overstated pring data ansing out of the same pring action (e.g., the mitual pricing of the same contract or the pricing of the same change order)

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(5) An offset shall be allowed only in an amount supported by the facts and if the contractor -
(1) Certifies to the contracting officer that, to the best of the contractor's knowledge and belief, the contractor is entutled to the offset in the amount requested, and
(ii) Proves that the cost or pncing data were available before the date of agreement on price but were not submitted Such offsets need not be in the same cost groupings (e $g$, material, direct labor, or indirect costs)
(6) An offset shall not be allowed if -
(1) The understated data was known by the contractor to be understated when the Certificate of Current Cost or Pricing Data was signed; or
(i1) The Government proves that the facts demonstrate that the pnce would not have increased in the amount to be offset even if the avarlable data had been submitted before the date of agreement on price.
(7)(1) In addition to the price adjustment amount, the Government is entitled to interest on any overpayments The Government is also entitled to penalty amounts on certain of these overpayments Overpayment occurs only when payment is made for supphes or services accepted by the Government. Overpayments do not result from amounts paid for contract financing, as defined in 32902
(i1) In calculating the interest amount due, the contracting officer shall -
(A) Determine the defective pricing amounts that have been overpaid to the contractor;
(B) Consider the date of each overpayment (the date of overpayment for this interest calculation shall be the date payment was made for the related completed and accepted contract items; or for subcontract defective pricing, the date payment was made to the prime contractor, based on prime contract progress billings or deliveries, which included payments for a completed and accepted subcontract item), and
(C) Apply the underpayment interest rate(s) in effect for each quarter from the time of overpayment to the tume of repayment, uthlizing rate(s) prescribed by the Secretary of the Treasury under 26 U S C $6621(\mathrm{a})(2)$.
(iii) In arriving at the amount due for penalties on contracts where the submission of defective cost or pricing data was a knowing submission, the contractung officer shall obtain an amount equal to the amount of overpayment made Before taking any contractual actions concerning penalties, the contracting officer shall obtain the advice of counsel
(iv) In the pnce reductron modification or demand, fhecontractung officer shall separately include -
(A) The repayment amount,
(B) The penalty amount (If any),
(C) The interest amount through a specified date, and
(D) A statement that interest will continue to accrue until repayment is made

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(c) If, after award, the contractung officer learns or suspects that the data furnished were not accurate, complete, and current, or were not adequately venfied by the contractor as of the ume of negotration, the contractung officer shall request an audit to evaluate the accuracy, completeness, and currency of the data. The Government may evaluate the profit-cost relationships only if the audit reveals that the data certufied by the contractor were defective The contracting officer shall not reprice the contract solely because the profit was greater than forecast or because a contingency specified in the submission falled to materialize.
(d) For each advisory audit received based on a postaward review that indicates defective pricing, the contractung officer shall make a determunation as to whether or not the data submitted were defective and relied upon Before making such a determination, the contractung officer should give the contractor an opportunity to support the accuracy, completeness, and currency of the data in question The contractung officer shall prepare a memorandum documenting both the determination and any corrective action taken as a result. The contracting officer shall send one copy of this memorandum to the auditor and, if the contract has been assigned for admınistration, one copy to the administrative contracting officer (ACO) A copy of the memorandum or other notuce of the contracting officer's determination shall be provided to the contractor
(e) If both the contractor and subcontractor submitted, and the contractor certified, or should have certified, cost or pricing data, the Government has the right, under the clauses at 52 215-22, Price Reduction for Defective Cost or Pricing Data, and 52 215-23, Price Reduction for Defective Cost or Pricing Data-Modıfications, to reduce the prome contract price if it was significantly increased because a subcontractor submitted defective data. This night apphes whether these data supported subcontract cost estumates or supported firm agreements between subcontractor and contractor
(f) If Government audit discloses defective subcontractor cost or pricing data, the information necessary to support a reduction in prime contract and subcontract prices may be avalable only from the Government. To the extent necessary to secure a prime contract price reduction, the contracting officer should make this information available to the prime contractor or appropriate subcontractors, upon request. If release of the information wouid compromise Government security or disclose trade secrets or confidental business information, the contracting officer shall release it only under conditions that will protect it from improper disclosure. Information made available under this paragraph shall be limited to that used as the basis for the prime contract price reduction In order to afford an opportunity for corrective action, the contractung officer shouid give the prime contractor reasonable advance notice before determining to reduce the prime contract price
(1) When a prime contractor includes defective subcontract data in arriving at the price but later awards the subcontract to a lower pnced subcontractor (or does not subcontract for the work), any adjustment in the prime contract price due to defective subcontract data is limited to the difference (plus applicable indurect cost and profit markups) between the subcontract price used for pricing the prime contract, and etther the actual subcontract price or the actual cost to the contractor, if not subcontracted, provided the data on which the eztual subcontract price is based are not themselves defective
(2) Under cost-rembursement contracts and-under all fixed-pnce contracts except firm-fixed-price contracts, and fixed-price contracts with economic price adjustment, payments to subcontractors that are higher than they would be had there been no defective subcontractor cost or pricing data shall be the basis for disallowance or nonrecognition of costs under the clauses prescribed in 15508 (b) and (c). The Government has a contmuing and direct financial interest in such payments that is unaffected by the initial agreement on prime contract price

## CODSIA ANALYSIS \& RECOMMENDATIONS

FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

### 15.507-2 Make-or-buy programs.

(a) General The prime contractor is responsible for managing contract performance, including planning, placing, and admumstening subcontracts as necessary to ensure the lowest overall cost and technical nisk to the Government. When make-or-buy programs are required, the Government may reserve the nght to review and agree on the contractor's make-or-buy program when necessary to ensure negotuation of reasonable contract prices, satusfactory performance, or implementation of socioeconomic policies. Consent to subcontracts and review of contractors' purchasing systems are separate actions covered in part 44 This section does not apply to contracts for commercial utems.

## CODSIA ANALYSIS

CODSIA's suggests revision so that it is clear that FAR 15 507-2 does not apply to contracts for commercial items. This is made necessary as a resuit of combining FAR Subparts 157,158 , and 159
(b) Definitions

Buy item means an item or work effort to be produced or performed by a subcontractor
Make item means an item or work effort to be produced or performed by the prime contractor or its affiliates, subsidiaries, or divisions

Make-or-buy program means that part of a contractor's wnitten plan for a contract identifying those major items to be produced or work efforts to be performed in the prume contractor's facilttes and those to be subcontracted
(c) Acquisittons requiring make-or-buy programs. (1) Contractung officers may require prospectuve contractors to submit make-or-buy program plans for negotiated acquisitions requiring cost or pricing data whose estumated value is $\$ 10$ milhon or more, except when the proposed contract is for research or development and, if prototypes or hardware are involved, no significant follow-on production is antucipated
(2) Contractıng officers may require prospectıve contractors to submit make-or-buy programs for negotated acquisitions whose estimated value is under $\$ 10$ million only if the contracting officer -
(1) Determunes that the information is necessary, and
(11) Documents the reasons in the contract file
(d) Solicitation requirements. When prospective contractors are required to submit proposed make-or-buy programs, the solicitation shall include -
(1) A statement that the program and required supporting informatron must accompany the offer, and
(2) A descnption of factors to be used in evaluating the proposed program, such as capability, capacity, availability of small, small disadvantaged, and women-owned small business concerns for subcontracting, establishment of new facılities in or near labor surplus areas, delivery or performance schedules, control of technical and schedule interfaces, propnetary processes, technical superionity or exclusiveness, and technical risks involved

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(e) Program requirements To support a make-or-buy program, the following information shall be suppied by the contractor in its proposal
(1) Items and work included The information required from a contractor in a make-or-buy program shall be confined to those major items or work efforts that normally would require company management review of the make-or-buy decision because they are complex, costly, needed in large quantities, or require additional facilities to produce Raw matenals, commercial items (see 2 101), and off-the-shelf items (see 46101 ) shall not be included, unless their potentral impact on contract cost or schedule is critucal As a rule, make-or-buy programs should not include items or work efforts estumated to cost less than 1 percent of the total estimated contract pnce or any munmum dollar amount set by the agency
(2) The offeror's program should include or be supported by the following information
(1) A description of each major item or work effort.
(ii) Categonzation of each major item or work effort as "must make," "must buy" or "can etther make or buy"
(ii1) For each item or work effort categorized as "can etther make or buy," a proposal etther to "make" or to "buy"
(iv) Reasons for categonzing items and work efforts as "must make" or "must buy," and proposing to "make" or to "buy" those categonzed as "can etther make or buy" The reasons must include the consideration given to the evaluation factors described in the solicitation and be in sufficient detall to permit the contracting officer to evaluate the categorization or proposal
(v) Designation of the plant or division proposed to make each item or perform each work effort, and a statement as to whether the existing or proposed new facrity is in or near a labor surplus area
(vi) Identification of proposed subcontractors, if known, and their location and size status (see also subpart $1 \overline{9} 7$ for subcontracting plan requirements)
(vii) Any recommendations to defer make-or-buy decisions when categonzation of some items or work efforts is impractucable at the time of submission
(vili) Any other information the contracting officer requires in order to evaluate the program
(f) Evaluation, negotation, and agreement. Contractung officers shall evaluate and negotuate proposed make-or-buy programs as soon as practucable after their recetpt and before contract award
(1) When the program is to be incorporated in the contract and the design status of the product being acquired does not permut accurate precontract identufication of major items or work efforts, the contractung officer shall notufy the prospective contractor in writung that these items or efforts, when identifiable, shall be added under the clause at 52 215-21, Changes or Additions to Make-or-Buy Program

## CODSIA RECOMMENDATIONS SHOWN IN BOLDIITALICS

(2) Contracting officers normally shall not agree to proposed "make items" when the products or services are not regularly manufactured or provided by the contractor and are avalable - quaitry, quantity, delivery, and other essental factors considered - from another firm at equal or lower prices or when they are regularly manufactured or provided by the contractor, but avaulable - quality, quantity, dehvery, and other essental factors considered - from another firm at lower prices However, the contractung officer may agree to these as "make items" if an overall lower Governmentwide cost would result or it is otherwise in the best interest of the Government If this stuation occurs in any fixed-price incentive or cost-plus-incentuve-fee contract, the contractung officer shall specify these items in the contract and state that they are subject to paragraph (d) of the clause at 52.215-21, Changes or Addtions to Make-orBuy Programn (see 15.508(a)) If the contractor proposes to reverse the categonzation of such items during contract performance, the contract pnce shall be subject to equitable reduction
(g) Incorporating make-or-buy programs in contracts The contractung officer may incorporate the make-or-buy program in negotated contracts for -
(1) Major systems (see part 34) or their subsystems or components, regardless of contract type, or
(2) Other supphes and services of -
(i) The contract is a cost-rembursable contract, or a cost-sharing contract in which the contractor's share of the cost is less than 25 percent, and
(ii) The contractung officer determines that technical or cost nsks justufy Government review and approval of changes or additions to the make-or-buy program

### 15.507-3 Forward pricing rate agreements.

(a) When certufied cost or pricing data are required, offerors are required to describe any forward pncing rate agreements (FPRA's) in each specific pricing proposal to which the rates apply and to identufy the latest cost or pncing data already submitted in accordance with the agreement. All data submitted in connection with the agreement, updated as necessary, form a part of the total data that the offeror certufies to be accurate, complete, and current at the tume of agreement on price for an mittal contract or for a contract modfication
(b) Contractung officers will use FPRA rates as bases for pricing all contracts, modifications, and other contractual actions to be performed during the period covered by the agreement. Conditions that may affect the agreement's validity shall be reported promptly to the ACO If the ACO determunes that a changed condition invalidates the agreement, the ACO shall notify all interested parties of the extent of its effect and status of efforts to establish a revised FPRA
(c) Contractung officers shall not require certufication at the tume of agreement for data suppied in support of FPRA's or other advance agreements When a forward pricing rate agreement or other advance agreement is used to price a contract action that requires a certuficate, thecertuficate supportung that contract action shall cover the data supphed to support the FPRA or other advance agreement, and all other data supporting the action
(d) When an FPRA is invalid, the contractor should submit and negotate a new proposal to reflect the changed conditions If an FPRA has not been established or has been invalidated, the ACO will issue a forward pricing rate recommendation (FPRR) to buying actuvitues with documentation to assist negotators In the absence of a FPRA or FPRR, field pricing information will include support for rates utilized
(c) The ACO may negotate continuous updates to the FPRA The FPRA will provide specific terms and conditions covering notfication, apphcation, and data requirements for systematic monitoring to assure the validity of the rates.

## CODSIA RECOMMENDATIONS SHOWN IN BOLDITTALICS

### 15.507-4 Should-cost review.

(a) General. (1) Should-cost reviews are a specialized form of cost analysis Should-cost reviews differ from traditional evaluation methods because they do not assume that a contractor's histoncal costs reflect efficient and economical operation Instead, these reviews evaluate the economy and efficiency of the contractor's exisung work force, methods, materials, facilities, operating systems, and management. These reviews are accomplished by a mult-functional team of Government contracting, contract administration, pricing, audit, and engineering representatives The objectuve of should-cost reviews is to promote both short and long-range mprovements in the contractor's economy and efficiency in order to reduce the cost of performance of Government contracts In addition, by providing rationale for any recommendations and quantufying their impact on cost, the Government will be better able to develop realistuc objectives for negotation
(2) There are two types of should-cost reviews - program should-cost review (see paragraph (b) of this subsection) and overhead should-cost review (see paragraph (c) of this subsection). These should-cost reviews may be performed together or independently. The scope of a should-cost review can range from a large-scale review examining the contractor's enture operation (including plant-wide overhead and selected major subcontractors) to a small-scale tallored review examining specific portions of a contractor's operation
(b) Program should-cost review (1) Program should-cost review is used to evaluate signficant elements of drrect costs, such as material and labor, and associated indirect costs, usually associated with the production of major systems When a program should-cost review is conducted relative to a contractor proposal, a separate audit report on the proposal is required
(2) A program should-cost review should be considered, partucularly in the case of a major system acquisition (see part 34), when -
(1) Some inttual production has already taken place,
(11) The contract will be awarded on a sole-source basis;
(iti) There are future-year production requirements for substantial quantuties of like items,
(iv) The items being acquired have a history of increasing costs,
(v) The work is sufficiently defined to permit an effective analysis and major changes are unlikely,
(vi) Sufficient tume is available to plan and adequately conduct the should-cost review, and
(vil) Personnel with the required skills are available or can be assigned for the duration of the should-cost review
(3) The contractung officer should decide which elements of the contractor's operation have the greatest potental for cost savings and assign the avariable personnel resources accordingly The expertise of on-site Government personnel should be used, when approprate. Whle the partucular elements to be analyzed are a function of the contract work task, elements such as manufacturing, pricing and accountung, management and organızation, and subcontract and vendor management are normally reviewed in a should-cost review

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(4) In acquisitions for which a program should-cost review is conducted, a separate program should-cost review team report, prepared in accordance with agency procedures, is required The contracting officer shall consider the findings and recommendations contained in the program should-cost review team report when negotuating the contract price After completing the negotation, the contracting officer shall provide the ACO a report of any identified uneconomical or inefficient practices, together with a report of correction or disposition agreements reached with the contractor The contracting officer shall establish a follow-up plan to monitor the correction of the uneconomical or inefficient practices
(5) When a program shouid-cost review is planned, the contracting officer should state this fact in the acquisition plan or acquisition plan updates (see subpart 7 1) and in the solicitation.
(c) Overhead should-cost review (1) An overhead should-cost review is used to evaluate indirect costs, such as fringe benefits, shipping and receiving, facilites and equipment, depreciation, plant maintenance and security, taxes, and general and admimstrative activities. It is normally used to evaluate and negotiate an FPRA with the contractor. When an overhead should-cost review is conducted, a separate audit report is required
(2) The following factors should be considered when selecting contractor sites for overhead should-cost reviews*
(1) Dollar amount of Government business
(11) Level of Government participation
(iii) Level of noncompetitive Government contracts
(iv) Volume of proposal activity
(v) Major system or program
(vi) Corporate reorganizations, mergers, acquisitions, or takeovers
(vii) Other conditions (e.g., changes in accounting systems, management, or business activity)
(3) The objectuve of the overhead should-cost review is to evaluate significant indurect cost elements in-depth, and identufy and recommend corrective actions regarding inefficient and uneconomical practices If it is conducted in conjunction with a program should-cost review, a separate overhead should-cost review report is not required However, the findings and recommendations of the overhead should-cost team, or any separate overhead should-cost review report, shall be provided to the ACO. The ACO should use this information to form the basis for the Government position in nezotiating an FPRA writ the contractor. The ACO shall establish a follow-up plan to monitor the correction of the uneconomical or inefficient practices.

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### 15.507-5 Estimating systems.

(a) Using an acceptable estumatung system for proposal preparation benefits both the Government and the contractor by increasing the accuracy and reliability of individual proposals Cognizant audit activitues, when it is appropnate to do so, shall establish and manage regular programs for reviewing selected contractors' estimatung systems or methods, in order to reduce the scope of reviews to be performed on individual proposals, expedite the negotiation process, and increase the reliability of proposals The results of estumating system reviews shall be documented in survey reports
(b) The auditor shall send a copy of the estumatung system survey report and a copy of the official notice of corrective action required to each contracting office and contract adminıstration office having substantal business with that contractor Significant deficiencies not corrected by the contractor shall be a consideration in subsequent proposal analyses and negotations

### 15.508 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert the clause at 52 215-21, Changes or Addttons to Make-or-Buy Program, in solcitations and contracts when it is contemplated that a make-or-buy program will be incorporated in the contract. If a less economucal "make" or "buy" categonzation is selected for one or more items of signficant value, the contracting officer shall use the clause with -
(1) Its Alternate I, if a fixed-price incentive contract is contemplated, or
(2) Its Alternate II, if a cost-plus-incentive-fee contract is contemplated
(b) The contractung officer shall, when contracting by negotation, insert the clause at 52215-22, Price Reduction for Defective Cost or Pricing Data, in solicitations and contracts when it is contemplated that cost or pricing data will be required from the contractor or any subcontractor (see 15.503-4)
(c) The contracting officer shall, when contractung by negotation, insert the clause at 52215-23, Pnce Reduction for Defective Cost or Pricing Data-Modifications, in solicitations and contracts when it is contemplated that cost or pricing data will be required from the contractor or any subcontractor (see $15503-4$ ) for the pricing of contract modifications, and the clause prescribed in paragraph (b) of this section has not been included
(d) The contractung officer shall insert the clause at 52 215-24, Subcontractor Cost or Pricing Data, in solictitaions and contracts when the clause prescribed in paragraph (b) of this section is included
(e) The contractung officer shall insert the clause at 52215-25, Subcontracter Cost or Pricing Data-Modifications, in solicitations and contracts when the clause prescribed in paragraph (c) of this section is included

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(f) The contracting officer shall insert the clause at 52.215-26, Integnty of Unit Prices, in solicitations and contracts for other than -
(1) Acquisitions at or below the simplified acquisition threshold,
(2) Construction or archutect-engineer services under part 36,
(3) Utilty services under part 41,
(4) Service contracts where supplies are not required,
(5) Acquisitions of commercial tems, and
(6) Contracts for petroleum products The contracung officer shall insert the clause with its Alternate I when contracting without full and open competition or when prescribed by agency regulations
(g) The contractung officer shall insert the clause at 52215-27, Termination of Defined Benefit Pension Plans, in solicitations and contracts for which it is anticipated that cost or pricing data will be required or for which any preaward or postaward cost determinations will be subject to part 31
(h) The contractung officer shall insert the provision at 52 215-30, Facilities Capital Cost of Money, in soltcitations expected to result in contracts that are subject to the cost principles for contracts with commercial organizations (see subpart 312 )
(1) If the prospective contractor does not propose facilities capital cost of money in its offer, the contracting officer shall insert the clause at 52 215-31, Waver of Facilties Capital Cost of Money, in the resulting contract
()) The contractung officer shall insert the clause at 52 215-39, Reversion or Adjustment of Plans for Postreturement Benefits (PRB) Other Than Pensions, in solicitations and contracts for which it is anticipated that cost or pricing data will be required or for which any preaward or postaward cost determunations will be subject to part 31
(k) The contractung officer shall insert the clause at 52 215-40, Notfication of Ownership Changes, in solicitations and contracts for which it is contemplated that cost or pricing data will be required or for which any preaward or postaward cost determination will be subject to subpart 312
(l) Considering the hierarchy at 15502 , the contractung officer may insert the provision at $52215-41$, Requrements for Cost or Pricing Data or Information Other Than Cost or Pricing Data, in solictations if it is reasonably certain that cost or pricing data or information other than cost or pncing data withe requred This provision also provides instructions to offerors on how to request an exception The contracting officer shall -
(1) Use the provision with its Aiternate I to specify a format for cost or pricing data other than the format required by Table 15-2 of this section,
(2) Use the provision with its Alternate II if copies of the proposal are to be sent to the ACO and contract auditor,
(3) Use the provision with its Alternate III if submission via electronic media is required, and
(4) Replace the basic provision with its Alternate IV if cost or pricing data are not expected to be required because an exception may apply, but information other than cost or pricing data is required as described in 15 503-3

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(m) Considening the hierarchy at 15 502, the contracting officer may insert the clause at 52215-42, Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data-Modifications, in solicitations and contracts if it is reasonably certain that cost or pricing data or information other than cost or pricing data will be required for modifications This clause also provides instructions to contractors on how to request an exception The contracting officer shall -
(1) Use the clause with its Alternate I to specify a format for cost or pricing data other than the format required by Table 15-2 of this section,
(2) Use the clause with its Alternate II if copies of the proposal are to be sent to the ACO and contract auditor,
(3) Use the clause with its Alternate III if submission via electronic media is required, and
(4) Replace the basic clause with its Alternate iV if cost or pnoing data are not expected to be required because an exception may apply, but information other than cost or pricing data is required as described in 15 503-3

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

Table 15-2. Instructions for Submitting Cost or Pricing Data
This document provides instructions for preparing a contract pricing proposal when cost or pneing data are required.

## Notices

1. There is a clear distunction between submitung cost or pricing data and merely making available books, records, and other documents without identufication The requirement for submission of cost or pricing data is met when all accurate cost or pricing data reasonably avalable to the offeror have been submitted, etther actualiy or by specific identufication, to the Contractung Officer or an authorized representative As later information comes into your possession, it should be promptly submitted to the Contracting Officer demonstrating how the information relates to your price proposal. The requirement for submission of cost or pricing data contunues up to the tume of agreement on price, or arther another date agreed upon between the parties if applicable
2. By submitung your proposal, you grant the Contracting Officer or an authorized representative the nght to examine records that formed the basis for the pricing proposal That examination can take place at any tume before award It may include those books, records, documents, and other types of factual information (regardless of form or whether the information is specifically referenced or included in the proposal as the bass for pricing) that will permit an adequate evaluation of the proposed price

## General Instructions

1 You must provide the following information on the first page of your pricing proposal
(a) Solictation, contract and/or modification number,
(b) Name and address of offeror;
(c) Name and telephone number of point of contact,
(d) Name of contract administration office (if avalable),
(e) Type of contract action (that is, new contract, change order, price revision/redetermination, letter contract, unpriced order, or other),
(f) Proposed cost, profit or fee, and total,

- (g) Whether you will require the use of Government property in the performance of the contract, and, if so, what property;
(h) Whether your organization is subject to cost accountung standards, whether the proposal is consistent with your estabisshed estumatrng and accounting principles and procedures and FAR part 31, Cost Prnciples, and, if not, an explanation,


## CODSLA ANALYSIS \& RECOMMENDATIONS FAR SUBPART 15.5 REWRITE <br> FAR CASE 95-029

## CODSIA RECOMMENDATIONS SHOWN IN BOLDIITALICS

## (1) The following statement

This proposal reflects our estimates and/or actual costs as of this date and conforms with the instructions in FAR 15 503-5(b)(1) and Table 15-2 By submitting this proposai, we grant the Contractung Officer and authorized representative(s) the right to examine, at any time before award, those records, which include books, documents, accounting procedures and practices, and other data, regardless of type and form or whether such supporting information is specifically referenced or included in the proposal as the basis for pricing, that will permit an adequate evaluation of the proposed price
(j) Date of submission, and
(k) Name, tutle and signature of authonzed representative

2 In submitting your proposal, you must include an index, appropriately referenced, of all the cost or pricing data and information accompanying or identified in the proposai In addition, you must annotate any future additions and/or revisions, up to the date of agreement on price, or an-earter another date agreed upon by the partues, on a supplemental index

3 As part of the specific information required, you must submit, with your proposai, cost or pncing data (that is, data that are verifiable and factual and otherwise as defined at FAR 15 501) You must clearly rdentify this data as "Cost or Pricing Data" In addition, you must submit with your proposal any information reasonably requred to explain your estrmating process, including -
a. The judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projectung from known data, and
b. The nature and amount of any contingencles included in the proposed price
4. You must show the relationship between contract line item pnces and the total contract price You must attach cost-element breakdowns for each proposed hne item, using the appropnate format prescribed in the "Formats for Submission of Line Item Summaries" section of thus table You must furnish supporting breakdowns for each cost element, consistent with your cost accounting system

5 When more than one contract line item is proposed, you must also provide summary total amounts covenng all line items for each element of cost
6. Whenever you have incurred costs for work performed before submussion of a proposal, you must identify those costs in your cost/price proposal.
7. If you have reached an agreement with Government representatives on use of forward pricing rates/factors, identufy the agreement, include a copy, and describe its nature.

8 As soon as practicable after final agreement on price or artief another date agreed to by the partues, but before the award resulting from the proposal, you must, under the conditions stated in FAR $15506-2$, submit a Certificate of Current Cost or Pricing Data.

# CODSIA ANALYSIS \& RECOMMENDATIONS FAR SUBPART 15.5 REWRITE <br> FAR CASE 95-029 

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

## Cost Elements

Depending on your system, you must provide breakdowns for the following basic cost eiements, as appicable
A Materials and services Provide a consolidated priced summary of individual maternai quantities included in the vanous tasks, orders, or contract line items being proposed and the basis for pricing (vendor quotes, invoice prices, etc ). Include raw materials, parts, components, assemblies, and services to be produced or performed by others. For all items proposed, identify the item and show the source, quantity, and price Conduct price analyses of all subcontractor proposals Conduct cost analyses for all subcontracts when cost or pricing data are submitted by the subcontractor. Include these analyses as part of your own cost or pncing data submissions for subcontracts expected to exceed the appropnate threshold in 15 503-4 Submit the subcontractor cost or pricing data as part of your own cost or pncing data as required in subparagraph $A(2)$ of this table These requirements also apply to all subcontractors if required to subimt cost or pricing data
(1) Adequate Price Competition Provide data showing the degree of competition and the basis for establishing the source and reasonableness of price for those acquisitions (such as subcontracts, purchase orders, material order, etc) exceeding, or expected to exceed, the appropnate threshold set forth at $15503-4$ priced on the basis of adequate price competition For interorganizational transfers priced at other than the cost of comparable competitive commercial work of the diviston, subsidiary, or affiliate of the contractor, explain the pricing method (see 31205 26(e))
(2) All Other Obtain cost or pricing data from prospective sources for those acquisitions (such as subcontracts, purchase orders, material order, etc ) exceeding the threshold set forth in 15.503-4 and not otherwise exempt, in accordance with $15503-1$ (b) ( 1 e , adequate price competition, commercial items, prices set by law or regulation or waver) Also provide data showing the basis for establishing source and reasonableness of price. In addition, provide a summary of your cost analysis and a copy of cost or pricing data submitted by the prospectrve source in support of each subcontract, or purchase order that is the lower of either $\$ 10,000,000$ or more, or both more than the pertinent cost or pneing data threshold and more than 10 percent of the prime contractor's proposed pnice The Contracting Officer may require you to submit cost or pricing data in support of proposals in lower amounts Subcontractor cost or pricing data must be accurate, complete and current as of the date of final price agreement, or andier another date agreed upon by the parties, given on the prime contractor's Cernficate of Current Cost or Pring Data. The prime contractor is responsible for updating a prospective subcontractor's data. For standard commercial items fabricated by the offeror that are generally stocked in inventory, provide a separate cost breakdown, if pnced based on cost For interorganizational transfers priced at cost, provide a separate breakdown of cost elements Analyze the cost or pricing data and submit the results of your analysis of the prospective source's proposal When submission of a prospective source's cost or pricing data is required, it must be included along with your own cost or pricing data submission, as part of your initial pneing proposal. You must also submit any other cost or pricing data obtained from a subcontractor, ether actually or by specific dentrfication, along with the results * of any analysis performed on that data

B Direct Labor. Provide a time-phased (e g.r monthly) breakdown of labor hours, rates, and cost by appropnate category, and furnish bases for estumates

C Indirect Costs Indicate how you have computed and applied your indirect costs, including cost breakdowns Show trends and budgetary data to provide a basis for ewatuating determining the reasonableness of proposed rates Indicate the rates used and provide an appropnate explanation

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

D. Other Costs List all other costs not otherwise included in the categones described above (eg, special tooling, travel, computer and consultant services, preservation, packaging and packing, spoilage and rework, and Federal excise tax on finished articles) and provide bases for pricing

E Royalties If royalties exceed $\$ 1,500$, you must provide the following information on a separate page for each separate royalty or license fee
(1) Name and address of hicensor
(2) Date of license agreement.
(3) Patent numbers
(4) Patent application serial numbers, or other basis on which the royalty is payable
(5) Brief description (including any part or model numbers of each contract item or component on which the royalty is payable)
(6) Percentage or dollar tate of royalty per unit
(7) Unit price of contract item
(8) Number of units
(9) Total dollar amount of royalties
(10) If specifically requested by the Contracting Officer, a copy of the current license agreement and identification of applicable clams of specific patents (see FAR 27204 and 31 205-37)

F Facilities Capital Cost of Money When you elect to clam facilities capital cost of money as an allowable cost, you must submit Form CASB-CMF and show the calculation of the proposed amount (see 31 205-10)

## Formats for Submission of Line Item Summaries

A New Contracts (Including Letter Contracts)


## Column and Instruction

(1) Enter appropriate cost elements
(2) Enter those necessary and reasonable costs that, in your judgment, will properly be incurred in efficient contract performance When any of the costs in this column have already been incurred (e g , under a letter contract), describe them on an attached supporting page When preproduction or startup costs are significant, or when specifically requested to do so by the Contracting Officer, provide a full identification and explanation of them
(3) Optional, unless required by the Contracting Officer
(4) Identify the attachment in which the information supporting the specific cost element may be found Attach separate pages as necessary

## CODSIA ANALYSIS \& RECOMMENDATIONS FAR SUBPART 15.5 REWRITE

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

B Change Orders, Modıfications, and Clams


Column and Instruction
(1) Enter appropnate cost elements
(2) Include the current estumates of what the cost would have been to complete the deleted work not yet performed (not the onginal proposal estumates), and the cost of deleted work already performed
(3) Include the incurred cost of deleted work already performed, using actuals incurred of possible, or, if actuais are not available, estumates from your accounting records Attach a detaled inventory of work, materials, parts, components, and hardware already purchased, manufactured, or performed and deleted by the change, indicaung the cost and proposed disposition of each line item Also, if you desire to retain these items or any portion of them, indicate the amount offered for them.
(4) Enter the net cost to be deleted, which is the estimated cost of all deleted work less the cost of deleted work already performed Column (2) - Column (3) $=$ Column (4)
(5) Enter your estumate for cost of work added by the change When nonrecurring costs are signuficant, or when specrfically requested to do so by the Contractung Officer, provide a full identrication and explanation of them When any of the costs in this column have already been incurred, describe them on an attached supportung schedule
(6) Enter the net cost of change, which is the cost of work added, less the net cost to be deleted Column (5) Column (4) $=$ Column (6) When this result is negative, place the amount in parentheses
(7) Identify the attachment in which the information supporing the specific cost element may be found Altach separate pages as necessary

## CODSLA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

## C Pace Revision/Redetermination

|  | Number of unts <br> completed <br> Cutsif date <br> $(1)$ | Number of unit <br> to be compteted <br> (2) | Contract <br> amount | Redetermunation <br> proposal amount | Difference <br> (3) |
| :---: | :---: | :---: | :---: | :---: | :---: |


| Cost elements (7) | Incurred costs preproduction (8) | Incurred costcompleted units (9) | Incurred costwork in process (10) | Total incurred <br> cost <br> $(11)$ | Estumated cost to complete (12) | Estamated total cost (13) | $\begin{aligned} & \text { Reference } \\ & (14) \\ & \hline \end{aligned}$ |
| :---: | :---: | :---: | :---: | :---: | :---: | :---: | :---: |

(Use as applicable)

## Column and Instruction

(1) Enter the cutoff date required by the contract, if applicable
(2) Enter the number of unis completed dunng the penod for which experienced costs of production are being submitted
(3) Enter the number of units remaining to be completed under the contract
(4) Enter the cumulative contract amount
(5) Enter your redetermination proposal amount
(6) Enter the dufference between the contract amount and the redetermination proposal amount When this result is negative, place the amount in parentheses Column (4) - Column (5) $=$ Column (6)
(7) Enter appropriate cost elements When residual inventory exists, the final costs established under fixed-pnceincentive and fixed-pnce-redeterminable arrangements should be net of the fair market value of such inventory In support of subcontract costs, submit a listing of all subcontracts subject to repricing action, annotated as to their status
(8) Enter all costs incurred under the contract before starting production and other nonrecurring costs (usuaily referred to as startup costs) from your books and records as of the cutoff date These include such costs as preproduction engmeering, spectal plant rearrangement, traiming program, and any identifiable nonrecurring costs such as initial rework, spoilage, pilot runs, etc- In the event the amounts are not segregated in or otherwise available from your records, enter in this column your best estumates Expiain the basis for each estumate and how the costs are charged on your accountung records (e.g, included in production costs as direct engineering labor, charged to manufactunng overhead) Also show how the costs would be allocated to the units at their vanous stages of contract completion
(9) Enter in Column (9) the production costs from your books and records (exclusive of preproduction costs reported in Column (8)) of the unts completed as of the cutoff date

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(10) Enter in Column (10) the costs of work in process as determined from your records or inventones at the cutoff date When the amounts for work in process are not avarlable in your records but relable estumates for them can be made, enter the estumated amounts in Column (10) and enter in Column (9) the differences between the total incurred costs (exclusive of preproduction costs) as of the cutoff date and these estumates. Explain the basis for the estumates, including identufication of any provision for expenenced or anticipated allowances, such as shrnikage, rework, design changes, etc Furnish expenenced unit or lot costs (or labor hours) from incepton of contract to the cutoff date, improvement curves, and any other avallable production cost history pertaming to the item(s) to which your proposal relates
(11) Enter total incurred costs (Total of Columns (8), (9), and (10))
(12) Enter those necessary and reasonable costs that in your judgment will properly be incurred in completing the remaining work to be performed under the contract with respect to the item(s) to which your proposal relates
(13) Enter total estumated cost (Total of Columns (11) and (12))
(14) Identufy the attachment in which the information supportung the specific cost element may be found Attach separate pages as necessary

## CODSLA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

## PART 52 - SOLICITATION PROVISIONS AND CONTRACT CLAUSES

### 52.215-21 Changes or Additions to Make-or-Buy Program.

As prescnbed in 15 508(a), insert the following clause.

## Changes or Additions to Make-or-Buy Program (Date)

(a) The Contractor shall perform in accordance with the make-or-buy program incorporated in this contract If the Contractor proposes to change the program, the Contractor shall, reasonably in advance of the proposed change, (1) notify the Contracting Officer in writung, and (2) submt justufication in sufficient detail to permit evaluation Changes in the place of performance of any "make" items in the program are subject to this requirement
(b) For items deferred at the tume of negotuation of this contract for later addition to the program, the Contractor shall, at the eariest possible time -
(1) Notify the Contracting Officer of each proposed addition, and
(2) Provide justification in sufficient detall to permit evaluation
(c) Modification of the make-or-buy program to incorporate proposed changes or additions shall be effective upon the Contractor's receppt of the Contracting Officer's wnitten approval
(End of clause)

Alternate I (Date) As prescribed in $15508(\mathrm{a})(1)$ add the following paragraph (d) to the basic clause
(d) If the Contractor desires to reverse the categonzation of "make" or "buy" for any tem or items designated in the contract as subject to this paragraph, it shall -
(1) Support its proposal with cost or pricing data when permitted and necessary to support evaluation, and
(2) After approval is granted, promptly negotrate with the Contracting Officer an equitable reduction in the contract price in accordance with paragraph ( $k$ ) of the Incentive Price Revision-Firm Target clause or paragraph (m) of the Incentive Price Revision-Successive Targets clause of this contract

Alternate II (Date) As prescribed in 15 508(a)(2), add the following paragraph (d) to the basic clause
(d) If the Contractor desires to reverse the categorization of "make" or "buy" for any item or items designated in the contract as subject to this paragraph, it shall -
(1) Support its proposal with cost or pacing data to permit evaluation, and
(2) After approval is granted, promptly negotiate with the Contracting Officer an equitable reduction in the contract's total estimated cost and fee in accordance with paragraph (e) of the Incentuve Fee clause of this contract

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

### 52.215-22 Price Reduction for Defective Cost or Pricing Data.

As prescribed in 15 508(b), insert the following clause

## Price Reduction for Defectıve Cost or Pricing Data (Date)

(a) If any price, including profit or fee, negotiated in connection with this contract, or any cost rembursable under this contract, was increased by any significant amount because -
(1) the Contractor or a subcontractor furnished cost or pricing data that were not complete, accurate, and current as certified in its Certuficate of Current Cost or Pricing Data,
(2) a subcontractor or prospective subcontractor furnished the Contractor cost or pneing data that were not complete, accurate, and current as certified in the Contractor's Certificate of Current Cost or Pricing Data, or
(3) any of these parties furnished data of any description that were not accurate, the price or cost shall be reduced accordingly and the contract shall be modified to reflect the reduction
(b) Any reduction in the contract price under paragraph (a) of this clause due to defective data from a prospective subcontractor that was not subsequently awarded the subcontract shall be limited to the amount, plus applicable overhead and profit markup, by which -
(1) The actual subcontract, or
(2) The actual cost to the Contractor, if there was no subcontract, was less than the prospective subcontract cost estumate submitted by the Contractor, provided, that the actual subcontract pnce was not itself affected by defective cost or pricing data
(c)(1) If the Contracting Officer determines under paragraph (a) of this ciause that a price or cost reduction should be made, the Contractor agrees not to raise the following matters as a defense
(1) The Contractor or subcontractor was a sole source suppiter or otherwise was in a superior bargaining position and thus the price of the contract would not have been modified even of accurate, complete, and current cost or pricing data had been submitted
(i1) The Contracting Officer should have known that the cost or pricing data in issue were defective even though the Contractor or subcontractor took no affirmative action to bring the character of the data to the attention of the Contracting Officer
(ii1) The contract was based on an agreement about the total cost of the contract and there was no agreement about the cost of each item procured under the contract
(iv) The Contractor or subcontractor did not submit a Certificate of Current Cost or Pncing Data
(2)(1) Except as prohibited by subdivision (c)(2)(ni) of this clause, an offset in an amount determined appropnate by the Contracting Officer based upon the facts shall be allowed against the amount of a contract pnce reduction if -
(A) The Contractor certifies to the Contracting Officer that, to the best of the Contractor's knowiedge and belief, the Contractor is entitled to the offset in the amount requested, and

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(B) The Contractor proves that the cost or pricing data were available before the date of agreement on the price of the contract (or price of the modification), or an eariler date agreed upon by the parties, and that the data were not submitted before such date.
(i1) An offset shail not be atlowed if -
(A) The understated data were known by the Contractor to be understated when the Certificate of Current Cost or Pricing Data was sıgned, or
(B) The Government proves that the facts demonstrate that the contract price would not have increased in the amount to be offset even if the avarlable data had been submitted before the date of agreement on price or an earlher date agreed upon by the partues
(d) If any reduction in the contract price under this clause reduces the proce of items for which payment was made prior to the date of the modification reflecting the price reduction, the Contractor shall be laable to and shall pay the Unuted States at the tume such overpayment is repaid -
(1) Simple interest on the amount of such overpayment to be computed from the date(s) of overpayment to the Contractor to the date the Government is repard by the Contractor at the apphicable underpayment rate effective for each quarter prescribed by the Secretary of the Treasury under 26 U S C 6621(a)(2), and
(2) A penalty equal to the amount of the overpayment, if the Contractor or subcontractor knowingly submutted cost or pricing data that were incomplete, inaccurate, or noncurrent

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

### 52.215-23 Price Reduction for Defective Cost or Pricing Data - Modifications.

As prescribed in 15 508(c), insert the following clause

## Price Reduction for Defective Cost or Pricing Data - Modifications (Date)

(a) This clause shall become operative only for any modification to this contract involving a pricing adjustment expected to exceed the threshold for submission of cost or pricing data at FAR 15 503-4, except that this clause does not apply to any modffication of an exception under FAR $15503-1$ applies
(b) If any price, including profit or fee, negotrated in connection with any modification under this clause, or any cost rembursable under this contract, was increased by any significant amount because (1) the Contractor or a subcontractor furnished cost or pncing data that were not complete, accurate, and current as certufied in its Certificate of Current Cost or Pricing Data, (2) a subcontractor or prospective subcontractor furnshed the Contractor cost or pricing data that were not complete, accurate, and current as certufied in the Contractor's Certuficate of Current Cost or Pricing Data, or (3) any of these partues furnshed data of any descnptoon that were not accurate, the price or cost shall be reduced accordingly and the contract shall be modified to refiect the reduction This nght to a price reduction is limuted to that resultung from defects in data relating to modifications for which this clause becomes operative under paragraph (a) of this clause
(c) Any reduction in the contract price under paragraph (b) of this clause due to defective data from a prospective subcontractor that was not subsequently awarded the subcontract shall be limited to the amount, plus appicable overhead and profit markup, by which -
(1) The actual subcontract, or
(2) The actual cost to the Contractor, if there was no subcontract, was less than the prospective subcontract cost estumate submitted by the Contractor; provided, that the actual subcontract price was not itself affected by defective cost or pricing data
(d)(1) If the Contractung Officer determines under paragraph (b) of thus clause that a price or cost reduction should be made, the Contractor agrees not to ranse the following matters as a defense
(1) The Contractor or subcontractor was a sole source suppier or otherwise was in a superior barganing position and thus the pnce of the contract would not have been modified even if accurate, complete, and current cost or pricing data had been submitted
(i1) The Contractung Officer should have known that the cost or pricing data in issue were defective even though the Contractor or subcontractor took no affirmative action to bring the character of the data to the attention of the Contractung Officer.
(ii1) The contract was based on an agreement about the total cost of the contract and there was no agreement about the cost of each item procured under the contract
(iv) The Contractor or subcontractor did not submit a Certuficate of Current Cost or Precing Data
(2)(1) Except as prohibted by subdivision (d)(2)(i) of this clause, an offset in an amount determined appropriate by the Contracting Officer based upon the facts shall be allowed aganst the amount of a contract price reduction if -
(A) The Contractor certufies to the Contractung Officer that, to the best of the Contractor's knowledge and belief, the Contractor is entitled to the offset in the amount requested, and

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(B) The Contractor proves that the cost or pring data were avalable before the date of agreement on the price of the contract (or pnce of the modification), or an earlier date agreed upon by the partics, and that the data were not submitted before such date
(i1) An offset shail not be allowed if -
(A) The understated data were known by the Contractor to be understated when the Certuficate of Current Cost or Pricing Data was signed, or
(B) The Government proves that the facts demonstrate that the contract pnce would not have increased in the amount to be offset even if the avalable data had been submitted before the date of agreement on price, or an eariter date agreed upon by the partues.
(e) If any reduction in the contract price under this clause reduces the price of tems for which payment was made prior to the date of the modification reflecting the price reduction, the Contractor shall be liable to and shall pay the United States at the time such overpayment is repard -
(1) Simple interest on the amount of such overpayment to be computed from the date(s) of overpayment to the Contractor to the date the Government 1 r repard by the Contractor at the applicable underpayment rate effective for each quarter prescribed by the Secretary of the Treasury under 26 U S C $6621(a)(2)$, and
(2) A penalty equal to the amount of the overpayment, if the Contractor or subcontractor knowingly submitted cost or pnoing data that were incomplete, inaccurate, or noncurrent
(End of clause)

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

### 52.215-24 Subcontractor Cost or Pricing Data.

As prescribed in 15 508(d), insert the following clause

## Subcontractor Cost or Pricing Data (Date)

(a) Before awarding any subcontract expected to exceed the threshold for submission of cost or pneing data at FAR 15 503-4, on the date of agreement on price or the date of award, whichever is later, or before pricing any subcontract modification involving a pricing adjustment expected to exceed the threshold for submussion of cost or pricing data at FAR 15.503-4, the Contractor shall require the subcontractor to submit cost or pricing data (actually or by specific identrication in writung), unless an exception under FAR 15 503-1 applies
(b) The Contractor shall require the subcontractor to certify in substantally the form prescribed in FAR 15 506-2 that, to the best of its knowledge and belief, the data submitted under paragraph (a) of this clause were accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract or subcontract modification
(c) In each subcontract that exceeds the threshold for submission of cost or pricing data at FAR 15 503-4, when entered into, the Contractor shall insert etther -
(1) The substance of this clause, including this paragraph (c), if paragraph (a) of this clause requires submission of cost or pricing data for the subcontract, or
(2) The substance of the clause at FAR 52 215-25, Subcontractor Cost or Pricing Data - Modifications
(End of clause)

## CODSIA ANALYSIS \& RECOMMENDATIONS <br> FAR SUBPART 15.5 REWRITE <br> FAR CASE 95-029

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

### 52.215-25 Subcontractor Cost or Pricing Data - Modifications.

As prescnbad in 15 508(e), insert the following clause

## Subcontractor Cost or Pricing Data - Modifications (Date)

(a) The requirements of paragraphs (b) and (c) of this clause shall -
(1) Become operatuve oniy for any modification to this contract involving a pnicing adjustrment expected to exceed the threshold for submission of cost or pricing data at FAR 15 503-4, and
(2) Be lumited to such modrfications
(b) Before awarding any subcontract expected to exceed the threshold for submussion of cost or pricing data at FAR 15 503-4, on the date of agreement on price or the date of award, whichever is later, or before pricing any subcontract modification involving a pricing adjustment expected to exceed the threshold for submission of cost or pricing data at FAR 15 503-4, the Contractor shall require the subcontractor to submit cost or pricing data (actuaily or by specific identification in writing), unless an exception under FAR 15 503-1 applies
(c) The Contractor shall require the subcontractor to certify in substantalily the form prescribed in FAR 15 506-2 that, to the best of 1ts knowledge and behef, the data submitted under paragraph (b) of this clause were accurate, complete, and current as of the date of agreement on the negotated price of the subcontract or subcontract modification
(d) The Contractor shall insert the substance of this clause, including this paragraph (d), in each subcontract that exceeds the threshold for submission of cost or pricing data at FAR 15 503-4 on the date of agreement on price or the date of award, whichever is later

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

### 52.215-26 Integnty of Unit Prices.

As prescribed in $15508(\mathrm{f})$, insert the following clause

## Integrity of Unit Prices (Date)

(a) Any proposal submitted for the negotuation of prices for items of supplies shall distribute costs withan contracts on a basis that ensures that unit prices are in proportion to the items' base cost (e $g$, manufacturing or acquisition costs) Any method of distributing costs to line items that distorts unit prices shall not be used For example, distributing costs equally among line items is not acceptable except when there is little or no variation in base cost Nothing in this paragraph requires submussion of cost or pricing data not otherwise required by law or regulation
(b) When requested by the Contracting Officer, the Offeror/Contractor shall also identify those supplies that it will not manufacture or to which it will not contribute significant value
(c) The Contractor shall insert the substance of this clause, less paragraph (b), in all subcontracts for other than acquisitions at or below the simplified acquisition threshold, construction or architect-engineer services under FAR Part 36, unlity services under FAR Part 41, services where supphes are not required, commercial items, and petroleum products

## (End of clause)

Alternate I (Date) As prescribed in $15508(\mathrm{f})$, substutute the following paragraph (b) for paragraph (b) of the basic clause
(b) The Offeror/Contractor shall also identify those supplies that it will not manufacture or to which it will not contribute signtficant value

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

### 52.215-27 Termination of Defined Benefit Pension Plans.

As prescribed in 15 508(g), insert the following clause

## Termunation of Defined Benefit Pension Plans (Date)

The Contractor shall promptly notify the Contracung Officer in writung when it determines that it wilf terminate a defined benefit pension plan or otherwise recapture such pension fund assets If pension fund assets revert to the Contractor or are constructively received by it under a termination or otherwise, the Contractor shail make a refund or give a credit to the Government for the equitable share as required by FAR 31 205-6())(4) The Contractor shall include the substance of this clause in all subcontracts under this contract that meet the applecability requirement of FAR 15 508(c)

## (End of clause)

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

### 52.215-41 Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data.

As prescribed in 15 508(I), insert the following provision

Requarements for Cost or Pricing Data or Information Other Than Cost or Pricing Data (Date)

(a) Exceptions from cost or pricing data (1) In lieu of submitung cost or pning data, offerors may submit a written request for exception by submitting the information other than cost or pricing data described in the following subparagraphs. The Contracting Officer may require additional supporting information, but only to the extent necessary to determune whether an exception should be granted, and whether the price is fair and reasonable
(1) Identufication of the law or regulation establishing the price offered. If the price is controlled under law by penodic rulings, reviews, or similar actions of a governmental body, attach a copy of the controling document, unless it was previously submitted to the contracting office
(i1) For a commerctal item exception, the offeror shall submit, at a minimum, information on prices at which the same item or similar items have previously been sold in the commercial market that is adequate for evaluating the reasonableness of the price for this acquisition Such information may include -
(A) For catalog items, a copy of or identification of the catalog and its date, or the appropnate pages for the offered items, or a statement that the catalog is on file in the buying office to which the proposal is being submitted Provide a copy or describe current published discount policies and price lists (published or unblished), e g, wholesaie, ongmal equipment manufacturer, or reseller Also explain the basis of each offered price and its relationship to the established catalog price, including how the proposed price relates to the price of recent sales in quantuties sumular to the proposed quantities,

## CODSIA ANALYSIS

See CODSIA's comment at FAR 15501 If the DAR Council and CAA Council decides not to provide a workable definition of discount, the offeror's obligation to disclose unpubished discounts should be removed. It is unfart to impose such disclose nsks on industry) This is a hiph-risk concern to industry
(B) For market-priced items, the source and date or period of the market quotation or other basis for market price, the base amount, and appicable discounts In addition, describe the nature of the market,
(C) For items included on an active Federal Supply Service or Information Technology Service Multuple Award Schedule contract, proof that an exception has been granted for the schedule item
(2) In submutting information other than cost or pricing data, the offeror grants the Contractung Officer or an authorized representative the right to examine, at any time before award, books, records, documents, or other directly pertinent records to venfy any request for an exception under this provision, and the reasonableness of price Access does not extend to cost or profit information or other data relevant solely to the offeror's determination of the prices to be offered in the catalog or marketplace

## CODSIA ANALYSIS \& RECOMMENDATIONS <br> FAR SUBPART 15.5 REWRITE <br> FAR CASE 95-029

## CODSLA RECOMMENDATIONS SHOWN IN BOLD/TTALICS

(b) Requirements for cost or pncing data If the offeror is not granted an exception from the requirement to submit cost or pricing data, the following appies
(1) The offeror shall prepare and submut cost or pricing data and supportung attachments in accordance with FAR Table 15-2
(2) As soon as practicable after agreement on price, but before contract award (except for unpnced actions such as letter contracts), the offeror shall submit a Certuficate of Current Cost or Pricing Data, as prescribed by FAR 15 5062
(3) In submitting cost or pricing data, the offeror grants the Contracting Officer or an authorized representative the right to examine, at any tume before award, books, records, documents, or other directly pertinent records in accordance wuth the provistons of 52.215-2.

> CODSIA ANALYSIS
> See CODSLA's comment at FAR $15503-5$ and FAR $15503-6$ CODSIA believes that the access to records and audit nghts must be absolutely clear, partucularly if Table 15-3 and Standard Form 1448 are elıminated The most practical alternative if to revised FAR $52215-41$ and FAR 215-42 This is a high-risk concern to industry

> (End of clause)

Alternate I (DATE) As prescribed in 15 508(1), substutute the following paragraph (b)(1) for paragraph (b)(1) of the basic provision.
(b)(1) The offeror shall submit cost or pricing data and supportung attachments in the following format

Alternate II (DATE) As prescribed in 15 508(1), add the following paragraph (c) to the basic provision
(c) When the proposal is submitted, also submit one copy each to (1) The Admınstrative Contractıng Officer, and
(2) the Contract Auditor

Alternate III (DATE) As prescnbed in 15 508(I), add the following paragraph (c) to the basic provision (if Alternate II is also used, redesignate as paragraph (d))
(c) Submit the cost portion of the proposal va the following electronic media [Insert medra format, eg, electronic spreadsheet format, electronic mall, etc ]

Alternate IV (DATE) As prescribed in 15508 (1), replace the text of the basic provision with the following
(a) Submission of cost or pricing data is not required
(b) Provide information described below [Insert description of the information and the format that are required, including access to records necessary to permit an adequate evaluation of the proposed price in accordance with 15 503-3]

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

### 52.215-42 Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing DataModıfications.

As prescribed in $15508(\mathrm{~m})$, insert the following clause

Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data - Modifications (Date)

(a) Exceptuons from cost or pricing data. (1) In lieu of submitting cost or prieing data for modifications under this contract, for price adjustments expected to exceed the threshold set forth at FAR 15 503-4 on the date of the agreement on pnce or the date of the award, whichever is later, the Contractor may submit a written request for exception by submittung the information other than cost or pricing data described in the following subparagraphs The Contractung Officer may require additional supporting information, but only to the extent necessary to determine whether an exception should be granted, and whether the price is farr and reasonable-
(1) Identrfication of the law or regulation establishing the price offered If the price is controlled under law by periodic rulings, reviews, or simular actions of a governmental body, attach a copy of the controlling document, unless it was previously submitted to the contracting office
(i1) Information on modifications of contracts or subcontracts for commercial items (A) If-
(1) The onginal contract or subcontract was granted an exception from cost or pricing data requirements because the price agreed upon was based on adequate price competition or prices set by law or regulation, or was a contract or subcontract for the acquisition of a commercial item, and
(2) The modification (to the contract or subcontract) is not exempted based on one of these exceptions, then the Contractor may provide information to establish that the modification would not change the contract or subcontract from a contract or subcontract for the acquisition of a commercial item to a contract or subcontract for the acquistion of an atem other than a commerctal item
(B) For a commercial item exception, the Contractor shall provide, at a minmum, information on prices at which the same item or simular tems have previously been sold that is adequate for evaluating the reasonableness of the price of the modification Such information may include -
(1) For catalog items, a copy of or identification of the cataiog and its date, or the appropriate pages for the offered items, or a statement that the catalog is on file in the buying office to which the proposal is being submitted Provide a copy or describe current published discount policies and price lists (fublisher unpublushed), eg, wholesale, onginal equipment manufacturer, or reseller Also explan the basis of each offered price and ts relationship to the established catalog pnce, including how the proposed price relates to the price of recent sales in quantities simular to the proposed quantties
(2) For market-priced items, the source and date or period of the market quotation or other basis for market pnce, the base amount, and applicable discounts In addition, describe the nature of the market.
(3) For items included on an active Federal Supply Service or Information Technology Service Multuple Award Schedule contract, proof that an exception has been granted for the schedule ttem
(2) In submutung information other than cost or pricing data, the Contractor grants the Contractung Officer or an authorized representative the right to examme, at any time before award, books, records, documents, or other drectly pertunent records to venfy any request for an exception under this clause, and the reasonableness of price Access

# CODSIA ANALYSIS \& RECOMMENDATIONS <br> FAR SUBPART 15.5 REWRITE 

FAR CASE 95-029

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

does not extend to cost or profit information or other data relevant solely to the Contractor's determination of the prices to be offered in the catalog or marketplace
(b) Requirements for cost or pricing data. If the Contractor is not granted an exception from the requirement to submit cost or pricing data, the following applies
(1) The Contractor shail submit cost or pricing data and supporting attachments in accordance with FAR Table 15-2
(2) As soon as practicable after agreement on price, but before award (except for unpnced actions), the Contractor shall submit a Certıficate of Current Cost or Pricing Data, as prescribed by FAR 15 506-2
(3) In submutting cost or pricing data, the offeror grants the Contracting Officer or an authorzzed representative the right to examine, at any time before award, books, records, documents, or other durectly pertunent records in accordance with the provisions of 52 215-2.

> (End of clause)

Alternate I (DATE) As prescribed in $15508(\mathrm{~m})$, substitute the following paragraph (b)(1) for paragraph (b)(1) of the basic clause
(b)(1) The Contractor shall submit cost or pricing data and supporting attachments prepared in the following format

Alternate II (DATE) As prescribed in 15 508(m), add the following paragraph (c) to the basic clause
(c) When the proposal is submitted, also submit one copy each to (1) the Administrative Contracting Officer, and
(2) the Contract Auditor

Alternate III (DATE), As prescribed in $15508(\mathrm{~m})$, add the following paragraph (c) to the basic clause (if Alternate II is also used, redesignate as paragraph (d))
(c) Submit the cost portion of the proposal via the following electronic media [Insert media format]

Alternate IV (DATE) As prescribed in $15508(\mathrm{~m})$, replace the text of the basic clause with the following
(a) Submission of cost or pricing data is not required
(b) Provide information described below [Insert description of the information and the format that are required, including access to records necessary to permit an adequate evaluation of the proposed price in accordance with 15 503-3 ]

## CODSIA RECOMMENDATIONS SHOWN IN BOLDITTALICS

PART 53 - FORMS

## CODSIA ANALYSIS

See CODSIA's comment at FAR 15 503-5, FAR 15 503-6, FAR 52 215-41, and FAR 52 215-42 CODSIA is concerned that the proposed rewrite obscures the bnght-line test which was created as a result of FASA CODISA supports eliminating the Standard Form 1448 only if it is replaced with clear guidance in FAR Subpart 15.5 and the solicitation provision at FAR 52.215-41 and contract clause at FAR 52 215-42 This is a high -risk concern to industry

## CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

## PART 99-COST ACCOUNTING STANDARDS

CODSIA understands that the DAR Council and CAA Council are not responsible for the regulations promulgated by the CAS Board However, CODSIA believes it is important use all related opportuntties to continue expressing its concern with the Board's farlure to implement necessary reforms and to coordinate its activities with the Government's changing pricing rules CODSIA urges the DAR Council and CAA Council to not implement the guidance at FAR 15 504-1(d) on cost realism unless and until the CAS Board has exempted at 48 CFR 9903201 1 (b)(15) for firm fixed price contracts that do not involve the submission of certified cost or pricing data.

## OFFICE OF THE UNDER SECRETARY OF DEFENSE

```
General Services Administration
FAR Secretarıat (VRS)
1800 F Street, NW
Room 4035
Washington, DC 20405
Subject. FAR Case 95-029
Dear sir.
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We have reviewed the proposed rule published in the May 14, 1997, Federal Register, our comments are attached


Attachment

## GROUP A COMMENTS

1. FAR 15.209(b), prescription for 52.215-2, Audit and RecordsNegotiation. Add "For commercial 1 toms exempted under 15.503-1" to the list of contracts excepted from incorporating 52 215-2 in solicitations and contracts. Authority for Comptroller General examination of records for commercial items is covered in clause 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders-Commercial Items.
2. 15.405(a)(1). Delete the first parenthetical reference "(but see 15.504-1(d)(3)." This paragraph begins by stating that for firm-fixed-price or fixed-price with economic price adjustment contracts, competition normally establishes price reasonableness and that comparison of the proposed prices will usually satisfy the requirement to perform a price analysis. The parenthetical reference is inappropriate because it refers to a totally different subject -- cost realism analysis -- which is actually discussed at the end of this same paragraph, where another parenthetical reference to $15.504-$ 1(d) (3) is provided.

## GROUP B COMMENTS

3. 15.501, definition of cost or pricing data. Delete the final sentence of the definition. It incorrectly states that cost or pricing data may include parametric estimates of elements of cost or price, from appropriate validated calibrated parametric models. Parametric estimates are estimates, they are not cost or pricing data. The data which is included in parametric models is cost or pricing data. However, it is not necessary to expand the definition of cost or pricing data to refer to the data supporting parametric estimates The change made to $15.504-1(c)(2)(1)(C)$ is sufficient
4. 15 503-3(a)(1). This paragraph seems to conflict with 15.502(a)(2). It states that the contracting officer should obtain information from the offeror to the extent necessary to determine price reasonableness. $15.502(a)(2)$ establishes an order of preference for obtaining information other than cost or pricing data rely first on information available within the government, second on information obtained from sources other than the offeror, and, if necessary, on information obtained from the offeror.
5. 15.503-3(a)(3). Delete from the last sentence the phrase "in accordance with 15.506-2." While 15 506-2 discusses the requirement for certifying cost or pricing data, it does not mention the topic of not requiring certification of contractor provided information other than cost or pricing data Thus no helpful information is provided by the cross reference, and it should be deleted
6. 15 503-4(a)(1)(11). Revise the parenthetical reference from "(but see waivers at 15.503-1(b)(4))" to "(but see waivers at 15 5031 (c) (4))." 15.503-1(b)(4) provides no useful information; it simply states that a contracting officer shall not require submission of cost or pricing data when a waiver has been granted 15.503-1(c)(4) provides pertinent information. that granting a waiver to a prime contractor or higher-tier subcontractor does not waive the requirement for lower-tier subcontractors
7. 15.503-4(c). Revise the final reference in the paragraph from "in accordance with 15 506-2" to "in accordance with 15.506-2(e)." The 15.506-2 (e) reference more precisely addresses the topic discussed in this 15.503-4(c).
8. 15.504-1(a)(3). In the second sentence, replace the word "shall" with "should." Current policy is that a contracting officer should perform a price analysis even though a cost analysis is performed.
9. 15.504-1(a)(7) Because of the way the Federal Acquisition Institute (FAI) has listed the 5 resource guides on the Internet, we recommend the following changes to coincide with EAI's reference. In one place, FAI refers to the resource guides not by title, but by volume number, and the order of the volume titles does not match the FAR coverage.

## $95-029 \cdot 68$

The Air Force Institute of Technology (AFIT) and the Federal Acquisition Institute (FAI) jointly prepared a series of fie desk defences [five volume set of Contract Pricing Resource Guides] to guide pricing and negotiation personnel. The five desk referees [guides] are [I -] Price Analysis t[;] Cost-Amalysis [II -] Quantitative Techniques for Contract Pricing[, III - Cost Analysis; IV -] Advanced Issues in Contract Pricing-[;] and [V -] Federal Contract Negotiation Techniques. The[se] references provide detailed discussion and examples applying pricing policies to pricing problems. They are to be used for instruction and professional guidance. However, they are not directive and should be considered informational only. Copies of the desk references are available on CD-ROM which also contains the FAR, the FTR and various other regulations and training materials. The CD-ROM may be purchased by annual subscription (updated quarterly), or individually (reference "List ID GSAFF," Stock No. 722-009-0000-2). The individual CD-ROMs or subscription to the CD-ROM may be purchased from the Superintendent of Documents, $U$ S. Government Printing Office, by telephone (202) 512-1800 or facsimile (202) 5122550, or by mail order from the Superintendent of Documents, P O. Box 371954, Pittsburgh, PA 15250-7954. Free copies of the desk references are available on the World wide Web, Internet address: http://www gsa.gov/staff/v/guides/ instructions.htm

## Dear Sir or Madam

This letter is in reference to EAR Case 95-022. I would like to submit the following comments

1. I believe the sentence in 15205 regarding comparative assessment of proposals from the September 12, 1996 draft should not have been deleted I recommend adding it back into the rule:
2. Proposed is 406(b)(2), perhaps the "may" should be "shath"
3. Given that in some curcumstances there can be adequate price comperition with only offeror, perhaps it is inot prudent to state that the government should only get additional information in "undisual" carcumstances in 15.503-3(b)
4. I recommend that in 15 406(c) "proposuls rated most highly" be changed to "most highly rated ptoposals "
5. I recommend that 151406 (c)(1) be changed to state proposal(s) By not having parentheses afound the "is," it makes it seem as if there cannot be one proposal in the competitive range
6. In discussing past performance evaluation in 15405 (a)(2) the rule should address the 1 ssue of what constitutes contract performance for determung when the three year past performance time frame starts'to run

7 The language at 15 206(g) is unclear in three areas
a First, it does inot state what happens if the solicitation cannot be annended without revealing sehsitive information
b Second, there is an inconsistency in the language because a proposal cannot at the sarae tume unvolve a departure from the stated requirements and be most advantageous according to the established evaluation criteria. I recommend dropping the parenthetical
c Third, the language presumes that departures will always be most advantageous
Pedrhaps language should be added to state what should be done when the departure is not advantigeous.

8 In 15406 perhaps you should add back the language from current FAR prohibiting telling an offeror its standing relative to other offerors
9. In 15201 , perhaps the procurement integrity cite should be moved to include all of the section

SVEV,


Nathan Tach

General Services Admunistration
FAR Secretanat (VRS)
UNITED STATES DEPARTMENT OF COMMERCE Chief Financial Officer Assistant Secretary for Admınistration Washington DC 20230

18th \& F Streets, NW
Room 4035
Washington, DC 20405
Attn FAR Case 95-029

To the FAR Secretariat

The Office of Acquisition Management in the Department of Commerce is pleased to submit comments on the proposed rule regarding the Part 15 Rewrite, Contracting by Negotiations and Competitive Range Determinations Our recommendations and comments on the case relate to the proposed FAR 15406 , Communucations with offerors Paragraph (b)(4) states that "Communications with offerors before establishment of the competitive range shall address adverse past performance information on which the offeror has not previously had an opportunity to comment " The following are our recommendations related to FAR 15 406(b)(4)

1 Change "shall address" to "may address" If this change is not made, then require the officials who fill out the past performance evaluation to furmsh a copy of therr evaluation to their contractor ( 1 e , the offeror), so mandatory discussions of adverse past performance information do not encumber the source selection process

2 Require the Government to disclose only the information that relates to "negative information" (as opposed to information that was not as positive as others) collected directly from references/sources (This does not include information that the Govemment determines to be negative or less positive than other offerors' information) and whether with its use it could determine the outcome of the selection In other words, if it hadn't been used would it have harmed the offeror?

The following is a summary of discussions which led to the above recommendations This information is provided to support these recommendations
(a) In a best value acquisition, it is possible that a past performance reference might provide neutral or even positive comments By themselves, these comments are not "adverse" However, if the nature of these comments relates to a significant discriminator in the source selection, then the contractor could be adversely affected relative to more positive comments for other offerors Does this mean that neutral or positive comments must be provided to the offeror for rebuttal once it is evident that they have "adversely" affected the offeror? Additionally, the comments may be positive or neutral from the reference's point of view, but be considered negative by the offering
agency in light of what is important to the agency At this point, the agency makes a subjective judgement about the comments Does this mean that we must let the offeror know that we think the information is negative even though the reference thought it was good or neutral? For those comments that are unquestionably negative by the reference it may be that they are not related to any significant discriminators and do not "adversely" affect the best value selection Do we have to let the offeror know about that information?
(b) Another concern we have in this area is related to differing opimons by multiple references on the same contract It is very possible that a program manager will see the performance of a contractor differently than the COTR or CO. and all perspectives could be correct For instance, it is possible that a contractor gets an award for doing a great job on one task but is given less award fee because of problems on other tasks One task order manager will say the contractor is stellar and another may say the contractor is a poor performer How is another agency who is now using this past performance information in a source selection to consider the positive and negative information? Should there be one position by an agency?
(c) What responsibility does the Government have for identifying adverse past performance information on which the offeror has not previously had an opportunity to comment? Theoretically, all the Government contracting activities will have files with past performance reports that have been signed and seen and rebutted by the contractors However, it is not an ideal world This means that agency must solicit opinions directly from an individual rather than from a preexisting file There are really only two ways to do this -- by survey or interview With a survey you get a written record of what the reference thinks However, it is through the interviews that the majority of the "real" information is obtained The interview notes are handwritten notes or formally prepared notes Clearly, the interview notes have not been seen by the contractors and they may not have seen the surveys either Does the Government have a requirement to send these survey and interview notes to the offeror if they contain "adverse" information?

From an operational standpoint, sending copies of survey responses or interview notes to contractors would be a burden to the government Additionally, it could adversely affect the willingness of references to participate candidly
(d) It is not always clear on "what" adverse past performance information the offeror has had an opportunity to comment In practice, evaluators view this to mean that if the offeror provided the reference then THAT was considered their opportunity to comment However, in practice, the offeror generally does not see the past performance evaluation that the reference agency fills out in responding to other agency requests

It you have any questions or wish to discuss the issues further please contact me or Deborah O'Neill on (202) 482-0202

Sincerely,


Kenneth I Buck, Acting Director for
Acquisition Management and
Procurement Executive

July 14, 1997

VIA U.S. MAIL ONLY

General Services Administration
FAR Secretariat (VRS)
1800 F Street, NW
Room 4035
Washington, DC 20405

# Re: FAR Case 95-029; Federal Acquisition Regulation; <br> Part 15 Rewrite -- Proposed Rule Issued on May 14, 1997 

## Dear Members of the FAR Council

The National Association of Minority Contractors is a trade association that represents the interests and concerns of minority contractors nationwide We respectfully submit these comments in response to the proposed rule issued in the Federal Register on May 14, 1997 under FAR Case 95-029, the Federal Acquisition Regulation (FAR) Part 15 Rewnte While commending the FAR Council for making significant improvements to the federal contracting by negotiation process, we would like to use this opportunity for constructive comments of particular concern to minority contractors

## I. General Concerns

NAMC believes that the proposed revisions to FAR Part 15 will impact sigufficantly on minority contractors, and will have major leks to a) FAR Case $95-004$, the proposed major rule on the "Reform of Affirmative Action in Federal Procurement", b) the pending Small Business Administration (SBA) proposed rule on the 8(a) Program and Small Disadvantaged Businesses, c) the Department of Commerce's (DoC's) ongomg process on 'benchmarking" in accordance with the U S Supreme Court's decision in Adarandv Pena, and d) to some extent, OST-97-2550, the U S Department of Transportation's (DoT's) Supplementary Notice of Proposed Rulemaking (SNPRM) on the Participation by Disadvantaged Business Enterprise in DOT Programs

Over the past several weeks, NAMC has received numerous calls from minority businessowners requesting clarification on the links between the FAR Part 15 rewrite and the abovementioned rule- and policy-making efforts The uncertainty and anxiety expressed by these business-owners indicates a disconnect between the FAR Part 15 rewrite process and the particular concerns of minorities In particular, there is an urgent need for stronger links between the promulgated rules under the procurement reform process and the ongoing parallel processes of affirmative action reform under the Supreme Court's decision in Adarand v Pena While
acknowledging the committed efforts of the federal government to develop fair rules and standards under Adarand, our experience with business owners demonstrates deep uncertamty and anxiety over where they stand relative to the future This uncertainty is confirmed by a sumple reading of the proposed FAR Part 15 rewrite, and brings ito focus the question of regulatory fairness There $1 s$, for example, only a single reference to the category of "Small Disadvantaged Businesses (SDBs)" in the entire FAR Part 15 Rewrite, even though the FAR Council has concurrently issued FAR Case 97-004, a major rule, which apples new standards for SDB procurement opportunities on a government-wide basis Similarly, only mmimal reference is made to "small business concerns owned and controlled by socially and economically disadvantaged individuals "

We suggest, as a general matter of rulemaking policy, that a more concerted effort be made to clanfy linkages between the FAR Case 95-029 and other rules and policy letters being issued by the federal government in accordance with Adarand Such an effort would do much to address the biggest problem faced by mmority-owned businesses -- lack of far access to procurement opportunities It would also do much to defuse concerns about potential rule conflicts between proposed new FAR Parts 15 and 19

Other more specific issues and concerns are further outlined below

## II. Specific Issues and Concerns

## A) Contents of Written Acquisition Plans

FAR section 7105 is amended to include the Government's budget estimates and how they were derived as part of the acquisition plan for disclosure to potential bidders This amendment does a lot to assist bidders with a working price/cost range for their bid preparation process, and would most likely result in stronger bid competition The amendment further provides opportunity for feedback from the private sector prior to the solicitation closing date in situations where proposed estimates are significantly out of kilter with market reality NAMC therefore strongly supports this amendment

## B) Multi-step Source Selection Technique

A proposed new FAR section 15102 outlines the process for "multi-step source selection" This proposed process concerns minority businesses greatly because of the actual or perceived potential for built-m bias against SDBs in the first step of source selection While acknowledging that the FAR Council's modifications on past performance evaluation factors and subfactors should assist subcontractor SDBs in the multi-step source selection evaluation process, NAMC believes that clearer measures should be implemented to avoid potential problems of bias against prime SDBs We therefore propose a modification to the language under the proposed new FAR section 15.408, entitled "Source Selection," to clearly require the Source Selection

Authority (SSA) to conduct all proposal assessments "fairly and without bias" Such language (or some derivative thereof) would create an affirmative, actionable duty among members of the SSA to refrain from using their authority to unfairly discriminate against SOBs or other less nontraditional market participants in the multi-step source selection process More importantly, it would help assure small and minonty business-owners of a safeguard against unfair treatment in the multi-step source selection process

## C) SDB References under FAR section 15103 and Elsewhere Throughout the Proposed Rule

Under proposed FAR section 15 103(b) (4), Oral Presentations, NAMC proposes a modification to read as follows (new wording italicized) "The impact on small and small disadvantaged businesses" Appropnate modifications in this vein should be made throughout the proposed rule to reflect the unique concerns and issues faced by SDBs Alternatively, an overnding definition should be inserted at an appropriate location in the proposed rule (e.g under FAR section 15001 ) indicating SDBs as a subset of small busmesses (There may be technical problems with the latter approach, however, since small business and SDB issues are significantly distuguished under FAR Case 97-004 and elsewhere in the federal regulations) This issue may require further exploration prior to FAR Council action, but should ultimately be addressed as critical to the perception by SOBs of their treatment under FAR Part 15.

## D) Presolicitation Exchanges with Industry

The proposed new FAR section 15201 outlines allowable methods of interaction between interested parties and the Government prior to solicitation issuance We request a modification of section 15 201(c)(1) to read (new wording italicized) "Industry, small business or small disadvantaged business conferences," This modification would be particularly important to SDBs as it falls squarely within the Adarand outreach intent outhed in the FAR Council proposed rule on affirmative action in FAR Case 97-004

## E) Mmimum Requirements on RPs for Competitive Acquisitions

The proposed new FAR section 15 203(a)(4) requires Government requests for proposals (RPs) to describe, at minimum, "Factors and significant subfactors that will be used to evaluate the proposal "This is a proposal that NAMC supports because it will assist potential bidders in their self- assessment on a range of price, cost and non-cost issues early in the bidding process

## F) Evaluation Factors and Subfactors, Applicability Threshold

Proposed FAR section 15 404(d) requires evaluation factors and subfactors to be utilized on all source selections for negotiated competitive acquisitions expected to exceed $\$ 1,000,000$ [as of the effective date of the rule] It also requires evaluation factors and subfactors to be utilized

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on all source selections for negotiated competitive acquisitions expected to exceed $\$ 100,000$ after January 1, 1999 NAMC is strongly opposed to the omission of the current FAR section 15605 (b)(ii)(B) which requires agencies to meet or exceed the requirement to utilize evaluation factors and subfactors on solicitations with an estimated value in excess of $\$ 500,000$ issued on or after July 1, 1997. The change is unnecessary, and comes across as an effort to unfarly delay the implementation of key evaluation factors and subfactors such as past performance Similar concerns apply in all other parts of the proposed rule where this proposed change occurs, meluding FAR section 421502

## G) Definition of Neutral Past Performance Rating

Under the proposed new FAR section 15 405(a)(2)(iv), the FAR Council requires firms lacking any relevant past performance history to receive a "neutral" evaluation for past performance In the interest of fairness, a neutral rating should be awarded only in situations where an argument can be made (with a preponderance of the evidence) to demonstrate the offering firm's lack of opportunity to acquire a record on relevant past performance The absence of such a requirement would otherwise open the door for abuse by firms who might wish to offset their poor record ( 1 e below satisfactory rating) on past performance by declaring or requesting a neutral rating in relevant evaluation factor or subfactor categories
(1) Example Firm A, a major prime contractor, has a very poor record on utilizing SDB subcontractors on large contracts in all sectors of the market To avoid being rated on SDB utilization as an evaluation factor or subfactor, Firm A might request a neutral rating under the pretext that it has never had the opportunity to utilize SDBs on past contracts The requirement of a clear statement with evidence documenting this lack of opportunity would help avoid the improper award of a neutral rating under such a scenario, since this statement would remain on record, and could be later accessed for the purposes of re-evaluation, protest, etc
(2) Example 2 Firm B, a small disadvantaged buswess. has performed poorly on meeting Government-mandated environmental objectives on two out of its last four contracts In an effort to qualify for neutral rating on environmental issues, Firm B might omit all references in its to environmental obligations under the two projects The requirement of a statement by Firm $B$ documenting its lack of opportunity to perform contracts with required environmental objectives would assist in discouraging such an omission, since this statement would remain on record, and could be later accessed for purposes of protest, impeachment, etc

## III. Conclusion

The above are some of the key concerns of minority contractors regarding the proposed FAR Part 15 Rewrite As stated earlıer, the biggest concerns have to do with how FAR Case 95-

029 will ultimately link to other rulemaking efforts affecting minority contractors NAMC urges the FAR Council to make appropriate modifications to clarify links between the FAR Part 15 rewrite and other (ongoing) federal government rule- and policy-making activities subject to the Supreme Court's decision in Adarand We also urge specific modifications in the FAR Part 15 proposal to correct any misperception of unfairness against, or lack of consideration of, minonty contractors in the federal contracting by negotiation process Thank your for the opportunity to submit these comments Finally, we believe that constructive modifications on the issues of specific concern (where indicated) would do much to improve the overall proposed rule and its fairness to all businesses

Respectfully submitted by


Samuel A Carradine, Jr
Executive Director


J Cobble de Graft
General Counsel

SMALL BUSINESS LEGISLATIVE COUNCIL

July 14, 1997
General Services Administration
FAR Secretariat (VRS)
1800 F Street, NW
Room 4035
Washington, DC 20405

## RE FAR Case 95-029 "FEDERAL ACQUISITION REGULATION, PART 15 REWRITE"

The Small Business Legislative Council (SBLC) is pleased to submit these comments on the proposed rule published jointly by the Department of Defense ("DoD"), the General Services Administration ("GSA") and the National Aeronautics and Space
Administration ("NASA") concerning the combined Phases I and II of the rewrite of Federal Acquisition Regulation ("FAR") Part 15 This proposed draft of the rule was published in the Federal Register on May 14, 1997 (62 FR 26640)

SBLC is a permanent, independent coalition of nearly one hundred trade and professional associations that share a common commitment to the future of small business Our members represent the interests of small business in such diverse economic sectors as manufacturing, retailing, distribution, professional and technical services, construction, transportation, and agriculture Our policies are developed through a consensus among our membership Individual associations may express their own views

The ability of small business to participate in the $\$ 200$ billion spent annually by the federal government has been identified as a prionty issue in 1980, 1986 and 1995 at each of the three White House Conference on Small Business Through the Small Business Act of 1953, Congress specifically stated that "The Government should ensure that a fair proportion of the total purchases and contracts or subcontracts for property and services
be placed with small business enterprises" Since the enactment of that important legislation, the percentage of federal contracts awarded to small business has hovered between $203 \%$ in 1967 to $222 \%$ in 1979 and $22 \%$ in $1995^{1}$

[^4]RE FAR Case 95-029 "Federal Acquistton Regulation Part 15 Re-write"

The small business community has consistently embraced streamlıning the procurement process and made specific recommendations in the 1986 Conference report The small business community has significant concerns when streamlining initiatives vest discretion in the contracting officer without appropriate guidelines and internal checkpoints to guard against erosion of full and open competition through exclusion of valid proposals for vague efficiency purposes and the funneling of contract money on partisan or personal basis

The proposed rule seeks to amend the Federal Acquisition Regulation (FAR) by rewriting Part 15, Contracting by Negotiation The proposed rule suggests that this re-write is undertaken given the "spirit of the National Performance Review, Federal Acquisition Streamlining Act of 1994 (FASA), and Federal Acquisition Reform Act of 1995 " In this regard, there is no statutory authority for the initiatives undertaken in this rule

## INTRODUCTION

Only a very small portion of the May 14 proposed rule is designed to implement provisions of the Federal Acquisition Reform Act, hereafter "FARA" (Public Law 104106). Moreover, there is no documented need for the proposed changes nor any study that concludes that these changes will result in the benefits claimed by the Office of Federal Procurement Policy

At the outset, we would like to commend the FAR Councll for addressing, in this most recent draft of the proposed regulation, a number of small business concerns that were raised in comments to the original FAR Part 15 re-write draft of July 31, 1996

Yet, we specifically note that while some accommodation was made to our concern that efficiency was the driver for the inclusion of exclusion of proposals in the competitive range, we maintain that the May 14 proposed rule still is not consistent with FARA Quite simply, rather than write the proposed rule in language tracking the statutory language and specific documented intent of Congress, the proposed rule in its various three drafts have employed creative, crafty, or contrary language in the regulations to enable the practice of full and open competition to be narrowed or unfarly whittled

We do not believe that the July 31, 1996, the September 12, 1996 of the May 14, 1997 proposed rules are in compliance with FARA, but in fact, attempt to implement via regulation a competitive system specifically rejected by Congress At a minimum, the competitive range provisions leave the basic determination of fair competition open to such wide discretion by the contracting officer that it will almost certainly at times lead to favoritism, improper funneling of contract money, or simply exclusion of valid and worthy proposals at the convenience of the officer

[^5]The balance of the May 14 proposed rule comprises Executive Branch initiatives to rewrite this critical chapter of the federal acquisition process Several of these initiatives make beneficial changes to the federal acquisitions process that we support However, these limited number of beneficial changes remain overshadowed by provisions that upset the basic tenets of federal procurement policy Thus, we do not support many provisions of this rule and once again cannot support the implementation of this rule and recommend that the rule not be adopted in its present form In our view, the rule is inconsistent with FARA, will fundamentally alter the principles that are the foundation of the federal procurement system, and will have significant adverse consequences for all business, but particularly small businesses, that seek an opportunity to do business under the Federal Acquisition Regulations with federal agencies

Notwithstanding the assertions of the FAR Council in the Federal Register notice, we also strongly believe that the May 14 rule is a "major rule" under the definitions of the Congressional Accountability Act (5 U S C. 804) The refusal to declare any of the three versions of the proposed Part 15 rule a "major rule" as mandated by the Small Business Regulatory Enforcement Fairness Act (SBREFA") is a blatant attempt by the Office of Management and Budget to circumvent the statutory review and approval scheme enacted by Congress. Mr Raines, Director of the Office of Management and Budget, has publicly stated that he believes the proposed Part 15 rule is necessary to streamline government and balance the federal budget Therefore, the proposed rule must have an impact of $\$ 100$ million of more on the economy and meets the criteria for a major rule. We urge the FAR Council to reconsider this important aspect of the rule-making process and urge the Office of Information and Regulatory Affairs to declare the proposed rule a major rule

We appreciate the recognition that this rule is a "significant regulatory action" pursuant to Executive Order 12866. We applaud the determination made by the FAR Council that the rule is a "major rule" under the Regulatory Flexibility Act and the improvement in the flexibility analysis performed on the May 14 rule

SBLC believes that, if implemented as published, the proposed rule will lead to the following consequences
$\checkmark$ Arbitrary discretion vested in contracting officers enable them to funnel money to states or favorite contractors
$\checkmark$ Piecemeal promulgation of regulations makes assessment of the impact of all the changes impossible FAR Part 15 and the FAR regulations are being issued in "pieces" so the total impact is impossible to assess
$\checkmark$ Arbitrary discretion vested in a contracting officer lowers incentives to increase competition, rather it offers an incentive to the contracting officer to decrease competition
$\checkmark$ Moves the locus from the best possible price/quality of service of good to the best possible marketing of the contracting officer or the best "relationship" with the contracting officer "Long term relationships" desired by Dr Kelman translate to favoritism
$\checkmark$ The proposed rule upsets the basic tenets of the federal procurement process Therefore it will lead to considerable litigation that would not have otherwise occurred and will be counterproductive to the Administration's efforts to reduce litigation

## 1. MAJOR RULE

The proposed rule was not declared a "major rule" as mandated by the Small Business Regulatory Enforcement Fairness Act (SBREFA) SBREFA specifically defines a major rule as any proposed rule which (1) has an annual impact on the economy of $\$ 100$ mullion of more, (2) had adverse effects on competition, employment, investment, productivity, and innovation, or (3) causes a major increase in costs or prices. Frank Raines, Director of the Office of Management and Budget, has specifically stated that the FAR 15 proposed rule is a necessary step to balancing the federal budget, thus admitting that the proposed rule will have a $\$ 100$ mullion or more impact on the economy Yet his own department, OMB, refuses to classify it as such

SBLC recommends that the Administration should declare the proposed rule a "major rule" as mandated by SBREFA

## 2. PORTIONS OF THE MAY 14 PROPOSED RULE ARE NOT CONSISTENT WITH TARA

As we indicated in our previous two comments submitted regarding the July 31 and September 12 proposed rules, the coverage under the May 14 proposed rule also fails to properly implement the two key provisions of FARA affecting competition and the competitive range determination Likewise, the expanded coverage of the proposed rule falls to properly implement the statute, undercutting the bedrock procurement principle of full and open competition.

## Competitive Range

(1) The rule allows contracting officers to limit the number of proposals in the competitive range to those proposals "most highly rated" This would enable the contracting officer to only allow the top two proposals on the competitive range.

FARA mandates that the contracting officer can 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" The rewrite eliminates the requirement to include the "greatest number" of proposals in its primary definition of the competitive
range, by stating that "the contracting officer shall establish a competitive range comprised of those proposals most highly rated

Thus, the contracting officer can always limit the competitive range to as few as two proposals because the top two proposals would have the greatest likelihood of award SBLC recommends 15406 (c) be amended to read as follows. "(1) . . Based on the ratings of each proposal against all evaluation criteria, the contracting officer shall establish a competitive range comprised of all of those proposals most highly rated, unless the range is further reduced for purposes of efficiency pursuant to paragraph (c) (2) of this section"

The use of the word "all" also has the advantage of establishing a "bright line" test that will be easy to apply. The proposed rule does not require a "bright line" test for determining the proposals with the greatest likelihood of award as those within the competitive range Thus, the competitive range for proposals ranked $98,96,94,92,89$, 72,70 could be drawn between 94 and 92 or between 92 and 89 rather than between the "bright line" of between 89 and 72

## Efficient Competition Provisions of FARA

The proposed rule fails to implement the provisions of "competition" as required by FARA Section 4101 of FARA states, in part, that
"The Federal Acquisition Regulation shall ensure that the requirement to obtain full and open competition is implemented in a manner that is consistent with the need to efficiently fulfill the Government's requirements."

The statement of the managers accompanying the conference report explains clearly that.
"This provision [FARA Section 4101] makes no change to the requirement for full and open competition of to the definition of full and open competition."

The proposed rule states that the "(2) 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." Thus, instead of the FAR ensuring that the requirement of full and open competition is implemented in a manner consistent with the need to efficiently fulfill the government's requirements, the contracting officer is allowed to select procedures to meet this requirement.

SBLC recommends that 15406 (c) (2) be amended to ensure that the contracting officer considers the greatest number of proposals that might otherwise be included . ."

The FAR should specify the factors to be considered in making efficiency determinations for purposes of the elimination of proposals from the competitive range. The FAR should

RE FAR Case 95-029 "Federal Acquisition Regulation Part 15 Re-write"
also specify the documentation required when proposals are elimınated for reasons of efficiency SBLC recommends the addition of a definition for "efficient competition" in 2 101. The FAR could also require agencies to first streamline their procurement process, for example, utilizing electronic mechanisms, such as the SBA pilot initiative PRONET Small businesses would be opposed, however, to mandated electronic submissions Agencies should not be able to use lack of advance planning for the procurement to justify limiting the number of proposals in the competitive range See FAR 6301 (c).

As written, the proposed rule works against market forces by elıminating proposals that would otherwise be competitive and considered but for "efficiency" or contracting officer discretion. We recognize that the federal workforce is being reduced, and acknowledge that the downsizing of the workforce will also impact on the number of acquisition personnel available In light of these reductions, we have previously supported legislation and regulations that will simplify the acquisition process, reduce unnecessary work on both the government's and contractors' part, and joined with efforts to streamline the acquisition process Many of these actions have already been put into place

However, absent any definition or clarification of what is an "efficient procurement," this proposed rule vests unchecked discretion in the contracting officers ability to arbitrarily limit the number of proposals in the competitive range based solely on unfair factors, such as how the officer feels, how hard he/she wants to work on that procurement, or resources available to conduct the procurement (even summer/holiday vacation schedules)

## 3. DISCUSSIONS

The Proposed rule allows very flexible discussions with offerors, and a contracting officer can treat offerors unequally in discussions. The new proposed rule is significantly worse than the previous version, It is vague and open-ended, without any clear parameters, even arbitrary and capricious SBLC recommends the following
(3) All offerors and contractors are entitled to fair treatment Fair treatment requires that the members of the acquisition team abide by the solicitation and acquisition plan (if any) and comply with applicable laws and regulations in dealıng with offerors and contractors. All offerors and contractors shall be treated farrly and impartally

Additionally, in discussions, a contracting officer can disclose that an offer is too high or unrealistic based upon their own price analysis or "other reviews," enabling an officer to "suggest" that a lower price might win the award The offeror can then adjust his price in submitting his revised proposal.

The proposed rule does not retain the current FAR 15610 (e) (2) prohibition on "auction technıques" We do not believe that the government should be engaged in an "auction" when conducting source selections, however, we believe this exclusion was done intentionally (particularly in light of the affirmative approval of such "action techniques"
in dealing with the September 6 FARA proposed rule on simplified acquisition procedures) SBLC strongly urges the retention of these provisions in the FAR Part 15

## 4. INTERIM PROPOSAL REVISIONS

The proposed rule does not ensure offerors equal time for interim proposal revisions Although the new draft does require a common cut-off date for BAFO, it does not require equal time for all offerors to make interim proposal revisions. 15208 allows late interim proposals and could undercut fair competition The contracting officer can talk more to one offeror and give him more time to submit a revised proposal. Thus, and officer could allow the preferred offeror more time to get his proposal "right" before requesting BAFO

## 5. COMMUNICATIONS

Prior to deciding the competitive range, the contracting officer can take into consideration an oral representation that is made in "communications" with offeror whose exclusion from of inclusion in the competitive range is uncertain There is no requirement that the contracting officer talk to all offerors in this range Thus, a contracting officer could talk to one or a few and decide not to talk to the others similarly situated, thus precluding fair competition among these offeror

SBLC recommends that the FAR require the contracting officer to hold communications with all such offeror before making a competitive range determination

## 6. PAST PERFORMANCE

Proposals may be eliminated from the competitive range based upon factors including "past performance." The source of the past performance information does not have to be revealed. Thus, proposals could be eliminated by someone holding a "grudge" or by another competitor, and the blackmarked company would not be able to defend itself or rebut the allegations.

SBLC recommends the full disclosure to the offeror of all past performance considerations, including the percentage of weight given to considerations, including the percentage of weight given to the information, the sources, and a clear statement of what can be considered The offeror shall be allowed to respond to any past performance information relied upon by the contracting officer or used to rank the offeror. The contracting officer should be prohibited from using any past performance information unless such information has been fully disclosed to the offeror and the offeror has had an opportunity to respond or comment upon such information

## Use of Past Performance

SBLC is concerned that offeror may be eliminated from the competitive range based on an adverse "past performance" record that they are unaware of or have not been given the opportunity to comment on as required by FAR 421503.

To date, the contracting officers' use of past performance to eliminate offerors from the competitive range has raised the number of past performance protests to the Comptroller General to an estimated 100 per year, largely as a result of a lack of definitive regulatory direction to the contracting officer on the limitations of the use of past performance in the source selection process

There has been considerable controversy about OFPP's efforts to circumvent the SBA's responsibilities under the Certificate of Competency Act, where offeror are small businesses

Past performance has always been a responsibility factor to be considered by a contracting officer in making the requisite "affirmative" determination of responsibility Under the regulations, anything short of an affirmative determination is a nonresponsibility determination, and the offeror is not eligible for that award There are no degrees of responsibility permitted under the regulations While it is allowable to rank offeror based on their present technical capabilities, past performance is permissible in considering an award except where a small business is involved Then, the statute and regulations require that all responsibility factors be referred by the contracting officer to SBA for a binding determination The contracting officer cannot make or proceed with an award until SBA has acted The Comptroller General's decisions support this process

If the contracting officers follow the proposed regulations, the specificity issue may be resolved and would have the support of SBLC In two sections of the proposed regulations 15403 (b) (4) and 15505 (e) and (f), "all factors and significant subfactors that will affect contract award and their relative importance shall be stated clearly in the solicitation" 10 U S C. 2305 (a) (2) (A) (I) and 41 U S C 253a (b) (1) (A), See Sec 15404 (f)
(f) The solicitation shall also state, at a minimum, whether all evaluation factors other than cost or price, when combined, are-
(1) Significantly more important than cost or puce,
(2) Approximately equal to cost or price, or
(3) Significantly less important than cost or price (10 U.S C 2305 (a) (3) (A) (111) and 41 US C 253a (c) (1) (C))

The current proposed regulations provide that prior to establishing the competitive range, communications may be held with those offeror whose exclusion from, or inclusion in, the competitive range is uncertain ( 15406 (b) (1)) and "may" address "information relating to relevant past performance" SBLC recommends this provision be amended to say "shall address any past performance information that may be used or relied upon by the contracting officer in determining if the offeror will be included in the competitive range."

## Notice of Past Performance

As presently drafted, the contracting officer is not required to advise the offeror of adverse past performance information during the selection process FAR Subpart 4215 Contractor Performance Information requires contracting officer evaluation reports on every contract in excess of $\$ 1$ million, with copies of the agency's evaluation, be provided to the contractor "as soon as practicable after completion of the evaluation" Contractors have a minimum of thirty (30) days to submit comments, rebutting statements or additional information. Agencies shall provide for a review at a level above the contracting officer to consider the offeror's disagreements. The offeror's comments are required to be made part of the contract file However, SBLC is concerned that the report could include biased and/or adverse or incomplete information that the contractor is unaware of and that could, at a later date, result in the offeror being eliminated from the competitive range without the offeror having had the opportunity to correct or contest such adverse or incomplete information

SBLC is still concerned about the offeror not being aware of adverse past performance information As presently drafted, Proposal Evaluation-Past Performance Evaluation provides that the "Government shall consider the [FAR 42 1503\} information as well as information obtained from any other source when evaluating the offeror's past performance, [adding] the contracting officer shall determine the relevancy of similar past performance information" 15405 (a) (2) (11) (emphasis added) If the contracting officers follow these source selection procedures, the Comptroller General will have better guidance in reviewing protests involving past performance

Because of this justified concern, SBLC strongly recommends that in the source selection process, the contracting officer be denied the use of any adverse past performance information that the offeror of bidder is not aware of or has not been given an opportunity to comment on. In those instances, the adverse information cannot be used for any purpose until the offeror has had a reasonable opportunity to provide all comments This would apply to all acquisitions below or above $\$ 1,000,000$.

SBLC remains concerned that the GARs also currently provide that the identity of the Government (and other) sources of past performance information is not to be revealed

SBLC believes strongly that without regulatory checks, the adverse past performance information that the contractor is unaware of and has not been given the opportunity to refute is completely unacceptable The Office of Federal Procurement Pohcy (OFPP) Administrator's responsibility is "to provide guidance that include standards for evaluating past performance and other relevant performance factors that facilitate consistent and fair evaluation by all executive agencies" 41 U SC 405 (J) (1) (A) (emphasis added)

With regard to past performance, the drafters of the proposed regulations have failed to meet the prior standard of defining the contracting officers' authorities and accountability

The proposed use of past performance criteria which are largely subjective will only lead to confusion and uncertainty that is already adversely affecting small business Congressionally - mandated maximum participation in order to receive a "fair share" of the procurement dollars

## 7. MULTI-STEP SOURCE SELECTION

The multi-step source selection process in the proposed rule is a regulatory attempt to impose a mandatory downselect This was specifically rejected by the conferees in PARA.

Section 15.202 provides the advisory downselect and should be the only provision for the multi- step source selection for competitive range determinations SBLC further recommends that the government advise all offerors regarding their relative ranking in the procurement The advisory downselect process puts the decision on whether to proceed with competition for the award squarely in the hands of the business, which is in the best position to determine its capabilities to compete for that contract Revealing the offerors' ranking -- a process already in place in New York state -- would clearly help offeror decide whether to proceed in the competition

When the government takes the step to provide a clear statement of its need (which is not an essential element of this rule or of the existing FAR) and the key evaluation criteria that it will use in making its award decisions, as well as notifies offeror of their ranking, we behave that interested offeror will make the most of the information by competing only where they believe they have a reasonable chance of success, or where they are willing to invest their own resources.

Furthermore, to ensure that multi-phase acquisitions are not viewed as an independent means of conducting a procurement, it is essential that any use of a multiphase acquisition be tied to evaluation criteria (by a reference to 15404 ), competition requirements, and other source selection provision in FAR 15

## 8. CHARGES FOR SOLICITATION SETS

Section 15205 allows agencies to charge for solicitation sets The Small Business Act specifically limits those charges to the cost of duplication SBLC recommends that this fee should be specifically stated in Section 15.205

## 9. PARTICIPATION THROUGH ELECTRONIC CONTRACTING

 Proposed FAR 15.203 (c) permits the contracting officer to issue Request for Proposal (REPs) and receive offerors' proposals (and modifications and revisions to such proposals) using electronic commerce FAR Part 15 does not contain any explicit requirement that offerors can be required to use electronic commerce methods, if the contracting officer selects electronic commerce as the preferred method of issuing the solicitation and receiving responses SBLC is concerned, however, that tow provisions in the proposed rule strongly imply that the offerors may be completed to use electronic commerce Proposed FAR 15204 - 5 Part IV (Representations and Instructions)authorizes the contracting officer to specify the required "format" for an offeror's response to a solicitation Paragraph FAR 15 205(a) (issuing solicitations) limits the statutory right of a small business to be furnished a copy of any solicitation to those solicitations issue through "other than electronic contracting methods"

Given the failure of the procuring agencies to effectively implement the uniform Federal Acquisition Computer Network (FACNET) System and the growing proliferation of nonuniform procurement bulletin boards, SBLC strongly recommends that paragraph 15 204(a) be modified to explicitly reserve the right of a small business offeror to obtain a solicitation and submit a proposal in a paper format The buying agency is more likely to have ready access to the necessary computer hardware and software to print any needed copies of an electronic solicitation and could easily scan any small business paper-based offer into electronic format.

## CONCLUSION

Based upon the above comments, the proposed rule should be revised as discussed and recommended We appreciate the changes made to date to the FAR 15 rewrite and the careful consideration the FAR Council has given to our concerns We believe the proposed recommendations, if implemented, would enhance the proposed rule in such a manner as to ensure the integrity of the federal procurement process, the involvement of small business in the competition for federal contracts, and will result in a streamlined procurement system. We emphasize, however, that our concerns go the core tenets of the procurement process and that, absent the changes recommended, the proposed rule would immediately and detrimentally alter the certainty and integrity of government procurement.

For these reasons, the proposed rule must be revised to conform to the minimal FARA changes that were enacted, to minimize diversion from the current FAR unless there is justification for doing so, to ensure the supremacy of the FAR as the uniform guiding rules of the federal procurement process, and to preserve full and open competition for government contracis. We also recommend that the FAR Council urge OMB to declare the proposed rule a major rule under 5 U S C Section 804 and publish a notice to that effect in the Federal Register

Thank you for your consideration of these views


## 05029.4

July 14, 1997
General Services Administration
FAR Secretanat (VRS)
1800 F Street, NW
Room 4035
Washington, DC 20405

## RE FAR Case 95-029 "FEDERAL ACQUISITION REGULATION, PART 15 REWRITE"

The American Subcontractors Association (ASA) is pleased to submit these comments on the proposed rule published jointly by the Department of Defense ("DoD"), the General Services Administration ("GSA") and the National Aeronautics and Space Administration ("NASA") concerning the combined Phases I and II of the rewrite of Federal Acquisition Regulation ("FAR") Part 15 This proposed draft of the rule was published in the Federal Register on May 14, 1997 (62 FR 26640)

ASA is a national trade association with a membership of over 6,000 specialty trade contractors A majority of our members are small companies, engaged in the construction trades

The proposed rule seeks to amend the Federal Acquisition Regulation (FAR) by rewriting Part 15, Contracting by Negotiation The proposed rule suggests that this re-write is undertaken given the "spirit of the National Performance Review, Federal Acquisition Streamlining Act of 1994 (FASA), and Federal Acquisition Reform Act of 1995 " In this regard, there is no statutory authority for the initiatives undertaken in this rule ASA believes that FAR Part 15 will only be used sparingly for procurement of construction and currently this section of the FAR does not apply to most construction procurement activities. However, the intertwining nature of the FAR regulations leads ASA to comment on several aspects of the proposed regulation, and to reinforce our position that federal procurement should be full and open

ASA has consistently embraced streamlining the procurement process and has made specific recommendations throughout the regulatory process Yet, ASA has significant concerns when streamlining initiatives vest discretion in the contracting officer without appropriate guidelines and internal checkpoints to guard against erosion of full and open competition through exclusion of valid proposals for vague efficiency purposes and the funneling of contract money on partisan or personal basis

The proposed rule seeks to amend the Federal Acquisition Regulation (FAR) by rewriting Part 15, Contracting by Negotiation The proposed rule suggests that this re-write is undertaken given the "spirit of the National Performance Review, Federal Acquisition Streamlining Act of 1994 (FASA), and Federal Acquisition Reform Act of $1995^{"}$ In this regard, there is no statutory authority for the initiatives undertaken in this rule

## Government Resources Should Not Be a Basis for Limiting Competition

We are concerned that this proposed rule allows contracting officers to arbitrarily limit the number of proposals in the competitive range based solely on the resources available to conduct the procurement. The proposed rule relegates the statutory foundation of full and open competition to a lesser priority, and competition becomes dependent on the manpower available (or merely assigned) to conduct a specific procurement

## INTRODUCTION

Only a very small portion of the May 14 proposed rule is designed to implement provisions of the Federal Acquisition Reform Act, hereafter "FARA" (Public Law 104106) Moreover, there is no documented need for the proposed changes nor any study that concludes that these changes will result in the benefits claimed by the Office of Federal Procurement Policy

At the outset, we would like to commend the FAR Council for addressing, in this most recent draft of the proposed regulation, a number of small business concerns that were raved in comments to the original FAR Part 15 re-write draft of July 31, 1996

Yet, we specifically note that while some accommodation was made to our concern that efficiency was the driver for the inclusion of exclusion of proposals in the competitive range, we maintain that the May 14 proposed rule still is not consistent with FARA Quite simply, rather than write the proposed rule in language tracking the statutory language and specific documented intent of Congress, the proposed rule in its various three drafts have employed creative, crafty, or contrary language in the regulations to enable the practice of full and open competition to be narrowed or unfairly whittled

We do not believe that the July 31, 1996, the September 12, 1996 of the May 14, 1997 proposed rules are in compliance with FARA, but in fact, attempt to implement via regulation a competitive system specifically rejected by Congress At a mınımum, the competitive range provisions leave the basic determination of fair competition open to such wide discretion by the contracting officer that it will almost certainly at times lead to favoritism, improper funneling of contract money, or simply exclusion of valid and worthy proposals at the convenience of the officer.

The balance of the May 14 proposed rule comprises Executive Branch initiatives to rewrite this critical chapter of the federal acquisition process Several of these initiatives make beneficial changes to the federal acquisitions process that we support However, these limited number of beneficial changes remain overshadowed by provisions that upset
the basic tenets of federal procurement policy Thus, we do not support many provisions of this rule and once again cannot support the implementation of this rule and recommend that the rule not be adopted in its present form In our view, the rule is inconsistent with FARA, will fundamentally alter the principles that are the foundation of the federal procurement system, and will have significant adverse consequences for all business, but particularly small businesses, that seek an opportunity to do business under the Federal Acquisition Regulations with federal agencies.

We apprecrate the recognition that this rule is a "signıficant regulatory action" pursuant to Executive Order 12866 We applaud the determination made by the FAR Council that the rule is a "major rule" under the Regulatory Flexibility Act and the improvement in the flexibility analysis performed on the May 14 rule

ASA believes that, if implemented as published, the proposed rule will lead to the following consequences:
$\checkmark$ Arbitrary discretion vested in contracting officers enable them to funnel money to states or favorite contractors.
$\checkmark$ Precemeal promulgation of regulations makes assessment of the impact of all the changes impossible. FAR Part 15 and the FAR regulations are being issued in "pieces" so the total impact is impossible to assess
$\checkmark$ Arbitrary discretion vested in a contracting officer lowers incentives to increase competition, rather it offers an incentive to the contracting officer to decrease competition
$\checkmark$ Moves the locus from the best possible price/quality of service of good to the best possible marketing of the contracting officer or the best "relationship" with the contractıng officer "Long term relationshıps" desired by Dr Kelman translate to favoritism
$\checkmark$ The proposed rule upsets the basic tenets of the federal procurement process. Therefore it will lead to considerable litigation that would not have otherwise occurred and will be counterproductive to the Administration's efforts to reduce litıgation.

## 1. MAJOR RULE

The proposed rule was not declared a "major rule" as mandated by the Small Business Regulatory Enforcement Faırness Act (SBREFA) SBREFA specifically defines a major rule as any proposed rule which (1) has an annual impact on the economy of $\$ 100$ million of more, (2) had adverse effects on competition, employment, investment, productivity, and innovation, or (3) causes a major increase in costs or prices Frank Raines, Director of the Office of Management and Budget, has specifically stated that the FAR 15 proposed rule is a necessary step to balancing the federal budget, thus admitting that the
proposed rule will have a $\$ 100$ million or more impact on the economy. Yet his own department, OMB, refuses to classify it as such

ASA recommends that the Administration should declare the proposed rule a "major rule" as mandated by SBREFA

## 2. COMPETITIVE RANGE

ASA has some concerns regarding the language used to implement the government's intent regarding competitive range determination In particular, ASA is concerned with the language of the proposed rule, which allows contracting officers to "establish a competitive range comprised of those proposals most highly rated, unless the range is further reduced for purposes of efficiency," and limits the competitive range to only those proposals that have the greatest likelihood of receiving award The government has given itself the ability to narrow the number of offerors, but has no responsibility to explain how the decision was made.

As the proposed rule currently stands, government procurement officials will likely decide how many offers to include in the "greatest likelihood" test based on efficiency ASA strongly believes that the government should not sacrifice competition solely for the sake of administrative efficiency

There is a considerable advantage to the government and to taxpayers in assuring that competitive procurements are used under all but the most extenuating circumstances To minimize the potential for abuse of this discretion, ASA recommends that contracting officers provide substantial additional, written justification in instances when they propose to go forward with fewer than three offers In addition, without such a safety mechanism, potential new entrants into the federal marketplace may be denied opportunities to participate, which is clearly contrary to the intent of the Rewrite

## 3. DISCUSSIONS

The Proposed rule allows very flexible discussions with offerors, and a contracting officer can treat offerors unequally in discussions. The new proposed rule is significantly worse than the previous version, It is vague and open-ended, without any clear parameters, even arbitrary and capricious. ASA recommends the following
(3) All offerors and contractors are entitled to fair treatment Fair treatment requires that the members of the acquisition team abide by the solicitation and acquisition plan (if any) and comply with applicable laws and regulations in dealing with offerors and contractors All offeror and contractors shall be treated fairly and impartially

Additionally, in discussions, a contracting officer can disclose that an offer is too high or unrealistic based upon their own price analysis or "other reviews," enabling an officer to "suggest" that a lower price might win the award The offeror can then adjust his price in submitting his revised proposal

The proposed rule does not retain the current FAR 15610 (e) (2) prohibition on "auction techniques "We do not believe that the government should be engaged in an "auction" when conducting source selections, however, we believe this exclusion was done intentionally (particularly in light of the affirmative approval of such "action techniques" in dealing with the September 6 FARA proposed rule on simplified acquisition procedures) ASA strongly urges the retention of these provisions in the FAR Part 15

## 4. INTERIM PROPOSAL REVISIONS

The proposed rule does not ensure offeror equal time for interim proposal revisions Although the new draft does require a common cut-off date for BAFO, it does not require equal time for all offerors to make interim proposal revisions 15208 allows late interim proposals and could undercut fair competition The contracting officer can talk more to one offeror and give him more time to submit a revised proposal. Thus, and officer could allow the preferred offeror more time to get his proposal "right" before requesting BAFO

If solicitation requirements change, ASA believes that offerors should have the option to submit a revised proposal, providing that all offerors are given that ability The opportunity to submit a revised proposal is critical to an offeror's ability to make the best offer possible to the government Accordingly, ASA strongly believes that offerors should have the discretion to submit revised proposals based on new information, such as changing market conditions, new ideas, or information received from the government during the course of negotiations On the other hand, ASA recognizes that the government does not want to be inundated with unsolicited proposal revisions Thus, ASA recommends that revision due dates be established by the contracting officer in advance so that offerors can reasonably combine all intended revisions into a single proposal

ASA also urges the Rewrite Committee not to consider permitting the government to accept late proposals regardless of the reason for the tardiness under FAR 15208 This is not currently part of the sealed bid process, which is the current preferred method for the acquisition of construction services. As a matter of fairness and administrative efficiency, allowing the government to accept late proposals (where tardiness is attributable to the offer) will likely result in discord among offeror and disputes that can be prevented by establishing a submission deadline. ASA believes that these drawbacks will outweigh the benefits to the government in being able to evaluate a few late proposals that it would otherwise be required to reject ASA recommends that FAR 15208 be amended so that the contracting officer will not accept late proposals unless it is established that the tardiness is the result of government mishandling or fault

## 5. COMMUNICATIONS

Prior to deciding the competitive range, the contracting officer can take into consideration an oral representation that is made in "communications" with offeror whose exclusion from of inclusion in the competitive range is uncertain There is no requirement that the contracting officer talk to all offeror in this range Thus, a contracting officer could talk
to one or a few and decide not to talk to the others similarly situated, thus precluding fair competition among these offeror

ASA recommends that the FAR require the contracting officer to hold communications with all such offeror before making a competitive range determination

## 6. PAST PERFORMANCE

Proposals may be eliminated from the competitive range based upon factors including "past performance" The source of the past performance information does not have to be revealed. Thus, proposals could be eliminated by someone holding a "grudge" or by another competitor, and the blackmarked company would not be able to defend itself or rebut the allegations

ASA recommends the full disclosure to the offeror of all past performance considerations, including the percentage of weight given to considerations, including the percentage of weight given to the information, the sources, and a clear statement of what can be considered. The offeror shall be allowed to respond to any past performance information relied upon by the contracting officer or used to rank the offeror The contracting officer should be prohibited from using any past performance information unless such information has been fully disclosed to the offeror and the offeror has had an opportunity to respond or comment upon such information

## Use of Past Performance

ASA is concerned that offeror may be eliminated from the competitive range based on an adverse "past performance" record that they are unaware of or have not been given the opportunity to comment on as required by FAR 421503

To date, the contracting officers' use of past performance to eliminate offeror from the competitive range has raved the number of past performance protests to the Comptroller General to an estimated 100 per year, largely as a result of a lack of definitive regulatory direction to the contracting officer on the limitations of the use of past performance in the source selection process.

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regulations require that all responsibility factors be referred by the contracting officer to SBA for a binding determination The contracting officer cannot make or proceed with an award until SBA has acted. The Comptroller General's decisions support this process

If the contracting officers follow the proposed regulations, the specificity issue may be resolved and would have the support of ASA In two sections of the proposed regulations 15.403 (b) (4) and 15505 (e) and (f), "all factors and sıgnificant subfactors that will affect contract award and their relative importance shall be stated clearly in the solicitation" 10 U S C 2305 (a) (2) (A) (1) and 41 U.S.C 253a (b) (1) (A), See Sec. 15404 (f) ${ }^{\text {. }}$
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Because of this justified concern, ASA strongly recommends that in the source selection process, the contracting officer be denied the use of any adverse past performance information that the offeror of bidder is not aware of or has not been given an opportunity to comment on In those instances, the adverse information cannot be used for any purpose until the offeror has had a reasonable opportunity to provide all comments This would apply to all acquisitions below or above $\$ 1,000,000$

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With regard to past performance, the drafters of the proposed regulations have fanled to meet the prior standard of defining the contracting officers' authorities and accountability The proposed use of past performance criteria which are largely subjective will only lead to confusion and uncertainty that is already adversely affecting small business Congressionally - mandated maximum participation in order to receive a "fair share" of the procurement dollars

## 7. MULTI-STEP SOURCE SELECTION

The multi-step source selection process in the proposed rule is a regulatory attempt to impose a mandatory downselect. This was specifically rejected by the conferees in FARA ASA supports the use of the advisory down select process, and opposes the mandatory down select process

Section 15202 provides the advisory downselect and should be the only provision for the multi- step source selection for competitive range determinations ASA further recommends that the government advise all offerors regarding their relative ranking in the procurement The advisory downselect process puts the decision on whether to proceed with competition for the award squarely in the hands of the business, which is in the best position to determine its capabilities to compete for that contract. Revealing the offerors' ranking -- a process already in place in New York state -- would clearly help offerors decide whether to proceed in the competition

When the government takes the step to provide a clear statement of its need (which is not an essential element of this rule or of the existing FAR) and the key evaluation criteria that it will use in making its award decisions, as well as notifies offerors of their ranking, we beheve that interested offerors will make the most of the information by competing only where they believe they have a reasonable chance of success, or where they are willing to invest their own resources

Furthermore, to ensure that multi-phase acquisitions are not viewed as an independent means of conducting a procurement, it is essential that any use of a multi-phase acquisition be tied to evaluation criteria (by a reference to 15.404), competition requirements, and other source selection provision in FAR 15

## 8. CHARGES FOR SOLICITATION SETS

Section 15205 allows agencies to charge for solicitation sets The Small Business Act specifically limits those charges to the cost of duplication ASA recommends that this fee should be specifically stated in Section 15205

## 9. PARTICIPATION THROUGH ELECTRONIC CONTRACTING

 Proposed FAR 15203 (c) permits the contracting officer to issue Request for Proposal (RFPs) and receive offerors' proposals (and modifications and revisions to such proposals) using electronic commerce. FAR Part 15 does not contain any explicit requirement that offerors can be required to use electronic commerce methods, if the contracting officer selects electronic commerce as the preferred method of issuing the solicitation and receiving responses ASA is concerned, however, that tow provisions in the proposed rule strongly imply that the offerors may be completed to use electronic commerce. Proposed FAR 15.204-5 Part IV (Representations and Instructions) authorizes the contracting officer to specify the required "format" for an offeror's response to a solicitation Paragraph FAR 15.205 (a) (issuing solicitations) limits the statutory right of a small business to be furnished a copy of any solicitation to those solicitations issue through "other than electronic contracting methods"Given the failure of the procuring agencies to effectively implement the uniform Federal Acquisition Computer Network (FACNET) System and the growing proliferation of nonuniform procurement bulletin boards, ASA strongly recommends that paragraph 15 204(a) be modified to explicitly reserve the right of a small business offeror to obtain a solicitation and submit a proposal in a paper format The buying agency is more likely to have ready access to the necessary computer hardware and software to print any needed copies of an electronic solicitation and could easily scan any small business paper-based offer into electronic format

## CONCLUSION

We appreciate the changes made to date to the FAR 15 rewrite and the careful consideration the FAR Council has given to our concerns We believe the proposed recommendations, if implemented, would enhance the proposed rule in such a manner as
to ensure the integrity of the federal procurement process, the involvement of small business in the competition for federal contracts, and will result in a streamlined procurement system

There are many innovations in this rule which have been sought by the private sector and which we support. However, there are a greater number of harmful changes that will add confusion to the acquisition system, create distrust among critical participants, and potentially increase protests and litigation as bidders and other interested parties, particularly small business, seek information about their exclusion from the federal marketplace

In sum, it is our belief that this the bulk of the changes in the proposed rule will lead to an acquisition process that will be prone to improvisation and influence pedding, and not to one which fosters tull and open competition.

ASA appreciates the opportunity to submit these comments and would be pleased to provide additional information that you may find useful. ASA looks forward to working with government representatives to finalize and implement the administration's procurement reform initiatives


Washington, DC 20520

Office of the Procurement Executive State Annex Number Six, Room 603

July 14, 1997

## FAR Secretanat (VRS)

General Services Administration
Room 4035
1800 F Street, N W
Washington, DC 20405

## Dear Sir or Madam •

In response to the Federal Register notice of May 14, 1997, the following are the Department of State's comments on FAR Case 95-029, FAR Part 15 Rewrite
$1 \quad 15100$ - This section states that the coverage that follows is not mandatory, by indicating that some, but not all, techniques are included and that they "may" be used This regulation should be limited to required procedures, so as to minimize the size and impact of the coverage FAR 1 102(d) already articulates a rule that procedures not explicitly forbidden by the FAR are permissible, which begs the question of why Part 15 must include a host of non-mandatory procedures Part 15 could be shortened considerably, and confusion avoided, by limited its scope to required procedures and leaving all other procedures up to the creativity of the Contracting Officer, within established parameters

215101 - This coverage essentially negates the accepted meaning of the term "best value" acquisition, in that lowest-pnced technically acceptable awards are now considered best value It is suggested that some other term be used to convey the intended message (eg, "most advantageous selection," etc.)
$3 \quad 15$ 101-2 - The term "lowest price technically acceptable" should be changed to "lowest priced acceptable," because the former implies that a formal technical evaluation is needed, yet it is not required by law Paragraph $(\mathrm{b})(1)$ is more burdensome than the current Part 15 in that it requires agencies to express "acceptability standards for non-cost factors" This is not required by law and would impose an administrative burden on agencies that do not mandate a formal technical evaluation or list detailed technical factors in the solicitation. For example, negotiated procedures may be necessary to discuss price issues, not technical matters, and thus a formal technical evaluation would not be needed, however, a more complicated process is mandated by the proposed coverage. Also, paragraph (b)(4) states that communications may occur in lowest-priced technical acceptable acquisitions, are these prohibited in all other methods of acquisition? Highlighting this aspect raises more questions than it answers

415102 - Paragraph (b) needs clanfication in that references to "solicitation" and "firststep solicitation" are used interchangeably so that it is unclear which step is intended

15103 - Since oral presentations are permitted, but not discussed, in the current Part 15, we question the need for regulatory coverage on this topic. Many of the procedures imposed are not necessary or raise irrelevant issues (see (b)(4) and (e), for example)

15201 - The reference to "products" in paragraph (b) should be replaced with "supplies," for consistency with the rest of the FAR
$7 \quad 15$ 204-2 - We object to the replacement of the SF-33 with proposed OF-308, as the latter form appears to offer no advantage over the former. For example, block 15 C provides instructions to offeror regarding remittance address, but this item is deleted from the OF308 and thus requires that Section H of all REPs contain additional wording on this topic (see proposed FAR 15.204-2(g)).

815205 - This section should be revised to reflect the current environment in which solicitations are normally issued via the Internet rather than in hard copy
9. $\quad 15401$ - This section creates a confusing and artificial distinction between a deficiency and a weakness. These terms should be combined into a single term that will accomplish the same purpose.
$10 \quad 15.405(\mathrm{a})(2)(\mathrm{iv})$ - This paragraph should explain how a neutral evaluation should be made. For example, if point scores are used, is neutral considered to be $0 \%$ of available points, $50 \%, 60 \%, 70 \%$ or some other figure? The proposed wording implies, but does not declare, that neutral means "satisfactory."

11 15.406(b) - We continue to believe that flexibility demands that communications be permitted before establishment of the competitive range. The proposed coverage is artificially restrictive and will complicate the acquisition process for contracts where, as in private industry, candid communication on any topic would be advantageous.

12 15.604(c) - These instructions are unclear, as using the SF-26 does not require the proposed change specified, and readers of this regulation will feel compelled to scrutinize the SF-26 to ensure compliance with these procedures The first sentence of this paragraph should be deleted or clarified.

1315606 - This section should be revised to reflect the recent changes to the FOIA statute regarding unsuccessful proposals and contracts that do not incorporate an offeror's proposal.
14. 15 609(a) - This paragraph should be clarified to indicate that unilateral signature on the SF-26 is acceptable.
15. $52215-1$ - This provision should include the wording regarding emergency office closings that appears in 52 215-36.

These changes would require conforming changes to FAR Parts $1,5,6,14,36,52$, and 53
$16 \quad 15502(\mathrm{a})$ - The guidance in this paragraph is inartfully presented The numbered subparagraph should not begin with a negative and then refer elsewhere in the section, as this is confusing.
17. 15 503-4(a)(1) - The second reference should be to $15503-1(\mathrm{c})(4)$
$18 \quad 15.504-4(\mathrm{c})(4)(1)(\mathrm{B})$ - This subparagraph should be moved to Part 36, as the "fee" referred to is not profit/fee but rather the price of the A/E contract
$19 \quad 15.504-4(\mathrm{~d})(1)(1)(\mathrm{B})$ - This subparagraph should be revised to address labor in general, rather than just "conversion" direct labor in manufacturing, so that service contracts are addressed.
$20 \quad 15.504-4(\mathrm{~d})(1)(\mathrm{ii})(\mathrm{B})-$ Please define what is meant by "closely priced "
$21 \quad 15504-4(\mathrm{~d})(1)(111)$ - These subparagraph should be deleted, at its premise is that small businesses are inherently more risky than large businesses, which is an improper assumption.
$22 \quad 15$ 506-3-This subsection should be more definitive as to whether a price negotiation memo is required or not Also, the format provided is not particularly useful for most acquisitions. It focuses primanly on cost or pricing data, which is now the exception rather than the rule. The key areas that should be covered are pricing, technical issues, and terms and conditions, with the price negotiation memo focusing on differences from the prenegotiation objectives.

These changes would require conforming changes to FAR Parts $4,7,11,16,42,43$, and 52
Overall, the proposed FAR coverage takes an already over-regulated area and makes it even more complicated Although the proposed FAR 15002 (b) states that the goal is to minimize the complexity of negotiated acquisition, this goal has not been achieved As an alternative to this expanded regulation, enclosed are two proposals for a more streamlined approach to negotiated contracting

We appreciate the opportunity to comment on the proposed regulation


Enclosures (as stated)

Notes for FAR 156 Rewrite

1. Version A uses the ABA Model Procurement Code for State and Local Governments (3-203, (4)-(7)) as a baseline. Version B uses the current 156 as a baseline Version B is an attempt to streamline existing procedures, while Version A is major surgery that provides no coverage for the non-statutory procedures in the current 156 , with the understanding that the Contracting Officer may follow whatever procedures are appropriate for the particular acquisition Version B is an attempt only to repair the current system, Version A replaces the current system with a more discretionary environment where procedures are dictated more by business judgment rather than by regulation.

2 FASA codified the phrase "competitive range" in Section 1061(c) (41 U S C 253b), in its revision on award without discussions, so it is not possible to eliminate the concept entirely

3 An attempt was made to replace "shall" with "should" throughout and to delete unnecessary wording, the deletions should be reviewed to ensure that none of the deleted coverage is required by statute Section 1061 of FASA poses the greatest obstacle to simplifying FAR 156 , as it codifies several procedures that were previously addressed by regulation This law creates rigid requirements for an area that would better be addressed in regulation or business practices

Version A
Delete current FAR 15.6 and replace with the following •

## SUBPART 156 - SOURCE SELECTION

## 15600 SCOPE OF SUBPART

This subpart prescribes policies and procedures for selection of a source or sources in competitive negotiated acquisitions, this subpart is not required for simplified acquisitions under Part 13

## 15601 EVALUATION FACTORS

The solicitation shall state the evaluation factors and subfactors, their relative importance, and any minimum requirements that apply to particular evaluation factors and significant subfactors Evaluation factors shall include cost or price to the Government and may include (a) the quality of the supplies or services being acquired (including technical capability, management capability, prior experience, and past performance), (b) numeric weights for evaluation factors or subfactors, or (c) a statement that award will be made to the offeror that meets the solicitation's mandatory requirements at the lowest cost or price Further, the solicitation shall state whether all evaluation factors other than cost or price, when combined, are--
(1) Significantly more important than cost or price;
(11) Approximately equal to cost or price; or
(iii) Significantly less important than cost or price

## 15602 DISCUSSIONS

(a) Except as provided in paragraph (b) of this section, the contracting officer shall conduct written or oral discussions with all responsible offeror who submit proposals within the competitive range from a technical or price standpoint The content and extent of the discussions are matters of the contracting officer's judgment, based on the particular facts of each acquisition
(b) Discussion need not be applied in acquisitions--
(1) In which prices are fixed by law or regulation,
(2) Of the set-aside portion of a partial set-aside; or
(3) In which the solicitation notified all offeror that the Government intends to evaluate proposals and make award without discussion, unless the contracting officer determines that discussions (other than communications conducted for the purpose of minor clarification) are
considered necessary (see 15.407 (d)(4)) Once the Government states its intent to award without discussion, the rationale for reversal of this decision shall be documented in the contract file

## 15603 AWARD

Award shall be made to the responsible offeror whose proposal is determined to be most advantageous to the Government, taking into consideration the evaluation factors and subfactors stated in the solicitation. The contract file shall contain the basis on which the award is made

Version B

## SUBPART 156 - SOURCE SELECTION

## 15600 SCOPE OF SUBPART

This subpart prescribes policies and procedures for selection of a source or sources in competitive negotiated acquisitions Femme sure selection preedures, involving beards,
 dreeusions with offerers dung the mpetition-are dressed in 15613

## 15601 DEFINITIONS.

Clarification, as used in this subpart, means communication with an offeror for the sole purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes in the proposal. It is achieved by explanation or substantiation, ether in response to Government inquiry or as initiated by the offeror. Unlike discussion (see definition below), clarification does not give the offeror an opportunity to revise or modify its proposal, except to the extent that correction of apparent clerical mistakes results in a revision

Deficiency, as used in this subpart, means any part of a proposal that fails to satisfy the Government's requirements

Discussion, as used in this subpart, means any oral or written communication between the Government and an offeror (other than communications conducted for the purpose of minor clarification), whether or not initiated by the Government, that (a) involves information essential for determining the acceptability of a proposal, or (b) provides the offeror an opportunity to revise or modify its proposal

Source selection authonty means the Government official in charge of selecting the source. This title is most often used when the selection process is formal and the official is someone other than the contracting officer
-Source reduction, fused this subpar, means any practice wheel (a) reduces the amount of any hazardous aubataneo, pollutant, or eontammantenter any waste stream or otherwise released into the environment prior to reeyeling, treatment, or dropesal, and (b) reduces the hazards to public health and the environment asseverated with the release of such substances, pollutants, or contaminants.

### 15.602 APPLICABILITY.

(a) This subpart applies to [competitive] negotiated contracting -when source selection is based on
(1) Cost or price competition between propestals that meet the Government's minimum requirements stated in the sollertation, or
(2) Competition involving an evaluation and comparison of eos ere and factors
(b) This subpart [is not required for] acquisition procedures (see part 13)

## 15603 PURPOSE

Source selection procedures are designed to -

## - (a) Maximizeompettion;

([a] b) Minimize the complexity of the solicitation, evaluation, and the selection decision,
([b] e) Ensure impartial and comprehensive evaluation of offerors' proposals, and
([c] d) Ensure selection of the source whose proposal has the highestegree realism and whose performanee-is expected [best] to best meet stated Government requirements

## 15604 RESPONSIBILITIES

(a) Agency heads or their designees are responsible for source selection
(b) The cognizant technical official is responsible for the technical and past performance requirements related to the source selection process
(c) The contracting officer is responsible for contractual actions related to the source selection process, including -
(1) Issuing solicitations to which this subpart applies in accordance with subpart 154 and this subpart;
(2) Conducting or coordinating cost or price analyses as prescribed in subpart 15.8,
(3) Conducting or controlling all negotiations concerning cost or price, technical requirements, past performance, and other terms and conditions, and
(4) Selecting the source for contract award, unless another official is designated as the source selection authority
(a) The factors and subfactors that will be considered in evaluating proposals shall be tailored to each acquisition and shall include only those factors that will have an impact on the source selection decision.
(b)(1) The evaluation factors and subfactors that apply to an acquisition and the relative importance of those factors and subfactors are within the broad discretion of agency acquisition officials except that--
(1) Price or cost to the Government shall be included as an evaluation factor in every source selection.
(ii) Past performance shalt [may] be evaluated in all competitively negotiated acquisitions [if feasible and appropriate for the supplies or services being acquired] expected to exceed $\$ 100,000$ not later than January 1,1999 , unless the documents in the entrant file the reasons why past perform ane sherd not be evaluated Agenere may develop their own phase in schedule for past performance evaluators whet meet or exceeds the following milestones All sohertations with an est mat value in exes of (A) $\$ 1,000,000$ issued on or after July 1, 1995; (B) $\$ 500,000$ issued on or after July 1,1997 , and (C) $\$ 100,000$-issued on or after January 1, 1999 -Past perform the may be valuated in competitively negro aequrtions estimated at $\$ 100,000$ or less at the drseretion of the contracting officer
> (int) Quality shall be addressed in every source selection through delusion the one or mere of the non cost evaluation faetersor stubfators, ste as past performance, teehneal excellence, management capability, personnel qualifications, prior experience, and schedule emplane

CC (iv) Envronmental-objectives, stu ch as promoting waste reduction, sere reduction, energy effierency, and maximum practienble reeored (en 23), shall also be considered in every sore selection, when-nppropfate.
(2) Any other relevant factors or subfactors, such as cost realism, may also be included.
(c) In awarding a cost-reımbursement contract, the cost proposal should not be controlling, since advance estimates of cost may not be valid indicators of final actual costs There is no requirement that cost-reimbursement contracts be awarded on the basis of lowest proposed cost, lowest proposed fee, or the lowest total proposed cost plus fee The award of costreimbursement contracts primarily on the basis of estimated costs may encourage the submission of unrealistically low estimates and increase the likelihood of cost overruns The primary consideration should be which offeror can perform the contract in a manner most advantageous to the Government, as determined by evaluation of proposals according to the established evaluation criteria
(d)(1) The solicitation should be structured to provide for the selection of the source whose proposal offers the greatest value to the Government in terms of performance, risk management, cost or price, and other factors. At a minimum, the solicitation shall clearly state the significant evaluation factors, such as cost or price, cost or price-related factors, past performance and other non-cost or non-price-related factors, and any significant subfactors, that will be considered in making the source selection, and their relative importance (see 15406 5(c)) The solicitation shall inform offerors of minimum requirements that apply to particular evaluation factors and significant subfactors Further, the solicitation shall state whether all evaluation factors other than cost or price, when combined, are--
(1) Significantly more important than cost or price,
(11) Approximately equal to cost or price, or
(iii) Significantly less important than cost or price
(2) The solicitation may elaborate on the relative importance of factors and subfactors at the discretion of the contracting officer Agencies may elect to assign numerical weights to evaluation factors and employ those weights when evaluating proposals. Numerical weights need not be disclosed in solicitations, however, nothing precludes an agency from disclosing the weights on a case-by-case basis. The solicitation may state that award will be made to the offeror that meets the solicitation's minimum criteria for acceptable award at the lowest cost or price.
(e) In addition to other factors, offers [may] wi be evaluated on the basis of advantages and disadvantages to the Government that might result from making more than one award (see $15407(\mathrm{~h})$ ) The contracting officer shall assume for the purpose of making multiple awards that $\$ 5[, 0] 00$ would be the administrative cost to the Government for issuing and administenng each contract awarded under a solicitation. Individual awards shall [may] be for the items or combination of items that result in the lowest aggregate cost to the Government, including the assumed admınıstratıve costs.

## 15606 CHANGES IN GOVERNMENT REQUIREMENTS

(a) When, ether before or after receipt of proposals, the Government changes, relaxes, increases, or otherwise modifies its requirements, the contracting officer sha\#t [should] issue a written amendment to the solicitation [if the changes will affect the source selection] When time is of the essence, oral advice of changes may be given of the changes involved are not complex and all firms to be notified (see paragraph (b) below) are notified as near to the same time as possible. The contracting officer shall [should] make a record of the oral advice and promptly confirm that advice in writing (see 15.410 ).
(b) In deciding which firms to notify of a change, the contracting officer shat [should] consider the stage in the acquisition cycle at which the change occurs and the magnitude of the change, as follows

## Comers)

(1) If proposals are not yet due, the amendment shall [should] be sent to all firms that have received a solicitation
(2) If the time for receipt of proposals has passed but proposals have not yet been evaluated, the amendment should normally be sent only to the responding offerors.
(3) If the competitive range (see 15 609(a)) has been established, only those offeror within the competitive range shall [should] be sent the amendment
(4) If a change is so substantial that it warrants complete revision of a solicitation, the contracting officer shalt [should] cancel the original solicitation and issue a new one, regardless of the stage of the acquisition The new solicitation shall [should] be issued to all firms onginally solicited and to any firms added to the onginal list
(c) If the proposal considered to be most advantageous to the Government (as determined according to the established evaluation criteria) involves a departure from the stated requirements, the contracting officer shall [should] provide all offerors an opportunity to submit new or amended proposals on the basis of the revised requirements [if the changes will affect the source selection]; provided, that this can be done without revealing to the other offeror the solution proposed in the onginal departure or any other information that is entitled to protection (see 15 407(c)(8) and 15.610(d))

## 15607 DISCLOSURE OF MISTAKES BEFORE AWARD

(a) Contracting officers shall [should] examine all proposals for minor informalities or irregularities and apparent clerical mistakes (see 14405 and 14.407) Communication with offeror to resolve these matters is clarification, not discussion within the meaning of 15610 However, if the resulting communication prejudices the interest of other offerors, the contracting officer shall not make award without discussions with all offeror within the competitive range
(b) Except as indicated in paragraph (c) below, mistakes not covered in paragraph (a) above are usually resolved during discussion (see 15.610).
(c) When award without discussion is contemplated, the contracting officer shall [should] comply with the following procedure:
(1) If a mistake in a proposal is suspected, the contracting officer shall [should] advise the offeror (pointing out the suspected mistake or otherwise identifying the area of the proposal where the suspected mistake is) and request verification If the offeror verifies its proposal, award may be made.
(2) If an offeror alleges a mistake in its proposal, the contracting officer shall [should] advise the offeror that it may withdraw the proposal or seek correction in accordance with subparagraph (3) below
(3) If an offeror requests permission to correct a mistake in its proposal, the agency head (or a destine not below the level of chef of theontraeting office) [contracting officer] may make a written determination permitting the correction, provided, that ( 4 ) both the existence of the mistake and the proposal actually intended are established by clear and convincing evidence from the solicitation and the proposal mind (in) legit before making the detemmation.
(4) If the determination under subparagraph (3) above cannot be made, and the contracting officer still contemplates award without discussion, the offeror shall [should] be given a final opportunity to withdraw or to verify its proposal
(5) Verification, withdrawal, or correction under subparagraph (c)(1) through (4) above is not considered discussion within the meaning of 15.610. If, however, correction of a mistake requires reference to documents, worksheets, or other data outside the solicitation and proposal in order to establish the existence of the mistake, the proposal intended, or both, the mistake may [should] be corrected through discussions under 15610
(d) If a proposal received at the Government facility in electronic format is unreadable to the degree that conformance to the essential requirements of the solicitation cannot be ascertained from the document, the contracting officer mmednely shall [should] notify the offeror and provide the opportunity for the offeror to submit clear and convincing evidence --
(1) Of the content of the proposal as onginally submitted, and
(2) That the unreadable condition of the proposal was caused by Government software or hardware error, malfunction, or other Government mishandling

## 15608 PROPOSAL EVALUATION

(a) Proposal evaluation is an assessment of both the proposal and the offeror's ability to successfully accomphsh the prospective contract. An agency shall evaluate competitive proposals solely on the factors specified in the solicitation
(1) Cost or price evaluation The contracting officer shall use cost or price analysis (see subpart 158 ) to evaluate the cost estimate or price, not only to determine whether it is reasonable, but also to determine the offeror's understanding of the work and ability to perform the contract The contracting officer shall document the cost or price evaluation

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(ii) Where past performance to be valuated, the-seliettatien shall afford efferers the opportunity to identify Federal, state, and leal government, and private contracts performed by the offeror that-were-manlar in nature to the centraet-bong evaluated, so that the Government may verify the offerers' past performanteron these contracts In adducer, at the drseretion-of the eentrating iffier, the-efferers may provide information on problems encountered on the identified contracts and the offerers' eorreetive-aetiens- Past performance mfemation may also be obtained frem-otherseurees known to the Government. The source and type of past performance information to be melded m the evaluation iswithm the-breat diseretion-of agency aequisition-effierals-and should be tailored to the crreumbtanoes of encl acquisition. Evaluations of contractor performance prepared maceordanee-with 48 CFR part 42 , subpart 42.15 -ar e-one source of performance infemation when may be used
(iii) Firms lacking relevant past performance history shall reeve a neutral evaluation for past performance
(3[2]) Technical evaluation. If any technical evaluation is necessary beyond ensuring that the proposal meets the minimum requirements in the solicitation, the cognizant technical official, in documenting the technical evaluation, shall include -
(1) The basis for evaluation;
(11) An analysis of the technically acceptable and unacceptable proposals, including an assessment of each offeror's ability to accomplish the technical requirements,
(111) A summary, matrix, or quantitative ranking of each technical proposal in relation to the best rating possible, and
(iv) A summary of findings.
(b) All proposals received in response to a solicitation may be rejected if the agency head [contracting officer] determines in writing that -
(1) All otherwise acceptable proposals received are at unreasonably prices,
(2) The proposals were not independently arrived at in open competition, were collusive, or were submitted in bad faith (see subpart 33 for reports to be made to the Department of Justice),
(3) A cost comparison as prescribed in OMB Circular A-76 and subpart 73 shows that performance by the Government is more economical, or
(4) For other reasons, cancellation is clearly in the Government's interest
(5) A violation or possible violation of section 27 of the Office of Federal Procurement Policy Act, as amended (41 U S C. 423), has occurred (see 3 104).
(c) The requirements of 14 408-3, Prompt payment discounts, are applicable to negotiated acquisitions

## 15609 COMPETITIVE RANGE [REJECTION OF PROPOSALS]

(a) The contracting officer [may at any time reject] shall determmewheh proposals [that are not considered to be in the competitive range from a price or technical standpoint ] the competitive range for the purpose of conducting witt or oral dreusson(see $15610(\mathrm{~b})$ ) The competitive range shall be determined on the basis of cost or proc and other factors that -were stated in the solicitation and shall melude all proposals that have reasonable chance of being selected for award. When there is doubt as to whether a proposal - is the competitive range, the proposal should be deluded
(b) If the contracting officer, after complying with 15610 (b), determines that proposal no longer has a reasonable thane of being selected for contract award, it may no longer be considered for selection
(0) The contracting officer shall notify in writing an unsuccessful offeror at the earl hest praetreable time that its proposal is no longer eligible for award (see- $15-1002(\mathrm{~b})$ )
(d) If the entraetmg iffier initially solvents untried technical proposals, they shall be evaluated to determine which are aeeptable to the Government or could, after-diseusion, be made neeoptable-After necessary discussion of these technical proposals is-empleted, the eentraetmg offieershall(1) solver prier proposals for all the acceptable teelment propesate which offer the greatest value to the Government me rms of performance ant other footers and (2) make award to the low responsible offerer, et therwtheut or following discussion, as appropriate- Exempt in aequition of archive engineer serve e (see subpart 366), acompetitve range determination must melude cost or price proposals

## 15610 WRITTEN OR ORAL DISCUSSION

(a) The requirement in paragraph (b) of this section for written or oral discussion need not be applied in acquisitions--
(1) In which prices are fixed by law or regulation,
(2) Of the set-aside portion of a partial set-aside, or
(3) In which the solicitation notified all offeror that the Government intends to evaluate proposals and make award without discussion, unless the contracting officer determines that discussions (other than communications conducted for the purpose of minor clarification) are considered necessary (see 15.407 (d)(4)) Once the Government states its intent to award without discussion, the rationale for reversal of this decision shall be documented in the contract file
(b) Except as provided in paragraph (a) of this section, the contracting officer shall conduct written or oral discussions with all responsible offeror 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) of this section).
(c) The contracting officer shall
(1) Control all discussions and should,
$(\mathcal{Z}[1])$ Advise the offeror of deficiencies in its proposal so that the offeror is given an opportunity to satisfy the Government's requirements,
(3[2]) Attempt to resolve any uncertainties concerning the technical proposal and other terms and conditions of the proposal,
(4[3]) 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 15607 and part 24),
(5[4]) 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, and
(6[5]) Provide the offeror an opportunity to discuss past performance information obtained from references on which the offeror had not had a previous opportunity to comment Names of individuals providing reference information about an offeror's past performance shall not be disclosed
(d) The contracting officer and other Government personnel involved shall not engage in technical leveling ( 1 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).
(e) The following conduct may constitute prohibited conduct under section 27 of the Office of Federal Procurement Policy Act, as amended (41 U S C 423), and subpart 3104 to which civil and criminal penalties and administrative remedies apply.
(1) Technical transfusion (1.e., Government disclosure of technical information pertaining to a proposal that results in improvement of a competing proposal), or
(2) Auction techniques, such as -
(1) Indicating to an offeror a cost or price that it must meet to obtain further consideration;
(11) 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

## 15611 BEST AND FINAL OFFERS

(a) Upon completion of discussions, the contracting officer shall issue to all offeror still within the competitive range a request for best and final offers Oral requests for best and final offers shalt [should] be confirmed in writing
(b) The request shall [should] 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 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 [should] issue an additional request for best and final offers to all offeror 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, eensidering pie and the other factors meluded in the selertation (butsee-15-608(b))
in accordance with the evaluation factors stated in the solicitation

## 15612 FORMAL SOURCE SELECTION.

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sure selection, releasing atuthenty shall be as preserfbedinageney procedures. In all eases, agency procedures should prescribe the releasing authority
(2) Government personnel shall net contact or visit \& contractor regarding a proposal under source selection evaluation, without the prior approval of the sore selection autherfy (see 3104 for additional restrictions).
(f) Pestawat ines tings. See 15.1002 (e) 151004

## 15613 ALTERNATIVE SOURCE SELECTION PROCEDURES-

(a) The Neaten Aerenatites Spae Admmentration(NASA) and the Department of Defense (DOD) have developed, and use in appropriate situations, source selection procedures that limit diseussiens with offeror during the competition, and that differ from ether procedures presented in subpart 15.6 The procedures are the NASA Sere Evalunten Beard procedures and the DoD Four Step Sere Selection Preeedures-Detuledeover of these procedures in the respective agency acquisition regulations
(b) Other 4 gene ie may uther the NASA or DoD procedure as a model developing there own procedures, melding appleability erterta, consistent with mission needs

General Services Administration
FAR Secretariat (VRS)
1800 F Street NW
Room 4035
Washington DC 20405

# SUBJECT: FAR Case 95-029, Part 15 Rewrite Contracting by Negotiation; Competitive Range Determmations 

Dear Sir
We are providing the following comments in response to FAR Case 95-029, Pait 15 Rewrite Contracting by Negotiation, Competitive Range Determmations. As requested in the Federal Register, we have divided our comments into Group B addressing Subpart 15.5 and Group A addressing Subpart 15.2

## Group B

1. Deletion of Standard Form (SF) 1411. We do not recommend that the SF 1411 , Contract Pricing Proposal Cover Sheet, be eliminated The SF 1411 provides benefits in being a standard format, readily understood by both government acquisition personnel and the contractor community. Provision of a set of basic information relevant to a proposal or equitable adjustment in a consistent format familiar to the acquisition community, i.e , contractors, contracting officers, auditors, price analysts, etc, can and the government in more efficient utilization of resources. Fol the most part, the information currently on the SF 1411 must be provided to the government in an easily interpreted. fashon even if an SF 1411 is not used By placing this information in a consistent format, government officials can save resources by scamning the SF 1411 for information elements, such as, if the proposal was consistently propared in accordance with the Cost Accounting Standards and the cost principles in FAR Part 31, which can affect the negotiation of a proposal or equitable adjustment. In addition, government resources can also be saved by auditors and other contracting officers' representatives in performing cost and price analyses, especially for new contractors Preparation of an SF 1411 is not a

SUBJECT FAR Case 95-029, Part 15 Rewrite: Contracting by Negotuation, Competitive Range Determinations
2. Retention of Cost Accounting Standards (CAS) Information. Some of the information elements on the SF 1411 were retained and inerged into proposed Table

15-2.--Instructions for Submitting Cost or Pricing Data, and others were deleted. The inforination elements applicable to CAS in Block 14 contain 4 questions, A through D Question A about whether the contract will be subject to CAS has been retamed The other information elements have been deleted They address.

- whether a Disclosure Statement has been submitted,
- If the contractor/offeror has been notified of any noncompliances with the Disclosure Statement or CAS; and
if any aspect of the proposal is inconsistent with the disclosed practices or applicable PAS.

We recommend that all the CAS related information be retained and meluded in proposed Table 15-2 in the General Instructions This CAS mformation is similar in nature to the information which has been retained in the proposed Table 15-2 and is now in SF 1411 Block No. 13, regarding consistent proposal preparation with the contractor's estimating and accounting procedures and FAR PART 31--Contract Cost Principles and Procedures. The CAS information in Block 14 places the burden on the contractor, who is in the best position to know the answers, to disclose pertinent information The benefits of including this information include-

- Identifying for a contracting officer who may not be aware or have access to reports if there are any noncompliances which may have a significant financial impact upon the estimating information which forms the basis of the proposal,
- making the contracting officer aware that impacts must be considered if the contractor has not prepared their proposal in accordance with their disclosed practices or the CAS.

Identification of this information assists contracting officials in determining the factors and risks associated with negotiating a fair and reasonable contract price.

We recommend that the following be added to proposed Table 15-2, General Instructions ( h )
(h) Whether your organization is subject to cost accounting standards (CAS); whether your organization has submitted a CASB Disclosure Statement and if it has been determined adequate, whether you have been notified that your are or may be mi noncompliance with your Disclosure Statement or CAS, and if yes, an explanation, whether any aspect of this proposal is inconsistent with your disclosed practices or applicable CAS, and if not, an explanation, and whether the proposal is consistent with your established estimating

SUBJECT: FAR Case 95-029, Part 15 Rewrite Contracting by Negotiation;
and accounting principles and procedures and FAR part 31, Cost Principles, and if not, an explanation;

## 3. Exception to Obtaining Cost or Pricing Data for Modifications to Commercial

 Contracts. The rewrite has changed what was a carefully crafted policy statement by the Federal Acquisition and Streamlining Act (FASA) Truth in Negotiations Act (TINA) Team Their changes provided in FAR 15 804-1(b)(5), Modifications, the supulation that if the modification to a contract changes the nature of the work under the contract either by a change to the commercial item or by the addition of other noncommercial work, the contracting officer is not prohibited from obtaining cost or pricing data for the changed or added work The rewire does not improve upon the earlier language drafted by the FASA TINA Team Their coverage both meets the statutory requirements and empowers contracting officers to obtain the information necessary to negotiate far and reasonable prices. We recommend that this coverage be reinstated in 15 503-1(c)(3), Commercial Items.4. Forward Pricing Rate Agreements (FPRAs). We recommend that paragraphs (d) and (e) of 15 507-3, Forward pricing rate agreements, be moved to paragraphs (d) and (e) of 42 1701, Procedures. PART 42--CONTRACT ADMINISTRATION provides polices and procedures for performing contract admumistiation functions. The coverage in paragraphs (d) and (e) of 15 507-3 is directive to the administrative contracting officer ( ACO ) for.

- circumstances when forward pricmg rate recommendations (PRs) should be used;
- providing field pricing support when there is no FPRA or FPRR; and
- updating and monitoring the FPRA

5. Submission of Proposals for Forward Pricing Rate Agreements. The regulation in FAR 15 804-6, Instructions for submission of cost or pricing data or information other than cost or pricing data, has been deleted These instructions provide that.

Data supporting forward pricing rate agreements or final indirect cost proposals shall be submuted in a format acceptable to the contracting officer

The proposed regulation is silent about the formats for subinssion of data in support of FPRAs and indirect cost submissions The proposed regulation contmues to provide coverage about the formats for subroussion of cost or pricing data and information other than cost or pricing data Data supporting the FPRA may be later certified when individual contracting actions arc executed Providing contracting officers with the latitude to specify the format in which data will be submitted assists them in effectively utilizing the data submitted in negotiations We recommend that this coverage should be

SUBJECT: FAR Case 95-029, Part 15 Rewnte, Contracting by Negotiation; Competitive Range Determinations.
reinstated as paragraph (b)(3) of 15.503-5, Instructions for submission of cost or pricing data or 10 formation other than cost or pricing data
6. Retention of Subcontract Pricing Considerations Regulation. The regulatory coverage in FAR $15806-3$, Field prising reports, has been deleted from the proposed regulation FAR $15806-3$ provides guidance on getting field puling asssistancelon subcontractor proposals. We recommend retaining this coverage which addresses

- When it may be appropriate for the contracting officer to request field pricing assistance;
- that the prime contractor's analysis of the subcontract should be provided to the ACO or auditor;
- what the government should report to the contractor about the results of a subcontract review
We recommend that this coverage be retained in the FAR rather than in other sources such as the DCAA Contract Audit Manual (CAM), because FAR will carry the force of regulation and be addressed to the entire acquisition community Inclusion of this guidance in other sources is merely guidance and targets a specific audience For example, guidance in the CAM is policy for DCAA auditors CAM is not directive to other government representatives, such as contracting officers. We recommend that the following be added to 15.504-2, Information to support proposal analysis, in paragraph
(a) Field pricing assistance, as follows'
(6) When obtamng field pricing assistance on a prime contractor proposal, the contracting officer should request audit or field pricing support to analyze and evaluate the proposal of a subcontractor at any tier (notwithstanding availability of data or analyses performed by the prime contractor) if the contracung officer believes that such support is necessary to ensure reasonableness of the total proposed price These reviews should be fully coordinated with the ACO having cognizance of the prime contactor before being initiated. This step may be appropriate when, for example --
(1) There is a busies relationship between the contractor and subcontractor not conducive to independence and objectivity,
(ii) The contractor is a sole source and the subcontract costs represent a substantial part of the contract cost,
(iii) The contactor has been denied access to the subcontractor's records,
(iv) The contracting officer determmes that, because of factors such as the size of the proposed subcontract price, audit or field pricing assistance for a subcontract or subcontracts at any tier is critical to a fully detailed analysis of the prime contract proposal,
(v) The contractor or higher tier subcontractor has been cited for having significant esturnating system deficiencies in the area of subcontract pricing, especially the failure to perform adequate cost analyses of proposed subcontract costs or to perform subcontract analyses prior to negotiation of the prime contract with the Government, or
(vi) A lower tier subcontractor has been cited as having significant estimating system deficiencies
(7) It nay be appropriate for the contracting officer or administrative contracting officer (ACO) to provide assistance to a contractor at any tier where the contractor has been denred access to a subcontractor's records in carrying out the contractor's responsibilities under FAR 15.504-3 (to conduct price or cost analysis to determine subcontractor price reasonableness). For these circumstances the contracting officer or the ACO should determine that providing field pricing assistance or audit will serve a valid government interest

We recommend that the following be added to 15 504-2, Information to support proposal analysis, in paragraph (b) Reporting field pricing information, as follows
(3) When the Government performs the subcontract analysis, the Government shall furnish to the prune contractor or higher tier subcontractor, with the consent of the subcontractor reviewed, a summary of the analysis performed $m$ determining any unacceptable costs included to the subcontract proposal If the subcontractor withholds consent, the government shall furnish a range of unacceptable costs for each element in such a way as to prevent disclosure of subcontractor proprietary data

## Group $\mathbf{A}$

Access to Contractor Books and Records on Commercial Item Contracts. We do not recommend that the exception provided at paragraph (b)(2) of FAR 15 106, Contract clauses, be eliminated Paragraph (b)(2) of FAR 15106 provides the exception for excluding contract clause FAR 52.215-2, Audit and Records--Negotation, in commercial

PFC 730.5.21
SUBJECT. FAR Case 95-029, Part 15 Rewrite Contracting by Negotiation, Competitive Range Determinations.

Item contracts The proposed regulation no longer provides for this exception on commercial item contracts. The proposed implementation of the prescription at paragraph (b) of 15.209 , Solicitation provisions and contract clauses, now requires the Audit and Records contract clause be included in commercial item contracts since there is no exception

The requirements in FAR 52 215-2 provide the government with the right to examine and audit costs clammed on cost-reimbursement, incentive, tume-and-matenal, labor-hour, or price redeterminable contracts FAR S2 215 -2 does not provide for examination of costs on fixed-priced contracts or fixed-price contracts with economic puce adjustment Commercial item contracts are only fixed-price or fixed-pnice with economic price adjustrnent In addition, FAR 52 215-2 provides for the right to examine and audit the accuracy, completeness, and currency of cost or pricing data. Commercial items are excepted from providing cost or pricing data. Therefore, inclusion of thus clause in a commercial tern contract would not provide any benefit to the government Therefore, we recommend that an exception be reinstated at paragraph (b) of 15 209, Solicitation provisions and contract clauses, excluding application of FAR $52215-2 \mathrm{~m}$ commercial item contracts.

Questions may be addressed to Ms Joyce Frtcdland, Program Manager, Pricing, Finance and Clams Division, at (703) 767-2270

Sincerely,
/Signed/
Lawrence P. Uhlfelder
Assistant Director
Policy and Plans

## FROM 11 CONS/LGC

500 Duncan Ave, Rm 250
Bolling AFB DC 20332-0305
SUBJECT Comments on FAR Case 95-029, FAR Fart 15, Group A
1 This office has reviewed the proposed new rule and has the following comments
FAR Part 15209 (a), Soluctation provisions and contract clauses The wording provides for the Contracting Officer to determine a clause selection for the solicitation of either 52 215-1, Instructions to Offerors-Competituve Acquisition, if the Government intends to make award without discussions and use the Alternate If the Government intends to make award after discussions with offerors within the competitive range Thus FAR Part as proposed in the rewnte, provides the Contractung Officer at the time of issuance and the solicitation, to make a determination of awarding without discussions or of awarding with discussions The selection of the clause with or without the Alternate I would be just a guess on the part of the Contracting Officer and limet the ability of the CO to make the correct decision at the proper tume which is after evaluation The suggested wording is to allow the CO to make the determination of award with or without discussion after evaluation of the award All offerors should be put on notice to submut the best proposal because the CO may determine that an award can be made without discussions However, if 15209 (a) is left as it is, what would be the criteria for the detcrmination of the CO for award with or without discussions at the tume before the solicitation sent out The FAR provides no direction on this issue However, at FAR Part 15406 (a)(2) provides for documentation to the file if the solicitation stated that award would be made without discussions, and then it become necessary to hold discussions The bottom line is you can either hold discussions or not hold discussions depending on some arbitrary y decision by the CO

2 Quesuons regarding the above should be addressed to Januce K McConaha, LGCP, (202) 404-1223


MEMORANDUM FOR GENERAL SERVICES ADMINISTRATION FAR SECRETARIAT (VRS) 1800 F STREETS, NW, ROOM 4035 WASHINGTON, DC 20405

FROM 11 CONS/LGC<br>500 Duncan Ave, Rm 250<br>Bolling AFB DC 20332-0305<br>SUBJECT Comments on FAR Case 95-029, FAR Part 15, Group B

1 This office has reviewed the proposed new rule and has the following comments
FAR Part 15 504-1 (d) (3) Cost Realısm Analysis This section provides for cost realism analysis on fixed-price type contracts hmited to quality concerns, or past experience indicates that contractors' proposed costs have resulted in quality or service shortfalls The results of this analysis may be used in performance risk assessments and responsibtlity determinations However, the proposals shall be evaluated using the criteria in the solicitation, and the offered prices shall not be adjusted as a result of the analysis The definition of cost realism analysis is a process of evaluation of each cost element and a projection by the government of the proposed costs compared to the most probable cost These differences or this analysis shall be used to evaluate the best value The statement at the FAR Part permits the use of cost realism on fixed priced contracts but restricts the use of adjustments to the cost elements This provides little value to the government agency For example, if in the evaluation of an offer you find that one part of a cost element was not included in the proposed costs However, in the evaluation of the proposal you make an adjustment to this cost element, you can determine if the amount is insignificant or significant to the total price of the award This analysis will assist the government in the determination of the best value for award, or if award could be made without discussions based upon this analysis Also, the limit of usage to the quality and past expenence (performance) area for fixed price contracts cannot be a method of determining if the offeror has a understanding of the work to be performed for the proposed price without the realism analysis As stated in the proposed rule this restriction provides that this analysis be used only for quality and past experience (performance) Suggest that the restriction to fixed price contracts for realism analysis not be restricted to quality and past experience (performance), but expanded to include a clear understanding of the requirements for the price and allow for adjustments to the cost elements

2 Questions regarding the above should be addressed to Janice K McConaha, LGCP, (202) 404-1223


## JUL 211997

Ms Beverly Fayson
General Services Administration
FAR Secretariat (VRS)
1800 F Street, NW
Room 4035
Washington, DC 20405

## Dear Ms Fayson

This is in reference to FAR Case 95-029, Part 15 Rewrite Contracting by Negotiation, Competitive Range Determination We would like to offer the following comments regarding this case
a The statement that "agencres may seek limited information initally" in paragraph 15 102(a) appears to be in conflict with the specific requrements set forth in paragraph 15 102(b) We recommend that paragraph (a) be changed to read "agencies may seek the limited information described in paragraph (b) initially" This would clearly identify what is meant by "limited information" and lessen the risk of protests
b 15204 Add contracts for commercial items to the list of contracts where the standard contract format need not be used
c 15207 Add a definitive statement that proposals received by electronic format or facsimile shall not be evaluated until after the date and time of closing established in the solicitation
d 15209 Needs to address whether or not the prescribed clauses apply to commercial item acquisitions
e 15210 Clarify whether or not the SF 1449 must be used for commercial item acquisitions
f 15 406(c)(2) Recommend substitution of "offers with the greatest hkelihood of award" in lieu of "efficient compettion" The term "efficient compettion" is too arbitrary and increases the chances of litigation by excluded offerors $52215-1(f)(4)$ should be revised accordingly

Ms Beverly Fayson
g 15 503-1(b)(3) Consideration should be given to providing a limited exception to require cost and pricing data for commercial items only when price history or other information indicates that the item was previously provided to the Government at a much lower price than that currently being proposed and other information does not support the price increase
h 15 604(c) Clarify that this paragraph does not apply to awards for commercial items This paragraph states that "if the Optional Form 307 (OF 307), Contract Award, is not used to award the contract, the first page of the award document shall contain the Government's acceptance statement from Block 15 of that form "Contracts for commercial items are awarded using Standard Form (SF) 1449, Solicitation/Contract/Order for Commercial Items Although SF 1449 contains similar wording to OF 307, there are slight differences This discrepancy needs to be addressed
i 15 605(b) Include clarifying language that if the Government delays the preaward debriefing, the time for receipt of protests does not begin until after the debriefing is accomplished
j 52 215-1 Clarify the use of this clause in solicitations for commercial items This rewnte incorporates information currently contained in 52 215-11, Authonzed Negotiators, and 52 215-12, Restriction on Disclosure and Use of Data and deletes them as separate clauses If $52215-1$ is not to be used in solicitations for commercial items, these clauses need to be retained If 52 215-1 is to be used in solictations for commerctal items, it needs to be revised to conform with 52212 clauses
k 52 215-1(f)(1) Change the word "intends" to "may"
2 Questions regarding this matter should be addressed to Ms Ramona Jones, Senior Procurement Analyst, Acquisition Pohcy Team She may be reached at (202) 273-8821


# GEAE Comments - FAR Part 15 Rewrite 

### 15.001 Definitions

(1) The language appears to create a distinction between "communications" and "discussions" and then defines "communications" as including "discussions" The purpose of the distinction is not clear Recommend deletion of the term "communications"
(2) The purpose of expanding the definition of "negotiation" to include the term "bargaining" is unclear The activities included under "bargaining" are already understood to be part of the "negotiation" process is something else intended? Recommend deletion of the term "bargaining" unless some meaningful distinction is intended

### 15.002 Negotiated acquisitions

(1) The streamlining actions recommended in paragraph (a) for sole source REPs should be standard practice for ALL solicitations, not just sole source
(2) Paragraph (b) states that " the procedures of this part are intended to (lead) to selection of the proposal representing the best value to the Government" Does this mean that all source selections (conducted under Part 15) are now to be automatically considered "best value" source selections?

### 15.103 Oral presentations.

(I) The seeond-sentence states that oral presentations can be used " as a substitute for portions of a proposal "Aren't oral presentations considered part of the proposal and not a substitute for it?
(2) The fourth sentence states that oral presentations provides an opportunity for dialogue in sole source acquisitions The concept of an "oral presentation" seems unnecessary in a sole source acquisition
(3) The language states that pre-recorded videotape presentations may be included " when appropriate" This should contain the caveat "when authorized by the contracting officer"

### 15.202 Advisory multi-step source selection.

(1) The intent of the term "advisory" is unclear, particularly in light of the title of 15102
(2) How does the language in paragraph 15202 relate to 151027 They seem to be duplicative

### 15.203 Requests for proposal.

(1) Paragraph (c) states that "electronic commerce" may be used, however, paragraph 15205 refers to using "electronic contracting" Recommend reconciling
(2) Paragraph (c) states that the RFP shall specify the electronic commerce methods) that offerors may use "Will use of such electronic methods be optional?
(3) Paragraph (e) states that letter RPs may be used in " sole source follow-on acquisitions and other appropriate circumstances" Recommend revising to delete the reference to "follow-on," the limitation is unnecessary
(4) Paragraph (e)(6) should read "anticipated contract terms and conditions"
(5) Paragraph (e)(9) reference to " any peculiar or different requirements " is unclear What would be considered peculiar or different?

### 15.206 Amending the solicitation.

Paragraph ( $f$ ) language that states "If, an amendment issued after offers are received is so substantial that it is beyond what prospective offers could have reasonably anticipated " is unclear Recommend more specific language such as "If, an amendment issued after offers are received is so substantially different from the initial requirement that additional sources likely would have submitted offers, "

### 15.406 Communication with offerors.

(1) The intent of paragraph (b)(1) is unclear Is it prescnptive or permissive? Does it mean that the contracting officer may only hold communications with those offeror whose exclusion is uncertain, or does it mean that the contracting officer has the option to hold communications with only those whose exclusion is uncertain?
(2) The title of paragraph (d) seems to confuse by trying to explain the unnecessary distinction between "communication" and "discussion "Paragraph (d) should be titled "Discussion with offerors after establishment of the competitive range" and revise subparagraph (d)(1) accordingly
(3) The language of paragraph (d)(2) with regard to maximizing the Government's ability to obtain best value, based on the requirement " is unclear It is understood that the source selection is "based on the requirement "
(4) The language of paragraph (3) is very problematic While we appreciate the Government's necessary latitude to give credit for features in an offeror's proposal that exceeds the minimum, the decision whether or not to exceed the minimum should be solely based on the offeror business judgment Suggesting that the Government may " negotiate for increased performance "would seem to call into question the Government's initial requirement Likewise, the Government's suggestion that an offeror should remove "excesses" would appear to put the Government in a difficult position, particularly if the "excesses" were removed as suggested, and that offeror was then not selected based on "best value"
(5) Paragraph (e)(2) should not be limited to a prohibition on revealing technical solutions, unique use of commercial items and intellectual property Also included should be a prohibition on revealing any feature of an offeror proposal including such things as management approach, key personnel, subcontractors, etc

### 15.407 Proposal revisions.

The limitation in paragraph (b) that "The contracting officer is required to establish a common cut-off date only for receipt of final proposal revisions" is unclear Why is this limitation prescribed?

### 15.501 Definitions.

The definition of "price" should include language that makes it clear that price includes cost plus any profit or fee applicable to the contract type, whether or not it is separately identified A"price" is presumed to include both cost and profit/fee, there is no
requirement for the contracting officer to attempt to separately identify each

### 15.503-1 Prohibition on obtaining cost or pricing data.

When a waiver of cost or pricing data for the prime contractor is obtained under paragraph (c)(4), subcontractors should automatically be included The concept of waiving certified data at the prime level but not at the subcontractor level does not make practical sense Contracting officer should not have to remember to request waiver for subcontractors when waiving certified data at the prime level

### 15.508 Solicitation provisions and contract clauses.

Paragraph (l) states that the contracting officer may use 52 215-41 if it is reasonably certain that cost or pricing data will be required

- If this is permissive ("may use "), what other alternative does the contracting officer have? It would appear that the language of 52 215-41 covers all situations where an exception apples (paragraph (a)), and where no exception applies (paragraph (b)) The only other situation is where a waver to cost or pricing data was granted, in which case Alternate IV would be used Why is the prescriptive language permissive?
- If this provision is used when data will be required, why would a contracting officer then insert Alternate IV which replaces the entire provision and states that cost or pricing data is not required?


### 52.215-41 Requirement for cost or pricing data or information other than cost or pricing data.

(1) The changes made in this provision seem to confuse rather than clarify this area The provision already includes language in paragraphs (a)(1) and (a)(ii) that tells offeror that if they believe that an exception to cost or pricing data applies, then submit certain data to support that assertion The provision then describes the types of data that would support the assertion Alternate IV tells the offeror that an exception will apply and then allows the contacting officer the latitude to prescribe the type of data the offeror will have to submit to satisfy the contracting officer's determination that an exception does, in fact apply This is a step backwards form the present FAR provision
(2) The SF 1448 was created to clarify when data submitted or being submitted to the contracting officer fell within the requirements of "cost or pricing data" There were several cases litigated in recent years that established that the line between data submitted to the contracting officer not intended to be certified and data submitted that was intended to be certified was not clear The SF 1448 was intended to clarify that situation If the SF1411 and SF1448 forms are to be removed, the bright line between the two types of data must remain absolutely clear

OSA - FAR Semetariat(VRS)
18007 Streen NW, Room 4035
Washingtar, DC 20005
Attentios: FAR CASE CIIE 5S-029

Thank you for the opportanity to prou'de commente on the subjet. Au a Governmem contracting officish, I an a atounch adrocate of the process and cincaraly hope to do most of ny sequidition actions yoliaing this method

I have encloned the commerat document If you would ine ary upeife infonmation or ofditiong ferolbask on our processet and procaduren, plame ent me at 404-842-6715.

I atrondy support the asquitifion reform initiative and believe it is long overthe, The use of oral prasentationa is by far the mont innovative and useful of the acgulision seform
 thia acquidition technique taten away form un.


Buate Cluveland Olsen
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Centers for Disease Control and Praveration

## COMQIENTS ON FAR RART IS DRATT RIVINTON DOCUMENT CONCRENDN USE OR ORAL PROPOSALS

On behalf of the Centers for Bherea Control and Revymifiog (CDC) I Would like to state Thar the use of oral propotyls in tho negatiation process has leed to reduced asquistion lead
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We have ukitised the proctsy in "rand alone" as weil as coupled with written technical
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Pugen
Commony IAR Is OFPP

Ti ahould De noted that this feedhode eame fron both fuceeroful and unsuecentul trarort In the proces.e.

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- When dexacating the number of pergonal who ment partiefpate in the oral proporaly, remember that these contrantors who are outride the commultes ante to bear addidiond travel enatio
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## Headquarters

Washington, DC 20546-0001


JUL $3: 1997$
HC
General Services Admınıstratıon
FAR Secretarıat (VRS)
1800 F Street, NW, Room 4035
Washington, DC 20405
Re FAR Case 95-029, Group A
NASA strongly supports paragraph 15406 (c) of the proposed rule that would permit the contracting officer, after evaluation of all proposals, to establish the competitive range comprised of those proposals most highly rated, and to further reduce the range for purposes of efficiency NASA has long believed that smaller competitive ranges strengthen the source selection process Both the Government and industry save time and money when the Government determines and eliminates proposals that are no longer competitive as early as possible in the source selection process Industry, particularly the small business community, however, fears that smaller competitive ranges might compromise the source selection process

Industry's first concern is that smaller competitive ranges might prematurely elıminate otherwise-winning proposals from the competition Based on a review of our recent competitive award expenence, we don't beheve that smaller competitive ranges would affect the outcome of competitions We examined all competitive negotiated contracts over $\$ 100,000$ awarded to small businesses during FY 1995 and FY 1996 Of the 342 competitive negotiated contracts over $\$ 100,000$ we awarded to small businesses during FY 1995 and FY 1996, none was awarded to a contractor who was not among the top three competitors going in to competitive range

Industry's second concern is that smaller competitive ranges, through the elimination of more offerors prior to discussions, might disproportionately jeopardize the award potential of small businesses As part of our initiative to streamline the source selection process, NASA has encouraged its contracting officers to establish smaller competitive ranges Effective October, 1996, NASA's FAR Supplement advises contracting officers that "a total of no more than three proposals shall be a working goal in establishing the competıtive range "

Based on a comparison of our competitive experience before and after the new policy, we don't beheve that smaller competitive ranges affect the percentage of awards won by small businesses We compared all unrestricted competitive negotiated contracts over $\$ 100,000$
awarded during FY 1995 and FY 1996 with those awarded during the second and third quarters of FY 1997 We specifically excluded first quarter FY 1997 data, believing that it would not yet reflect the policy change Small businesses won approximately $38 \%$ of the 356 unrestricted negotiated competitions over $\$ 100,000$ conducted during FY 1995 and FY 1996 Similarly, small businesses won approximately $39 \%$ of the 64 unrestricted negotiated competitions we conducted during second and third quarters of FY 1997 Although the data are preliminary, we concluded that NASA's policy encouraging more aggressive competitive ranges has no affect on the ratio of contracts won by small businesses

Based on these data, we are convinced that smaller competitive ranges would not prematurely eliminate otherwise-successful proposals from the competition and that small businesses would not be disproportionately affected by smaller competitive ranges Instead, we believe that smaller competitive ranges will only make the source selection process faster and cheaper for both the Government and industry NASA's Office of Small and Disadvantaged Business Utilization has concurred with this letter

We hope this information will allay the concerns of the small business community and contribute to more enthusiastic support for the proposed rule

Suncerely,


## Comments Received on Far Case 95-029, Part 15 Rewrite - Phase I

| Response Number | Date Received |  | Comment Date |  |
| :--- | :--- | :--- | :--- | :--- |
| Commenter |  |  |  |  |


| Response Number | Date Recelved | Comment Date | Commenter |
| :---: | :---: | :---: | :---: |
| 95-029-12 | 10/18/96 | 10/10/96 | Stocker \& Yale |
| 95-029-13 | 10/28/96 | 10/24/96 | Department of Treasury |
| 95-029-14 | 10/30/96 | 10/30/96 | Contract Services Assocration of America |
| 95-029-15 | 10/31/96 | 10/31/96 | Professional Services Councrl |
| 95-029-16 | 11/01/96 | 10/31/96 | Gordon L Campbell |
| 95-029-17 | 11/01/96 | 10/31/96 | Federal Bar Association |
| 95-029-18 | 11/04/96 | 10/24/96 | Department of Army |
| 95-029-19 | 11/06/96 | 1/05/96 | TRW |
| 95-029-20 | 11/06/96 | 11/08/96 | AIA |
| 95-029-21 | 11/12/96 | 11/08/96 | Alliant Tech Systems |
| 95-029-22 | 11/12/96 | 11/05/96 | Nuclear Regulatory Commission |
| 95-029-23 | 11/12/96 | 11/07/96 | Social Security <br> Admunistration |
| 95-029-24 | 11/12/96 | 11/05/96 | TASC |
| 95-029-25 | 11/12/96 | 11/08/96 | James McAleese \& Assoctates, P C |
| 95-029-26 | 11/12/96 | 11/08/96 | SBA |
| 95-029-27 | 11/12/96 | 11/11/96 | Robert J Guerta \& Associates |


| Response Number | Date Recerved | Comment Date | Commenter |
| :---: | :---: | :---: | :---: |
| 95-029-28 | 11/12/96 | 11/08/96 | Department of Navy |
| 95-029-29 | 11/12/96 | 11/04/96 | US Army <br> Communications <br> Electronics Command <br> Technology <br> Applicatıons Office |
| 95-029-30 | 11/13/96 | 10/21/96 | NISMC |
| 95-029-31 | 11/13/96 | 11/13/9 | Bureau of Reclamation |
| 95-029-32 | 11/13/96 | 11/06/96 | DOE |
| 95-029-33 | 11/13/96 | 11/08/96 | HUD |
| 95-029-34 | 11/12/96 | 11/12/96 | C Solloway |
| 95-029-35 | 11/15/96 | 11/11/96 | COMDISCO |
| 95-029-36 | 11/18/96 | 11/13/96 | Department of Energy |
| 95-029-37 | 11/18/96 | 11/14/96 | Department of Navy |
| 95-029-38 | 11/19/96 | 11/14/96 | Department of Energy |
| 95-029-39 | 11/19/96 | 11/15/96 | LOGICON |
| 95-029-40 | 11/19/96 | 11/14/96 | G W University |
| 95-029-41 | 11/19/96 | 11/08/96 | Department of Navy |
| 95-029-42 | 11/19/96 | 11/18/96 | NASBP |
| 95-029-43 | 11/21/96 | 11/18/96 | DynCorp |
| 95-029-44 | 11/21/96 | 11/21/96 | DoD |
| 95-029-45 | 11/25/96 | 11/22/96 | Department of Navy |


| Response Number | Date Recelved | Comment Date | Commenter |
| :---: | :---: | :---: | :---: |
| 95-029-46 | 11/25/96 | 11/24/96 | BDM |
| 95-029-47 | 11/25/96 | 11/19/96 | Assoctated Specialty Contractors. Inc |
| 95-029-48 | 11/25/96 | 11/25/95 | Bureau of Alcohol Tobacco and Firearms |
| 95-029-49 | 11/25/96 | 11/25/96 | Social Security Administration |
| 95-029-50 | 11/25/96 | 11/25/96 | ITAA |
| 95-029-51 | 11/26/96 | 11/25/96 | The Associated General Contractors of America |
| 95-029-52 | 11/26/96 | 11/22/96 | American Consulting Engineers Council |
| 95-029-53 | 11/26/96 | 11/25/96 | HHS |
| 95-029-54 | 11/26/96 | 11/21/96 | Department of Transportation |
| 95-029-55 | 11/26/96 | 11/26/96 | Computer Technology Industry Association |
| 95-029-56 | 11/26/96 | 11/25/96 | Department of Arr Force |
| 95-029-57 | 11/26/96 | 11/26/96 | SBLC |
| 95-029-58 | 11/26/96 | 11/26/96 | Household Goods Forwarders Association of America, Inc |
| 95-029-59 | 11/26/96 | 11/26/96 | Northrop Grumman |


| Response Number | Date Recerved | Comment Date | Commenter |
| :---: | :---: | :---: | :---: |
| 95-029-60 | 11/26/96 | 11/26/96 | Hughes |
| 95-029-61 | 11/26/96 | 11/26/96 | Chamber of Commerce |
| 95-029-62 | 11/26/96 | 11/26/96 | Crowell \& Moring L L P |
| 95-029-63 | 11/26/96 | 11/26/96 | HWAC |
| 95-029-64 | 11/26/96 | 11/26/96 | DLA |
| 95-029-65 | 11/26/96 | 11/26/96 | DoD |
| 95-029-66 | 11/26/96 | 11/26/96 | Computer and Communications Industry Association |
| 95-029-67 | 11/26/96 | 11/26/96 | AMC |
| 95-029-68 | 11/26/96 | 11/21/96 | Department of Transportation |
| 95-029-69 | 11/26/96 | 11/25/96 | CSDC |
| 95-029-70 | 11/26/96 | 11/26/96 | Department of Navy |
| 95-029-71 | 11/26/96 | 11/26/96 | FBA |
| 95-029-72 | 11/26/96 | 11/26/96 | SBA |
| 95-029-73 | 11/26/96 | 11/26/96 | AIA |


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| :---: | :---: | :---: | :---: |
| 95-029-74 | 11/27/96 | 11/26/96 | Professional Services Councrl |
| 95-029-75 | 11/29/96 | 11/26/96 | CODSIA |
| 95-029-76 | 11/29/96 | 11/26/96 | DOC |
| 95-029-77 | 11/29/96 | 11/25/96 | EDS |
| 95-029-78 | 11/29/96 | 11/25/96 | DOI |
| 95-029-79 | 11/29/96 | 11/27/96 | ABA |
| 95-029-80 | 11/29/96 | 11/27/96 | McKenna \& Cuneo, LL P |
| 95-029-81 | 11/26/96 | 11/15/96 | Department of Army |
| 95-029-82 | 11/29/96 | 11/21/96 | Department of State |
| 95-029-83 | 12/02/96 | 11/20/96 | ClO |
| 95-029-84 | 12/02/96 | 12/02/96 | U S Coast Guard |
| 95-029-85 | 12/02/96 | 11/26/96 | Office of Naval Research |
| 95-029-86 | 12/02/96 | 12/02/96 | Veterans Affars |
| 95-029-87 | 12/02/96 | 12/02/96 | Department of Army |
| 95-029-88 | 12/02/96 | 11/26/96 | American <br> Subcontractors <br> Assoctation, Inc |
| 95-029-89 | 12/02/96 | 11/26/96 | ABC |
| 95-029-90 | 12/03/96 | 12/02/96 | GSA |
| 95-029-91 | 12/03/96 | 11/21/96 | Department of Navy |


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| :---: | :---: | :---: | :---: |
| 95-029-92 | 12/03/96 | 11/01/96 | NPR |
| 95-029-93 | 12/03/96 | 11/26/96 | Digıtal <br> Equipment <br> Corporation |
| 95-029-94 | 12/03/96 | 11/27/96 | Department of the Army U.S. Army Chemical \& Bıological Defense Command |
| 95-029-95 | 12/10/96 | 12/04/96 | Latton Corporation |
| 95-029-96 | 12/13/96 | 12/09/96 | Dept. of the <br> Army; U.S. <br> Army Corps of Engineers |
| 95-029-97 | 12/13/96 | 12/09/96 | Defense Commissary Agency |
| 95-029-98 | 12/13/96 | 12/13/96 | EPA |
| 95-029-99 | 12/13/96 | 11/26/96 | DDI, Inc. |
| 95-029-100 | 01/07/97 | 01/10/97 | Council of <br>  <br> Space <br> Industry <br> Assoclations |

COMMENTS ON PROPOSED REVISION TO
FAR PART 15 - CONTRACTING BY NEGOTIATION

1. Standard forms are mandatory forms delegated by a regulation. They can not be modified on the whim without approval of the issuing agency (this is called an exemption). Optional forms on the other hand are just that - optional. They are not delegated by a regulation. If an agency wishes to use the form they can; or they can develop their own agency form. This eliminates the need for an exemption. This also allows the agency to collect the data they need plus what is required.
2. Since the procedures for negotiated procurements are changing, the forms involving procurements need changing too. Revise the SF 26, 30, and 33 (and any other forms SF 1448, 1447, and 1449?) to cover just sealed bids and offer the three new optional forms for just negotiated procurements.


2

Message Contents

LaRhonda, attached is the first comment received via $E$-Mail on 95-029. Please it out and put it in the comment folder.

This is the first time we have accepted electronic responses, so lm sure there will be a lot of them. Ill forward them to you as soon as I receive them.

|  |  |
| :--- | :--- |
| Subject: FAR Case 95-029, FAR 15 Rewrite |  |
| Author: | gcalta@pica.army.mil at internet |
| Date: | $9 / 18 / 9612: 06 \mathrm{PM}$ |

AMSTA-AR-AS 18 Sep 1996

## MEMORANDUM FOR General Services Administration ATTN: Beverly Fayson

SUBJECT: FAR Case 95-029, FAR Part 15 Rewrite

1. Reference proposed rule, Phase I rewrite of FAR Part 15, Acquisition Reform Network (WWW.ARNET.Gov)
2. Reference 1 invited comments to the proposed rewrite of the FAR Part 15. In that regard, the following comments are provided:
a. General, overarching comments regarding the rewrite are:
(1) There will be a very large learning curve on the part of contracting officers, specialists, and other procurement/contracting professionals as a result of granting more latitude and flexibility in the procurement processes.
(2) Based on some of the language, more protests could easily be envisioned (e.g. changing competitive ranges after bid submissions; limiting the number of acceptable proposals at the discretion of the contracting officer)
(3) Initially (several years), procurement actions will take longer to complete due to the learning curves noted in $a(1)$ above and the discretionary nature of the language causing more careful and deliberate actions to occur.
b. The definition or explanation of 'Fairness' in the proposed 48 CR Chapter 1, Section 1.102 could easily lead to more frequent protests on the part of offerors. Currently offerors are treated equally. The proposed language states that that is no longer required. Since 'fairness' is now proposed as not equal to all offerors, and is therefore a discretionary determination, the grounds for protest have been increased.
c. Subpart 15.104 discusses the option of Oral Presentations in lieu of written proposals. We would suggest Oral Presentations as a supplement to a written proposal but not as a substitute. Source selection generally requires several reviews and analysis of proposed information. A one-time oral presentation leaves offerors proposals open for wide interpretation, misunderstanding, misstatements, and unavailability for further or future review. There would be no formal record for historical or legal purposes.

- d. Subpart 15.405, paragraph (a) (2) (iii) discusses past performance as part of the Proposal Evaluation process. It states that "Firms lacking past performance history shall receive a neutral evaluation for past performance., that neither rewards nor penalizes..." It is not at all clear how this can be affected (egg. if evaluation criteria is on a 1-10 scale, does a firm with no past performance history get a 5 ? That's not neutral. Any score cannot be considered neutral). Not weighting that part of the evaluation for a particular firm is certainly not fair to other bidders who either had good past performance or those who had poor past performance.

3. The point of contact is the undersigned at AMSTA-AR-RME, DSN 880-7938, email 〈gcalta@pica.army.mil〉.
//signed//
GLENN CALTABILOTTA
Acquisition Management \& Engineering Div. Advanced Systems Concepts Office

General Services Adminıstration
FAR Secretarlat (VRS), ATTN Beverly Fayson
18th and F Streets, NW Room 4037
Washington, D C. 20405

SUBJECT: FAR Part 15 Rewrite - Phase I

1. Reference is made to FAR Case 95-029.
2. The following comments are made by the undersigned on the proposed rewrite of FAR Part 15 (Phase 1) keyed to the proposed new FAR (FAR Case 95-029).
a Paragraph 1.102(c)(3). "Reasonably" is a highly subjective term. Recommend additional coverage to expand on the term "reasonably". Absent some further standards, this can generate protests that can delay the procurement significantly. What is reasonable to a PCO whose customer demands an expedited obligation (and can perhaps adversely influence the $P C O^{\prime}$ s performance appraisal if it does not happen) may not be reasonable to a competing firm whose firm's competitive posture (and perhaps survival) may be at stake And, absent additional standards, the GAO may very well side with the latter and rule the PCO's actions arbitrary and capricious. Examples of what is and is not reasonable would also be helpful.
b Paragraph 14.404-1(f): After the words "agency head", insert "(delegable no lower than the Chıef of the Contracting office (CCO) level)". The approval is not one that needc to be retained at the Agency Head level
c Paragraph 15.100: After the words "source selection authorıty (SSA)", insert ", generally the contracting officer," to emphasize that in most cases the warranted (PCO) contracting officer is the source selection authority. This will preclude the proliferation of formal, non-1102 SSAs and whll assure most actions are handled in the simplest, less tımely manner.
d. Paragraph 15.201(c)(4): Change to read "One-on-one meetings with all potential offerors...". Addition of the
word "all" will assure that one firm does not receive a competitive advantage
e. Paragraph $15.201(f)$. In the second sentence at the end, delete ", but no later than the next release of information," This is too vague a concept and can result in a considerable delay which has the high potential of giving one firm a significant competitive advantage. Substitute but no later than three (3) working days after the initial release,".
f. Paragraph 15.201: Add a new sub-paragraph (g) as follows: "Early exchange of information, and particularly that described in (c) (4) above, shall be through or under the guidance of the authorized contracting officer or other SSA" This is essential to preclude an inappropriate release of competitive advantage information, which, if the PCO is not aware of it and doesn't correct it per paragraph f, could result in a successful, time-delaying protest and/or possible criminal indictments.
g Paragraph 15203 The Model Contract format significantly changes the current Uniform Contract format. Since this change will also require changes in existing and planned automated contract formats, it is highly recommended that the $F A R$ Council provide additional rationale, including a cost benefit analysis, considering current and planned automated contracting processes before adopting such a change on the surface, it would appear that the change at Table 15-1 is not needed It will result in a considerable cost in modifying existing, planned automated contract preparation execution and administration systems while giving little benefits The rationale for the change is not apparent at the working level.
h Paragraph 15.203-2(a): Add "In case of a conflict with other parts of the solicitation (ie Sections II, V), the latter governs and this shall be indicated in Section I."

I Paragraph 15 206(c): Last sentence should read "If the retransmitted proposal is still unreadable, it may be rejected provided the retransmission problems are not the government's fault." This would assure that offerors are not periled by such factors as a low toner or other
problems with the Government's facsimile equipment (see paragraph 5 below).
J. Paragraph 15.207(c). This (coupled with the definitions of "proposal modification" and "revision") seems to preclude offerors submitting an updated cost proposal at the negotiation table, as is done frequently now Is this the intent? If so, state this more specifically to more specifically caution all offerors. Also for the contracting officers' benefit, additional guidance as to the impact of this prohibition on the requarements for Truth in Negotiation Act submissions is needed. If this ls not the Intent, clarification of the intent of this paragraph is essential Would such updated proposals at the negotation table constitute a permissible proposal modification due to a mistake?
k. Paragraph 15401 "Deficiency 15 a single. ". What if there are multiple failures to meet a requirement or multiple flaws? Recommend, for clarıfication, that the words "or multiple" be added after the word "single" in both cases where the word appears

1. Paragraph 15.403 (b) (2): Delete the words "ıf agency procedures require a plan" The whole concept and text of Part 15 rewrite requires a pre-established plan to effect a competıtıve procurement
m Paragraph 15 404(d)(2) Delete "and prior experience". This can effectively convert a supposed competative procurement into one that is a de facto sole or limated source action under the guase of a competitive one wathout obtanning the required J\&A.
n. Paragraph 15.405(a)(1): Does a competition where each of two (2) offerors are guaranteed $40 \%$ of the effort and true competition exists for only $20 \%$ satisfy this requarement to use price analysis and not cost analysis? Recommend addıtional guidance
O. Paragraph 15 405(a)(2) (i土1): Recommend expansion of the concept of a "neutral evaluation" for past performance For example, if an evaluation plan contemplates a maximum of ten (10) points for past performance out of a one hundred (100) points for non-cost factors, do you give the
contractor with no past performance five (5) of the ten (10) points to be neutral? If so, doesn't this hurt the firm as it could put the firm outside the competitive range? To avoid protests, more guidance/examples are needed.
2. Note that while some of the above may have the answer buried in the below cited provision, we believe strongly, the matters should be highlighted in the FAR text too.
3. Paragraph 52.215-1, The provision "Instructions to Offeror - Negotiated Acquisition".
a The definition at (a) (5) of the term "communication" appears to be more narrow than that for the word "communication" at 15407 (b) Recommend a more comprehensive discussion of the word "communication" in the provision at (a) (5)
b. Above provision at (c) (6) See comment with respect to paragraph 15.207 (c) An offeror may be required to submit a revised cost proposal at the negotiation table (even though neither requested nor desired by the PCO) to preclude being accused of violating the Truth in Negotiations Act. To mandate that the offeror wait to submit this information as the result of discussions (15 001) when the PCO requests it can significantly delay the procurement
c Above provision at (f) (9). Contracting personnel have always interpreted award as being effective when the PCO transmitted a contract to the contractor. However financial functional have pointed out that in the lr eyes an award is not made until the obligation is recorded in the financial management system. This can result in problems at the end of the FY. Recommend here and at FAR 15804 (leadin sentence), the FAR specifically state that recording the obligation in the financial management system is not a pererequisite for a valid obligation.
4. Paragraph 52.215-5, Facsimile Proposals: Under the conditions in subparagraph (d) of the clause, why would any firm submit a facsimile proposal? How can the Government abrogate (after authorizing facsimile submission) a basic responsıbılıty to maintain $1 t s$ equipment in proper working order, i e sub-paragraph (2) and safeguard proposals

## 45029.3

received (7). Also, there appears to be an inconsistency between subparagraph (2) and the new FAR 15202 (d) (1), (111), and (Iv) which require the contracting officer to consider the factors therein before authorizing facsimile submission. Consideration of the "avaılabılıty" and "adequacy" and other listed factors implies an "assurance" that may be held, upon protest, to approach a warranty which (notwithstanding the clause) may be held against the Government. This is especially the case with respect to "safeguarding" as well as the other factors specified in FAR 15.202(d) (i), (iii), and (Iv) In any event, what appears to be an inconsistency should be resolved
6. Paragraph 53.215-1. The word "prescribe" means "dictate" or "order" (Webster's 9th Collegiate Dictionary) Thus, the lead-in to the paragraph makes mandatory the use of the listed forms. Yet the subparagraph make clear ("may") that the listed of forms do not have to be used and paragraph 15210 makes use of the forms discretionary Indeed no forms have to be used to effect negotiated procurements Recommend that some other words than "prescribed" be used in this paragraph Perhaps "are available for use" or "are authorized" would be more appropriate in this paragraph.

7 Since some of the new concepts in the FAR rewrite are significant and will have a major impact on both the Government and contractors, recommend an advisory opinion of the GAO be obtained before finalizing the changes. This should help minımıze protests.

8 For the same reason, extensive training will be required of both Government and contractor personnel before implementation as we are entering a completely new way of doing business in the negotiated procurement area An 8hour video will not suffice Recommend a minimum 3-day training course be sponsored and be paid for by the FAR Council and taken as a Roadshow (similar to the AMC Roadshow (I-V) to all contracting offices It is unlikely contracting offices have budgeted funds for the extensive training that wall be required nor wall they be able to train their personnel timely A FAR Council sponsored course of sufficient length (3-days minimum) will standardize training, will relieve the funding burden on the
field and will minımıze the prospect that time delaying protests wall occur
9. The bottom line is that the rewrutten $\operatorname{FAR}$ has taken tried and true negotiated contracting concepts, processes and terminology that have been settled through numerous protests, boards and court cases and radically changed them. This starts a new learning process and new way of doing business for both Government and industry contracting personnel. The result will be a complete new learning curve, less productivity, more protests, increased procurement leadtıme for negotiated procurements, and the need for more (not less) contracting, legal and acquisition support personnel at least for the near term (2-5 years) tıme frame support to the customer will be less, at least until a line of protests, court and Board cases resolves, further defines and settles the concepts, issues, constraints on subjectivity and the like The question is: Can DOD and the federal agencles afford the delays, reduced productivity, and need for increased personnel anherent in the FAR rewrite, especially in an era of downsizing.


MEMORANDUM FOR The Federal Acquisition Regulation (FAR) Council

## FROM FrontLine Procurement Professional's Forum

SUBJECT Forum Comments Concerning FAR Part 15 Rewrite, FAR Case 95-029
The Front-Line Procurement Professional's Forum is a group of 32 contract specialists, contract negotiators and contracting officers from multiple Government agencies The Forum is a diverse group of contracting professionals involved in procurements ranging from common commercial products to complex services and weapon systems The Forum meets periodically with Co-chairs Dr Steven Kerman, OFPP, and Ms Colleen Preston, OUSD/AR, to provide working-level feedback on proposed and recently implemented acquisition reforms At a recent meeting, we reviewed the subject FAR case and reached consensus on the comments and opinions expressed herein

First and foremost we strongly support the rewrite effort and wholeheartedly endorse the philosophy underlying the proposed changes The current source selection process is too rigid and cumbersome and, therefore, too costly for both the Government and its vendors We believe the proposed changes provide for reasonable Contracting Officer discretion and flexibility in applying the source selection process This type of flexibility is the key to efficient and effective satisfaction of government requirements While some of our industry counterparts may express concern over the flexibility inherent in the proposed rules, we can assure you that the front-line contracting professionals whom we represent are both fully capable and prepared to exercise this flexibility in a responsible manner which balances the concern for offerors interests with the needs of the Government Our specific comments follow

FAR 15.407 -Communications with Offerors: We applaud the concept of open communications which are not "discussions" prior to establishment of the competitive range A free flow of information which permits the Government to fully understand offeror's proposals is too constrained by the current process It is essential that we be able to fully communicate regarding perceived strengths, short-comings, errors, and deficiencies in order to make an informed and intelligent competitive range determination or decision to award without discussions We are also pleased that the rule makes it clear that communications, unlike discussions, need not be conducted with all offeror We beheve these communications will greatly reduce the time and cost of source selection and increase the number of awards which can be made without discussions

FAR 15.409 - Proposal Revisions: The Forum discussed the issue of proposal revisions at great length, particularly with regard to establishing a common cut off date We agree that the establishment of a common cut off should be a matter of Contracting Officer discretion and, therefore, support the proposed language at 15409 (a) Generally, we see little value in mandating common cut off dates for revisions to technical proposals, but there was some concern among our members concerning cut off dates for price proposal revisions Most of our concerns related to potential volatility in market prices and potential challenges from offerors ( 1 e, protests) concerning our exercise of this discretion There was also concern that, in the interests of fairness, offerors be granted equal time to prepare and submit proposal revisions The current rules which require completion of discussions with all offeror and a common cut
off date for best and final offerors are, however, too rigid and drive much of the "bureaucracy" in the existing process We can envision at least two situations where establishing a common cut off date may not be in the best interests of the Government-- first when limited resources are available to conduct proposal evaluations and, second, when it is reasonable and appropriate to require a subsequent proposal revision from only one or some of the offerors in the competitıve range Identical treatment of offerors has been over-emphasized in the interest of ensuring fairness to all offerors At tımes, adherence to this aspect of the process seems to be at odds with the more important objective of obtaining the best value in satisfying the needs of the Government We do not believe rigid adherence to the doctrme of "identical treatment" is essential to ensurng offerors a fair opportunity to be considered for award and support the proposed flexibility with regard to proposal revisions

FAR 15.405(a)(2)(iii) - Neutral past performance evaluations: Although we fully understand and appreciate the logic regarding farly evaluating offerors who lack relevant past performance, we are concerned regarding this proposed rule The absence of relevant past performance, when such performance is a key consideration for award, will clearly have an impact on the award decision If nothing else, this becomes a matter of assessing performance rısk As front-line professionals, we are confused as to what a "neutral evaluation" would look like in practice Is such an offeror deemed to automatically meet the standard in this area absent a record of poor past performance?, or, is the offeror simply not evaluated or rated in the area of past performance? We have no specific improvement to offer for the regulation language, but see this as a problem area that will open to new grounds for protest We would prefer that firms lacking relevant past performance be evaluated with flexibility and discretion as determined appropriate to the individual action For example, a critical need with a shorter than normal required delivery schedule might warrant significant emphasis being placed upon a proven record of relevant past performance

FAR 15.406 (c) and $\mathbf{5 2 . 2 1 5 - 1}$, ALT II, Pre-establishment of the number of proposals that will be included in the competitive range: Alternate II of the clause entitled Contract Award provides an additional but, in our view, unnecessary tool The basic clause (as revised by the proposed rule) already advises offerors that the Government may limit the number of offerors in the competitive range solely for the purposes of conducting an efficient contracting action without requiring insertion of a specific number of proposals We feel it is unwise to establish a defined limit on the number of offerors to be included before the solicitation is released Doing so unnecessarily limits the Contracting Officer's discretion and may prevent considering an offer that would be in the best interests of the Government

The Forum considered and discussed other inputs concerning the proposed rule, but did not reach a clear consensus The above comments represent only those which generated strong and consistent opimions among the membership Thank-you for this opportunity to comment on the proposed rule and for your support of needed changes in the Government source selection process

## Front Line Procurement Professionals Forum Members



# Bostonian. <br> GOVERNMENT SERVICES <br> incorporated 

October 2, 1996

General Services Administration
FAR Secretariat (MVRS)
$18^{\text {th }} \& F$ Streets NW
Room 4037
Washington, DC 20405
Dear Sir or Madam

I am writing this letter in response to Proposed Rule revising Federal Acquisition Regulation, Part 15 Rewrite- Phase I

Bostonia Government Services specializes in providing procurement and financial advisory services to local governments, Federal agencies and their contractors Much of our work focuses on helping to create public-private partnerships for development projects Often the transactions we deal with involve leveraging existing underutilized government owned assets into the tools needed by agencies We believe federal agencies are pressed for capital and are limited on debt capacity Many, however, have substantial assets which can be used to leverage into the things they require To make these deals work sophisticated and dynamic relationships must be structured between public and private parties

A major problem we find in working with Federal agencies is the principle underlying every procurement that the government must know what it wants to procure before it issues a solicitation This requires the public sector to design a specification or work statement That specification or work statement may not represent the best solution for the government However, because proposals must be evaluated on an equal basis and because price must be given some consideration virtually every procurement official believes that the RFP must specify a "what"

The financial pressures currently being felt in Federal agencies were brought to bear at the local government level many years ago Local governments developed a number of tools that could now be useful to their federal colleagues Principal among them is the Request for Qualifications (RFQ) RFQs are routinely used by local governments in creating public-private partnerships They work in a variety of ways but usually something like this -

1 An RFQ is issued which identifies the who the public sector partner is looking to team with In the case of a development project, the RFQ mıght say that the government wants a development partner with prior successful relationships in major developments and demonstrated results in creating value for their partners
2 RFQs are usually open for about a month Because evaluation is limited to qualifications, awards typically are made about a month after receipt of offers The award is of an exclusive right to negotiate an agreement with the public sector partner
3 The successful offeror has some period of time to undertake a joint due diligence with the public sector partner This due diligence is intended to come up with a business plan for the project The plan usually includes a variety of components Among them are the final terms of the development agreement including development fees

We recently applied this kind of approach to a $\$ 325$ million facility for the National Institutes of Health The deal involved "commercializing" NIH's assets to fund the development cost The award was made within 10 weeks of issuance and no offeror spent more than $\$ 8,000 \mathrm{in}$ the preparation and submission of their proposal

Protests are virtually unheard of using an RFQ Turnaround time is short and response costs are low The typical RFP approach to a development project can take a year or more in procurement Proposal preparation and pursuit costs can be several hundreds of thousands of dollars It is no surprise that protests are so common in RFP procurements The incremental cost of protesting can be minor relative to the cost and effort spent in pursuit of the opportunity

An RFQ is used to create a relationship-based transaction It really does not make sense to protest award and try to force yourself into a relationship with an unwilling public partner

The problem we at Bostonia Government Services constantly confront in the Federal government is that the only approved tool is an RFP Every deal has to be shoehorned into the RFP structure Although I recognize that the RFP approach is really quite permissive it is percerved as the only permitted tool And if price must be a factor in the evaluation, then you must specify the what in urder for it to be puced In complex issues the what may be best left to the private sector partner to work through with the public partner As a common vision evolves reasonable pricing should be negotiated as a part of the partnership structure and business plan Being limited to the RFP tool greatly limits the range of thinking on market approaches which will work best for the government

An RFQ should be an approved tool for major development and systems acquisition procurements It works well for local governments and in industry At the Federal level, the RFQ is used with considerable success only by the U S Postal Service The USPS has competitively awarded about $\$ 15$ billion in development transactions and has never had a protest or a claim The problem is not how an RFP is used or what terms are used in the RFP

The problem simply is that the RFP is the wrong tool to be used for many major procurements

I plan to attend the October 17, 1996, meeting although I may only attend the latter part due to prior commitments Please accept this letter as my statement and include me among those presenting statements

I look forward to meeting with you and if there are any questions please feel free to call

${ }^{\prime}$ 'วáté: $10 / 9 / 96 \quad 5 \cdot 21$ PM
Priority: Normal
TO. "kent cockerham" 〈edward $k$ cockerham. 1فgsfe nasa.gov〉 at internet
CC Sharl Kiser at GSA-CA
Subject. Re.
Message Contents
I have forwarded this to the person that receives the comment mall for that page, for her response to you

Regards,
Webmaster

## Reply Separator

Subject: Author. "kent cockerham" <edward $k$ cockerham.1@gsfc nasa.gov> at internet
Date: 10/09/96 4.29 PM
zI submitted this on-line Did you get it and do you intend to post it Please advise

SUBMITTED TO THE ACQUISITION REFORM NET ON 10/7/96

Subject. Comment on the draft Part 15 change to the Uniform Contract Format (UCF)

I don't think the format in the draft is a good one for federalwide use I would prefer that imposition of a uniform format be abandoned as opposed to adoption of the format in the draft

However, I do think that a new format is needed Several years ago I proposed a new format There was not an interest in making a change at that time. It is not a very exciting subject. I got the impression that the UCF was "untouchable". Apparently, it is not. So if it is going to be changed, it should be the very best that can be done It should not be an unexamıned part of a very significant rewrite that has many other perhaps more important issues. However, I agree with the Acquisition Reform Net posted comment that a change in the format will impact contract drafting systems. If it ts going to be changed, let's get it right the first time

I will address the following.

WHY THE PRESENT FORMAT SHOULD BE CHANGED
A PROPOSED NEW UNIFORM CONTRACT FORMAT
SOME RULES

WHY THE PRESENT FORMAT SHOULD BE CHANGED
The present Federal Acquisition Regulation format states that the purpose of the UCF is to facilitate the preparation of solicitations and contracts and the use of those documents by offerors and contractors. I agree with the objective but disagree that the present UCF meets the objective.

The purpose of a format is to make it easy to find topies contracts should be written so that the primary RESPONSIBILITIES of both parties are organized by subject matter and easy to locate. The present format does not provide the primary contract aspects- - what must be provided, when it must be
pNovided and the \$--in a single location. Deliverables and prices/costs are listed in Section B, The description or statement of work is in Section C and ${ }^{2}$ the delivery schedule or period of performance goes in section $F$ This should all be at the front and in a single section

Further, related topics can be widely separated in "by reference" versus "full text" portions and there are clauses in section $I$ that could logically fit in some other section..

Also, the present format is inconsistent withan itself Part I-The Schedule--consists of Sections A through $H$ and has many "clauses". However, part II (which consists of a single section) is titled "clauses" There are clauses everywhere, not Just in Part II And why have a part with a single section? Same for Section $A$, which, assuming no continuation pages, consists of a single page, the SF 33 or SF 26 Why have a one page section?

PROPOSED NEW FORMAT.
(Please read the "RULES" that follow The "RULES" make it work
Executive Summary (optional)
This would cover the major aspects of the solicitation and highlight those things of particular $2 m p o r t a n c e$.

Part I--Contract
Part I is the contract and is identified as such It is a single entity and is not divided into the Schedule, the Clauses and the Attachments ( 3 parts) like the present format. Further, the present format does not specifically state that the contract consists of the 3 parts

SF 33 or SF 26
The SF 33 or SF 26 would simply be the "face page" of the contract. It will not be a separate Section as at present. A one page Section does not make sense

Section A--Requirements/Deliverables and Prices/Costs
Addresses the three primary aspects of any contract-what must be provided, when it must be provided (delivery schedule), and what is the price/cost The present format scatters these aspects between Sections B, C and $F$

Section B--Packaging, Marking and Transportation
Addresses the next logical step-how should the deliverables be packaged, marked and transported.

Section C-Inspection and Acceptance
Covers inspection and acceptance as the next logical step However, in-process inspection and quality assurance would also be addressed here. The present format addresses inspection and acceptance before delivery

Section D--Vouchers/Invoices and Payment
Covers payment since this normally occurs after acceptance (Section C), although contract financing payments would be included, if applicable.

Section E-Socioeconomic Requirements
Covers all applicable Socioeconomic requirements as derived from Section $D$ of the FAR and associated agency supplement It makes this important area much more visible and locates it all in one section.

Section F--Contract Management
Covers all aspects of Contract Management as derived from Subchapters $G$ of the FAR and agency supplement with the exception of Part 46--Quality

Assurance and Part 47-Transportation which are covered in Sections $C$ and $B$, respectively.

Section G--Special Contract Requirements
Covers primarily installation and contract specialist drafted text that does not fit under one of the other Sections FAR and agency supplement clauses would NOT be included here

Section $H$-List of Attachments
Self explanatory
Part II--Solicitation Requirements
Section K -Representations, Certifications, and Other Statements of Offeror
Same as present format
Section L--Instructions, Conditions, and Notices to Offeror
Same as present format
Section M- Evaluation Factors for Award
Same as present format

SOME RULES
1 FAR clauses, agency supplement clauses, or contract specialist drafted "clauses" relating to a Part of the FAR will NOT appear in more than one section of the Format The reader can then be assured, for example, that all Part 32 coverage $1 s$ in Section $D$ of the proposed format.
2. Full text and "by reference" clauses will not be separated, but will appear in sequence. For example, a full text clause might be followed by the citation of a by reference clause Example: 52.232-25 PROMPT PAYMENT (MAR 1994) (by reference). If you are looking or Part 32 clauses they will all be in Section $D$ and provided in sequence.

Kent Cockerham
NASA
Goddard Space Flight Center
301-286-281.2
$=$
Author, "terry ford" <tford-ibripnr@ibr8gw80,usbr gov> at internet
Date: $10 / 8 / 96$ 2.05 PM
Priority Normal
TO- Shari Riser at GSA-CA
Subject FAR Case 95-029
Message Contents
To' Shari.kıser@GSA gov
From tford@pn usbr gov
Reference the new FAR Part 15, FAR Case 95-029

A The following comments on substance are keyed to the proposed new paragraphs:

1. In paragraph 15.104 (c) (4), what is the meaning of this item? The preceding text (in subparagraph 15104 (c), indicates that this is one of seven itemized elements that \#the solicitation may describe\#. However, as written, it sounds more like something the author felt we should consider before requiring oral presentations. Please review and clarify,
2. In paragraph 15.201(f), I agree with the comment made by George Marchant. Further, for safety \#s (and consistency\#s) sake, the only Government personnel disclosing specific information about a specific proposed acquisition should be Contracting Officers Contracting officers are well enough trained that they\#ll provide information to all prospective offerors simultaneously (or nearly enough so that none will gain a competitive advantage by advance notice). Second, there may not be a next planned release of information. I suggest that this whole paragraph be limited to the first and last sentences only, Delete the middle sentence entirely, to avoid giving non-contracting personnel the idea that they may disclose information about specific proposed acquisitions at all;
3. In paragraph $15202(\mathrm{~d})(1)$, the use of the word \#these\# could be misunderstood, since the phrase is subordinate to the preceding subparagraph, which refers only to facsimile methods It\#s obvious that the author intended that it apply to both facsimile and electronic methods Suggest that you renumber this paragraph as \#15.202(e)\# and within it, change \#these\# to \#electronic or facsimile\# of course, the remaining following paragraphs would have to be re-designated accordingly;
4. In paragraph 15 203, the use of the model contract format (MCF) is prescribed \#to the maximum extent practicable\# Again, I agree, generally, with George Marchant\#s comments I see no significant improvement in \# or benefit to be gained by using \# the MCF Until we are ready to change $A L L$ of our contract/solicitation forms/formats (the ones we use for sealed bidding as well as for negotiation, the ones we use for construction as well as for supplies and services), to any \#new and improved\# version, we ought to stay the course with what we have (the UCF and currently-in-use SFs), absent some compelling reason to change Currently, I don\#t see one. Throwing a new format, and another new set of only marginally improved forms in with the plethora we have now is not progress In fact, I suspect it will be a little counterproductive;
5." In paragraph 15 207(c). I agree with George Marchant\#s comment I also suggest that the language be expanded to allow submission of a revision at any time to avoid the offerors\# running afoul of TINA.;
5. In paragraph $15.402(\mathrm{~b})$, line one, delete \#1s used\# and change \#where\# to \#wherein\#. End that first sentence with a period after \#technically acceptable\# where it appears in line three, and delete the rest of the sentence The suggested revised paragraph reads like this:
\#A lowest price technically acceptable process wherein it has been determined that the Government\#s interests are best served by selection of the lowest price offer that is evaluated (on a pass/fail basis) as technically acceptable Proposals need not be ranked under this process nor are communications precluded\#;
6. In paragraph 15405 (a) (4), be specific about at what point the cost or price information may be provided to the members of the technical evaluation team;

8 In paragraph 52 215-1(f)(9), I don\#t necessarily support George Marchant\#s call for language to the effect that recording the obligation in financial management systems is not a prerequisite for a valid obligation. That\#s long been established However, I do suggest that we insert \#or notice of award\# following \#transmittal of the contract\#; as currently written, it\#s too narrow,
9. In paragraph 52 215-8, use the MCF designations, rather than a description of what the section contains The offerors may not be famıliar with what we term \#tailored clauses\#, nor be able to tell which ones they are, unless we so designate them,

Somewhat less substantive comments and suggestions follow .... .
10. In paragraph 15.203-4, suggest the first sentence be slightly rewritten by substituting \#whether\# for \#are\# in line one, and deleting \#are not tailored but are\# in the third line Also, suggest underlining \#elects\# in the fourth line, for emphasis and clarity;

11 In paragraph 15 206, insert \#responses to\# before \#requests for information\#;
12. In paragraph 15207 (b), excellent change'

13 In paragraph 15.208(b) (4), insert \#where\# after \#organizations, \#;

14 In paragraph 15.401, insert a comma after \#subpart\#;

15 In paragraph 15.403 (b) (1), delete \#an appropriate\# and insert "\# as appropriate \# a\#;

16 In paragraph 15.403(b)(4), delete \#based\#,
17 In paragraph 15404 (d), In the first line,

1nsert a comma after \#acquisition\#,
$\therefore$ 18: In paragraph $15404(d)(1)$, add a semicolon at the end;
19. In paragraph 15404 (d) (2), add a semicolon and the word\#and\# at the end;

20 In paragraph $15405(a)(1)$, line four, change \#offeror\# to \#proposal\#;
21. In paragraph 15.405 (a) (2) (ii), change the parenthetical phrase to read (including those with Federal, State, and local Governments, as well as those with commercial firms);

22 In paragraph 15405 (a) (3) (11), add \#and against the other technical proposals \#;

23 In paragraph 15.406(a), line two, suggest that \#a significant\# be substituted for \#the greatest\#;

24 In paragraph $15.406(\mathrm{~b})$, next to last line, change \#number or proposals\# to \#number of proposals\#;
25. In paragraph 15.407(a), line one, ingert a comma after \#alone\#, and insert \#itself, \# after \#process\#;

26 In paragraph $15.407(b)(5)$, line four, delete \#or not\#;

27 In paragraph $15.407(c)$, what\#s the mplication and meaning of the reference to 15.410 ? There is no apparent connection, perhaps the reference should have been to 15409 ,
28. Also in paragraph 15 407(c), last line, the referenced paragraph 15.411 doesn\#t exist;
29. In paragraph 52 215-1 (e) (1), the \#and\# following the semicolon at the end of the legend doesn\#t belong with the legend; rather it prefaces and introduces the next subparagraph; and

30 In paragraph 53.214 (d), insert \#bids for\# after \#soliciting\#.
$B$ The following are some comments less about substance and more about form . ..

1 For general readability purposes, to enhance clarity, and to minimize misinterpretations, $I$ suggest that you stick with the usual convention of using commas between all elements of a series of words or phrases when using and, nor, or or. (Believe me, as one who has had to use the ASPR, the DAR, and the FAR, it simply makes things a lot easlex') with that in mind, add commas to the series of words or phrases found in
a. Paragraph $15201(a)$, second sentence (after \#personnel\#);
b Paragraph $15201(b)$. last line (after \#negotiation\#);
c Paragraph $15201(c)$, line three
(\#proposed contract type, terms and conditions, and
d. Paragraph 15.203-5, line two (after \#data requirements\#);
e. Paragraph 15 207(a), last Ine (after \#revisions\#);
f Paragraph 15.405(a) (2), line three (after \#data\#); and
g Paragraph 52 215-1(c), line one (after \#xevision\#).
2. For the same considerations (readability, clarlty, and ease of interpretation, stick with the convention of beginning a serles of phrases that are separated by semicolons with an introductory colon With that in mind:
a. Insert a colon after the word \#change\# in line two of paragraph 15001 ;
b. Insert a colon after the word \#regarding\# in line two of paragraph 15.201(c),
c. Insert \#and\# following paragraph 15.202(a)(3), and
d In paragraph $15405(\mathrm{a})(1)$. In Iine six, insert a colon after \#determine\#; in line seven, insert a semicolon after \#effort\#, and in line eight, insert a semicolon after \#work\# Also, insert the words \#the offeror\#s\# immediately before \#abllity\#.
3. Three more punctuation comments
a In paragraph $15.205(f)$, suggest a comma after \#departure\#, in the next to last line;
b. Throughout the document, suggest that you use brackets (vice parentheses) wherever two parentheses appear together, to minimize reader confusion (in other words, use )] instead of )). for example): and
c. In paragraph $15407(\mathrm{c})$, line seven, suggest insertion of a comma after \#offeror\#s attention\#

Thanks for the opportunity to comment \#

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Author: "bob antonlo" <antonlor rced@gao gov> at internet
Date. 9/16/96 8.20 AM
Priority: Normal
mo. Shari Kiser at GSA-CA
Subject. definition of "down-select"
-.-.-.-.-.-.-.-.-.-.-.-.-.-.-.-.-.-.-. Message Contents
Below is the result of your feedback form It was submitted by bob antonio (ant
onior rced@gao gov) on Monday, September 16, 1996 at 08 20.18
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sender part15@www gsa.gov
TITLE Part }15\mathrm{ proposed rule comments
text. Could you provide the intended definltion of "down-select"
as it is used in section 15 103?
agency not representing any organization
REMOTE_HOST viper gao gov
REMOTE_USER
REMOTE_ADDR: 161 203 16 1
```

Reference Federal Register, Vol 61, No. 178, FAR Case 95-029, dated 12 September 1996.
The following are my comments on the proposed rewrite of FAR Part 15 (Phase I):

1. Paragraph 1.102(3):
a. second sentence - add "or strategy" after acquisition plan. Where an acquisition plan is not always required a strategy of some type should be developed. This will emphasize the need to develop a strategy.
b. Last sentence - Whale I fully concur with this statement I believe it should be clarified further Recommend deleting the last sentence and adding the following or similar statement "Fairness does not mean that prospective offerors and contractors will be treated the same. Offerors and contractors proposals will be evaluated and treated based on their own ments considering individual capabilities, past performance and other relevant factors described in the solicitation".
2. Paragraph 15100 third sentence - Recommend adding the "PCO" either before or after source selection authority. This will reinforce that the PCO is generally the SSA unless the HCA specifically appoints someone else.

3 Paragraph 15.101(b)(1) \&(b)(2) - Please clarify. Appears to be a conflict between these two paragraphs. Paragraph(b)(1) indicates that a technical proposal could receive a rating other than pass/fail This leads one to believe that trade offs can be considered in making an award decision based on lowest priced technical acceptable However, in paragraph 2 it states that trade offs are expressly prohibited and ratings are accomplished on a pass/fall basis.

4 Paragraph 15103 - Recommend changing references to Government to "Contracting Officer" This is a critical area that if not properly handled could lead to technical leveling, the perception of providing unfair competitive advantages and ultimately undefendable protests As such the Contracting Officer responsible for the solicitation should be kept mn the loop so that they are aware of everything that is occurring on the proposed procurement.
5. Paragraph 15.103(d)(2)(ii) - Need to define "supporting rational". Offeror should be advised of the PCO's rational as long as it will not reveal sensitive technical or procurement information Rational should be limited to the specific deficiencies in the offeror proposal such as financial, experience, management, and past performance. Technical and cost deficiencies should be revealed only after careful consideration and determination that they will not reveal sensitive information or provide the offeror a competitive advantage
6. Paragraph 15201 (b) first sentence - Recommend adding after requirements "and industries capabilities". The purpose of exchanging information is not only to improve understanding of the Governments requirement but, also, to improve understanding of industries capabilities
7. Paragraph 15 201(c)(4) - After with add "all" This will reinforce that meetings should be held with all offerors.

## 8. Paragraph 15 104(f):

a Need to clarify. Only the PCO should release specific information This is essential to assure sensitive info is not inadvertently released and that all offerors receive equal treatment If not, we are exposing ourselves to potential protests which we would not be able to defend.
b. Second sentence - recommend establishing a minimum penod such as 3 to 5 days for the release of information. As currently stated it is to general. Some offices may not have established schedules or policies for releasing information. This could result in only certain offeror receiving specific information pertinent to the preparation of their proposal. Again, we could be mereasing our risk of receiving and losing protests
9. Paragraph 15.202(a)(4) -Add after subfactors ", as well as their relative importance,". This will emphasize the need to identify to the prospective offerors what is considered by the Government to be important.
10. Paragraph 15.203 - Do not understand the need to initiate a new nonmandatory format for only those contracts not exempted at (a)(1) through (5) Recommend that before we implement this new format we perform a detailed independent study and comparison of the impacts and cost of the new versus the current process to determine if the new process will in fact provide savings or be of any real benefit It appears that we are changing the process for the sake of changing rather than correcting a real problem. It is my opinion that the resource impact to implement this will far exceed any value we would gain. $I$ am concerned that the cost and time it will take to adopt, especially when we are downsizing, will impact our ability to be responsive to our customers needs. In addition $I$ believe that it will contribute more to confusing industry because not all agencies will adopt this format. Therefore, the Government will not be presenting one face as industry would like.
11. Paragraph 15.206 (c) - Recommend adding to the last sentence ", provided that the retransmission problems are not the fault of the Govemment" This will clearly show that an offeror will not be penalized for Government caused problems like faulty equipment
12. Paragraph 15.403 (b)(2 )-Recommend deleting "if agency procedures require a plan". A plan is essential to ensure consistency and faimess in the process. It has been my experience that when a plan is not prepared, the evaluation and selection process is fraught with problems and has lead, in some cases, to protests and subsequent loss of the protest By stating the plan is required before release of the solicitation, we emphasize the importance of 1 ) the evaluation plan to the process and 2 ) the importance of properly performing necessary planning in advance

## 13. Paragraph 15 404:

a. Paragraph (a) - Recommend adding a sentence similar to the following "The use of factors and subfactors should be kept to the minimum necessary to adequately determine the best value to the Government" This will encourage PCO/SSA's to define the significant areas that are relative to the procurement. It should help to reduce unnecessary requirements that add additional burden and confusion to the process
b Paragraph (d)(1) first sentence - Recommend adding "reasonableness" after Price or cost. Thus better defines what the Government is evaluating for.
14. Paragraph 15405 :
a. Paragraph (a)(1) - Do not agree with second sentence. While competition generally will establish reasonableness, I believe we need to evaluate proposals against Government estimates to determine possible imbalancing and clear understanding of the requirement. Especially in situations where it is a complex requirement or where a limited number of offers are received
b Paragraph (a)(2)(iii) - Recommend adding clarification to better define what neutral means and how it should be treated. In situations where past performance is the most significant factor we could unwittingly limit competition.
c. Paragraph (4) - Recommend changing this paragraph to encourage giving cost data to the technical evaluation team. Cost data can prove to be an extremely useful tool to the team in helping them determine technical proposal is reasonable and if the offeror does in fact really understand the requirement and can in fact perform for the proposed pice, especially if cost is evaluated as described at paragraph (a)(1) For example, the offeror may propose in the technical part that they will provide seven managers to oversee production efforts The requirement is of such a nature that seven managers are needed. The cost proposal is considered reasonable using the standards defined at paragraph (a)(1) However, the offeror has only proposed cost for two managers. The technical evaluators not be aware of this and would probably rate this part of the technical proposal favorably In this case we may not receive the management effort necessary for successful performance Thus we could end up with a contract that will not provide us the requirement within the time or cost anticipated. By providing the technical evaluators cost data, these type of problems could be identified and surfaced during the evaluation process. Thus could ultimately reduce claims and cost and time growth
15. Paragraph 15.406 - Recommend adding language emphasizing that the contracting officer should seek the advise and counsel of the technical team and counsel in making a competitive range determination or a determination to limit the number of proposals in the competitive range for efficiency.
16. Paragraph 15.407(c) third sentence - Please clarify. Does this mean that we will be required to give a offeror an opportunity to dispute unfavorable performance ratings. If this is the intent do not agree Of course a offeror can explain why the rating is unjustified or arbitrary What are we suppose to do with their position accept it and ignore the official rating

RAYMOND J. POLLARD
Team Chief, Policy and
Review Team
CETAC-CT-P

FACSIMILE HEADER SHEET
(ER 105-1-5).

|  |  | $(E R \quad 105-1-5)$ |  |  |
| :---: | :---: | :---: | :---: | :---: |
| EROM Ray Poldard | OFFICE SYMBOL CETAC-CT-C | TELEPHONE NO.$703 / 665-3666$ |  |  |
| SHARI.KISER |  | TELEPHONE NO. \#PAGES $8-202-501-4067$ | FRECEDENCE Routュne | DTG |
| SUBJECT: COMMENTS | TO EAR PART 1 | REWRITE |  |  |

ENCLOSED is a copy of my comments to the FAR PART 15 Rewrite. Sorry we couldn't seem to make it work electronically but, thanks for letting me send them in this way.

Ray

October 21, 1996
To FAR Secretariat
From Ralph C Nash, Jr

## Re Comments on FAR Case 95-029

The proposed draft of Part 15 of the FAR in the subject case is a vahant attempt to accomplish some excellent objectives Particularly laudable are the goals of opening up the communications between the parties and streamlining the best value process The difficulties in the draft occur in the implementation of these objectives There are a number of instances where the language is less than clear--creating the risk of misinterpretation and misunderstanding These are discussed below--first with regard to major issues and then directed toward the numerous minor defects in the draft

## The Term "Proposal"

The draft apparently adopts a new meaning for the term "proposal" to include the offer plus all information submitted in response to the RFP It attempts to use the term "offer" when it refers to the binding language of the subsequent contract Curiously, it does this without altering the definition of "offer" in FAR 2101 To say that this is confusing is to seriously understate the problem I beheve this new distinction is far to subtle to be understood--even if the terms were consistently used in the draft (which they are not ${ }^{1}$ ) Thus, any adoption of this new terminology should be thoroughly explained in the new FAR and the term "proposal" should be defined In addition, if this new distinction is to be carried out, you should do a global search of the FAR to ensure that the terms are consistently used throughout the regulation

I agree that the new draft should contain a clear distinction between contractual language and mere information to be used for evaluation purposes However, it appears that a better solution to the problem would be to draw the distinction between the "proposal" (meaning "offer" in a negotiated procurement) and information accompanying the proposal This would permit continued use of the FAR 2101 definition of "offer"--a less drastic shift in terminology It would also permit clear regulatory language when the goal is to tell COs how to deal with information accompanying the proposal

In ether case, a great deal of rewriting is needed to create a regulation that is clear with regard to the distinction that you are attempting to make In addition, the regulation would be greatly improved if it contained specific direction to the CO to state in the RFP what contractual offers the Government is seeking and what is merely information This would greatly increase the parties' understanding of the terms of the ultimate contract Without such direction, it seems unlikely that the new FAR will clear up this difficult area

Correction of Mistakes
The draft apparently makes a major improvement in permitting the correction of mistakes as soon as they are identified However, the implementation of this policy is very murky No where is the policy clear and forthnghtly stated and there is no guidance on the rules to be used in correcting mistakes For example, what type of evidence will be demanded to demonstrate that a mistake has been made? If there are no rules, the door is open to proposal "revisions" at any tıme--contrary to the rules in the draft

This is an instance where the goal is laudable but the implementation is poor Major rewriting of the regulation is needed to provide a workable set of rules

## Limiting the Competitive Range

The draft has the good objective of encouraging the CO to increase the efficiency of the best value process by lumiting the competitive range to a reasonable number of competitors However, there are two problems with the new language in FAR 15406

First, the draft uses different language to describe the scope of the new rule Paragraph (a) permits limiting the range to the proposals "having the greatest likelihood of award" while paragraph (c) uses the term "most highly rated proposals" It is suggested that these paragraphs be merged and that the standard by to include only the "leading contenders" in the competitive range Additional gudance might be added to advise COs that proposals should not be dropped from the competitive range if they are ranked close to those that are left in the competitive range The goal, of course, is to include in the competitive range those proposals that are clustered together as the leading contenders The regulation will be more understandable if this concept is clearly conveyed

Second, paragraph (b), permitting the establishment of a specified number of proposals in the competitive range before the proposals are evaluated is a bad idea which was rejected by the Comptroller General many years ago There is no way to know how many offerors will submit proposals that are in the cluster of leading contenders until they are evaluated 'This paragraph should be deleted from the regulation

## Evaluation Factors

The guidance in FAR 15404 is not very helpful because it is jumbled The key problem is in paragraph (d) which lumps a number of factors under the category denoted as "the quality of the product or service " Most of the enumerated factors (past performance, management capability, personnel qualifications and prior experience) are actually means of determining the capability of the offeror not the quality of the work to be performed Thus, they only indirectly deal with quality of performance by enabling the CO to assess the risk that the offeror will not perform as promised

The draft would be far more useful if it divided the guidance into two types of factors-offer factors and capability factors It could then direct COs to choose the minimum number of capability factors (including past performance) necessary to assess the risk of poor performance and to select those offer factors that reflected additional promises solicited from the offerors (the major offer factor--to meet the contract specifications--1s not an evaluation factor because all offeror are the same in this regard) This would promote clearer thinking about the purpose of evaluation factors and hopefully would reduce the number of factors used (perhaps the single most important reason for inefficient best value procurements is the mindless use of multiple evaluation factors without any clear analysis of what purposes they serve)

## Communications

The goal of FAR 15407 to permit more open communications before setting the competitive range or awarding without discussions is laudable However, the guidance would be clearer if the distinction between capability factors and offer factors were adopted Then the rule could be established that communication as to capability is unrestricted while communication as to offer factors is limited to clarification (and changes to the offer are not permitted except for the correction of mistakes under specified rules) This would provide a more coherent logic supporting the opening up of communications while adhering to the statutory guidance that discussions must be conducted with all offeror within the competitive range

If this suggestion were adopted, the rule as to "discussions" could then be written to focus on bargaining about the price and other offer factors This is the goal of any real negotiations-linking price to proposed performance by asking, for example, how much could you reduce the price if less performance were promised or how much would more performance cost The rule should probably also state that the CO should use the discussion to clear up any concerns about the validity of the information used to evaluate capability that have not been cleared up in the arediscussion communications You should also consider using the term "negotiations" in lieu of "discussions" to convey a clearer view of what you are attempting to accomplish (which I assume is real bargaining between the parties)

## New Model Contract Format

The new model contract format appears to be change for the sake of change There is no indication in the draft of the purpose of this change or the benefits to be derived Yet it will require changes to all computer drafting programs and force contractors to learn one "uniform" format for sealed bid procurements and another "uniform" format for negotiated procurements Furthermore, by reducing the number of sections it will tend to reduce the uniformity of solicitations and contracts Unless there is some sigmficant benefit to be derived from this change, it is suggested that it be dropped

The draft also calls for each agency to create its own cover sheet for the contract or use Standard Form 33 This is the worst of all worlds! Standard Form 33 is a cover sheet for sealed
bid procurements and never should have been used for negotiated procurements in the first place A multuphicity of cover sheets is chaotic It is suggested that a single cover sheet be drafted for negotiated procurements and that such a cover sheet require the CO to clearly specify what the contract consists of This is a major failing of current practice where the "proposal" is a jumble of promises and information and it is frequently not clear what becomes the final contract

## Detailed Comments

1 FAR 15001 --The defintion of "revision" imples that an offeror can only make a change to its proposal if requested by the CO This seems odd

2 FAR 15 002(a)--Encouraging COs to follow Part 15 "to the maximum practicable extent" seems far too strong There are many aspects in this part that are not relevant and probably should not be followed in a sole source procurement

3 FAR 15 103(d)--The guidance in this paragraph is confusing in that it assumes that it is the "information" that is requested that makes an offer binding This is an incorrect premise-what makes an offer "binding" is the promissory nature of the offer with an indication that the offeror can be bound by an acceptance This is just one of a number of instances where clarity as to the difference between information and offer would improve the regulation

4 FAR 15 103(d)--The guidance on providing information to offerors that are dropped ((11) and (ii1)) should be made applicable to mandatory down-selects as well as advisory downselects and should be stated in a single provision to ensure that it is clear that dropped offerors will be fully informed as to the reasons for their beng dropped but that a full debriefing (including all of the statutory information) will not be possible until after award

5 FAR 15 104(c)--This guidance misses the critical lesson that has been learned from oral presentations-that they are far more useful when they involve real dialog between the parties (rather than just a canned presentation by the offeror without any questions, discussion, etc ) The gudance in (7) is particularly harmful because it will chill any such real dialog If oral presentations involve probing an offeror's capability (as they should), there should be no issue of discussions under the new regulation

6 FAR 15 205(a)--One of the ways to avoid the continual amendment of a solicitation is to include a provision permitting the submission of alternate proposals (proposals not meeting the specific requirements of the solcitation) This has been used by DOD with regard to military specifications and can be used for other aspects of the contract as well It would be helpful if guidance on this technique were included in the regulation

7 FAR 15 405(a)--The first line contans one example of the misuse of the term "proposal" in the current draft Following the usage in the draft the term should be "offer" The paragraph also equates scoring the evaluation by listing scoring methods as means to "evaluate
proposals "Scoring is not evaluationt In addition to the scoring, the evaluators should be required to state the substantive reasons that they have arrived at the scores so that the source selection official has good data on which to base the decision This requirement (for narrative information including strengths, weaknesses and risks) is missing from the guidance

8 FAR 15 405(a)(2)(11)--Why should information on problems encountered and corrective actions by provided only "at the discretion of the CO" It would seem that such information would always by useful and pertinent If anything it should be permitted by a standard clause at the discretion of the offeror

9 FAR 15 407(a)--The first sentence is garbled
10 FAR 15 407(d)(3)-Advice that a cost or price is too low should also be permitted
11 FAR 15 408--The last sentence appears to be an afterthought that is misleading Presumably, the CO can conduct any type of communication in 407(b) prior to award without discussions--not just "minor clanifications"

12 FAR 15 803(b)--Why is notice only required if a proposal was in the competitive range? This seems to violate the statutes and is confusing with regard to award without discussions

13 FAR 52 215-1--Paragraph (c)(3) is too vague as to late proposals While 1 agree with the new policy it is suggested that the clause use language that makes it clear that a proposal that is significantly late will probably not be considered Language such as "will only be considered if " would be useful

Paragraph (d) states that proposals will be "valid" for a specified number of days What does this mean" The regulation correctly states that proposals can be withdrawn at any tıme

# MEMORANDUM FOR General Services Administration <br> FAR Secretariat (MVRS) <br> 18th \& F Streets, NW, Room 4037 <br> Washington, DC 20405 

FROM: 12 CONS/LGCD
395 B STREET WEST SUITE 2
RANDOLPH AFB, TX 78150-4525
SUBJECT: Ref FAR Case 95-029, as published in the Federal Register, Vol 61, No. 178, Thursday, September 12, 1996.

1. FAR $15.405(\mathrm{a})(2)$, as written in the Federal Register, states that "assessment of past performance information is separate from the responsibihty determination required under Subpart 9.1".
2. Question 1. FAR 9.103 currently requires contracting officers to award contracts to responsible contractors only. FAR 9.104-1(c) states that one criteria contracting officers are to consider is contractor's satisfactory performance. Will FAR Part 9 be changed to coincide with the revised FAR Part 15 ?
3. Questions 2. When an acquisition is set aside for small business, will the contracting officer be required to request a Certificate of Competency from the Small Business Administration when a contractor's performance is not satisfactory? If not, will FAR Part 19 be changed?
4. FAR 15.402, as written in the Federal Register, states "Typically the best value would be achieved through (a) A tradeoff process... OR (b) the lowest price technically acceptable process...".
5. Question 3. If the lowest price technically acceptable process is used, will contracting officers be able to use past performance as an evaluation criteria on a past or fail basis?


## STOCKER \& YALE, INC.

32 HAMPSHIRE ROAD, SALEM, NEW HAMPSHIRE 03079 USA, TEL (603) 893-8778 FAX (603) 893-5604

October 10, 1996

Rule Making Office
FAR Section -95-029
Room 4037 95A
Washington DC 20405
Attention Mr Ralph D Stefano
Dear Mr Stefano,
Enclosed please find a copy of my letter to Mr Steven Kelman regarding Federal Procurement Policy

I understand the comment period has been extended, and I offer this proposal for your consideration

I look forward to hearing from you
Sincerely,


Enclosure

## STOCKER \& YALE, INC.

32 HAMPSHIRE ROAD, SALEM, NEW HAMPSHIRE 03079 USA, TEL (603) 893-8778 FAX (603) 893-5604

October 2, 1996

Federal Office of Management and Budget
Old Executive Office Buldıng
Washington, DC 20503

Attention Mr Steven Kelman<br>Head of the Administratıve Office<br>of Federal Procurement Policy

Dear Mr Kelman,
I read with interest in The Wall Street Journal, your comment, "We're trying to make the government more like a smart commercial buyer and get ourselves out of the bureaucratic straight jacket "I commend your thoughts and hasten to say I have been proposing the same during the past forty years of doing business with all branches of the government Although the comment period for proposals may have ended yesterday, I offer the following simple plan for your consideration

One sure way to eliminate the bureaucratic straight jacket is to do away with the root cause the FAR's (Federal Acquisition Regulations) supposedly invented by Congress to keep the buyers honest and to level the playing field While the intent is indeed desirable, it does not work If you wish to operate like a commercial entity you must adopt the same procedure Hire competent buyers at fair wages, and give them the task of buying at the lowest "real" price, with regard for quailty of product and timely delivery The buyer is given "sole" responsibility for the buy and stands or falls on the record of his accomphshments No lawyers or committee should have to be consulted for their concurrence

The buyer must have a knowledge of manufacturing methodology and costs He must visit his vendors before placing a first important order so that he can formulate a sound judgment as to the bidder's ability to produce the item and to control the quality and delivery schedule

It should be mandatory that any buyer who is convicted of "dealing" should be put in jall for a period of 10 years The head of purchasing must be able to hire and fire with full authonty and stand on his record

I would recommend the government institute the above procedure on a "test" basis by selecting one agency like the Defense General Supply Center of Richmond, VA to prove out the method If it works after a one year trial, the same procedure can be instituted in an orderly way

In summary, there is no way to fix the system under the present set of regulations The Procurement officers do not have enough authority, and in actuality they all wait for the "legal" experts to tell them when and how to make a "buy " Most of the time it takes forever, and the cost of making the buy is often greater than the price of the item The above recommended method works commercially so that a company can make a reasonable profit, but it still takes competent people

I am ready to help you with the fine details should you indeed decide to "bite the bullet " Please call me

Sincerely


James Bıckman
President
$\mathrm{JB} / \mathrm{sln}$
Even if new jobs are created，＂it still
begs the question whether the develop－
ment might have＇occurred without the：
incentives，＂says Gary Olson，director of
the Michıgan state senate Fiscal Agency，
a nonpartisan group that assesses legisla－
tion．Hs state is now developing its own
group of＂renaissance zones，＂with a wide
array of tax breaks to encourage start－up
business．
pporads yuiqu sassoursna hrous ？SOW breaks for companies in enterprise zones
create uneven playing fields and thus
 surveys by the National Federation of Independent Business conclude．
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But the National Federation of Inde－
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The proposal to hire two clerks for a
 tion of Convenience Stores．Besides adding to costs，hiring two clerks could potentially
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 lems of assessing enterprise zones．
New York state Comptroller H．Carl McCall says a recent audit by his agency
 nomic Development had overstated the


 the zones were inadequate．

Department officials acknowledged
most of the shortcomings，but blamed them on practices established by the previ－

 and says it has worked aggressively to tax breaks．
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 economically depressed areas．Whether
 and it is difficult for agencies that admin－
 tiveness，says Tom Bogart，associate pro－
 sity and an expert in encerprise zones． A new study that Mr．Bogart helped conduct showed no significantly greater employment increase at New Jersey enter－ soḷurduoo łe ueqł saṭurduoo วuoz－әstad

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 and get ourselves out of the bureau－PoUIERNMENT cratic straitjacket，＂GOVERNMENT says Steven Kel－TT T man，head of the ad－TMA 0

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# THE DEPUTY SECRETARY OF THE TREASURY 

October 24, 1996

The FAR Secretariat
Attn. Ms. Victoria Moss
18th and $F$ Streets, NW, Room 4037
Washington, DC 20405

Dear Ms. Moss.

This is to express the Department of the Treasury's complete support of the proposed changes to the Federal Acquisition Regulation (FAR) Part 15, Contracting by Negotiation, which appeared in the September 12,1996 Federal Register. Many of the proposed revisions contain significant changes, which will streamline the procurement process, encourage performance and results-based management, eliminate regulations that impose unnecessary burdens on industry and Government contracting officers, and promote best value to the taxpayers

We are pleased that the major policy shifts will allow contracting officers more flexibility to make good business decisions by l) retaining offerors with the greatest likelihood for award, 2) comparing one offer to another to confirm which proposals offer the best value; 3) releasing the Government estimate to allow a better understanding of the requirement;
4) allowing discussions without the need for revised proposals; 5) using streamlined procedures, such as oral proposals, that facilitates focus on the "true requirement;" and 6) considering late proposals when in the Government's best interest

Treasury senior procurement officials, our Chief Information Officer and I believe that the proposed changes comport with the spirit of the National Performance Review, the Federal Acquisition Streamlining Act of 1994, and the Federal Acquisition Reform Act of 1995. We also believe the proposed rule reduces regulations that distance the government from those seeking to do business with us.


- We look forward to working with you to continue your exemplary efforts to make Federal procurement work better and cost less



## cc. Dr. Steven Kelman Eleanor Spector Deidre Lee <br> Ida Ustad

## Contract Services Association of America 1200 G STREET, N.W. SUITE 750 WASHINGTON, DC 20005

Putting the private sector to work for the public good

30 October 1996
General Services Administration
FAR Secretariat (MVRS)
18th and F Sts , NW
Room 4037
Washington, DC 20405
ATTN Sharon Kıser
Re FAR Case 95-029
Dear Ms Kıser
Please find attached a draft of the testimony to be delivered by Gary Engebretson at the public hearing on the proposed revisions to FAR Part 15 Since the testimony will undergo further refinement between now and that time, we will bring extra copies of the final testimony to the meeting However, the enclosed draft does raise each of the issues we plan to address and should thus provide more than adequate information for preview by the council members

If you have any questions or need more information, please let me know
Thank you for your time and assistance


# Contract Services Association of America 

1200 G STREET, N.W. SUITE 750 WASHINGTON, D.C. 20005
Ph: (202) 347-0600 Fax: (202) 347-0608
Putting the private sector to work. for the public good


Testimony of Gary Engebretson, President Contract Services Association of America<br>before the<br>FAR Council Public Hearing<br>on<br>the Proposed Revisions to FAR Part 15



November 8, 1996

Good morning I am Gary Engebretson, President of the Contract Services Association of America CSA is the nation's oldest and largest association of government service contractors, representing more than 225 member companies and their tens of thousands of employees And I am pleased to have the opportunity to present to you today our view and thoughts as regards the proposed changes to FAR Part 15 Also with me today is Stan Soloway, who has been overseeing CSA's efforts on the proposed revisions

CSA is also a member of the Council of Defense and Space Industry Associations and is the CODSIA project leader for the Part 15 rewrite Overall, we believe that the proposed changes to FAR Part 15 represent a positive step toward improving the government procurement system We support the government's efforts to enhance communications between suppliers and customers, to improve the efficiency of the system, and to adopt appropriate commercial practices to the government acquisition process We believe, in short, that the proposed changes represent a sound foundation from which to build toward a procurement system that genuinely serves the best interests of the American taxpayer

In that light, we believe the drafters of the proposed revisions deserve a great deal of credit for raising a range of important issues and, for the first time, putting those issues on the table for detailed discussion We do, of course, have a number of specific comments and concerns which we believe need to be addressed in order to ensure that the proposed revisions achieve their stated goal without adverse impacts But given our overall support for the direction of the proposed rewrite, we hope that our comments will be accepted not as criticisms but, rather, constructive suggestions


G Engebretson
PT 15 Testimony
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Since I know you have a long list of witnesses to hear from today, I will focus my remarks on a few specific issues that CSA's members believe merit additional attention and refinement We will, of course, also be happy to take any questions you might have

First, it is important to look at the rewrite not only from the perspective of the government, but from the perspective of the scores of dedicated and quality-conscious suppliers of goods and services who work in, or wish to work in, this marketplace Roughly half of CSA's members are small businesses, and over a third would be considered medıum-sized As the spokesman and advocate for all of our members, I must, therefore, look carefully at any legislative or regulatory proposal from each of those perspectives

I am convinced that the proposed changes to Part 15 can be executed without adversely impacting small and medium sized businesses I believe that the competitiveness of our smaller businesses can be retained without deviating substantially from the intent or spirit of the proposed rewrite However, doing so will require some modifications to the policies proposed and ongoing vigilance to ensure that when implemented, the proposed revisions are implemented as intended

We appreciate and support the government's desire to enhance the efficiency of the procurement process And we support efforts to provide contracting officers appropriate opportunities to winnow the field so that valuable resources are not allocated in a wasteful manner

At the same time, however, we could get to a point where efficiency takes precedence over fairness, where qualified and capable offerors never get the opportunity to full expose and market their capabilities This concern is most directly manifested in the sections dealing with multiphase acquisitions and competitive range determinations

Under the proposed multiphase technique, contracting officers will have the ability to limit not only the number of proposals that will be evaluated but also from whom proposals will even be accepted The proposed language would seem to create a kind of pre-qualification process without any real rules and regulations to govern that process

The Acquisition Reform Working Group, of which CSA is also an active member, has looked carefully at these issues and consistently recommended a proposal that meets the needs of all concerned It has always been ARWG's contention, and CSA's as well, that al interested parties should have an opportunity to participate in a procurement Thus, the ARWG proposal, which we recommend be adopted as part of this rewrite, would allow only advisory downselects prior to proposal submission, once proposals have been submitted and evaluated, a competitive range could certainly then be established to further narrow the field and enable government contracting officers to focus their attention on, and conduct discussions with, only those offeror who have a reasonable chance of success

GDE
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Page 3
In addition to giving interested offerors an opportunity to participate, we believe that most companies, when advised after the submission of initial proposals or statements of qualifications or other material short of a full proposal, that they are not likely to succeed, and assuming the information they are given at that time to back-up such an assessment is adequate, will choose not to proceed, thus voluntarily narrowing the field of offerors

Therefore, the multi-phase acquisition technique section should be redrafted to reflect that only advisory downselects are permitted prior to the submission and evaluation of proposals

Second, as I said at the outset, we strongly support the proposed rewrite's focus on enhancing communications between customer and supplier As you may recall, during the congressional hearings on the Federal Acquisition Streamlining Act, one of CSA's Board Members told the Senate committee that in the commercial world, communications between customer and supplier were considered a mark of excellence, yet in the government contractıng world they are a mark of potential crımınal activity

Clearly, that must change And the rewrite's focus on communications is an important one
At the same time, we are concerned that the proposed language is too vague and too permissive it could, we believe, result in a form of legalized technical leveling or auctioning, both of which are widely frowned on in the commercial world There needs to be greater clarity as well in the sections dealing with communications and discussions and what kind of communications can be held without being considered formal discussion

In short, communications are important But the nature and scope of communications that can take place must be clearly delineated We will be submitting comments with specific proposed language changes for those areas and urge your careful attention to them

Third, the rewrite does not, in our view, provide adequate coverage on the issue of past performance While it does make clear that past performance is an important element in the source selection process, we believe it could and must be strengthened in how it deals with the question of implementation

As you may know, CODSIA has recently submitted comments specific to the Past Performance Initiative and areas of continuing concern for industry We believe those comments should be applied, where relevant, to the Part 15 rewrite There are also areas in which the rewrite's handling of past performance needs to be enhanced

For instance, industry believes strongly that offerors must always be permitted to comment on any negative past performance report on which the offeror has not previously had an opportunity to comment While contractors are supposed to be made aware of, and given a chance to comment on, past performance report cards which become part of the larger data base, the reality is that we still have problems where such opportunities are not given

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to contractors Likewise, in the course of a source selection, when a contracting officer solicits references, there may well be negative comments made about which the offeror is not aware

The proposed rewrite should clearly reflect that offeror MUST be given an opportunity to comment on any negative past performance report on which it has not had the opportunity to comment in the past Moreover, the prohibition on talking about negative past performance reports with those offeror with whom "discussions" are conducted, should be removed As well, communications regarding negative past performance reports should be considered in the same light as corrections and clarifications, so that they can take place prior to the establishment of the competitive range or when awards are to be made without discussions

Fourth, I would like to spend a moment on the question of pere- and post-award debriefings Over the last several years, the quality and timing of debriefings has been discussed extensively, particularly in the context of both FASA and FARA I know we share the belief that debriefings should be prompt and comprehensive, that they should be designed to educate the offeror and provide virtually any information that could help the offeror understand the deficiencies in their proposal and ways in which they can be more competitive later on And, to be honest, the reports we get from the field indicate that, in general, debriefings are improving

While the proposed rewrite of FAR 15 clearly acknowledges the importance of debriefings, wee believe it can and should go farther in two areas First, any offeror that is eliminated from the competition prior to award should be entitled to a debriefing within a few days of their elimination There should be virtually no leeway provided to contracting officers to hold off on such debriefings until after award Doing so, we believe, substantially reduces the potential, positive impacts of a debriefing and is fundamentally unfair to the offeror Moreover, while conducting debriefings at this phase of a procurement might, in some rare circumstances, create a very minor delay in the process, it will clearly reduce cycle time at the end--both in terms of post-award debriefings and the risk of protest

Second, the regulations should expand the type and scope of information that can and should be divulged during a pre-award debriefing We are sensitive to the fact that with a source selection in process, one must be very careful about what information is made available to unsuccessful offerors However, in order to make the debriefings as effective as possible, there must be a degree of permissiveness, beyond that which the proposed rule outlines, that enables a reasonably and appropriately open discussion

Finally, I want to address an issue that is not specifically raised in the proposed rewrite but which I believe might be the most important issue of all training

We here in Washington look at this proposed rewrite largely from a policy standpoint, we analyze the words and intent and focus on the big picture Of course, the real impacts of

GDE
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Page 5
a proposal such as this is not determined by any of us in this room Rather, it is a determined by those who are charged with implementation Everything we, collectively, seek to accomplish in this rewrite, as in FASA and FARA, hinges on our commitment to effectively training the acquisition workforce Increasing the professionalism and sophistication of that workforce must be among our highest priorities Moreover, this is equally true for acquisition professionals who deal with the most sophisticated and complex requirements, and those who handle the simplest

In addition, without an effective and comprehensive training effort, there will almost certainly be scores of cases in which the spirit, if not the letter, of the proposal is misinterpreted, causing unnecessary conflict between supplier and customer and, in the end, a dilution of confidence on both sides of the table We have good people out there, in industry and government, who want to do a good job, and they must be given the tools to do so

This proposal has the potential to be among the most important acquisition reform proposals in many years Therefore, it must receive an commensurate degree of support and ongoing attention

As I said at the outset, CSA is pleased to be able to support your continued efforts at reforming the acquisition process The work that has gone into the proposed rewrite of Part 15 is obviously substantial, and the work product represents an outstanding foundation on which to build As I hope has been clear from my testimony, we share your commitment to meaningful reform and to continuing to work collaboratively in the months and years ahead As such, the comments we are submitting today and will submitting prior to November 19th, are offered in that spirit as well

My thanks for your time and attention We would be happy to answer any questions you have at this tıme

## Chaymant

Edward H Bersoff, Ph D
President \& CEO
BTG, Inc

## Vice Chaurs

C G Appleby, Esq
Sr VP \& Deputy General Counsel Booz-Allen \& Hamilton Inc

Barry G Campbell
President \& CEO
Vitro Corporation
Charles L Nichols
Consultant
Science Applications Intertational Corporation

## Treasurer

Thomas G King, CPA
Partner
Delorte \& Touche LLP

## Legal Counsel

James S Hostetler, Esq
Kırkland \& Ellıs

## Presudent

Bert M Concklin

## Vuce Presudents

Charles H Cantus
Heather B Rosenker

October 31, 1996

General Services Administration FAR Secretariat (MVRS)
18th \& F Streets, NW, Room 4037
Washington, D.C. 20405
Attn: Ms. Melissa Rider

## Reference: FAR Case 95-029

Federal Acquisition Regulations; Part 15 Rewrite--Phase I
Dear Ms. Rider:
The Professional Services Council (PSC) is pleased to submit our comments on the modifications to the Federal Acquisition Regulations (FAR) Part 15. These comments form the basis for the remarks we wish to make at the public hearing on November 8, 1996.

As background, PSC is a national trade association of 135 technology services companies Our members provide all types of professional and technical services to government, commercial and international customers. For nearly 25 years, PSC has represented those members in policy debates in Congress and the Executive Branch, focusing on issues including improving the federal procurement system.

The pattern of acquisition reform that has emerged during the last four years is extremely gratifying to all of us who have been promoting fundamental system change for more than a decade. FAR Part 15, in many respects, is the most critical element of the overall reform architecture, since it defines how winners will be selected. It also deals with the segment of the acquisition process where there exists the greatest opportunity to dramatically reduce cycle time and increase efficiency and effectiveness.

Ms. Melissa Rider<br>October 31, 1996<br>Page Two

We believe that the changes in the FAR Part 15 Rewrite, taken collectively, will produce major improvements in the acquisition process and the quality/value of the goods and services being acquired by the government. This conviction is based on a number of improvements to the existing FAR including: 1) a clear embrace of best value principles; 2) support for oral presentations; 3) provision for a multiphase acquisition technique; 4) a coherent definition of evaluation factors and their application, 5) a strong prohibition against technical leveling; 6) flexibility in limiting the competitive range; and 7) encouragement to have constructive, open communications with vendors.

Outlined in the attached is our current draft of suggested changes to specific sections of the proposal, which we believe will variously strengthen and clarify the proposed rule. We intend to submit our final comments by the Novemebr 19th deadline.

We look forward to the opportunity to present our comments at the November 8, 1996 hearing and continuing the dialogue on how to materially improve FAR Part 15.


Bert IM. Conckinn
President

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## Best Value Definition [Proposed Parts 2.101]

PSC believes the definition is wholly inadequate, lacking a meaningful description of what best value truly is The definition should be supplemented with a clear description of the range of contract requirements subject to the application of best value procedures. PSC strongly believes that the regulation must be further supported by a full description of best value, in order to educate and assist contracting officers and contracting officer's technical representatives (COTRs) in successfully using the technique.

Recommended Language: Definition-- "Best value is a process for determining whether an offer or quote is most advantageous to the government [delete remaining part of the sentence] based on a tradeoff among factors such as quality, past performance, cost/price and others as appropriate. Best value procedures are applicable to the full spectrum of contract requirements from off-the-shelf hardware and software to, at the other extreme, developmental, high risk requirements." (Additions are noted in bold)

Lowest Price Technically Acceptable [Proposed Parts 15.101, 15.402]
PSC has serious concern with any use of the phrase "lowest price technically acceptable" as having a perjorative meaning and otherwise driving buyers to conduct source selection on a low quality, cost auction basis. We believe the correct concept the government is trying to define is a conscious tradeoff among quality and cost/price factors. We strongly urge you to retitle the entire section "Best Value," and outlining a range of appropriate factors used in a best value process with guidance on how relative weights can be assigned to evaluation factors.

Recommended Language: Delete Part 15.101 "lowest price technically acceptable", and defer to an expanded description of the "tradeoff process" as described in Part 15.102. See the next section for the proposed restructuring of 15102 .

## Tradeoff Process [Proposed Parts 15 102, 15.402]

The proposed rule confuses existing best value practices by putting into regulations non meaningful guidance. Since the best value process is an issue of degrees, a process description is needed which outlines a range of alternatives that include lowest price selections through highest quality not lowest price selections.

After elımımating Part 15.101, restructure 15.102 to set forth a top down description of best value contracting, the essence of which is tradeoffs among quality and cost/price factors.

Recommended Language: Rename section 15.102 -- Best Value, then add the following description: Best value contracting involves a determination as to which proposal offers the
best tradeoff between quality and cost/price. Under a best value source selection, the selection officials) determines the relative importance or weight assigned to selection criteria. Quality includes such factors as past performance, technical approach, and management capability. In general, the determination of relative importance or weights for selection criteria should be based on the good or service's uniqueness (routine, specialized, or developmental) and, for services, the level of the service (low, medium, or high technology). The relative importance or weight of quality versus cost/price factors will vary depending on where a given contract requirement is positioned along a spectrum-that is, the more unique and high level the contract, the higher the quality factors will be weighted, and the more routine the contract, the more cost/price may be weighted After comparing proposals, officials judge which proposal represents the overall best value to the government and selects it for contract award.

Recommended Language: Section 15.402, sentence 2, reword as follows -- "A best value decision in these acquisitions reflects the government's [delete the remaining part of the sentence] desire to balance cost/price with quality factors such as past performance, technical approach, and management capability." (Additions are noted in bold)

## Multiphase Acquisition Techniques [Proposed Part 15.103]

PSC recommends revising this section to eliminate the government's ability to have a mandatory downselect before submitting a full proposal. Interested companies should be given an advisory notice about their apparent inability to be a serious contender for final award. This approach gives companies an early indication of their award prospects, allowing them to make a business decision as to whether to spend scarce bid \& proposal funds to continue in a competition. Yet, companies who feel they can upgrade their positions by submitting a full proposal, may still be able to proceed in subsequent phases.

Recommended Language: 15.103(d) "The Government shall evaluate all offerors'.....and make [delete: either a mandatory or] an advisory downselect decision. Delete section $15.103(\mathrm{~d})(1)$, which allows the government to make a mandatory downselect." (Additions are noted in bold)

## Cost Realism [Proposed Part 15.405(1)]

Cost realism as an important evaluation factor is alluded to in a casual way in this section. PSC urges that language be included which provides a definition of cost realism as an analytical, multı-factor, and sophisticated process, especially where complex, high-rısk developmental contract requirements are being procured.

Recommended Language: Part 15.405(1) Cost Realism is an analytical process which focuses substantially on the relationship between the work to be performed and the cost or price of manpower and other resources required to accomplish the work. The scope of cost realism analysis factors includes manpower, other direct costs (ODCs),
subcontractors, indirector costs, and contract unique aspects such as leasing, make-orbuy, risk sharing, and contractor furnished facilities (testing laboratory). Cost realism analysis must also consider the offerors past cost realism performance on prior comparable contracts. (Additions are noted in bold)

Past Performance [Proposed Parts 15.405(2), 15.407(b), 15 407(c), and 15.407(d)(4)] PSC has concern about the proposed regulations in several sections, where contracting officers are given discretion as to whether to allow a contractor to respond to negative past performance ratings obtained by the contracting officer. This guidance conflicts directly with the Federal Acquisition Streamlining Act (FASA) which establishes the precept that offeror should have the opportunity to respond negative past performance information and document the file.

Recommended Language: At $15.405(\mathrm{a})(2)(\mathrm{in})$, as a new sentence 3, insert the following: The contracting officer shall provide offerors an opportunity to respond to any negative past performance information, not previously responded to, coming from a variety of sources including 1) "report cards" contained in government data repositories; 2) reference checks in response to identified past contracts submitted by offerors; and 3) external sources such as market research data. (Additions are noted in bold)

Recommended Language: Section 15 407(b) Communications with Offerors Prior to Establishment of a Competitive Range -- insert the following statement: Communications relative to negative past performance, which have not been reclaimed by offerors shall occur before determining the competitive range. (Additions are noted in bold)

Recommended Language: Section 15.407(c) Communications with Offeror After Establishment of a Competitive Range -- Revise sentence 2 to read as follows • "If a competitive range is established, the Contracting Officer shall conduct discussions at least once with all offerors in the competitive range to discuss all evaluated deficiencies in an offerors proposal including unresolved past performance issues. All past performance issues shall be brought to the offeror attention and disclosed during the conduct of discussions." (Additions are noted in bold)

Recommended Language: Section 15.408 Award Without Discussions -- amend the last sentence as follows: "The Contracting Officer may permit minor clarifications to allow proposal modifications that resolve ambiguities, or correct apparent mistakes and shall discuss any unresolved negative past performance issues." (Additions are noted in bold)

Downselect [Proposed Part 15.406]
With the proposed changes in the downselect, it is essential that all offerors who do not make the downselect be informed of the downselect decision immediately and be provided a debrief.

Recommended Language: Section 15.406(d) -- amend sentence 2 to read as follows: "Written notice of this decision shall be provided to unsuccesful offeror [delete: at the earnest possible convenience] within three days and those offerors will be otherwise entitled to a debriefing in accordance with FAR Part 15.805." (Additions are noted in bold)

Technical Leveling [Proposed Part 15.407(d)(1)\&(2)]
This section changes the current FAR language to discourage technical leveling of multiple offeror technical approaches. PSC applauds these changes as needed improvements. A company's competitive advantage frequently is based on a unique technical approach, particularly niche small businesses. Attempts by Contracting Officers to dilute a technical approach is both unfair to the company and costly, in the form of alternative proposals.

Recommendation: Fully support the language as proposed.

## Communications [Proposed Part 15 407]

Communications is the key element to acquiring goods and services effectively. The proposed rule is a positive step forward in improving the buyer/seller communications In order to give more positive guidance in this area, several specific changes are noted.

Recommended language: 15.407(b) Communications with offeror prior to the establishment of the competitive range "Communication with offerors after receipt of proposals, but prior to establishment of the competitive range (or award, if award is to be made without discussions), is encouraged to be as extensive as possible to obtain information to facilitate the Government's decision either to award without discussions or determine the competitive range. Any negative past performance information should be communicated and clarifications should be allowed. Information received during this phase of communications is likely to provide context to the proposal in that it allows the Government to better understand both the offeror and the offeror's intent. Consequently, it should be used in proposal evaluation. Communications conducted pursuant to this paragraph-
(3) Are conducted to obtain information that enables the Government and the offeror to better understand both the Government's requirement and the proposer's offer. Resolution of ambiguities and other concerns (eg, perceived errors, perceived omissions, negative past performance reports or perceived deficiencies) is encouraged." (Additions are noted in bold)

Recommended Language $\cdot 15.407$ (c) Communication with offerors after establishment of the compentive range. "Communication with offeror determined to be in the competitive range is accomplished through written and/or oral discussions (see 15.401). Whenever possible, oral discussions are encouraged as the better means to communicate with offerors. If a competitive range is established, the Contracting Officer shall conduct discussions at least once with all offeror in the competitive range to discuss all evaluated deficiencies in an
offerors proposal including unresolved past performance issues. All past performance issues shall be brought to the offerors attention and disclosed during the conduct of discussions. Discussions are encouraged to be as open and frank as possible. These discussions should include sufficient inquiry to determine which offer presents the best value to the Government. While the Government may rely upon agreements made during discussions for the purposes of proposal evaluations, such agreements shall be confirmed by proposal revisions) before contract award (see 15.411)." (Additions are noted in bold)

Recommended Language. 15407 (d) Improper discussions and communications. "The contracting officer and other Government personnel involved in the procurement shall not engage in-
(1) Favoring one offeror over another [delete remaining part of the sentence]; (2) \&(3) remain unchanged; (4) [Delete: Revealing names of individuals providing reference information about an offeror's past performance]."

Proposal Revisions [Proposed Part 15.409(a)]
Too much latitude is given in the new guidance related to proposal revisions. The result likely will be a requirement for multiple submissions which increase costs for the contractor and the government making the investment in proposing greater Large investments in competitions without award success has been a contributing factor in the increases in bid protests. Guidance which discourages multiple proposal revisions is recommended.

Recommended Language - 15.409(a) Amend sentence 1 to read as follows: "The contracting officer may request specific portions of an offeror's proposal be revised during discussions, [delete: as often as needed] but these should be kept to a minimum and should maintain adherence to original performance standards set forth in the solicitation. An efficient approach should be taken to eliminate excessive or extensive resubmissions) of proposal information that may not be necessary for evaluation. The portions) of the proposal that is/are not changed or effected by the offeror's proposal revision need not be resubmitted. Complete proposal resubmittals should not be required. If the revision effects the estimated cost or price of the offeror, the offeror may submit only that portion of the cost proposal effected by the proposal revision." (Additions are noted in bold)
15.409(b) Add the following new second sentence. Notification shall be made to these offeror in accordance with 15.406 (d). (Additions are noted in bold)

Date: 31-Oct-1996 09 58pm<br>From: Campbell, Gordon L<br>Dept.<br>Tel No

To: "'Rider, Melissa'"
Subject: FAR Case 95-029
First, congratulations on an excellent job The effort necessary to
produce a document such as this $1 s$ often tedious and frustrating I, at least, think your efforts have been worthwhile and will be appreciated by acquisition professionals on both sides of the table As an ethicist, as well as a contracting professional, I particularly like your inclusion of paragraph (c)(3) to Section 1 102-2 relative to far treatment and what the definition of fairness does not mean

I do, however, have some questions and concerns relative to apparent diminution of contractor officer authority. Historically, determinations regarding the "best interests of the government" made within the acquisition process have been made either by the contracting officer or authorities higher in the contracting chain of command. This proposed re-write either leaves the authority in question or gives at to the Source Selection Authority (who may or may not be the contracting officer). Examples
$15207(b)$ states that late proposals, modifications and revisions "may be considered if doing so $1 s$ in the best interests of the Government" Who makes this determination and where 13 it documented? A revised statement to the effect
" may be considered if the Contracting Officer makes the determination it 15 in the best interests of the Government", would clarify the authority
15.405(b) states that "All proposals received may be rejected if the source selection authority determines doing so is in the best interests of the Government" (see also 15410 I believe the cross reference within 15410 was meant to be $15.405(\mathrm{~b})$ vice $15407(\mathrm{~b})$ ) This should be changed to "Contracting officer" vice " source selection authority" As stated of above, this change lends continuity to authority relative to determinations regarding the "best interests of the Government" It also removes apparent conflict of interest appearances which may arise if a "program person" were SSA and wanted to continue a source selection for his program, when, in the best business judgment of the contracting officer, it should not Also, the Contracting officer determines competitive range If left as written, conflicting determinations between authorities could be made

Again, continuity 1 s the key The authority to award a contract resides with the Contracting officer A Contracting officer is to use his best business acumen If a contract as not in the best interests of the Government, it should not be awarded These authorities, and the acumen necessary to make them, are two sides of the same coin and should reside with the Contracting officer The Contracting Officer represents the Government, not a program A single authority, face and voice to "private industry" on behalf of the Government, goes a long way to reducing the appearance of, if not actual, "arbitrary or capricious" decisions.

15403 (c), again for continuity, a statement to the effect
(c) The Contracting Officer shall-
(1) ***
(2) ***
(3) Determine the Competitive Range (where applicable)
(4) Award the contract (s)

15202 (e) A minor comment concerning minimum content of Letter RPs
If time is of such essence as to warrant a Letter RFP, then it is more than likely a Letter Contract will be awarded If this possibility $1 s$


October 31, 1996

BY MESSENGER
General Services Admınıstration
FAR Secretariat (MVRS)
Attn Sharon Kiser
18th and F Streets, N W
Room 4037
Washington, DC 20405
Re: Preliminary Statement Concerning Proposed Rewrite of FAR Part 15 FAR Case 95-029

Dear Ms Kıser
On behalf of the Government Contracts Section of The Federal Bar Association
 concerning the proposed rewrite of FAR Part 15, as published in the Federal Register on September 12, 1996 The FBA's FAR Part 15 Task Force currently consists of nine members of the FBA's Government Contracts Section Council who come from both the private and Government sectors The Task Force has met several times to discuss the proposed rewrite of FAR Part 15, and this preliminary statement is the product of those meetings We would welcome the opportunity to present this statement at the public meeting currently scheduled for November 8, 1996 The Task Force presently expects to submit more detalled written comments on the proposed rewrite on or before November 19 , in accordance with the schedule established in the Federal Register notice dated October 9, 1996
${ }^{1}$ The Federal Bar Association is an association of attorneys who practice in various areas of law relating to the Federal Government The Government Contracts Section of the Federal Bar Association, which consists of attorneys involved in the practice of Federal procurement law, is authorized by the Constitution of the Federal Bar Association to submit public comments on pending legislation, regulations, and procedures relating to Federal procurement These comments have been prepared by the FAR Part 15 Task Force of the Government Contracts Section, with the direction and approval of Section leadership The views expressed in these comments reflect the position of the FBA's FAR Part 15 Task Force They have not been considered or ratrfied by the Federal Bar Association as a whole or by any Federal agency or other organization with which Section or Task Force members are associated

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## A. Competitive Range Issues

## 1. Limiting the Competitive Range During the Acquisition Phase

As proposed, FAR 15.406(b) would authorize the contracting officer to announce in advance "the Government's estimate of the greatest number of proposals that will be included in the competitive range for purposes of conducting an efficient competition" The FBA's Part 15 Task Force questions why, from a policy standpoint, the Government would deem it desirable to announce in advance an arbitrary numerical limitation on the size of the competitive range Since the Government will still have to evaluate all offers received to determine whether they should be included in the competitive range, the establishment in advance of a numerical limitation on the size of the competitive range does not appear likely to reduce appreciably the expense or effort incurred by the Government in the evaluation process Moreover, by setting in advance a numerical limitation on the size of the competitive range, the Government may restrict its ability to consider for award a number of offers that are "closely bunched together" but, if all were considered, would exceed the designated numerical limitation established by the Government Finally, if the new multiphase acquisition technique is adopted, the Government can avoid the need to fully evaluate proposals through a threshold screening process For these reasons, the Task Force is opposed to any advance limitation on the size of the competitive range as contemplated by FAR 15 406(b) At a minimum, to the extent such a provision is adopted, the Task Force believes that the contracting officer must have the discretion to alter the numerical limitation during the evaluation phase of a procurement Such discretion is necessary to avoid arguably arbitrary and capricious results, such as, for example, the elimination of one offeror from the competitive range in the interests of efficiency when another offeror with a virtually identical score (or even identical score) is allowed to continue to compete for award.

## 2 Limiting the Competitive Range During the Evaluation Phase

As proposed, FAR 15 406(c) authorizes the contracting officer, provided prior notice has been given in the sohcitation, to limit the competitive range to "the greatest number that will permit an efficient competition among the most highly rated proposals " This represents a substantial change over the current standard set forth in FAR 15609 of "all proposals that have a reasonable chance of being selected for award " The Task Force agrees that streamlining the competitive range in the interests of cutting Government and industry costs and to shorten the time periods for making awards is a desirable goal The proposed regulation, however, lacks any definitive guidance as to how this new evaluation paradigm should (or will) be applied in the field Based on its reading of the proposed regulation, the Task Force is uncertain as to what processes will be used to determine the interplay between

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efficiency and the selection of those offerors considered the highest rated proposals To the extent a logical "break point" exists in the ranking of offers, the Task Force believes that such a break point should be used in defining the competitive range This break point should be derived by the consideration of each offeror's proposal against the stated evaluation criteria set forth in the solicitation. In the Task Force's view, "efficiency" concerns should not override the goals of fair treatment of all offerors and obtaining the best value for the Government

## B. The New Concept of Communications

The Task Force strongly supports the concept of open communications between the Government and competing offerors, as articulated in proposed FAR 15407 The Task Force understands that the new concept of communications is intended to facilitate the Government's selection of an awardee based on the evaluation of initial proposals, and that one of the goals behind the proposed rewrite of Part 15 is to encourage offerors to submit better initial proposals The Task Force agrees that Part 15 should encourage offeror to submit better initial proposals, and that the Government should strive to make award based on initial proposals, where possible The Task Force believes these goals can only be achieved when the Government's requirements are clearly defined in the solicitation

The Task Force does have a concern that the concept of communications not be abused and used as a vehicle to favor select offerors or avoid the establishment of a competitive range and the conduct of discussions with qualified offeror As proposed, FAR $15407(b)(5)$ authorizes the contracting officer, at his discretion, to engage in such communications prior to the establishment of the competitive range with only some, but not necessanly all, of the competing offerors. The Task Force is not troubled by this change from the current law, provided that the admonition in subsection (b)(2) that such communications should not be used to effect a change in an offeror's proposal (except for mistakes) is honored. The Task Force believes the proposed regulation should affirmatively advise contracting officers that communications should not be used as a vehicle to permit an offeror to improve its proposal in response to perceived deficiencies or change its proposal under the guise of correcting a "mistake" and then to obtain the contract award, or as a means of avoiding the "discussions" process

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## C. The Revised Scope of and Procedures for Discussions

## 1 The Desirable Scope of Discussions

The Task Force notes that the proposed regulation provides new definitions for the terms "deficiency" and "discussion," and that proposed FAR 15.407(c) indicates that the scope of discussions should be to address "[a]ll evaluated deficiencies in an offeror's proposal" and any other issues which the contracting officer determines warrant attention The Task Force is very concerned that the proposed regulation renders the scope of discussions overly narrow, and that matters which heretofore have been addressed in discussions -- such as weaknesses and excesses -- will no longer be addressed The Task Force is unaware of any compelling policy reasons which favor such a narrowing in the scope of discussions, and believes that the Government is the primary beneficiary of a policy which favors broad, not narrow, discussions The Task Force believes strongly in the principle that all issues which appear likely to affect the award decision should be addressed during discussions, and that the broad scope of discussions should not be subject solely to the discretion of the contracting officer Accordingly, the Task Force believes that the proposed regulation should, at a mınımum, be clarified to reflect support for the concept of broad discussions

## 2 Revised Discussion Procedures

The proposed regulation contemplates in FAR 15 407(c) that the contracting officer shall conduct discussions "at least once with all offerors in the competitive range" but nothing prohibits the contracting officer from limiting further rounds of discussions (if any) to one offeror or a small subset of the competitive range The proposed regulation also eliminates the concept of best and final offers ("BAFOs"), and at the same time states in 15 207(c) that "[o]fferors may not revise proposals unless requested by the contracting officer " The Task Force believes these revised procedures raise several practical problems which warrant attention

At the outset, the Task Force is unsure of the policy reasons which lay behind the concept of limiting the submission of revised proposals to only those offerors from whom a request is made by the contracting officer. Since the new regime contemplates narrower competitive ranges of highly-ranked offerors, the Government's interests would appear to be served by obtaining a revised proposal from all vendors in the competitive range who desire to submit one The Task Force is particularly concerned that, as proposed, revised FAR Part 15 does not give offerors the right to address in a revised proposal matters raised by the Government during discussions. If offerors do not have the right to address through the

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submission of a revised proposal matters raised during discussions, what is the purpose of such discussions?

Moreover, the notion that a revised proposal may only be submitted if one is requested by the contracting officer only enhances the risk for confusion and errors, such as the contracting officer simply forgetting to request a revised proposal from an offeror Since the revised regulation does not necessarily contemplate the submission of revised proposals at a certain date or time (proposed 15 409(b) makes this discretionary with the contracting officer), this seems to enhance the likelihood of revised proposals getting lost or not being evaluated because they were submitted at odd or unexpected times ${ }^{2 l}$ In addition, the absence of proposal revisions may create confusion as to the terms of the resulting contract

The Task Force generally believes that the concept of BAFOs has worked well from the Government's standpoint, particularly as regards competitive pricing, and that at a minimum the revised regulation should permit each offeror in the competitive range to submit a revised proposal by a certain date and time designated by the contracting officer Through such revised proposals, offerors should, at a mınımum, be given the opportunity to address and correct all issues raised by the Government during discussions ${ }^{3 /}$ Moreover, the use of a common cutoff date for revised proposals could be coupled with language giving the Government contracting officer the discretion -- but not the obligation -- to discuss remaining deficiencies in any offeror's proposal after the cutoff date When considered with the language of proposed FAR 15 409(a) -- which allows the contracting officer to "request proposal revisions as often as needed during discussions" -- such language would avoid the need for the Government to go through successive rounds of revised proposals with all offerors, an objective which presumably underlies much of proposed FAR 15 407(c)

## D. Residual Questions Regarding the Expanded Use of Oral Presentations

The Task Force supports the principle of expanded use of oral presentations, as reflected in proposed FAR 15104 . The Task Force, however, is concerned with the

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potential for misunderstanding that may result from the statement in proposed 15 104(a), which provides, "Generally, oral presentations are most beneficial when they substitute for, rather than augment, written information " One question which this statement raises, but which the proposed regulation does not appear to answer, is whether contract award may be based solely on an oral presentation Since the statement quoted above suggests that oral presentations should substitute for written proposals, the Task Force understands the regulation to contemplate the possibility of a contract award based on oral presentations only The Task Force questions whether statements and representations made during oral presentations are legally binding absent the incorporation of such statements and representations into the resultant written contract In general, the Task Force believes such written incorporation should occur as a matter of practice, rather than as a matter of the contracting officer's discretion, and that the regulation should be revised to require this practice Additionally, the Task Force is concerned and generally believes that the same limitations that apply to pre-competitive range "communications" (1.e , offeror cannot revise its proposal) should be applicable to oral presentations

## E. Best Value Issues

The Task Force supports the "best value" objective of source selection articulated in proposed FAR 15402 This section of the proposed regulation describes two alternatives for accomphshing a best value selection (a) a tradeoff process, and (b) a lowest price technically acceptable process. The Task Force is concerned that the second alternative, although an appropriate acquisition methodology, is not truly a "best value" procurement as the courts, boards and the GAO have come to use that term Thus, in the interests of avoiding further confusion, the Task Force recommends that the term "best value" be limited to the tradeoff process described in 15.402(a), and that the lowest price technically acceptable process described in 15402 (b) be referred to as simply another acceptable acquisition methodology

## F. The New Rule Governing the Government's Acceptance of Late Proposals

As proposed, FAR 15207 would allow contracting officers to consider late proposals "if doing so is in the best interests of the Government " This change represents a radical departure from the current version of FAR and the procedures which have historically governed the submission of late proposals. The Task Force is opposed to this proposed change because of the appearance of unfair treatment it creates

The Task Force is also concerned that the proposed revision may violate the Competition in Contracting Act ("CICA") In this regard, the Task Force refers to the

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decision of the Court of Federal Claims in Aerolease Long Beach v. United States, 31 Fed Cl 342 (1994), in which the court sustained a pre-award protest and enjoined award to an offeror that had submitted a proposal long after the due date for initial proposals but before BAFOs had been submitted. The Government argued in the case that GSA's lease regulations gave the contracting officer the discretion to accept the offer The court found in favor of the plaintiff on this issue for three reasons First, the court noted that CICA, as codified at 41 U S C. $253 \mathrm{a}(\mathrm{b})(2)$, specified that the due date for initial proposals be set forth in the solicitation The court reasoned that implicit in this express requirement is the requirement for strict adherence to any deadline for the submission of initial proposals as a condition precedent to a valid negotiated procurement Id at 366 Second, the court found that GSA's regulations conflicted with the FAR. ${ }^{41}$ Third, the court concluded that the Government's consideration of late proposals would be unfair to those offerors which submitted timely proposals and would tend to subvert the competitive system Id. at 368 Citing GAO precedent, the court held that the contracting officer's acceptance of a late proposal breached the Government's implied obligation to consider the proposals of the timely offeror fairly and honestly Id

The Task Force shares the concerns articulated by the Aerolease court, and urges that the proposed rule set forth in FAR 15207 -- which significantly broadens the Government's authority to accept late proposals -- not be adopted

Your consideration of the enclosed comments is appreciated On behalf of the FBA's Part 15 Task Force, I would welcome the opportunity to present these comments at the public meeting scheduled for November 8, 1996 If you have any questions concerning the enclosed comments, please contact the undersigned at (703) 790-7940


[^9]FEDERAL BAR ASSOCIATION

Government Contracts Section
FAR Part 15 Task Force

Linda A Donaghy, Esq<br>Department of Justice<br>Deputy General Counsel<br>Justice Management Division<br>Richard S Ewing, Esq<br>Arnold \& Porter<br>Robert J Kenney, Jr, Esq<br>Hogan \& Hartson<br>Jeffrey I. Kessler, Esq<br>Office of Command Counsel<br>Army Materiel Command<br>US Department of the Army<br>Tim E Nıckerson, Esq.<br>Eckert, Seamans, Cherın \& Melilot<br>Roger Sabin, Esq<br>Deputy General Counsel<br>Defense Information Systems Agency<br>John Cole, Esq<br>Barton, Mountain \& Tolle<br>Alex D Tomaszczuk, Esq<br>Shaw Pittman Potts \& Trowbridge<br>Donna Lee Yesner, Esq<br>Piper \& Marbury

# Small and Disadvantaged Business Utilization Office 

General Services Administration
FAR Secretariat (MVRS)
18th and F Street, NW, Room 4037
Washington, DC 20405

Dear Sir/Madam

Please reference FAR case 95-029

The following comments are submitted regarding proposed rule Small Business (SB) impact
a Initial adverse economic impact is anticipated simply due to SB lack of knowledge, 1 e of the proposed changes This could impact the SB contractor's ability to be cognizant of increased inherent risks in bid/proposal expenditures and concurrent diminished opportunity to be in the competitive range and/or be the successful bidder
b Some suggested methods to educate the SB community include disseminating information on the rule changes in traditional outreach efforts, e g SB Procurement Conferences/Semınars and Small Business Development Center counseling
c Additionally, "comprehensive" debriefings and presolicitation exchanges with industry along with other efforts included in FAR 15201 will serve to minımize adverse SB impact if judiciously appled

The point of contact for this action is Mr Lee A Ford, (205) 876-5318
The above comments are concerns expressed regarding the potential impact to our primary mission customer, "The Small Business Community"


TRW Space \& Electronics Group

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5 October 1996
Edward C Loeb
Director, Federal Acquisition Policy Division, MVR
General Services Administration
18th \& F, North West
Washington, DC 20405
Dear Mr Loeb
On behalf of TRW, I want to convey our appreciation and support of the bold and innovative rewrite initiative of Phase I of Part 15 of the Federal Acquisition Regulation The potential streamlining benefits of moving Government acquisition more closely to commercial practices far outweighs any inherent risks of change Moreover, any such inherent risks should be further mitigated by the FAR Council continuing to encourage and consider candid and broad-based industry comments, particularly those from industry organizations representing multiple companies

TRW has already provided detailed Phase I, FAR Part 15 comments to our industry organizations Our comments will be combined with those of other companies and forwarded to you, and be assured that TRW will endeavor to ensure that our industry organizations' comments and recommendations are positive and constructive

In brief, TRW is particularly sensitive to three major points (1) the Government's challenge to increase efficiency and effectiveness while treating all contractors fairly, (2) the lack of clarity and direction for rating past performance, and (3) late or modified/revised proposals

Again, TRW applauds your innovative and bold efforts, and extends our appreciation and support for the rewrite initiative of Phase I of Part 15 of the Federal Acquisition Regulation


Chair, Executive r Committee, AIA Procurement \& Finance
$\infty$ Dr Steven Kelman, Admınıstrator Office of Federal Procurement Policy Old Executive Building, Room 352 Washington, DC 20503

# Aerospace Industries Association 

# Statement for Public Meeting 

FAR Part 15 Rewrite - Phase I

(FAR Case 95-029)
November 8, 1996

## Introduction

The Aerospace Industries Association (AIA) is pleased to present this statement to the Federal Acquisition Regulation (FAR) Secretariat in response to the proposed rule on the Phase I rewrite of FAR Part 15, Contracting by Negotiation. The rule was published for public comment on September 12, 1996

AlA is the nonprofit trade association representing the nation's manufacturers of commercial, military, and business aircraft, helicopters, aircraft engines, missiles, spacecraft, and related components and equipment

AlA applauds the efforts of the FAR Council and the Part 15 Rewrite Committee to introduce innovative techniques into the source selection process These techniques are designed to simplify the process, eliminate non value-added regulations which impose unnecessary burdens on industry and Government, and promote best value for the Government. We also note the efforts to preserve the traditional concepts of fairness in the acquisition process, while providing greater discretion to the contracting officer. We believe the proposed rewrite of Part 15 will accomplish many of the changes needed to make the Government acquisition process more efficient and cost effective and will facilitate the move toward a more commercial-like acquisition process.

This statement will address some of the areas of much needed reform that will be facilitated by the proposed rule, and will provide some suggestions regarding the rule


## Comments on Proposed Rule

Best value. The proposed rule places an emphasis on selection of the offer which represents the best value to the Government. This is evidenced by addition of a definition of best value in Part 2 of the FAR and in the clear direction provided in Part 15 to select the offer which represents the best value to the Government

AlA strongly supports use of best value in source selection. Use of best value recognizes that selection of the lowest price technically acceptable offer does not necessarily result in the most advantageous contract for the Government It also allows the contracting officer to select the offer which best fits the Government's needs. However, we believe it may be misleading to simply state that tradeoffs need not be quantified in any manner, without also noting that they do need to be justified.

Lowest price technically acceptable process; tradeoff process. The proposed rule also describes four acquisition processes or techniques which may be used individually or in combination to design appropriate acquisition strategies Two of these are the lowest price technically acceptable process and the tradeoff process.

AlA supports the use of these two acquisition processes to select the offer which provides the best value to the Government. However, we are concerned about the emphasis on "Government resources available" as a factor in determining acquisition strategies. The amount of resources available to the Government to conduct source selection should not be a factor in determining the most appropriate acquisition process. Otherwise, the Government and contractors could expend resources in an acquisition process that may not produce the best value for the Government.

Multiphase acquisition technique: preaward debriefings. Another acquisition technique described in the proposed rule is the multiphase acquisition technique, which was known formerly as "two-phase" acquisition. This technique enables the Government initially to seek limited Information, make one or more "down-selects," and then require full proposals from a limited number of offerors. During the first phase of multiphase acquisition, the Government evaluates all offerors' submissions and makes either a mandatory or an advisory down-select. In the case of an advisory down-select, offerors not selected still may submit a proposal for the second phase which the Government must evaluate.

Although the AIA supports the concept of multiphase acquisition, there is concern that use of the advisory down-select process could deprive offerors of rights they otherwise would have had upon elimination from competition. An offeror informed as the result of an advisory down-select that it is "unlikely to receive an award" is faced with a dilemma The offeror can expend resources to prepare a proposal for the next phase of the competition, knowing that the chance of award is slight, or not submit a proposal and lose the right to request a preaward or postaward debriefing. Therefore, we recommend that a preaward debriefing be made available if an offeror receives notice as the result of an advisory down-select that it is unlikely to receive award and elects not to participate in the next phase of the acquisition. This would preserve the offeror's rights and put the offeror in the same position as any other offeror which had been eliminated from the competition due to mandatory down-select or excluded from the competitive range

AlA has several additional concerns relative to preaward debriefings. One of those concerns relates to delay of preaward debriefings. The proposed regulations require that the contracting officer promptly notify an offeror when its proposal is excluded from the competitive range or it is otherwise excluded from competition. The regulations require further that the contracting officer provide a preaward debriefing to the offeror as soon as practicable. However, the contracting officer is allowed to delay the preaward debriefing if providing a debriefing is not in the best interest of the Government at the time it is requested.

We recommend that the proposed regulation be revised to state that preaward debriefings may be delayed only if there are compelling circumstances for the delay. The contracting officer should be required to document the file with the supporting rationale for the delay. Otherwise, there is potential risk that preaward debriefings could be delayed merely because it is not convenient to provide a debriefing at the time. This would essentially deprive the unsuccessful offeror of its right to a preaward debriefing.

The preaward debriefing should contain as much information as possible in order to make the debriefing "meaningful". Meaningful communication during the evaluation process reduces the chance of protest, because the unsuccessful offeror should better understand the reasons for elimination from the competition and is more likely to feel that it has received fair treatment in the source selection process.

We also propose that an offeror which has received a preaward debriefing be allowed to request and receive a postaward debriefing, as well The
information provided in a postaward debriefing is more extensive than that provided in a preaward debriefing and would be more useful to the unsuccessful offeror. At a minimum, an unsuccessful offeror that is entitled to a preaward debriefing should be able to elect whether to receive a preaward or postaward debriefing.

Oral presentations. The fourth "new" acquisition technique described in the proposed rule is the use of oral presentations for submission of all or part of a proposal. AIA supports use of oral presentations when it is beneficial to both the offeror and the Government. We do recommend, however, that the proposed rule include a requirement for a permanent record of the oral presentation (e.g., a videotape or tape recording). A permanent record is necessary to establish accountability

Presollcitation communications. AIA supports presoliclation exchange of information between the Government and Industry as advantageous to both industry and Government. Presolicitation communications will enable the Government to better tailor its acquisitions in order to obtain quality products and services at reasonable prices and will increase the efficiency of the acquisition process. In addition, it will help identify and resolve issues regarding acquisition strategy, while facilitating resolution of other concerns or questions that industry or the Government might have. It also will allow industry to be more responsive to the Government's needs and make the most efficient use of industry resources in responding to Government requirements

Draft RFP's. Draft Requests for Proposal (RFP's) are an especially effective means of promoting industry involvement early in the acquisition process They allow the Government to obtain feedback in such critical areas as evaluation factors, terms and conditions, and requirements definition. When used effectively, draft RFP's reduce the need for time consuming modifications to RFP's and subsequent costly contract amendments. Draft RFP's allow industry to better understand the Government's requirements and help Government understand what industry is able to provide

Late proposals. The rule governing late proposals has been revised to emphasize that an offeror is responsible for timely delivery of its offer. However, the rule also allows late offers to be considered if doing so is in the best interests of the Government. Government mishandling or fault no longer need be established to accept a late offer.

AlA believes the proposed standard for consideration of late proposals is too open-ended. The rule should be revised to provide that, as a general rule, the
contracting officer may accept late proposals only if the contractor has an "excusable delay" which prevented timely delivery of the offer, such as inclement weather or other circumstances which are beyond the contractor's control. A reasonable time limit for acceptance of late offers (e.g., 48 hours) should be established, also. In addition, determination of whether a late proposal is "timely" should be made before the proposal price or its contents are revealed. In any event, the rule should ensure that consideration of late offers does not create a material compettive advantage for late offerors over offerors that submitted their proposais on time. These changes would avoid excessive delay in contract award and eliminate unnecessary protests

Past performance. A significant factor in evaluation of a contractor's proposal is evaluation of the contractor's past performance This is required in every source selection, unless the contracting officer docurnents the reason past performance is not an appropriate evaluation factor. The age and relevance of the information, the source of the information, subjectivity of the data, and general trends in the contractor's performance should be considered when evaluating past performance information.

AIA strongly supports use of past performance information in source selection as a good (although not infallible) indicator of a contractor's ability to perform future contracts. However, it is important to ensure that past performance information is used fairly, accurately and consistently when making determinations of nonresponsibility, making competitive range determinations, or evaluating offerors in order to award without discussions. Agencies should be required to notify an offeror of any negative past performance information (whether commented on previously or not) that will be used in the source selection process and provide an opportunity for the offeror to comment on that information prior to its use. The source of the negative past performance information also should be identified to the offeror Past performance information related to a contract which is the subject of a dispute or litigation should not be relled upon in evaluating a contractor's past performance Such information is inherently suspect.

Competitive range. The regulation establishes a new standard for Inclusion in the competitive range. Only those offerors which have the greatest likelihood of award based on the factors and subfactors in the solucitation will be included in the competitive renge.

The contracting officer is allowed to further limit the compettive range in the interest of efficiency. In planning an acquisition, the contracting officer may determine that the number of proposals that otherwise would be included in the
competitive range is expected to exceed the number at which an efficient competition can be conducted. An "estimate" of the greatest number of proposals that will be included in the competitive range for purposes of conducting an efficient competition among the most highly rated proposals may be indicated in the solicitation. If the solicitation contains proper notification, the contracting officer may determine after evaluation of offers to limit the competitive range for the sake of efficiency.

AIA supports the concept of more realistic competitive range determinations, which will be beneficial to both Government and contractors. More realistic competitive range determinations mean that offeror will not be kept in a competitive range artificially if they are not likely to receive award. Although this might cause a contractor to expend more in bid and proposal costs upfront to ensure that its initial proposal has the greatest likelihood of being included in the competitive range, It also will avoid unnecessary expenditure of time and resources trying to remain in a competition when there is little likelihood of securing the contract. Concomitantly, the Government will not expend tirne and resources unnecessarily on those same proposals.

However, AIA believes that additional guidance should be provided regarding the factors to be considered in determining the size of a competitive range at which an efficient competition can be conducted. Market research and historical data from previous similar acquisitions provide objective standards against which to measure the contracting officer's determination, but lack of resources does not.

The amount of resources available to the Government to conduct the source selection should not be a factor in determining the most efficient size for the competitive range. If it is used as a factor, both the Government and the contractor may expend resources unnecessarily on a process which could exclude the very proposal that would result in the contract that was most advantageous to the Government, simply because there were insufficient Government resources to evaluate that proposal.

Communications and discussions. One of the major policy changes in the proposed rule is the shift to a narrower definition of "discussions".
Communications with offerors prior to establishment of the competitive range are not considered discussions, and the contracting officer is not required to communicate with all offerors. Once the competitive range has been established, communications with offerors are considered discussions The contracting officer is required to conduct discussions at least once with all offerors in the competitive range, but is not required to hold discussions an
equal number of times with each offeror. Discussions remain open until contract award.

AIA strongly supports increased communication between the Government and offerors to allow the contracting officer to better understand an offeror's intent and make an informed decision whether to determine a competitive range or award without discussions. However, there is some concern that the ability to communicate with individual competing offeror prior to determination of the competitive range, coupled with the fact that communications need not be conducted with all offerors and the ability to conduct discussions more than once with individual members of the competitive range and request successive proposal revisions, could raise issues of fairness or the appearance of favoring one offeror over another

As a practical matter, we believe that there are steps the Government can take to alleviate these concerns. One is to ensure that contracting officers have the professional credentials and training necessary to exercise good business judgment. Another is to establish sufficient supervisory oversight to ensure that discretion is not abused. In addition, it should be emphasized in the proposed rule that when discussions are held, the contracting officer is required to disclose to the offeror all known weaknesses and deficiencies in the offeror's proposal and provide an opportunity for the offeror to respond to those weaknesses and deficiencies.

BAFO's. Elimination of the requirement for Best and Final Offers (BAFO's) and the requirement for a common cutoff date for proposal revisions is another major change in the way the Government proposes to conduct source selection

AlA supports these changes, which would streamline the current burdensome, expensive and time consuming acquisition process for both industry and the Government by allowing the Government to conduct discussions and request proposals as needed. However, it is important to ensure that there is not a disparity in the number of revisions requested or the cutoff dates that creates an unfair advantage for one offeror over the other offerors. All offerors must be provided an equitable opportunity to compete on essentially the same basis.

## Conclusion

AlA appreciates the opportunity to present this statement on Phase 1 of the proposed rewrite of FAR Part 15. We hope our comments and suggestions will be helpful as you prepare the final rule on this subject.

Beverly A Bryant
Business Counsel

Alliant Techsystems Inc MN11-2024
600 Second Street NE Hopkins, MN 55343-8384

November 8, 1996

General Services Administration

## VIA FEDERAL EXPRESS

FAR Secretariat (MVRS)
$18^{\text {th }} \&$ F Streets, $N$ W
Room 4037
Washington, DC 20405
Subject FAR Case 95-029

Dear Council Members

Enclosed are comments from Allant Techsystems on the subject FAR case We believe that significant progress has been made, however, there are still some areas of concern The attached chart provides comments to specific clauses of the FAR Part 15 Rewrite which we wish you to consider in finalizing the rules

If you have any questions, you may contact me at 612/931-6223
Very truly yours,


BAB mk

Enclosure

| FAR Paragraph | Comments | Commentor |
| :---: | :---: | :---: |
| 1102 | The definition of "Performance Standards" opens the door for offerors to be treated differently, depending on the Contracting Officer's assessment of "other relevant factors " This "different but fair" principal is susceptrble to abuse by a Contracting Officer or Source Selection Official | Aerospace |
| 2101 | The definition of "best value" ought to be tred back to the evaluation criteria, ie, "Best value means an offer or quote which, based upon the evaluation criteria contaned in the RFP or RFB, is determined most advantageous to the Government, cost or price and other factors considered " | Aerospace |
| $15102(\mathrm{~b})(3)$ | This gives the Source Selection Official too much discretion in making gut-feel trade-offs without the requirement to explain them This last sentence should be changed to read as follows "Although specific trade-offs need not be explained in great detall, the trade-off must be described to the degree necessary in order for unsuccessful offerors or other third parties to determine whether the trade-off was consistent with the goal of obtaining the "best value" for the Government Trade-offs should be quantified to the degree reasonably possible " | Aerospace |
| 15103 | This First Phase mandatory vs advisory down-select mechanısm is confusing and ambiguous How will the Contractıng Officer decide if "sufficient information" has been requested for there to be binding offers This will be a hotly protested down-select Shouldn't the Government be required to give advance notice of whether it will make a "mandatory" vs "advisory" down-select prior to submission of "information " How will offerors know when they can get by with submitting only the "information" requested or whether they had better submit an expensive and elaborate proposal in case the Contracting Officer decides to make a mandatory down-select? | Aerospace |
| 15103(d) | The first paragraph appears to require that the Government make a down-select decision after the first phase evaluation This may not be appropriate in a lot of instances This should be changed to allow a downselect in appropriate circumstances, not require it | Defense |
| $15103(\mathrm{~d})(2)(111)$ | This paragraph should be changed to require a debrief for Advisory downselects in order to ensure the offeror has adequate information on why it is unlikely to receive an award Otherwise, a contractor would be forced to submit an offer in order to ensure a mandatory debref This would have both a cost and time impact to the offeror and the Government, since the contractor would have to prepare the offer, and the Government would be required to evaluate it | Defense |
| 15104 | Language should be added requiring the Government to videotape or audiotape all oral presentations in order to create a record of what was presented This should help prevent potential "puffery" by offerors to win the contract and help ensure a fair evaluation by the Government because there will be a documented record A provision should also be added to this section to address protection of proprietary data of offerors orally presented, so that this data is protected in the same manner as written proposals A videotape would be a good way to document what was disclosed by the offeror | Defense |


| 15 104(a) | The lack of unfformity which this provision allows could lead to unfarness If oral presentations are allowed, all offerors should be given the same opportunity to give oral presentations covering the same portions of their proposals In contrast to the last sentence of this paragraph, oral presentations should only be used to explain or amplify what is contained in a written proposal since this is often incorporated into the actual contract document A contract which is entered into based upon the contract drafter's ability to capture the content of oral presentations will be fraught with ambiguity In addition, the regulation should state that Source Selection officials must not allow themselves to be influenced by the flamboyant or ostentatious nature of the methods or materials used in the oral presentation | Aerospace |
| :---: | :---: | :---: |
| 15 205(f) | By definition, a proposal which significantly departs from the stated requirements and the evaluation criteria cannot be the proposal which represents the best value to the Government The Government must do its homework in defining its requirements in the pre-RFP and draft-RFP stages of the acquisition It cannot be allowed to significantly alter its requirements after it receives the proposals The language of this re-write gives the Contracting Officer far too much latitude to do the wrong thing In the first place, it is unfair to make the mulhons of dollars expended by the other offerors on bid and proposal costs futile by revising stated requirements after the closing date for receipt of proposals Secondly, the C O can too easily determine that it isn't necessary to give other offerors a chance to re-submit because it would give away "the solution proposed in the original departure " | Aerospace |
| 15201 | Portions of this section appear to conflict with the prohibition on disclosing source selection information in FAR 3104 Recommend additional language to better define the information that can be sought or obtaned by offerors without violating the provisions on source selection information in 3104 | Defense |
| 15 202(e) | This section describes the use of letter RFP's It is unclear how or when this should be used or what the benefits/advantages are compared to a regular RFP For example, is it intended that only a letter contract can be awarded after a letter RFP ${ }^{7}$ Recommend that additional information/explanation be provided about purpose/use | Defense |
| 15 204(c) | Recommend this paragraph be amended to require that an amendment be issued to any party who submitted an offer | Defense |
| 15206(c) | Automatic rejection of a resubmitted proposal in electronic format which is unreadable is unfair Resubmission in another format should be directed if it is determined that the electronic malfunction was beyond the control of, and without the fault of neghgence of, the contractor | Aerospace |
| 15 207(b) | It is preposterous that late proposals may be considered The "best interest of the Government" standard gives too much latitude to Contracting Officers and is subject to being gamed by contractors <br> This paragraph allows the Government to accept late proposals if it is in the best interests of the Government This ought to be defined better to prevent a potential competitive advantage to a late offeror who has more time to submit a proposal than another offer | Aerospace <br> Defense |


| 15 402(b) | This paragraph does not make sense as written It appears there is a typographical/grammatical error in it, or some of the sentences transposed Recommend it be written to be more clear | Defense |
| :---: | :---: | :---: |
| 15 405(a) | There is no good reason for not sharing the evaluation method with the offerors except that the Contracting Officer wants to avoid being nailed for not following his own plan | Aerospace |
| 15 405(a)(2) | The entire area of past performance evaluation is problematic The Contracting Officer is given too much discretion in whether to, or how to, consider past performance information It says the contracting office "may" or may not use "information as well as information obtained from any other source to evaluate the offeror's past performance " The contractor has no way of knowing what past performance data is supphed to the contracting officer by previous contracting officers or other government individuals The contractor may or may not be given the opportunity to rebut or clarify negative past performance information received by the contracting officer Before it knows what happened, the contractor will find itself excluded from the competition or passed over for award In any case where negative past performance information is considered, the contractor should be given the opportuntty to rebut, explain, or clarify such information prior to its use in the source selection process | Aerospace |
| 15 405(a)(2)(11) | This paragraph allows the Government to use past performance information about an offeror no matter the source of the information This should be revised to require that offerors be given an opportunity to know of and rebut, specific unfavorable past performance information provided by other sources, before that information could be used negatively against the offeror in a solicitation This is even more critical because 15 405(a)(2)(i11) requires an offeror with no relevant past performance history to receive a neutral evaluation | Defense |
| 15 406(a) | Presently, the Competitive Range is composed of those offerors having a reasonable likelihood of receiving the award This maximizes competition and ancreases the Government's odds of obtaining the ultimate best value By limiting the competitive range to only those which have the "greatest likelihood of award," the contracting Officer is not maximızing competition as required by CICA and decreasing the Government's likelihood of obtaining the best value A "greatest likelihood" exclusionary test is more prone to abuse than the current "reasonable likelhhood" inclusionary test | Aerospace |
| 15 406(b) \& (c) | This new pre-competitive range exclusion of proposals based on the Contracting Officer's idea of "efficiency" is a big problem It introduces another area of uncertanty which will lead to arbitrary determinations by contracting officers Additional protests will ensue - contracting officers will need to show why a range of 4 is measurably more efficient than a range of 5 , why 3 is more efficient than 4 , etc This will be extremely arbitrary and subject to abuse <br> Allowing the CO to limit the number of proposals that will be included in the competitive range, in order to have an efficient competition, will potentially preclude full and open competition Offerors not included in the category of highly rated proposals, should be notified of that fact, but the offeror should stull be allowed to remain in the competition if it so desires | Aerospace <br> Defense |
| 15 407(a) | This gives too much discretion to contracting officers | Aerospace |


| 15 407(b) | This is perhaps the most troubling portion of the entire re-write By allowing the contracting officer to hold "non-discussion" communications with only selected offerors prior to award without discussions or establishment of the competitive range, the req invites unequal and unfar treatment These "nondiscussions" can pertain to "perceived deficiencies" and yet there is no requirement to hold "nondiscussions" with all offerors who have perceived deficiencies which could keep them out of the competitive range or prevent them from receiving a direct award While contracting officers would dearly love to possess this kind of latitude, the public trust involved with government procurement can not permit this potental for abuse | Aerospace |
| :---: | :---: | :---: |
| 15 407(d)(4) | Why the cloak and dagger approach to past performance information? This information should be provided in the light of day <br> Recommend this be deleted An offeror should have the right to know who has provided information on the offerors past performance This would tend to ensure accurate information is being provided | Aerospace <br> Defense |
| 15409 | Successive rounds of BAFOs was an abusive practice which lead to auctioning DOD did away with the practice in the mid-80's It appears to be coming back This whole concept of holding discussions and requesting proposal revisions differently from different proposers is too easily abused Discussions and BAFOs should be consistent and fair among all offerors in the competitive range | Aerospace |
| 15 409(b) | Allowing the CO to limit the number of proposals that will be included in the competitive range, in order to have an efficient competition, will potentally preclude full and open competition Offerors not included in the category of highly rated proposals, should be notified of that fact, but the offeror should still be allowed to remain in the competition if it so desires | Defense |
| $15410(\mathrm{~b})$ | This gives the Source Selection Official too much discretion in making gut-feel trade-offs without the requirement to explain them This last sentence should be changed to read as follows "Although specific trade-offs need not be explained in great detail, the trade-off must be described to the degree necessary in order for unsuccessful offerors or other third parties to determine whether the trade-off was consistent with the goal of obtaining the "best value" for the Government Trade-offs should be quantified to the degree reasonably possible " | Aerospace |
| 15 805(c) | This allows debriefings to be done orally, in writing or by any other method acceptable to the CO The offeror ought to have the right to an m -person debnefing meeting | Defense |
| $15806(\mathrm{~b})$ | This allows debriefings to be done orally, in writing or by any other method acceptable to the CO The offeror ought to have the right to an in-person debriefing meeting | Defense |
| 15 806(e)(4) | Recommend this be deleted An offeror should have the right to know who has provided information on the offerors past performance This would tend to ensure accurate information is being provided | Defense |
| $52215-1(\mathrm{f})(5)$ | This paragraph should be changed to only allow the Government to accept a lesser quantity than the quantity offered if the offeror specifies it is ok, rather than requirıng the offeror to specify the Government cannot accept a lesser quantity | Defense |

UNITED STATES

NUCLEAR REGULATORY COMMISSION<br>WASHINGTON, DC 20555-0001

November 5, 1996

Ms. Sharon A. Miser
FAR Secretariat
General Services Administration
Room 4037
18th \& F Streets, N.W.
Washington, D.C. 20405
Dear Ms. Riser:
I am responding to FAR Case 95-029, "Part 15 Rewrite - Phase I," which was published in the September 12, 1996, Federal Register.

The U.S. Nuclear Regulatory Commission (NRC) fully supports the proposed rewrite of Federal Acquisition Regulation (FAR) Part 15 to eliminate unnecessary burdens on industry and Government. We believe that the proposed changes will provide a level of flexibility which will permit contracting officers to accomplish procurements in a more timely manner while maintaining fair competition. We are especially supportive of the goal of efficiency as applied to competition and feel that this procedure benefits all parties involved in negotiated procurements.

As a Procurement Reinvention Laboratory since November 1993, the NRC has successfully used many of the innovations which are currently proposed, such as oral presentations, best value and past performance evaluations, and preaward debriefings. The revisions to FAR Part 15 will offer the NRC and other agencies the opportunity to use such innovations on a permanent basis.

Further streamlining can be accomplished by authorizing all agencies to directly post synopses of procurement opportunities on the Internet and by permitting a flexible format. Several agencies have already successfully posted synopses directly on the Internet. While working through the Commerce Business Daily was previously necessary to ensure quality control and centralize publication of Federal opportunities, the individual agencies can now accompiisii these through software and links on the internet.

We look forward to working with you in the implementation of these innovative changes to the FAR. If you would like to discuss these comments, please call Edward L. Halman, Director, Division of Contracts, at (301) 415-7305.

cc: The Honorable Steven Kelman
Administrator, Office of Federal
Procurement Policy


# SOCIAL SECURITY 

Office of the Commissioner

November 7, 1996

Ms. Beverly Fayson
FAR Secretariat (MVRS)
General Services Administration
18th and F Street, NW, Room 4037
Washington, D.C. 20405
Dear Ms. Fayson:
I would like to convey the Social Security Administration's support of the efforts to rewrite Part 15 of the Federal Acquisition Regulations. We are greatly encouraged by the work of the rewrite team to develop a revised negotiated acquisition process that will be less burdensome and time-consuming while, at the same time, maintaining the integrity of the process.

In addition, we are pleased to see that the advisory two-step down-select process that we have advocated has been included. Likewise, the ability to communicate with some or all offeror prior to the establishment of the competitive range will permit contracting officers to make more informed competitive range or award decisions. We expect to be able to provide additional comments on other aspects of the proposed regulations in detail by the requested due date.

Again, we endorse the rewrite effort and believe the revisions will provide the necessary flexibility to assure a more responsive and cost-effective acquisition system. We look forward to the implementation of these substantive improvements to the acquisition process. You have our continued support in this very important endeavor.


Shirley S. Chater
Commissioner
of Social Security

General Services Administration FAR Secretariat (MVRS) 18th and F Streets, NW, Room 4037 Washington, DC 20405

Re: FAR Case 95-029 (FAR-Part 15 Rewrite)
Dear Six/Madam,
I am writing to enthusiastically support the proposed FARPart 15 rewrite as published in the Federal Register on September 12, 1996.

Fox many years, I have been a strong advocate of the required government acquisition reforms -- not only in my executive capacity at risc, but also in my teaching at Harvarcl, as well as in my role as Vice Chairman of the Defense Science Board. In my opinion, and in the opinion of those in my firm and many others I have talked to throughout the industry and the government, this proposed rewrite is a major step forward toward achieving the needed improved effectiveness and efficiency with which the government does its business. This new approach allows the required buyer/seller communication that is so essential to assure that the government gets what it wants at the best price. It also eliminates much of the current waste of effort (for both the government and industry) that the current system requires in a failed attempt to mechanize a process which is inherently a judgmental one. Instead, this rewrite provides the necessary guidance and flexibility needed to assure that these decisions are made in the government's best interest. The guidance allows and provides for skilled government employees to apply their experienced management judgment so that the procurement results in the best value for the government. It truly is a major step forward, and att would be an enormous setback for the acquisition reform inatataves over the past four years if the special interests who want to maintain the old system are allowed to apply enough pressure so that positive change cannot take place.

As with any document such as this -- that makes such a significant change -- there will be those who feel that it doesn't
help their special needs (as contrasted to the government's needs). Also, there will be many small, suggested changes, which could be either incorporated at this time or at a subsequent period. However, I believe the overall current document is extremely fair to all qualified bidders for government work and -most importantly -- it assures that the government will get a quality product at a reasonable price. In fact, with regard to the latter point, I do believe that there should be some discouragement of the use (by the government) of the "lowest price, technically acceptable process". While 1 don't believe this needs to be eliminated in the document, the idea that the government should settle for simply "technically acceptable" performance from a supplier is totally inconsistent with good procurement practices. Rather, the government should achieve "best value" in all of its procurements, i.e., the best combination of performance and price to satisfy the particular need.

In summary, I believe this FAR-Part 15 rewrite is a major step toward moving the government forward in its acquisition practices, and should be enthusiastically supported and implemented at as early a date as possible. If $I$ can be of any additional help in answering any questions, I would certainly be pleased to do so.


JSG:mds

# REMARKS ON THE FAR 15 REWRITE, PHASE I FAR COUNCIL PUBLIC MEETING NOVEMBER 8, 1996 

JAMES McALEESE<br>McAleese \& Associates, P C.<br>8201 Greensboro Drive, Suite 820<br>McLean, Virginia 22102<br>TEL (703) 917-8900 / FAX (703) 917-8911

## I INTRODUCTION

Members of the FAR Council, FAR 15 Rewrite Phase I Team, Ladies and Gentlemen Good morning I am Jim McAleese of McAleese \& Associates, P.C., located in McLean, Virginia We represent both commercial and non-commercial government contractors, moluding developers, production houses, systems integrators, service providers, prime contractors, subcontractors, and both large and small contractors.

Thank you for the opportunity to share my thoughts regarding Phase I of the FAR 15 Rewrite I strongly support many of the changes proposed in Phase I, primary because the reforms will accelerate the acquisition process by reducing cycle times from new mission requirements to initial operational capability on major weapons and hardware programs In doing so, they will achieve significant savings for both DoD and other Federal agencies, which savings can then be re-invested into other government programs This is in addition to generating savings by reducing the government's internal acquisition costs. Vanous provisions of the proposed changes will also provide contractors greater flexibility in creatively offering true "best value" solutions to the customer. In short, the reforms will promote more efficient use of scarce acquisition dollars. This means that the government can then buy more goods and services, and spend less on the administrative and bureaucratic costs of procurement

However, acquisition reform may not necessanly generate large savings in the short ten, because contractors may expend more proposal preparation costs ( $B \& P$ ) to craft the type of "First and Final Offers" (FAFOs) required to win under the new regulations. This is driven by both market share and contractor perceptions Nevertheless, acquisition reform will certainly save money in the long run and yield greater contractor profit, so long as both the government and contractors clearly understand the new process.

Still, some proposed changes rave serous concerns for government contractors. Accordingly, I will focus my remarks on two types of reforms those that many contractors strongly endorse, and those that cause contractors significant alarm For convemence, I have organized my remarks under four clusters of issues, and will address them wo following sequence
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1) The Newly "Constricted" Competitive Range;
2) Obsolescence of BAFOs and the Dynamic Emergence of "FAFOs";
3) "Technical Leveling" and "Auctioning"; and
4) Past Performance Evaluations

## II THE NEWLY "CONSTRICTED" COMPETITIVE RANGE

(a) Under the current rule, FAR 15.609, the Contracting Officer is obligated to include in the competitive range all offerors with a "reasonable chance of being selected for award" Consequently, almost all offerors routinely expect "meaningful" discussions and submission of Best and Final Offers (BAFOs). The FAR advises the inclusion, rather than the exclusion, of offerors into the competitive range: that is, "if in doubt," admit them into the competitive range Under that incremental process, offeror often submit initial proposals with intentional ambiguities in key technical and/or business details. ${ }^{1}$ The reasonable expectation is for an offeror then to tender its genume offer as the BAFO, often to prevent the perceived danger of "technical leveling" and "auction techniques" in high-priority programs. This incremental strategy also keeps the successful offeror's pricing options open, and generally ensures that not too much money is "left on the table" between the price of the awardee and that of the nextranked offeror
(b) The proposed rule, in contrast, gives the Contracting Officer new authority to "constrict" the competitive range to an "efficient number" following the evaluation of initial proposals Thus represents a fundamental change to traditional negotiated procurements in short, the government has shifted the competitive range dynamic from "when in doubt, keep them in," to "when in doubt, throw them out." Moreover, as long as the government states its intention in the solicitation, the Contracting Officer may even identify the number of offeror that he or she intends to admit into the competitive range This places an obvious premium on being rated most highly in technical approach and other evaluation criteria, such as "past performance," on initial proposals. In effect, this dramatic change creates the equivalent of award on FAFOs Consequently, contractors who do not prepare their initial proposals on "bet the company" programs as "FAFOs" may not survive in the marketplace for lack of new business capture.
(c) Recommendation: Although the proposed constriction of the competitive range disrupts contractors' existing business strategies, it is my impression that contractors generally endorse the concept of being notified as early in the process as possible that they are unlikely to receive award. Contractors are understandably frustrated by the current process that keeps their companies in a procurement, at considerable expense and the loss of other business opportunities, only to learn later that they did not ever have the probability of receiving the contract award ${ }^{2}$ This frustration results primarily because of the policy in the FAR that admits
all proposals with a reasonable chance of being "made acceptable" into the competitive range, 1 e , it encourages the inclusion of marginal initial proposals, rather than their exclusion

Ironically, there 15 no statutory requirement for this FAR policy It appears as if the only interests served are the government's aversion to ask and industry's perception of "faumess." However, this is not truly a "fair" management of competitive procurements, because every cent spent by contractors must be invested in activities that have a realistic potential of returning both investment and profit. It is not in the government's long-term interests either, when it is forced to expend scarce overhead dollars to conduct discussions with offerors who do not have the probability of receiving award. Consequently, many contractors already support the notion that only those initial proposals with the "greatest likelihood of award" should be admitted into the competitive range.

We also note that the proposed rule potentially creates a two-step process. The first step requires an evaluation to determine those initial proposals with the "greatest likelihood of award" Once those initial proposals are identified, the second step allows further constriction of the competitive range to limit the number of offerors to achieve "efficient competition" The rationale is that this secondary constriction enables the government to more effectively negotiate with the remaining offerors.

The community appears to be divided on this issue. One segment of the community argues that, once those initial proposals with the "greatest likelihood of award" are selected, then "efficient" competition has been achieved as envisioned by FARA Therefore, there is no need for the second constriction of the competitive range. On the other hand, some "captains of industry" who believe that the second constriction is needed to truly change the "cultural" problem created by the FAR, which promotes inclusion of too many offers into the competitive range Such proponents argue that for negotiated procurements to become more efficient, this second stage is needed to refine fully the competitive range to the "best of the best" With either option, I recommend strongly that the government be given additional discretion to constrict the competitive range, and that the exercise of that discretion be reviewed on a periodic basis to prevent concerns over potential abuse

Finally, I would be remiss if I failed to mention the recent discussions occurring in the public and private sectors concerning whether you intend to limit the number of offeror poor to the establishment of the competitive range In my discussions within the community, it appears that limiting the specific number of offeror prot to the establishment of the competitive range was not your original intent. I have taken the opportunity to review the language in question, FAR 15.406 and FAR 52.215-1, and I understand the potential for misinterpretation, particularly if a person had not read the preceding provision on evaluations. This ambiguity can be avoided easily in a number of ways. First, you could delete any reference to limiting the competitive range in the solicitation. Second, you could rewrite FAR $52215-1$ to make it clear that the government solicits all vendors interested in the acquisition to submit an offer. However, after
completing the first evaluation of all initial proposals submitted and taking into account its market research and conditions, the government may limit the competitive range for efficiency purposes to a number that provides the government the opportunity to have "discussions" with those offerors who have the greatest likelihood of receiving award. Third, you could incorporate the "estimate concept" found at FAR 15.406 into FAR 52.215-1. However, any reference to a specific number of offerors to be unilaterally admitted into the constricted competitive range (ie., "estimate," "anticipate") in the solicitation clause may contribute to anxiety with n the contractor community. Moreover, it will limit, rather than broaden, the discretion delegated to the Source Selection Authority. I recommend the second alternative, since it provides offeror information that allows them to decide whether to compete for a contract knowing the government's view of the marketplace and its need to limit the competitive range for "efficient" competition.

## III OBSOLESCENCE OF BAFOS AND THE EMERGENCE OF "EAFOS"

(a) Under the current paradigm, all proposals with a "reasonable chance of award" are generally admitted into the competitive range under the "full and open competition" mandate of the Competition in Contracting Act of 1984 (CICA) Consequently, contractors have historically dechned to tender their best offers in their initial proposals Instead, they waited until submission of BAFOs after the completion of discussions, when they had sufficient opportunity to identify the government's true "technical discriminators" and price sensitivity. Only then would contractors tender their genuine offers, often cutting their proposed price by as much as an additional $15 \%$ to further improve their chance of award. Under that paradigm, contractors generally spent $85 \%$ of the program's budgeted B\&P through submission of the initial proposal, and then would spend the remaining $15 \%$ refining the proposal in accordance with what they had gleaned from discussions.
(b) Under the proposed rule, however, BAFOs will become increasingly obsolete because Contracting Officers will have the discretion to selectively conduct "communications" with offerors, prior to establishing the constricted competitive range. ${ }^{3}$ This is in contrast to conducting "discussions" following the formation of the competitive range. I am deeply concerned that these proposed changes pose increased risks to contractors and potentially adverse consequences to "full and open competition."

For example, the proposed regulation states that pre-competitive range communications "are conducted to obtain information that explains or resolves ambiguities or other concerns." Pre-competitive range communications of this nature may well create the "perception" of unfettered latitude to the agency to assist preferred vendors in making award on their inutial proposals, while ignoring less favored contractors. The fundarnental problem with the use of these communications is that they could potentially foster the appearance of inequality among offerors, and could violate the continuing statutory obligation for "full and open competition."
(c) Recommendation. Concems remain as to the potentıal appearance that the proposed regulations could not permit offerors to orally modify their mutial proposals dunng "communications" Under that scenario, a Contracting Officer might be persuaded to (1) orally agree to modify an offeror's proposal, (2) then make award without discussions, and (3) subsequently modify the contract after award The problem is that this would foster suspicion that other offerors in the competition did not receive the same opportunity to revise their initial proposals to match the awardee's oral agreement Obviously, this would not be a likely nsk in competitions under MilSpec or design specifications. However, the proliferation of performance specifications means that offerors' solutions will likely be very different from one another Therefore, denying contractors the opportunity to discuss the intricacies of their mitial proposals, and how they intend to satisfy the govemment's performance requirements, may preclude the government from getting true "best value." Therefore, I suggest that the Committee refine the term "communications" to ensure that all parties understand that this is not "code" to allow award without discussion, followed subsequently by post-award execution of a contract modification Rather, refinement of the definition of "communucations" would effectively put all parties on notice of the range and limitations of "communcations," to prevent any actual or perceived unfaur advantage from accruing during competition

## IV "TECHNICAL LEVELING"AND "AUCTIONING"

(a) Under currentrules, Contracting Officers are prohibited from engaging in "technical leveling" and "auction" techniques. These restrictions on discussions promote the goals of farness and protection of proprictary solutions and confidential data.
(b) The proposed_regulations dramatically strengthen the prohibition against technical leveling during "discussions." We strongly support the proposed provisions strengthening the prohibition against technical leveling However, the proposed regulations also change the rules governing auction techmques. Presently, government personnel cannot (1) discuss with an offeror the cost or pnce required for further consideration of its offer; (2) advise a bidder of its price relative to other offerors, or (3) provide information about competitors' pnces Instead, they can inform an offeror only that its pnce is considered by the Government to be "too hugh or unrealistic " Under the proposed rule, however, the only prohbited auction technuque would be "advising an offeror of another offeror's pnce without that other offeror's permission."
(c) Recommendation: As previously mentioned, we fully support the Committee's contunued desire to prohibit technical leveling. However, there is considerable anxuety among contractors, especially non-COTS OEMs, regarding the new proposal liberalızing of "auctionng." To remedy this perception, the govemment should (1) refine the definition of "communications," (2) use well-crafted performance specifications, and (3) participate in "real" price negotiations with contractors within the competitive range. Moreover, the proposed
regulations will authorize the Contracting Officer to inform all offerors of "the cost or price that the Government's ponce analysis, market research, and other reviews have identified as reasonable." In addition to old-fashoned negotiations, carrying out these actions will enable the contracting commumty to satisfy the government's interests, maintain a "level playing field" for all parties involved, and afford adequate protection of offerors' propnetary information during competition.

## V. PAST PERFORMANCE EVALUATIONS

(a) While the proposed rules of FAR Part 15 do not alter the statutory mandate for evaluation of past performance, such evaluation on mitial proposals is a prime determinant of which offerors will be admitted into the constricted competitive range. Therefore, contractors need to garner positive past performance ratings on initial proposals, as only those proposals with the "greatest likelihood of award" will (1) receive award on initial proposals, or (2) be admitted into the constricted competitive range for discussions. This approach disrupts the business development strategies of contractors who consciously invested as "loss leaders" with customer consent. It further forces contractors, who had bid previously to generate profit but encountered technical difficulties, to re-visit the potential of asserting claims, pursuing $A D R$, or exploring other avenues to protect their integrity. It also wreaks havoc in recently merged contractors, where the acquing contractor may have become an "impaired asset" as a matter of law Because of the lack of a refined past performance system throughout the government, the government should allow offerors to address their past performance records dung the perecompetitive range phase of the competition.
(b) Therefore, to preclude the "de facto debarment" of qualified offerors from participating in the procurement process, I recommend that agencies provide ample opportunity for offerors to correct or explain adverse past performance on previous contracts. This should reduce greatly the defensive triggering of unsavory administrative disputes and interminable litigation to exonerate erroneous past performance "report cards." I suggest that language be incorporated into FAR 15.407 (b) that would require agencies to provide offerors a reasonable opportunity to challenge and rebut adverse past performance evaluations. Such opportunity to rebut erroneous past performance information should be given to all contractors who submit a proposal (pre-competitive range), since inaccurate past performance data could improperly exclude an otherwise qualified offeror from the competitive range. Additionally, contractors should be alerted well in advance of which past performances will be evaluated in a particular procurement This ("pre-qualification") will enable them to understand how their specific past performance will be evaluated, so that they can make intelligent "Bid/No-Bid" decisions accordingly.
(c) Recommendation. Contracting Officers currently have the discretion to allow offeror to explain poor past performance records or describe those steps that they have taken to improve
their past performance I encourage the Committee to mandate that Contracting Officers must consider contractors' explanations for poor past performance evaluations, as well as those steps being taken by the contractor to remedy past performance deficiencies Otherwise, the government will effectively "debar" contractors from competing for future contract awards This mandate will ensure ultimately that the govemment receives "best value," as it will have the opportunity to select its contract awardees from the largest pool of solutions and pricing

## VI CONCLUSION

I would like to thank you again for the opportunity to share some of my own beliefs regarding the FAR 15 Rewrite As the process is just beginning, I would encourage the government to use a "FASA-like" process Based upon your expenence with FASA implementation, and the improvements you made to the process in developing FASA training, I believe strongly that an open process will provide the most successful means of achieving your objectives underlying the FAR 15 revision Granted, there will be disagreements throughout the process, but that is how sound policy is ultimately achieved After all, the primary objective of the government, its contractors, and the taxpayer, is to ensure that the government receives "best value," while its contractors earn a reasonable profit for their efforts.

## Endnotes

1 Our experience on major programs has been that contractors traditionally spend as much as $85 \%$ of budgeted B\&又P funds prior to submission of their intial proposals, with total B\&P consturuting $1-2 \%$ of projected contract value, under the "uncremental" procurement approach. Those initial proposals generally contain a complete technical solution, but intentionally leave ambiguities for pricing discretion and technical/management refinement in BAFOS.
${ }^{2}$ Specifically, contractors want to know when they are no Jonger in the competition to re-allocate scarce B\&P funds to other new business capture opportuntits

3 Proposed FAR 15401 Under the proposed fule, such communicauons would not be considered "discussions," and therefore, would not allow substantive changes in the offeror's proposal other than the correction of iregularities or mistakes As you are well aware, it is the cntical function of "discussions" that enables an offeror to revise its proposal
U.S. SMALL BUSINESS ADMINISTRATION Washington, DC 20416

## STATEMENT

OF
JIM O'CONNOR
PROCUREMENT POLICY ADVOCATE U.S. SMALL BUSINESS ADMINISTRATION OFFICE OF ADVOCACY

## BEFORE THE

FAR COUNCIL AT A PUBLIC MEETING TO DISCUSS
FAR CASE 96-303, COMPETITIVE RANGE DETERMINATIONS AND
FAR CASE 96-029, PART 15 REWRITE - PHASE I
NOVEMBER 8, 1996

# FAR Case 96-303, Competitive Range Determinations and FAR Case 96-029, Part 15 Rewrite - Phase I 

Good morning. I am Jim O'Connor the Policy Advocate for Procurement within the Small Businesa Administration's Office of Advocacy.

I thank the FAR Council for the opportunity to share the views of the office of Advocacy regarding the proposed rules, Competitive Range Determinations and FAR Part 15 Rewite Phase I. These rules, in Advocacy's opinion and in the opinion of many small business groups, will have an adverse impact on a substantial number of small firms.

The Office of Advocacy was established by Congress to ensure that Federal agencles consider the impact of their rules and policies on small business. In this capacity Congress also gave us the responsibility to monitor agency compliance with the Regulatory Flexibility Act (RFA) and to report deficiencies to the Congress.

The Regulatory Flexibility Act and the analytical requirements it mandates are designed to require federal agencies to articulate the effects of their proposed and final rules on small entities. In addition, the recent passage of the Small Business Regulatory Enforcement Fairness Act provides additional regulatory relief for small businesses, including judicial review of an agency's compliance with the Regulatory Flexibility Act.

We believe that full compliance with the "reg flex" law helps agencies understand the needs of small businesses, leads to greater competition and government cost savings and, most importantly, protects that sector of the economy that 25 the engine of prosperity and growth.

In accordance with our regulatory responsibilities, the Offlce of Advocacy voiced its concerns regarding the competituve range rule in recent letters to the FAR Council; Sally Katzen, Administrator of the Office of Information and Regulatory Affaırs; and, Dr. Kelman, Adminlstrator of the Office of Federal Procurement Policy. Advocacy will file additional comments on the competitive range rule as well as comments on FAR Part 15 , prior to the expiration of the November 26 coment period.

Before I articulate some of Advocacy's concerns on the
proposed rules, I want to thank the FAR Council, especially Dr. Kelman, for agreeing to extend the comment period on the proposals and for conducting two separate public meetings -- one this morning and another in Kansas City on November 18.

I also want to acknowledge recent changes my office has noticed regarding compliance with the Regulatory Flexibility Act. We are pleased to see that some of the newer FAR cases include improved regulatory analyses, better disclosure regarding small business impact and more regulatory alternatives being considered. This is not to suggest that all far cases are now in full compliance with "reg flex" -- they're not, but they are getting better.

In fact, as you know, Advocacy, in its August 27 comments to the FAR Council, described the competitive range rule as deficient in meeting the requirements of the Regulatory Flexibility Act.

The competitive range rule implements a provision in the Federal Acquisition Reform Act that gives a contracting officer the authority to limit the competitive range to the greatest number that will permit an efficient competition.

Only offeror that are initially "highly likely" to receive an award would be included in the competitive range. The current standard, under which those with a "reasonable chance" of receiving an award are included in the competitive range, would be eliminated. The proposed competitive range provisions are incorporated in the rewrite of FAF Part 15.

Advocacy supports the streamlining both rules suggest, but is very concerned that the proposals will limit competition by giving the contracting officer significant authority to eliminate offerors prematurely -- for reasons of convenience. In theory, limiting the competitive range to promote government and offeror efficiency sounds great. But, in the real world -- where contracting officers have concurrent buying actions ongoing and are under significant pressure to do more with less - we believe the rules will give government contracting officials license and incentive to focus on the fewest number of offeror that are the best known or who represent the most recognized brand name.

We are concerned that new government vendors, emerging firms and other small businesses, less polished in marketing or proposal writing skills, will be quickly eliminated from a competition.

Advocacy believes competition will be limited because provisions in the proposed rules:

- Do not define what is meant by an "efficient competition," giving the contracting officer signifacant latitude to interpret "efficiency" as "convenience."
- Allow a contracting officer to determine the number of offerors to be considered in a competitive range before the submission of offers;
- Do not require a minimum number of offerors to be considered in the competitive range;
- Leave open to the judgement of the contracting officer the method or reasons for eliminating a potentlal offeror from the competitive range; and,
- Provide no protections for small firms in mandatory or advisory "down-selects."

The most important issue here today is that the proposals represent a dilution of the practice of "full and open competition."

Competition strengthens the economy by providing profit and other incentives for firms that are responsive to the needs of a dynamic and ever-changing customer base. The clear end result is lower prices and better products and services -- all factors contributing to the strength of the U.S. economy.

The need for open competition in federal procurement markets is significant. Advocacy contends that some recent acquisition reforms, including those articulated in the proposed rules, will have the immediate effect of reducing procurement opportunities for small firms. In the long term, these changes may alter the number of firms available, willing and able to participate in federal procurement markets. These changes are being made in the name of government efficiency and cost savinge without, in our opinion, enough emphasis on maintaining a strong competitive marketplace.

Small business inclusion requirements and certain allowances in the procurement process are often viewed as obstacles to government efficiency. Certainly, some government-unique standards have grown obsolete and should be purged. Advocacy, however, believes the federal government has an obligation -stemming from the tenets of good public policy -- to direct public monies in such a way that competition is vigorously encouraged. As such, certain allowances for small fixms should exist to level the playing field so that open competition is preserved and that all gectors of the economy, including women and minority business owners, have an equal opportunity to
participate in federal markets.
Free markets thrive on competition. Ensuring the free and continuous access of small and new firms to federal procurement opportunities is an absolute requirement of $a$ dynamic and competitive federal marketplace. It would be myopic to sacrifice competition at the expense of creating false efficiencies and short-term savings. Only market-based competition can prevent monopoly practices and the concentration of federal dollars in the hands of a few large industry giants. It is easy -- and arguably more efficient in the short term -- for the government to contract with a cadre of mostly large firms. In the process, however, the fate of many small firms, the entrepreneurial base of the economy and the future of competition are jeopardized.

Advocacy asks that the following amendments and/or alternatives to the proposals be considered by the FAR Council:

1. Define what is meant by an "efficient competition" in the rules.
2. Factors for limiting competitive range "market research, historical data for previous/similar procurements" (as referenced in the rules) should be disclosed and readily available and the factor, "resources available," should be eliminated from the proposals.
3. Establish FAR guidelines for determining the minimum number of offerors in a competitive range.
4. If any small firms have a "reasonable chance" of winning a particular contract, at least one small firm (highest ranked) should be included in the competitive range.
5. Reaffirm in Part 15 of the FAR the government's commitment to utilizing small firms in federal procurement.
6. Require written tracking of all contracting officer/offeror "discussions."

In closing, Advocacy believes the competitive range rule and the rewrite of FAR Part 15 should be considered as major rules, subject to Office of Management and Budget (OMB) review under Executive Order 12866. A major rule is defined as one with an annual economic impact of greater than $\$ 100$ million or having significant adverse effects on competition. In FY '95, competed contracts represented about $\$ 130$ billion or 64 percent of all federal contract dollars. Further, these regulatory proposals will significantly alter what is meant by "full and open competition" in government contracting and, in our opinion, adversely affect many small firms.

The office of Advocacy is committed to making procurement reform a reality and stands ready work with the FAR Council, the Office of Federal Procurement Policy, and the promulgating agencies in that endeavor.

Thank you for the opportunity to expregs our views at this forum.

Richard H Hopf<br>Deputy Assistant Secretary for Procurement and Asssistance Management<br>U S Department of Energy

## EAR 15 REWRITE-PHASEI

## WHY CHANGE IS NEEDED

- Government and industry can no longer afford to operate within the traditional processonented, bureaucratic framework which constrains our ability to acquire goods and services in the most tumely and efficient manner practicable
- Need to establish a system that balances nsk against efficiency. A system of "manageable nisk" versus a "fail-safe" system
- Current policies/procedures have become largely irrelevant Agencies are manpulating current system, seeking special authoritues (e g , NASA, FAA)
- Reduced budgets and a signuficantly downsized acquisition workforce requre that the Government adopt a more results-onented, commercial-style approach to acquistion
- Need to abrogate current "management by litigation" mentality by reducing the basis for protest, 1 e, limitng prescnptive/proscnptive pohies and procedures resulting from adverse rulings by GAO, GSBCA, BCA's, etc


## WHY RLLE IS POSITIVE CHANGE

- It is recognuzed that many of the concepts advanced by the rule may be considered radical in that they represent a dramatic shut in the way the Government and industry will conduct business in the future
- Rule proposes the elimination of many obsolete, non-value added pollcies and procedures, while introducing innovatıve, common sense approaches to competitive source selection
- Rule adopts proven, commercially-oriented business practices, including the use of oral presentations, multı-phase proposals and the comparative evaluation of offers
- Such techniques are not statutorily prohibited for use by the Govemment, and are customarily uthized/endorsed by industry-REF•Sandia National Laboratories endorsement of one-on-one communications, multi-phase proposals, oral presentations, comparative evaluations, auctoning
- The coverage authonzing/encouraging more open communications throughout the source selection process will.
- enable the Government to more fully understand each offeror's proposal,
- enable offerors to more fully understand the Government's needs,
- faculate more timely evaluations of offers, and
- inject greater objectivity in making best value determinations
- The introduction of a new "model" contract format to replace the uniform contract format will provide a more logically organized, flexible and streamlined solicitation and contract award document
- Increased flexibility and discretion granted to contracting officers in making competitive range determinations will
- discourage/eliminate the longstanding practice of including firms in the competitive range whose proposals, while acceptable, clearly are not likely to receive the award,
- promote greater discipline and efficiency in the competitive source selection process by encouraging offerors to provide their "best offer" in their initial proposal,
- maintain faimess, impartiality and integnty in the system by promoting full and open competition, and ensuring that all proposals received will be objectively evaluated based upon the critena set forth in the solicitation,
- enable agencies to focus their resources on those proposals determined to have the greatest likelihood for award based on an objective evaluation of offers; and
- permit companies that are not likely to receive the award to free their resources to pursue other business opportunities


## CONCLUSION

The refortns developed under Phase I of the FAR Part 15 rewrite effort will effect a much overdue fundamental change to the current, process-driven approach of conducting competitive negotuted acquisitions -- an approach which is far too inefficient and costly to be sustained in today's budgetary environment

November 11, 1996
General Services Administration


FAR Secretanat (MVRS)
18th \& F Streets, NW Room 4037
Washington, DC 20405

I am writing to you to explain the reasoning behind my strong support for the timely execution of the Phase I rewrite of the Federal Acquisition Regulation Part 15 Fundamentally, the FAR Part 15 rewrite as contemplated, does not represent a major change in the way the more best managed, most effective Federal Procurement organizations have been conducting themselves for the past few years

With the active support of the Industry Advisory Council (IAC) the Federal procurement community and it's industry partners have made major strides in improving industry and government communications Today, we work in a much more cooperative environment than we have in the past, and both parties benefit from that improved relationship The rewrite of the FAR Part 15 as contemplated serves only to foster better, more effective relationships between industry and government The inevitable result of the rewrite will be better, more effective IT solutions for Federal employees, and better more effective use of taxpayers money

During my career providing IT solutions to Federal agencies, I have worked with or for large, small 8 (a), services, manufacturing, and systems integration companies I recently formed my own small business, and I firmly believe that the rewrite as contemplated must be allowed to go forward as it is consistent with both the strategic and philosophic changes we have all worked so hard for these last six years There will certainly be enhancements in the future The enhancements as proposed today simply need time to be tested for their effectiveness and benefits

To date, the major concerns expressed regarding the rewrite relate to the level of definition given certain areas such as "Best Value," early more aggressive competitive range determinations, and possible future abuses of the system leading to the need for further reform

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As regards the clanty of "Best Value" it seems that any defintton past that being offered by the committee would ultunately result in the cumbersome, restrictive environment the rewnte is intended to bring to an end Frankly, when this rewnte was originally contemplated, many of us in the IT communty were very skeptical about it ever seeng the light of day Now that is appears more of a reality, we cannot allow our comfort with past processes to impede the progressive approach of the rewnte effort The government has always been guided to obtam everything it buys on a best value basis, and the best value defintion being offered today is no different than that with which we have worked in the past The major difference today is that in the past, best value was most often defined as "lowest price" The least price defintion of best value in the past existed because agencies used very detauled, prescriptive technical specifications in defining their requirements Today, the more effective agencies have turned to more functional specifications in determining therr requirements In the "Tradeoff process" section of the rewrite, it is clearly stated that " all factors and significant subfactors and their relative importance must be clearly stated in the soltcitation "If in fact an agency clearly states their key factors and sub factors, then a more detalled definition of "Best value" need not be defined in the rewnte of the FAR Each individual procurement action should define it's own value determination and factors

As to competitive range determmations, I wholeheartedly support the direction given by the FAR rewnte committee Durng my career, I have only once been mvolved with a procurement where our offer was deemed to be outside the competitive range The technical team in our company wanted to protest that decision After a thorough review, it was clear that we had simply missed the mark Had our technucal team properly revewed the bid, and our management team truly understood the customers goals we would never have participated bid in the first place Most of the tume, when early effective competitive range determinations are made, both industry and the government benefit Once again, the better, more effective agencles are making these determinations today This part of the rewnte does not represent a major change in tactics Rather, it is a reinforcement of the phrlosophical change in direction written into the FARA, FASA, and Clinger/Cohen Bill (previously, ITMRA ) This idea will lead to longer more cumbersome procurements only if people are unable to get their egos out of the process, and accept that pertraps they did not understand their customers needs and their own corporate capabilties adequately prior to making then bid decision

As to abuses of the system, yes we can guarantee ourselves that there will be abuses There will be poor "Best value" determunations, and there will be improper competitive range determinations That will happen because we have human beings involved in the acquisition process In our daly hyes we all make decisions about things we want or need In general, we all do the best we can People will make mustakes, and some will even intentıonally abuse the system However, we have tried very restrictive pohcies in the past We are now coming off of an extremely well defined, controlled and highly legislated environment In that environment we had mistakes and abuses If someone sets abuse of the system as their goal, all we can do is test their creativity We will not, through any level of legslative specificty, be able to regulate good judgment and integrity


From: Commander, Naval Air Systems Command
To: General Services Administration, FAR Secretariat (VRS) 18 th and F Streets, NW (Room 4037)
Washington, DC 20405 ATTN: Beverly Fayson
Subj • FAR PART 15 REWRITE--PHASE I, FAR CASE 95-029
Ref OASN (RDA) ABM memo of 30 Sep 96
Encl: (1) NAVAIR Comments on FAR Part 15 Rewrite - Phase I

1. In response to reference (a), the Naval Air Systems Command has reviewed the subject rewrite. While the FAR rewrite is intended to streamline the procurement process and eliminate certain barriers, some of the proposed rewrite may lead to a compromise in the integrity of the source selection process. We are concerned that aspects of the rewnte may create an atmosphere which could be perceived to allow arbitrary and unequal actions by source selection officials. Specific comments are contained in enclosure (I).

2 If there are any questions, please contact Judy Richardson, AIR-2.1 1, at (703) 604-2005, X6119


## NAVAIR COMMENTS ON FAR PART 15 REWRITE, PHASE I

1. FAR 1.102(c)(3), Performance standards

States that far treatment requires members of the acquisition team abide by the solicitation and the "acqusition plan (if any)..." Acquisition plans do not address the specific source selection The term should be changed to "source selection plan."

## 2. FAR 2.101, Definitions

Best value definition - Although lowest price technically acceptable (LPTA) process is described in 15101 and 15402 further identifies LPTA as a best value approach, the best value definition does not address LPTA The defintion should be revised to reflect this approach also.
3. FAR 14.404-1, Cancellation of invitations after opening

Agency Head should be changed to Head of Contracting Activity or lower (Chief of Contractung Activity). Certanly, the Secretary of the Navy should not get involved in decisions regarding cancellation of IFB's

## 4 FAR 15.001, Definitions

Definition of "Proposal modification" - Correct "solicttation is closing" to "solicitation's closing date."

5 FAR 15101 (b)(2), Lowest Price technically acceptable process, 15.404(d)(3), Evaluation factors and subfactors, and $15.405(\mathrm{a})(2)$, Proposal evaluatıon

The issue of past performance as an evaluation factor for award in pass/fail lowest price technically acceptable process needs to be clarified throughout the reference sections to either make it a responsibility determination or make it the only comparative assessment of an otherwise pass/fail process.

## 6. FAR $15.102(b)(3)$, Tradeoff process

States that specific tradeoffs do not have to be described in terms of cost and price. While they do not have to be precisely measured and quantified, the SSA does have to document why the higher priced item may be a better bargan and must do so in terms of cost to the extent practicable. That analysis should yield a conclusion that implies a dollar value. Court cases have shown that best value decisions required some sort of actual cost benefit tradeoff to be performed showing how the higher cost of the selected awardee was offset by the technical superiority of its higher priced products. The FAR Council needs to check to see if this standard will successfully withstand scrutiny within the judictal system.

## 7. FAR 15.103, Multiphase acquisition technique



Should include a definition of "down-select"
FAR 15.103 (d)(1) - Uses the phrase "binding offer" which has never been defined in the FAR Either the term must be defined or change language to reflect "qualifying offer" instead and then define "offer" in FAR 2.101 with minimum required information noted.

## 8. FAR 15.104, Oral Presentations

FAR 15 104(a) - The statement that oral presentations are most beneficial when they substitute for rather than augment written information should be deleted. Due to legal concerns, potential for miscommunication, and protest, some form of written record or video is necessary. Therefore, the FAR should not state this preference.

FAR 15 104(c)(4) - The impact of oral presentations on small business is not an appropriate item to list as being required in the solicitation The contracting officer cannot describe the impact, the offerors need to describe the impact. This is an item that should be considered in acquisition planning but certainly cannot be included in the solicitation

9 FAR 15.201, Presolicitation exchanges with industry
FAR 15.201 (c)(4) - This section which allows one on one meetings with potential offeror should be deleted. This type of meeting creates a good chance of inadvertent release of procurement specific information which creates an unfair competitive damage which public release of information at a later date cannot cure. The potential for competitive harm is made worse by $15.201(f)$ which allows agencies to wat until next public release of information to remedy the potential competitive harm

FAR $15.201(f)$ - States that if government personnel disclose specific information about a procurement that information should be made available to the public no later than the next release of information in order to avoid creating an unfair competitive advantage. The entire paragraph should be deleted. An unfair competitive advantage has, in fact, already been created if information is provided to potential offerors. Any information provided to industry should go through the contracting officer to ensure integrity of the process

## 10. FAR 15 202(e), Request for Proposals

This section contains contradictory information. It states that letter RFP's may be used for sole source follow-on procurement However, (7) refers to "for other than sole source actions."

## 11 FAR 15.203, Model contract format

The new model contract format should be ehmunated. This is a major change that would force acquisition and contractor personnel to become famular with a new contract format and dramatically affect automated contract formats. Yet no reason or benefit is provided for this
significant change which would have far reaching implications. The new sections are unstructured, making it difficult for contracting personnel to find information. The same information can be in different places in different contracts Other information (deliveries - Old Section F) would now be buried in the Statement of Work making it more difficult to find and creating more confusion. It is not clear which clauses go in which sections nor why Full text clauses should not clutter sections with clauses included by reference. The same data is still required, it is just moved around. The current format is orderly and sets out the key, sahent features of the contract in predictable places. With so much potential for vanability, this new format would severely impact automated systerns that are currently being developed to the A through M format A great deal of effort and resources have been expended on these streamlining initiatives that would be wiped out with this change.
12. FAR 15.203-1, Section I, Cover Sheet/supplemental information

Although this section lists items to be included on the cover sheet, it does not require a specified form Lack of a standard form will create a great deal of variance which will be undesirable from a review/control standpoint.

## 13. FAR 15 203-3, Section III, Financial and Administrative Information

This section should clearly state that it includes negotiated or unique contract clauses. It is unclear where these clauses would go otherwise

## 14. FAR 15.205(f), Amending the solicitation

Thus section allows the government to consider offers that depart from the solicitation requirements if $1 t$ is more advantageous to the government The agency must allow all offerors the chance to submit new or amended proposals if it can be done without revealing to other offeror the solution proposed by the offeror that caused the departure from the solicitation requirement The inference, then, is that if this cannot be done, the agency can award to the offeror even though the proposal does not meet the solicitation requirements. It is believed that this is not the intent of the language. The language should be revised to clearly state the intent.

15 FAR 15 207(b), Submission, modification, revision, and withdrawal of proposals
This section allows the government to accept late offers if in the best interest of the government This section should be deleted in its entirely and paragraphs (b) through (d) under the current 15.412 should be reinstated. This rewrite is likely to result in significant litigation. The standard of fairness that must be present in government contracting is higher than that required in commercial transactions. Protecting that fairness standard with respect to late proposals is worth more than the few occasions when we might be able to use an advantageous proposal which was late through the fault of the contractor. Allowing late proposals raises potential for perception of arbitrary, unfair treatment (e.g., why consider some late proposals and not others 7). Other problems arise such as later offeror obtaining proprietary information after proposal due date to obtain award. Integrity of the process is jeopardized with this change. With this provision, contractors will not take solicitation due dates seriously and we may see many proposals come in
late. Contractors will take extra time assuming the Government would accept the tr proposal since another proposal is always "in the Government's best interest." Also, the language "but may be considered if in the best interests of the government" is different from the proposed language in FAR 52.215-1(c)(3) which states "and shall be considered at the Source Selection Authority's discretion."
,

## 16. FAR 15 401, Definitions

The definition of "deficiency" refers to a "single" material failure. Clearly there can be more and it is not clear why the word "single" is included The word should be deleted. Further, there is no reference to the deficiency being in the proposal. The definition should be revised to read "is a failure of a proposal or proposed approach to met a material Government requirement or a flaw in a proposal or proposed approach that appreciably increases the risk of unsuccessful contract performance"

## 17. FAR 15.403, Responsibilities

Paragraph (a) states that the contracting officer is designated the source selection authonty (SSA) unless the agency head appoints another SSA Revise to "unless head of contracting activity appoints another SSA." As written, for major competitions where the Program Executive Officer (PEO) or Head of Contracting Activity is typically the SSA, NAVAIR would have to request SECNAV for approval for this designation. This is clearly not a streamlining approach, nor what was intended

## 18. FAR 15.404, Evaluation factors and subfactors

This section should be expanded to include a section relative to the lowest price technically acceptable process; specifically language that distinguishes between evaluation factors and subfactors, and the thresholds of technical acceptability as referenced in 15.101 (b)(1). 15.404(b)(2).

FAR 15.404(b)(2) states that the factors and subfactors should "support meaningful discrimination and comparison between and among competing proposals." The initial evaluation should be measuring and evaluating only against the criteria in the solicitation Proposals should only be measured against one another after this review has been performed at or very close to the decision point. The use of the word "comparison" here and elsewhere should be removed in order to discourage a practice where proposals are compared with one another before they are measured against the criteria

## 19 FAR 15.405(a), Proposal evaluation

Use of numerical weights in a competitive evaluation imbues the final decision making process with a sense of inevitability and mathematical certainty which it should not have. The selection is more often characterized by a complicated tradeoff between many shades of gray made by an experienced executive or manager. It is a complicated and multidimensional decision which is
over-simphfied by the use of numerical weights. It is strongly suggested that reference to numerical weights be deleted.

Last sentence states, "The evaluation method used by the agency need not be disclosed in the solicitation." This is contrary to the basic tenet of informing all potential offeror of the evaluation criteria. This sentence should be clanfied or deleted.

FAR $15.405(\mathrm{a})(3)(\mathrm{ii})$ - Delete the word "quantitative" for same reasons noted above for deleting numerical weights.

## 20 FAR 15 406(b), Competitive range

Allowing the contracting officer to limit the number of proposals in the competitive range for efficiency creates the opportunity for arbitrary cutoffs, unfair treatment of offerors, and opens the door to a myriad of possible protests. How does the contracting officer determine what is efficient" It would be difficult to justify that evaluating 5 proposals was efficient, but evaluating 6 was inefficient Offeror number 6 may be able to correct one deficiency during discussions that would bring it ahead of number 5. The government could actually be harmed by eliminating a potential source in this fashion. The language in subparagraph (b) and (c) should either be eliminated or greatly revised to ensure the integnty of the process.

## 21. FAR 15.407 (b), Communication With Offerors Prior to Establishment of The Competitive Range

This section is very ambiguous, contradictory, and has the potential to create the basis for many protests. It needs to be rewritten to better define and narrow the scope of communication This section states that the government may use information obtained during communication prior to establishment of the competitive range in proposal evaluation, yet these communications are not considered "discussions." In paragraph (2), it is stated that these communications "do not permit changes in an offeror's proposal other than correction of mistake," while (3) allows obtaining information to explain or resolve ambiguities or concerns to include "perceived deficiencies" This is clearly a contradiction. As these communications require confirmation in writing, what is the clanfication of a deficiency considered? Clearly it would be a change to the offeror's proposal and considered "discussions." There appears to be no real distinction as to what can be discussed prior to establishment of the competitive range or after. This section needs to be rewntten to make very clear what can and cannot be "communicated," as well as clanfy the types of mistakes that may be corrected
22. FAR 15.407(c), Communication with offeror after establishment of the competitive range

We should not rely upon any "agreement" reached during discussions until that "agreement" is put in writing amending or amplifying the proposal. Also, during discussions, "agreements" cannot be reached. The contractor may make a "commitment" but the government and the contractor cannot have an "agreement" at this stage in the competition.
23. FAR 15.407(d)(4), Improper discussions and communications

States that revealing names of individuals providing reference information about an offeror's past performance is improper. This language should also be added to FAR Part 33 to ensure that this information is not required to be disclosed in GAO protest proceedings except under protective orders.

## 24 FAR 15 409, Proposal Revisions

FAR 15.409(a) - Common cut-off dates should be mandatory in paragraph (a). Allowing the contracting officers to determine at which point award will be made without a required notification injects the possibility of unfair treatment and is ripe for abuse and protest Paragraph (c) states that the requests for proposal revisions should advise offeror that the government may make award without obtaining further revisions. This sentence should be deleted. The intent in rewriting this section was to avoid the "rounds of discussions" that some felt were necessary each time discussions were held with one offeror Under the current procedures, these "rounds of discussions" with all in the competitive range is not required We currently have the latitude to conduct discussions with one offeror one time and another multiple times At the conclusion of each discussion, the contractor would address the government's concerns and discussions would continue until all issues are addressed Once this has occurred, a best and final offer is requested from all offerors in the competitive range with a common cut-off date. This approach accomplishes the desired goal of eliminating multiple rounds with all offerors but keeps impartiality in the process by establishing a common cut-off date so that all are aware when this process is over. Without this date and notification to all offerors, the contracting officer can decide at any point when to make award while a contractor is preparing a proposal revision that may be more advantageous to the government.

FAR 15.409(b) - This section violates the basic tenet of fairness If an offeror is considered in the competitive range and after discussions can be eliminated from the range without being afforded an opportunity to submit a proposal revision, it prejudges that the offeror's revised proposal will be unacceptable. There is no basis for knowing what will actually appear in the proposal.

## 25 FAR 15 410, Source Selection

Delete the word "independently" in the second sentence This could be construed to mean that the SSA is required to perform the evaluation of the technical and cost proposals in addition to the evaluation performed by the evaluation team What is intended is that the SSA's decision is made independently after assessing all the information presented by the evaluation team.

FAR 15.410(b) - The last sentence states that specific tradeoffs need not be described in terms of cost/price impacts nor do the tradeoffs need to be quantified in any other manner" (the same language as used in 15.102 (b)(3)) See discussion under number 6 above
26. FAR 15.803(a), Preaward notices

Add a new subparagraph (3) as follows:
"(3) Preaward notices for SBA 8(a) Program set-asides. In SBA 8(a) Program set-asides (see Subpart 19-805-2), the notification requirement called out in the preceding subparagraph (2) is not required. The SBA is responsible for determining that an 8(a) offeror is eligible for award under the 8(a) Program when the award package/contract is forwarded to them for execution "

This new subparagraph is added to clarify that preaward notification requirements do not apply in the 8(a) Program. In the small business arena, the preaward notice is given as a means of allowing small businesses to police each other and notify the SBA if they think an apparent successful offeror no longer meets the SIC Code requirements for a small business set-aside award. In the 8(a) arena, the contracting agency must obtain a Notification of Eligibility from the SBA for the prospective awardee prior to award. The agency does this by contacting the SBA's 8(a) program office in the appropriate region The SBA then confirms the apparent successful offeror's status in the 8(a) Program. Accordingly, there is no need for policing by other 8(a) contractors; hence, the notification requirement is not necessary or required

## 27. FAR $15.803(\mathrm{~b})$, Postaward notices

The word "award" is mussing from the end of the first sentence.

## 28. FAR 15 806(d)(3), Postaward debriefing of offeror

Delete subparagraph entirely. This subparagraph states that the debriefing shall including the "overall ranking of all offerors. ." Providing this information serves no useful purpose. Industry deserves to know how it did and how it compares with the winner Providing insight into how the rest of the competitors fared adds no value and could create unneeded controversy and possible protest

29 FAR 52.215-1, Instructions to Offeror - Negotiated Acquisition
Paragraph (c)(3) - Late proposals, see comments in number 15 above.
Paragraph (f)(4) - The language on limiting competitive range for "efficiency" should be reconsidered See comments in number 20 above

Paragraph (f)(7) - The proposed language describing maternally unbalanced offers is very unclear The current FAR 15.814(b) language is more succinct.

Paragraph(f)(10)(ii) - Overall ranking of offerors, see discussion in number 28 above

U S Army Communications-Electronics Command<br>Technology Applications Office<br>ATTN AMSEL-TA-C - Technical Contracting Division<br>607 Lakeside Drive<br>Fort Richie, MD 21719-4075<br>4 November, 1996

General Services Administration
FAR Secretariat (MVRS)
$18^{\text {th }}$ \&F Streets, NW Room 4037
Washington, DC 20405

Subject FAR case 95-029
I am a Government Contracting Officer with nineteen years of experience in contracting I view the changes in contracting in the last few years with both enthusiasm and skepticism The ideas I see being tried are exciting and potentially rewarding I see support from the top, but very little interest at the worker level, many of whom have years of well rewarded experience in an environment where the contractor was most definitely "them " I cannot envision many embracing these changes happily

I have reviewed the FAR Part 15 rewrite and have the following comments
In general, I think the increased open communication and flexibility can improve the contracting process for the government and industry if contracting personnel buy into the ideas

The Multiphase acquisition technique at 15103 is useful, and I am glad to see it codified I have used this technique to great advantage with contracts with classified data Only those who were accepted in the first phase received the classified information which reduced the handling and retrieval of classified materials to a minimum As a rater of Army contracting civilians, I have noted this procedure being "invented" many times at many locations It is an idea whose time has definitely come

In 15 202(a)(1)(1) Requests for Proposals, I have some concern that the ability to modify the contract line item number (CLIN) structure may make comparisons of offers more difficult, although such a change may well indicate that someone doesn't really understand the requirement (either the contractor or the government)

Also in 15 202, my reaction to the receipt of facsimile proposals was that there is a lot of room for problems, but the clause at $52215-5$ clarifies my concerns Might it be appropriate to put the information regarding the consequences regarding failure or unavailability of equipment in section 15 as well?
Noun: Lw
$95-0 \times 9-23$
The model contract format in 15203 seems to cover the same information as the current contract format, and with the fewer sections, redundancy should be reduced (such as duplication of information in Sections $L$ and M) The consequent risk of conflicting information should also be reduced Will the format for Sealed Bids remain the same? It think it is better if the same format is used as far as possible It reduces confusion for both the government and industry

If forms are not required (15209), many agencres will prescribe their own forms I thought that part of the reason for the FAR system was to standardize contracting It seems to me that it would make more sense to have Standard rather than an Optional forms

I like the set 430 closing tıme for all RFPs, ( 15 207) but I see some potential for problems with it Not all government offices are open that late, proposals could be delivered to empty offices If the time is changed in a particular solicitation, I think a lot of contractors are not going to notice it and submit at 430 anyway, and create problems for themselves

I have experienced having to return proposals that arrived 10 minutes after closing because the person carrying the proposal had car trouble, got lost or ran into traffic I awarded a contract to a contractor who may well have lost because Federal Express did not follow through on their promise of delivery at a certain time to the three other offerors I think the ability to accept a late proposal is a very sensible idea But the decision of "best interest of the government" is very subjective I get the feeling that this produces a "no win" stiuation for the contracting officer - a protest whatever the decision

I hope these comments prove useful


Author: " chayim phillips" <chayim.phillips@nismc navy.mil> at internet
Date: 10/21/96 1:38 PM
Priority: Normal
Receipt Requested
TO: Shari Riser at GSA-CA
CC. tronic-sidney@hq.secnav.navy.mil at internet
CC. ellen.washington@nismc.navy.mil at internet

CC: raycenia.barnes@nismc.navy.mil at internet


CC: david.capizzianismc.navy.mil at internet
Subject: Comments on 15.203 in Proposed Rule - FAR Part 15 Rewrite Ph

$$
\text { NISMC } 02 \mathrm{BO} \text { S/N 96-18-04-36 }
$$

The Proposed Rule in FAR 15.203 contains a revised "Model contract format" While this command does not feel there is any compelling reason to change the format and cause a consequent disruption to the workload in contracting offices, this e-mail contains suggestions to improve the proposed "Model contract format". For your convenience, an extract of the relevant section in included at the end of this email.

These suggestions have been submitted by the
Contracting Directorate
Naval Information Systems Management Center
Bldg 176-4, Washington Navy Yard
Washington, D.C. 20374
Telephone Number: (202) 433-2796
e-mail address. chayim.phillipsenismc.navy mil

## 1. Proposed Section VI

Comment: To require that the FAR's certifications and representations be included in this section will make this section unnecessarily complicated, lengthy and confusing. The instructions to the offerors and the evaluation factors can in themselves be quite lengthy. , This is especially so in best value procurements. We do not understand the necessity to complicate matters further by including in this same section the FAR's certifications and representations and other contract reporting information from the offerors. In addition, most of the issues in the FAR's certifications and representations deal with responsibility issues which are pass/fail subjects described directly or indirectly in FAR Part 9.

Recommendation: Require that the certifications and representations be inserted into a separate and distinct section, egg., a new section VII.

## 2 Tailored Clauses

15 203-4 Section IV, Contract Clauses says that "This section includes all contract clauses not tailored specifically for the acquisition... If the contracting officer elects to include a clause in full text, the clause shall be treated as if it were tailored (egg, placed in the financial and administrative information section). The restrictions in 52.104 on use of standard clauses still apply."

Comment. This is unnecessarily complicated. Just because a clause is "tailored" does not appear to be a compelling reason to place a full text FAR clause in the financial and administrative information section, Clauses, whether FAR, DFARS or inserted specifically for a particular contract contain substantive information concerning the terms and conditions of a contract. To include them in a section titled "financial and administrative information", seems illogical.

Clauses that are inserted in full text as deviations to the FAR should still continue to be placed in section IV, To include them in a section
titled "financial and administrative information", seems illogical
We do not understand what is meant by the word "tailored". If the term "tailored" means those clauses that would be placed in section $H$ of the current FAR UCF, then the title of section IV should be changed to reflect what is really meant, $i$ e. Additional Contract Requirements and financial and Administrative Information

Recommendation: Delete the words "This section includes all contract clauses not tailored specifically for the acquisition... If the contracting officer elects to include a clause in full text, the clause shall be treated as if it were tailored (e.g., placed in the financial and administrative information section)."

Clauses
Comment: In might be helpful to simplify the placement of clauses by specifying that all FAR clauses be inserted in "15.203-4 section IV, Contract Clauses" The only exception to this will be solicitation provisions, the time of delivery clauses at FAR 52.211-8 and FAR 52.211-9 and the "anticipated contract type" clause. This would also be most useful in simplifying placing clauses in solicitations using the Department of Defense Standard Procurement System. The contract for this System is currently in its downselect phase

Recommendation: Specify that FAR and agency clauses be inserted in "15 203-4 Section IV, Contract Clauses"

EXTRACT

## 15203 Model contract format

(a) Contracting officers should prepare solicitations and contracts using the model contract format (MCF) outlined in Table 15-1 to the maximum extent practicable. The use of the MCF facilitates preparation of the solicitation and contract as well as reference to, and use of, those documents by offerors, contractors, and contract administrators. The MCF need not apply to the following acquisitions:
(1) Construction and Architect-engineer contracts (see fAR Part 36).
(2) Subsistence items.
(3) Supplies or services requiring special contract formats prescribed elsewhere in this regulation that are inconsistent with the MF.
(4) Letter Request for Proposals (see $15203(\mathrm{e})$ ).
(5) Contracts exempted by the agency head or designee.

Table 15-1A--Model Contract Format


Sec. 15.203-1 Section I, Cover sheet/supplemental information
The solicitation cover sheet summarizes essential details about the solicitation. The cover sheet is the first page of the solicitation. The cover sheet shall include, as a minimum, the following information*
(a) Brief description of the acquisition.
(b) Whether or not the acquisition is restricted to small business
(c) Name, address and location of issuing activity, including room and building where proposals must be submitted.
(d) Solicitation number.
(e) Date of issuance.
(f) Closing date and time
(g) Number of pages.
(h) A Government point of contact and telephone number.
(1) Government designated period for acceptance of offers (in days).

Sec. 15.203-2 Section II, Acquisition Description.
This section includes a summary description of the supplies and/or services, and anticipated contract type, e.g., quantities, prices, item number, national stock number/part number, title or name identifying the supplies or services, and options.

Sec. 815.203-3 Section III, Financial and Administrative Information.
This section includes any required accounting and appropriation data and information affecting payment and contract administration, e.g., the small business subcontracting plan, tailored instructions and/or special tailored requirements for property management, packaging, packing, preservation, marking, inspection, acceptance, or quality assurance.
15.203-4 Section IV, Contract Clauses,

This section includes all contract clauses not tailored specifically for the acquisition that are incorporated by reference (i.e., all standard clauses incorporated by reference, including those with minimal fill-ins) or are not tailored but are required to be inserted in full text. The text of clauses incorporated by reference shall be available through the Internet or from the contracting officer. If the contracting officer elects to include a clause in full text, the clause shall be treated as if it were tailored (e.g., placed in the financial and administrative information section). The restrictions in 52.104 on use of standard clauses still apply.
15.203-5 Section V, Performance Requirements,

This section includes more detailed information as to what and when the contractor is to deliver, egg., the statement of work or its equivalent, process requirements, data requirements or special requirements for time and place of delivery.

### 15.203-6 Section VI, Proposal Evaluation and Submission Information.

(a) This section includes information on how the Government will evaluate the proposal and what the proposal must include, e.g., representations and certifications, instructions to offerors, and evaluation criteria.
(b) Upon award, the contracting officer shall not include section VI in any resultant contract but shall retain it in the contract file.

Author: " chayim phillips" [chayim.phillips@nismc.navy.mil](mailto:chayim.phillips@nismc.navy.mil) at internet
Date: $10 / 21 / 96$ 1:43 PM
Priority: Normal
Receipt Requested
To. Shari Riser at GSA -CA
CC: tronic-sidney@hq.secnav.navy.mil at internet
CC: ellen.washingtongenismc.navy.mil at internet
CC: raycenia.barnesenismc.navy.mil at internet
CC: david.capizzimismc.navy.mil at internet
Subject: Comment on 15401 under Proposed Rule - FAR Part 15 Rewrite

NISMC 02 BO $\mathrm{S} / \mathrm{N}$ 96-18-04-36

In the Proposed Rule, FAR 15.401 defines "deficiency" as ".. a single material failure to meet a Government requirement..."

Comment: We do not understand the meaning of the word "requirement" in this context. As simple dictionary definition would lead us to understand that it means the same as a minimum mandatory specification or term and condition. Minimum mandatory in this context means the same as Lowest Priced Technically Acceptable Process in FAR 15.101 of the Proposed Rule.

In that case, its appears that GAO case law is being overturned. GAO requires that in best value procurements, "weaknesses" be discussed.

Recommendation:
If you do not mean to overturn GAO case law, then we suggest that you either:
(1) Use a different word other than "requirement". For instance the phrase "evaluation standard" could be used.
(2) Provide, when the final or interim rule is issued, an explanation which could appear in the case summary or explanation section preceding the text of the actual FAR language changes, that would say that the use of the word "requirement" does not mean to overturn GAO case law.

If you mean to overturn GAO case law, then we suggest that you provide, when the final or interim rule is issued, an explanation which could appear in the case summary or explanation section preceding the text of the actual $F A R$ language changes

These suggestions have been submitted by the:
Contracting Directorate
Naval Information Systems Management Center
Bldg 176-4, Washington Navy Yard
Washington, D.C. 20374
Telephone Number
e-mail address:
(202) 433-2796
chayim.phillips@nisme.navy,mil

Author:* Shari Kiser at GSA-V
Date: 11/13/96 10:58 AM
Priority: Noṛmal
TO: Bruce Morris
TO: Paul Fontaine
TO: Larhonda Rrby
Subject: FAR 15 Rewrite - Phase I

La, here's another one for the coment folder.
Forward Header
Subject: FAR 15 Rewrite - Phase I
Author: "mark comstock" [mcomstock-ibr878001@ibr8gw8o.usbr.gov](mailto:mcomstock-ibr878001@ibr8gw8o.usbr.gov) at internet
Date: $11 / 13 / 967110 \mathrm{AM}$

Shart:
I have included Reclamation's comments below. They are in WordPerfect 6.1. If you can't read them, I will attempt to reformat.

Thanks Mark
TO: Shari Kiser
From: Bureau of Reclamation
Subject: Comments on Proposed Revision to FAR
Part 15 Rewrite - Phase I

1. FAR 1.102 Performance standards

In paragraph (c) (3), we suggest the last sentence be deleted as it does not appear to serve any purpose.
2. FAR 15.203 Model Contract Format

One problem with the Model Contract Format (MCF) is that Section VI combines the Representations and Certifications with instructions to offerors and the evaluation criteria. The problem with this is that the Reps and Certs contain provisions requixing the offeror to fill in information while the remaining parts of Section VI do not. These Reps and Certs are the only provisions required to be returned along with the proposal. The Co usually separates what is now section $K$ from the rest of the offeror\#s proposal and deals with it separately, If there has to be a model contract format, we would suggest a separate section for the Reps and Certs.
3. FAR 15.207 Submission, modification, revision, and withdrawal of proposals

Paragraph (b) states that \#late\# proposals, modifications, and revisions (PMR\#s) \#may be considered if doing so is in the best interests of the Government.\# It would appear that the \#date for receipt of proposals\# is effectively eliminated and it becomes the \#date after which proposals may be considered at the Government\#s discretion.\# This could be a hardship on the co as well as the technical evaluation committee.

Whe Co has little iden if the PMR\#s are in the best interests of the government absent an evaluation by the technical cominttee. Protests could occur if some PMR\#s are not evaluated when others are. At what point in the process do Co\#s state that they will not entertain any more PMR\#s?
It would seem that sooner or later the co has to establish a cut-off date. That cut-off date might as well be the \#date for recelpt of proposals.\#
4. FAR 15.208 Solicitation provisions and contract clause

It seems contrary to be talking about negotiated acquisition when the provision at FAR 52.215-1, Instructions to offerors - Competitive Acquisition, is set up primarily to award without discussion and secondarily (ALT I) to conduct discussions. This is emphasized by the definition of \#negotiation\# in the current FAR 15.101, Definitions, which states that \#\#Negotiation\# means contracting through the use of either competitive or other-than competitive proposals and discussions.\# The secondary definition was \#any contract awarded without using sealed bid procedures is a negotiated contract.\# This definition would tend to imply that \#discussions\# were usually an integral part of \#negotiation.\#

## 5. FAR 15.405 Proposal evaluation

Paragraph (a) (4) states that cost information may be provided to the members of the technical evaluation team if the SSA concurs. Providing cost data to this group prior to their completing the technical evaluation could influence the final ranking of the technical proposals, thereby corrupting the integrity of the entire process. If this is allowable under the rules, the pressure on the co from the technical committee to release cost data will be very great with the co not being able to fall back on any hard and fast regulation as to why he can\#t let them see the cost data. This then causes friction and a breakdown in the working relationship between the $C O$ and the technical evaluators. The co could easily be accused of not being service oriented and not wanting to work with the evaluators toward a common goal.
6. Far 15.407 Comanications with Offerors

Paragraph (b) (2) is confusing. We are not sure of the exact definition of a \#mistake\#, Paragraph (b) states that \#communications may provide context to the proposal in that it allows the Government to understand the offeror\#s intent.\# Does this mean only verbal context? If so, can verbal communications with offerors be used in determining the competitive range? If this means written communication, is this a definition of a mistake?

Paragraph (b) (3) uses the terms \#perceived errors, percelved omissions, or perceived deficiencies.\# Is the \#information\# obtained verbal or written? If written, are these then also definitions of \#mistakes?\#

Paragraph (a) states that \#The contracting officer may establish a common cut off date for recelpt of proposal revisions. ${ }^{\#}$ This cut off date becomes meaningless if the co can entertain any late revisions. It also could put a strain on the evaluation committees if late revisions from high ranking offerors require the comittees to reconvene when they thought thoy were through with the evaluations of the proposal revisions. If the co accepts one late revision for review then it would be very hard not to accept all late revisions for review. If all evaluations have been made of cost and price factors and a contractor has been selected, the entire ovaluation of cost and technical would have to be conducted again if an offeror was to send in a last minute pricing change that greatly affected his standing in the competitive range. There is never any closure until the time that the pre-award notices are issued.

In addition, CO\#s would have too much discretion by enforcing the rules in some cases and relaxing them in other cases. With no hard and fast rules as to what the \#actual real\# cut off dates are, mixed messages will be sent to offerors who on one acquisition are allowed to submit late proposals while on another for similar items are not. The rules of the game should remain somewhat rigid so that all players know them. We also need to minimize the opportunity for the government to be accused of being arbitrary and capricious.

Also, undue pressure from the technical committee for the CO not to accept late proposals or revisions from those offerors they would rather not award to while accepting those they would like to award to will be very great, again creating an area where the co could be accused of being arbitrary and capricious.
8. FAR 15.801 Definition

The definition of a \#day\# is extremely convoluted. Why not Just say \#Any calendar day exclusive of Saturdays, Sundays, and legal holidays.\# There is a question as to whether \#legal holidays\# really means \#federal holidays\# as some states have their own \#legal holidays.\#
9. FAR 52.215-1 Instructions to Offerors-Negotiated Acquisition

Paragraph (a) (1): Should not the definition be for the word \#day\# or \#days\# and not the word \#time\#. The definition should be the same as used in FAR 15.801 .

The point of contact for this matter is Mark C. Comstock at (303) 236-8040, extension 234.

Department of Energy
Washington, DC 20585

November 6, 1996

General Services Administration<br>FAR Secretariat (MVRS)<br>18th \& F Streets, N W , Rm 4037<br>Washington, DC 20405<br>Dear FAR Secretariat

This is in reference to the proposed rulemaking published in the Federal Register on September 12, 1996, (61 FR 48380) to implement Phase I of the Federal Acquisition Regulation (FAR) Part 15 rewnte initiative The Department of Energy strongly supports the proposed changes contained in the rulemaking, and applauds the efforts of the ad hoc Interagency Team responsible for its development We are pleased to note that the rule proposes the elimination of many obsolete and non-value added pohcies and procedures, while introducing innovative, common sense approaches to the process of competitive source selection We firmly believe that implementation of the proposed changes will facilitate significant resource savings for both industry and the Government by establishing a "best-ın-class" business perspective for Federal procurement

It is recognized that many of the concepts advanced by the proposed rule may be considered radical in that they represent a dramatic shift in the way in which the Government and industry will conduct business in the future However, we can no longer afford to operate within the traditional process-oriented, bureaucratic framework which constrains our ability to acquire goods and services in the most timely and efficient manner practicable The realities of reduced budgets and a significantly downsized acquisition workforce mandate that the Government adopt a more results-oriented, commercial-style approach to acquisition The proposed rule successfully embodies this approach by embracing several commercially-oriented business practices, including the use of such techniques as oral presentations, multı-phase proposals and the comparative evaluation of offers

The rule contains other notable reforms which will empower agencies and the private sector to achieve critical time and resource savings for negotiated acquisitions For example, the coverage authorizing and encouraging more open communications throughout the source selection process, and the elimination of non-value added process requirements associated with the conduct of discussions will enable the Government to more fully understand each offerors proposal This, in turn, will facilitate more timely evaluations of offers and greater objectivity in making best value determinations In addition, the authonties which provide the contracting officer with more flexibility and discretion in making competitive range determinations will discourage, if not eliminate, the longstanding practice of including firms in the competitive range whose proposals, while acceptable, clearly are not likely to receive the award While all proposals will be objectively evaluated based upon the criteria set forth in the solicitation, this coverage will enable
agencies to focus their resources on those proposals which are determined to have the greatest likelihood for award, while permitting companies that are not likely to receive the award to free their valuable resources to pursue other business opportunities Accordingly, use of these authorities will promote greater discipline and efficiency in the competitive source selection process by encouraging offerors to provide their "best offer" in their initial proposal

The innovative reforms developed under Phase I of the FAR Part 15 rewrite effort will effect a much overdue fundamental change to the current, process-driven approach of conducting competitive negotrated acquisitions, an approach which has proven to be far too inefficient and costly to be sustaned in today's budgetary environment These reforms offer new opportunities and benefits for both the Government and industry, while ensuring fairness, impartiality and integrity in the Federal procurement system

We look forward to the expeditious promulgation of the final rule implementing the reforms proposed under Phase I of the FAR Part 15 rewrite effort, and pledge our continued support through Phase II of this important initiative

Suncerely,


Richard H Hoppf
Deputy Assıstant Secretary for Procurement and Assistance Management

Atlanta Administrative Service Center
Richard B Russell Federal Building
75 Spring Street, SW
Atlanta, Georgia 30303-3388

November 8, 1996

MEMORANDUM FOR: General Services Administration, FAR Secretariat (MVRS)


SUBJECT: Proposed rule revising FAR Part 15

This memorandum provides comments regarding a review of the subject proposed rule published September 12, 1996, in the Federal Register. The proposed rule involves many major changes in contracting by negotiation. This memorandum only provides those comments that take exception to the particular proposed change. The specific FAR subpart is provided with each comment.

### 15.103 Multiphase acquisition technique

The reason this technique is being introduced is to provide an alternate method "when full proposals at the beginning of a source selection would be burdensome for offeror to prepare and for Government personnel to evaluate." However, our evaluation of this method is that it seems to be more burdensome and time consuming, especially on Government personnel, than receiving full proposals.

The description of the first phase notice states, "In the first phase, the Government shall publish a notice that provides a general description of the scope or purpose of the acquisition, identifies the criteria that will be used to make the initial down-select decision, and solicits responses. Alternatively, the Government may issue a solicitation that provides a more specific description of the supplies or services to be procured. The notice or solicitation may also inform offeror of the evaluation criteria or process that will be used in subsequent down-select decisions. The notice or solicitation shall contain sufficient information to allow potential offeror to make an informed decision about whether to participate in the acquisition. The notice or solicitation shall advise offeror that failure to participate in the first phase will make them ineligible to participate in subsequent phases."


Now 13


The available options noted above may appear to provide latitude to the Government, but, after some thought, may not provide any latitude whatsoever, but rather cause lost time and effort. And even worse, this procedure may actually limit competition. For instance, the option of issuing only a notice rather than a full solicitation seems to provide a much relaxed requirement. When compared to the alternative of issuing the full solicitation, that provides a more specific description of the supplies or services to be procured, the concern of subsequent protests ls raised in instances where a decision is made to issue only a notice. The protestors would assert that they would have participated if the notice had provided a more specific description of the supplies or services to be procured. Of course, lack of participation in the first phase prevents further participation and eventual award. Competition in these instances would effectively be reduced. Conversely, this relaxed requirement may actually cause some offeror to participate initially who, after submitting initially, find they are not truly interested because of inadequate information provided in the notice that is provided in the subsequent phase. This would cause frustration in both the offeror and the Government because work done on the initial phase would then be useless.

The Government is given the option of providing in the initial notice or solicitation information regarding only the initial down-selection decision process. This appears to be counterproductive and we suggest that the initial notice or solicitation always provide all information that will be used in each selection decision in each phase. This action in our opinion will promote greater participation of offeror who will have the benefit of knowing the complete selection criteria upfront, at the time of deciding whether to participate.

The requirement to debrief offeror, prior to award, as required by 15.805 and 15.806 only when they have been formally excluded from the competition is viewed as premature. We suggest that only after award has been made that any offeror be debriefed. This allows all offerors requesting a debriefing to be provided full information regarding their proposal and final award decision information.

### 15.104 Oral presentations.

The proposed rule states oral presentations are most effective when used to substitute for rather than augment written information. Also, the proposed rule states oral presentations may occur either before or after a competitive range is established.

In our opinion, oral presentations offer no advantage to either the offeror or the Government. On the contrary, oral presentations may only foster misunderstanding and confusion. Many other drawbacks are associated with oral presentations.

Oral presentations require all Government personnel associated with the procurement to be present to hear the presentation whereas if written information was required, the Government personnel could each read the material separately at times convenient to their schedules. Eventually, all information presented orally must be committed to writing which also produces more work for Government personnel, and the possibility of challenges later by the offeror, that the information did not include the entire presentation, or that the information put in writing did not accurately reflect the offeror's presentation. If the information was required in writing, the Government staff would be saved this double time and work (the oral presentation requires time to be heard and then requires time to be written for the file) and the possibility of subsequently being challenged.

Furthermore, it is possible that Government staff that could be biased toward a particular offeror, may hear and understand information provided by the oral presentation differently than other Government staff who hear the same presentation. This poses a real problem at the time the oral presentation is converted to writing. Had the information initially been required in writing from the offeror, this problem would have been averted.

The bottom line is oral presentations require MORE Government staff time than written presentations; oral presentations present opportunities for misunderstanding and confusion as opposed to written presentations.
15.201 Presolicitation exchanges with industry.

The language used under paragraph (c) in this subpart states, "Agencies are encouraged to promote early exchange of information about future acquisitions. An early exchange of information can efficiently and effectively identify and resolve concerns regarding the acquisition strategy, including proposed contract type, terms and condıtions and acquisition plannıng schedules; the feasibility of the requirement, including performance requirements,, statements of work and data requirements; the suitability of the proposal instructions and evaluation criteria; the availabillty of reference documents and information exchange approaches; and any other industry concerns or questions." Among the techniques provided to promote early exchange of information is included (4) one on one meetings with potential offerors. Paragraph (f) requires "If Government personnel discloses specific information about a proposed acquisition which is necessary for the preparation of proposals, that information shall be made available to the public as soon as possible, but no later than the next release of information, in order to avoid creating an unfair competitive advantage. Notwithstanding this requirement, a meeting of Government personnel with an offeror where such discussions are held regarding future acquisitions, some measure of competitive advantage is provided to that offeror regarding the future acquisition.

Therefore, we suggest that one on one meetings of this nature with potential offerors should not be allowed and all exchange of such information be provided in a public setting which has been advertised and all interested parties are given the opportunity to attend.

### 15.203 Model contract format

The proposed model contract format provides for six sections which apparently are viewed as an improvement over the present uniform contract format of thirteen sections. According to the minimal information presented in the descriptive subparts of 15.203-1 through 15.203-6, the proposed new sections will be broader and more inclusive and will not, in our opinion, foster an improved organization of solicitation or contract information. We believe the present format offers better definition, delineation and organization to facilitate faster retrieval of information than the proposed format.
15.207 Submission, modification, revision, and withdrawal of proposals.

The proposed rule allows the Government to receive and accept late proposals, "if doing so is in the best interests of the Government. Government mishandling or fault need not be established in order to accept a late offer. The contracting officer shall promptly notify any offeror if its proposal, modification,, or revision was received late and whether or not it will be considered, unless contract award is imminent and the notice prescribed in $15.803(b)$ would suffice."

We believe this proposed provision would be prejudicial to those offerors submitting timely proposals. Furthermore, the allowance of receipt of late offers, conditioned upon whether the offers are in the Government's best interest, opens the possibility of offerors disregard for submission of timely offers since the Government can always accept late offers that are in the Government's best interest. This presents a problem for the Government review of offers in a timely manner. With the addition of this provision, the Government will probably, in all likelihood, on ALL solicitations receive late offers that must be considered, at least to the point of whether the offer is in the Government's best interest, and in many cases that the offer is found to be in the Government's best interest, the offer must be entered into the evaluation process, that may have been substantially or completely finalized by the time the late offer is received.

We, therefore, believe, the proposed allowance of the Government's receipt and acceptance of late offers will not be overall advantageous to either offerors or the Government and should not be approved.

The proposed rule, paragraph (c), states, "Offeror may not revise proposals unless requested by the contracting officer." This instance, obviously, would happen if the contracting officer chose not to discuss the offer. This proposed change will not benefit either the offeror nor the Government. Since paragraph (d) allows proposals to be withdrawn at any time prior to award, upon identifying an error in an offer, an offeror would simply withdraw the offer because the offer could not be revised. In many instances, the Government may therefore lose the best proposal simply because the offer could not be revised.

### 15.404 Evaluation factors and subfactors.

A requirement for subfactors is item (2), Support meaningful discrimination and comparison between and among competing proposals.

Comparison of proposals to any criteria other than the established requirements necessary to carry out the contract terms appears to be unnecessary and disadvantageous to the Government and also to offerors. The technical factors and independent price estimate are established by the source selection authority, we assume, as minimum requirements for a contractor to be considered technically able to perform the contract requirements at a fair price. The present rating system compares offers to this set of criteria which results in the offers being ranked according to how well the offer demonstrates the offeror's ability to meet those standards. We find it unnecessary to compare offers "between and among competing proposals." Comparison of offers to other offers could theoretically result in a best ranked offer being technically unacceptable in regards to ability to successfully perform the contract terms and conditions, which bottom lines as being an exercise in futility.

### 15.406 Competitive range.

Paragraph (a) states, "The competitive range shall include proposals having the greatest likelihood of award based on the factors and subfactors in the solicitation."

This requirement appears to substantially restrict competition. Only those offerors having the greatest likelihood of receiving award will be included in the competitive range and those offers having any amount less than the greatest likelihood will be excluded from the competitive range.

Paragraph (b) states, "In planning an acquisition, the contracting officer may determine that the number of proposals that would otherwise be included in the competitive range is expected to exceed the number at which an efficient competition can be conducted." Several sources of information are provided that can be used in determining this particular number.

We believe establishing any particular number of offers to be included in the competitive range to be restricting competition and to be arbitrary. We further believe establishing such a number to be disadvantageous to the Government, since the action restricts competition, anything less than open and free competition is in our opinion not to the Government's advantage.

Paragraph (e) states those offerors excluded from the competitive range may request a debriefing. We believe it is in both the offeror's and the Government's best interest to provide unsuccessful offerors a debriefing only after award. Only after award can the debriefing include selection and award information to the offeror. Also, prior to award, the Government needs to devote all time to award of the contract as opposed to providing debriefing sessions to unsuccessful offerors.
15.407 Communications with offerors.

Paragraph (d), Improper discussions and communications, states, in subparagraph (3), "However, the contracting officer may inform an offeror that its price is considered by the Government to be too high or unrealistic, and the results of the analysis supporting that conclusion. It is also permissible to indicate to all offerors the cost or price that the Government's price analysis, market research, and other reviews have identified as reasonable..."

In our opinion, revealing the Government's independent price estimate is not advantageous to the Government in obtaining the most reasonable price offer. It is always possible that a prospective offeror may be able through some innovation to provide the goods or services at a substantially lower price than the Government independent price estimate. However, if the prospective offeror knows the amount of the Government price estimate, it is highly doubtful the offeror would ever propose a lower price. We, therefore, suggest removing this provision from the proposed rule.

## General Comments

The proposed rule apparently makes no mention of the Government request for best and final offers after discussions are concluded. It is not clear whether we may or may not continue to use this process. The procedure of requesting best and final offers has proven, in our opinion, in a majority of cases, to provide the Government with the lowest price offers. We believe, therefore, it will not be in the Government's best interest to remove the request for best and final offers from the competitive negotiation procurement process.

Author:. Shari Kıser at GSA-V
Date: 11/12/96 1:00 PM
Priority: Normal
TO: Bruce Morris
TO: Paul Fontaine
TO: LaRhonda Erby
Subject: FAR Case 95-029
Message Contents

La, another one for the comment file.
Forward Header
Subject: FAR Case 95-029
Author: chsolloway@aol.com at internet
Date: 11/10/96 10:10 PM

Forwarded message:
Subj: FAR Case 95-029
Date: 96-11-10 21:48:33 EST
From: ChSolloway
To: www.Arnet.gov.
Herewith are comments on the proposed new FAR Part 15 coverage. By way of introduction, I authored a textbook on best value procurement and have taught best value techiques to thousands of government acquasition personnel and to contractors, Government personnel included those from Army, Navy, Air Force, DoD,
Coast Guard, DOE, HHS, Justice, FAA, Agra., AID, and other agencies. The comments submitted take into account the problems and practices communicated to me by these students, as well as my 35 years of experience and training.

Comments are as follows:
a. If you make no other revision to the proposed FAR case, please change 15.100 and 15.101 and 15.102 (a) to remove any inference that the "Lowest price technically acceptable process" is a best value procurement. It is not possible for the SSA to
conclude under any circumstances that a low price acceptable proposal "is expected to result in the best value". It is possible, after receipt of offers, that the low price acceptable proposal turns out to be the best value , but - if it does - it is by a "happy accident" that cannot be forecasted by an SSA. We can only identify the best value after recelpt of proposals and by a comparison of the proposals received.

Infering that the "lowest price technically acceptable proposal process" is a best value technique will only further confuse industry and the government acquisition practicloners. Further, it will render many Comp Gen precedents of doubtful use.

Lastly, on this issue, there is no apparent benefit to be derived by identifying the low cost acceptable process as a best value process. Change for the sake of progress is good. Change for the sake of change 15 not. In the new FAR 15 most of the change is progressive and good. This change in the basic concept of best value is not.
b. 15.102 (3). This is an excellent change. Based on feed back frommy students
many procuring elements seem convinced - in spite of all the information to the contrary - that trade-offs must be quantified. Some even insist on the "scoring" of costs. These practices take away from the ability of the SSA to excercise rational business fudgement. Thank you for highlighting that "tradeoffs" do not have to be
"quantified",
c. Somewhere in 15.103 there should be coverage encouraging limits on the
size and contents of proposals and/or presentations. Expense to the contractor in preparing proposals and presentations and expense to the government in evaluations should be minmmued.
d. 15.103 should address four step procedure as a permissible "Multiphase acquisition technique". While four step may not save as much time and money as the multiphase techniques described, it can represent a savings over conventional "trade off" techniques.
e. 15-104 (b) (2) recommending adding the words "However, when circumstances dictate, oral presentations may include other areas of information as well". As now stated this subpart may be interpreted as limiting the use of orals. Instead, I believe we should empower acquisition personnel to make good business decisions based on particular circumstances.
f. 15.201(e) should require notification that the government does not intend to pay for information solicited or received, and that the government does not intend to be
obligated in any way for use of the information recelved.
g. $15.201(f)$ could be interpreted as permitting the release of advance procurement information to one or more sources without making such information available to all potential competitors at the same time. This may violate the Procurement Integrity Act. Further, I cannot conceive of a situation where advance procurement information to favored sources would not create "an unfair competitive advantage".
h. I see no advantage to cluttering the coverage in 15.202 with verbage about
negotiating CLIN structures. All procurement personnel are aware that anything not required by law or regulation is negotiable.

1. 15.202 (e) (7) Should include "Instructions to offerors should be designed to minimize the cost of competing while remaining consistent to the government's realistic informational needs. Evaluation factors should be limited to the meaningful discriminators between competing contractors. Except for matters required by law or regulation, instructions and evaluation factors should be tailored for each RFP and should reflect the unique circumstances of each RPP."
j. 15.401 should be changed to include a definition for "Weakness". That definition should be "A matter addressed in a contractor proposal or presentation that causes the proposal or presentation to be evaluated as inferior to any other proposals or presentations received".

Many agencies now instruct their personnel to discuss only "deficiencies" in proposals. This arose from two circumstances. One, the very poor wording of the
"technical leveling" definition in the FAR. The other, inconsistent use of the terms "deficiency" and "weakness" in Comp Gen opinions.

As a consequence, contractor that has "weaknesses" but no "deficiencies" is often not able to improve its proposal during the discussion phase. Discussions, in such cases were a meaningless charade.

Some Comp Gen opinions properly indicate that in order to have "meaningful discusssions" that deficiencies, weaknesses, questioned costs and excesses must be discussed.

If you include only a definition for "Deficiency" and not for "Weakness" you may inadvertently perpetuate the myth that weaknesses need not be discussed. This would be a shame, especially after the great job in doing away with the archaic definition of technical leveling and including the new description of "coaching".

We should be encouraging moxe communication with contractors after proposals/presentations. Inlcuding only a definition of "Deficiency" could encourage less comunication.
k, 15.401 Recommend changing the definition of "Deficiency" to read, "A flaw in a proposal submitted by a competing contractor that would render the proposal unacceptable to the government unless corrected." This is more along the lines of the traditional definition of "deficiency "as understood by most practicioners and it is a lot easier to understand than the definition being offered.

1. 15.403. It would be very difficult for some agencies to go to the agency head everytime they wish to make the SSA someone other than the contracting officer.
Suggest you change "the agency head" to "acquisition officials designated by the agency head".
m. 15.403 (b) (1) Should be changed to add, "Evaluation teams should be realistically limited in number. Using more evaluators than necessary can increase expense and impede communications to the SSA and any advisors of the SSA." As it now stands many evaluation boards have more extras than "Quo Vadis".

ת. $15.403(\mathrm{~b})(4)$ should be changed to read "Consistent with the evaluation criteria and the application of rational judgement, select the source or sources offering the best value to the Government."

Although the SSA should have very wide discretion, we should make lt clear that decisions must always meet the tests of "rationality and consistency".
0. 15,405(a). Suggest a more common word than "ordinal".
p. 15-405 (a) (1). While it is true that agencies do use (and should use) cost realism analysis to ascertain "probable costs" in cost reimbursement procurements, they also use cost realism analysis to demonstrate the contractors understanding of the work. In the latter case they sometimes apply this technique in FFP and FFP w/EPA. Why take away this flexibility? Empowerment is the name of the game.
q. $15.405(2)$ (iii) re: neutralizing past performance. This is one of the "best practices"
described in the orPP guide on past performance. However, $I$ have yet to meet anyone who had a realistic method of doing this. If you know how to score all other
contractors and reward them for good past performance without penalizing one or more contractors who are unscored on past performance, please include it in the FAR, I see nothing wrong with good past performers getting higher grades than the new kids on the block. The Comp Gen has consistently ruled that an advantage earned by incumbency is not an unfair advantage. I think that approach should be followed here.
r. $15.407(c)$. Please include discussion of "weaknesses" as well as "deficiencies" in order to foster broader, more open, and more meaningful communication. (See earlier comments on this matter.)
s. 15.407 (d) (1). Hooray for doing away with the poor definntion of technical leveling, the misinterpretation of which impeded communications with contractors. Please
further clarify the situation by encouraging discussions of weaknesses as well as deficiencies.
t. Despite the misuse of the BAFO, it sure makes things a lot less messy when there is a common cut-off date for receipt of any amendments. This is especially true when there have been sequential rounds of face-to-face discussions.

I hope these coments wall be of some help to you. I think a lot of your proposed coverage is great. For example:

The coverage on oral presentations. Especially, where you encourage (but do not prohibit) duplication of oral and written material. The contracting officer should have the broadest range of choices.

Encouraging more and earlier commaication between the government and coñtractors that have submitted proposals.

Multiphasing
Making clear that precise quantification $1 s$ not required in source selection.
And a host of other good things.
Thanks.

11 November, 1996

General Services Administration
FAR Secretariat (MVRS)
Room 4037
18th and F Streets, NW
Washington, DC 20405

Reference FAR Case 95-029

Dear Sir or Madame
COMDISCO Healthcare Group, Inc (CHG) hereby tenders the attached comments regarding proposed changes to the Federal Acquisition Regulations (FAR) pursuant to the call for such comments published in the Federal Register and a thorough review of the proposed changes by our corporation

In general, CHG strongly supports the spirit and intent of the proposed changes, specifically, the manifest trend by the federal government to adopt the "best commercial practices" where appropriate We are convinced that this direction will greatly enhance the federal government's ability to acquire high quality commercial goods and services in a streamlined and cost-effective manner

We applaud the adoption of "best value" as a basis for contract award We suggest that for too long, the axiom that the federal government always buys from the lowest bidder has discouraged acquisition excellence Within the vendor community, the mantra "bid to win, manage to profit" captures the essence of all that is wrong with the traditional "low cost wins" approach to competition and contract award Typically, the commercial sector favors the use of "best overall value" in lieu of "low cost" as the basis for negotiations and contract award

The general simplification of the federal procurement process and emphasis on improved communications is another important step in the right direction For too long, cumbersome bureaucratic barriers have skewed competitive procurements to those corporate entities with a dedicated federal government contracting section Such specialization was necessary to understand obscure (to the commercial sector) acquisition procedures, wade through voluminous requests for proposals, develop pricing models and prepare bids in a manner completely foreign to most commercial entities

CHG, like most companies, did not want to completely reengineer internal processes simply to gain access to the federal market We were fortunate, however, in that our corporate parent had previous federal government business experience CHG was able to tap that experience and expertise to negotiate the labyrinth of regulatory and procedural hurdles between us and our federal customer Other, smaller companies are typically not so fortunate

The result of this FAR improvement process should encourage competition and entice corporate entities who have avoided federal business due to the egregious bureaucracy and questionable award bases to enter this market

The National Performance Review, the Federal Acquisition Streamlining Act of 1994 and the Federal Acquisition Reform Act of 1995 have clearly made significant and measurable improvements in the way the federal government acquires commercial goods and services We applaud these efforts The proposed changes to the FAR which are the subject of this correspondence seem to make positive steps to implement these broader objectives

We caution the federal government, however, that this process is not yet complete The entrenched resistance to change in any large organization will slow the adoption of these new and improved approaches For that reason, we suggest that this process remain as visible as possible within the federal government and that all federal government personnel charged with acquiring commercial goods and services be thoroughly trained in the new paradigm for performance Executive-level oversight and carefully monitored implementation at the procurement activity-level will be necessary

The vendor community must also be educated in the implementation of these proposed changes Entrenched federal vendors must be persuaded that the new approaches to procurement actually improve the process Other, and especially small businesses, many of whom have eschewed federal business, will have to be swiftly folded into the mixture for these changes to have the desired effect There remains much work to be done and constant, candid communications will be the most effective tool to advance these improvements

Our comments regarding specific provisions of the proposed changes is attached for your review We stand ready to further illuminate our position in the event that additional discussions will facilitate this process

In the event that you have any questions, please call me at (800) 321-1111 or my Director of Federal Business Development (Mr Timothy Walsh) at (703) 312-7415 are grateful for this chance to comment on these important regulatory changes and thank you for your consideration

Michael C Myers
Vice President
COMDISCO Healthcare Group, Inc

## Enclosure

cc Dr Steven Kerman, Admınıstrator, OFPP
Mr Nathan Tash, Procurement Attorney, OFPP
Mrs Eleanor Spector, Director of Defense Procurement
Ms Deidre Lee, NASA Associate Admınıstrator for Procurement
Ms Ida Ustad, GSA Associate Administrator for Acquisition Policy

# Federal Acquisition Regulation Proposed Changes 

## Comments and Summary Recommendations

## FAR Part 2.101

The best value definition will become statutory
While the Government retains the option of purchasing low cost technically compliant products, the shift in policy more closely resembles the best commercial practices where overall best value is typically the basis for award

COMDISCO strongly supports this change

## FAR Part 15.101

The Government feels that sometimes, the low cost technically compliant solution is the best value

In our view, low cost is only useful when the product is essentially a shrink-wrapped commercial off the shelf (COTS) product such as 1000 copies of Microsoft-Word, toasters for mess halls, boots, etc

Complex transactions involving advanced technologies, complex or bundled services, mission-critical acquisitions, items with extended life cycles, heterogeneous acquisitions (involving advanced technologies, services, engineering, configuration management, etc ) or advanced technologies are not well suited for a low cost award

COMDISCO respectfully suggests that additional guidance will need to be provided to contacting officers as to when this approach is acceptable

## FAR Part 15.102

Currently called the "tradeoff process"
COMDISCO suggests that this name be changed to "flexible process", as the word "tradeoff" has many negative connotations

Furthermore, COMDISCO strongly suggests and recommends that additional guidance be provided to contacting officers as to when this approach is acceptable

In our view, the flexible process is instrumental in obtaining quality products and services when involving advanced technologies, services, mission-critical acquisitions, items with extended life cycles or advanced technologies

The "flexible process" should be encouraged to be the primary basis for award in the strongest possible terms This award basis should be the "norm"

## FAR Part 15.201

The Government wants to open up the presolicitation exchange of information between Government and industry

Communications are the key to us understanding our customer and them understanding what their options in the market are Typically, Government procurements are flawed by a dearth of technical communications resulting in unfulfilled expectations and frustration on both sides

The Government must thoroughly understand how and why the commercial sector approaches challenges similar to those the federal acquisition is meant to address

COMDISCO supports this change

## FAR Part 15.404

The Government addresses quality-related non-cost evaluation factors, indicating that they must be considered in each source selection process Several are identified but they are not ranked

The methedology and standards of excellence and performance in the commercial sector should be thoroughly investigated and evaluated by the Government as an integral element of this proposed change for all acquisitions involving complex technologies, services, or any combination thereof

COMDISCO suggests that the following rank order (from most important to least important) be implemented to provide additional guidance to contracting officers and source selection activities

1 Technical excellence,
2 Management capability,
3 Personnel,
4 Prior expenence and
5 Past performance

## FAR Part 15.406

Contracting officers will be given greater latitude to limit the competitive range in the interest of procurement efficiency The competitive range will not be set until proposals have been technically evaluated Only the "most highly rated proposals" will be eligible for the competitive range cut

This implies that the contracting officer has a detailed and comprehensive knowledge of the product/service being acquired as well as the best commercial practices of the industry in question This, however, is not always the case

COMDISCO suggests that the critena for determining the "most highly rated" proposals be clarified Also, we suggest that additional guidance be provided to contracting officers detailing their requirement to conduct a complete technical evaluation prior to establishing the competitive range

FAR Part 15.407
Subsection (d) 1 seems to indicate that minor proposal discrepancies could not be communicated to the vendor allowing the submission of clarifications

This clause, while correct in eliminating "coaching" and other improper activities, runs counter to the desire of Government to communicate with vendors freely and responsibly This clause will be the source of many bid protests and much aggravation and severely limits the ability of the Government to negotiate with prospective vendors

COMDISCO suggests that this clause be eliminated from the proposed changes as it is completely contrary to the best commercial practices of full and open communications between the vendor and the customer

## The Deputy Secretary of Energy

Washington, DC 20585

November 13, 1996

## General Services Administration

FAR Secretariat (MVRS)
18th \& F Streets, N W , Rm 4037
Washington, D C 20405
Dear FAR Secretarnat

The purpose of this letter is to offer the Department of Energy's endorsement of the proposed rule published in the Federal Register on September 12, 1996, to implement changes to Part 15 of the Federal Acquisition Regulation More specifically, the Department strongly supports the innovative reforms contained in the proposed rule for conducting competitive negotiated acquisitions Such reforms include the ability to tailor the competitive range to those offerors having the greatest likelihood of receiving the award, the use of multi-phased proposals and oral presentations, and the authorities that will permit more open communications with industry throughout the source selection process

Over the past several years the Department of Energy has aggressively implemented numerous acquisition reforms that have streamlined processes, reduced administrative burdens and overhead costs, increased emphasis on measurable results, and empowered procurement professionals at the operational level The Department has also actively supported changes in the Governmentwide acquisition system, including the Federal Acquisition Streamlining Act of 1994 and the ClingerCohen Act of 1996 Accordingly, we are very interested in the Federal Acquisition Regulatory Councll's effort to improve purchasing processes through regulatory reform

The Department served on the membership of the ad hoc Interagency Team tasked under the Federal Acquisition Regulation Part 15 rewrite initiative with reinventing the way in which the Federal Government conducts competitive negotiated acquisitions We regard this inttrative as a valuable opportunity to make the acquisition system more efficient and to significantly reduce industries' costs of participating in Federal procurement programs I fully endorse the enclosed position of the Department's Procurement Executive which supports the innovative policies set forth in the proposed rule developed under Phase I of the aforementioned initative


Charles B Curtis

Enclosure

General Services Administration
FAR Secretanat (MVRS)
18th \& F Streets, NW , Rm 4037
Washington, DC 20405

## Dear FAR Secretariat

This is in reference to the proposed rulemaking published in the Federal Register on September 12 1996, (61 FR 48380) to implement Phase I of the Federal Acquisition Regulation (FAR) Part 15 rewrite initiative The Department of Energy strongly supports the proposed changes contained in the rulemaking, and applauds the efforts of the ad hoc Interagency Team responsible for its development We are pleased to note that the rule proposes the elimination of many obsolete and non-value added policies and procedures, while introducing innovative, common sense approaches to the process of competitive source selection We firmly believe that implementation of the proposed changes will facilitate significant resource savings for both industry and the Government by establishing a "best-in-class" business perspective for Federal procurement

It is recognized that many of the concepts advanced by the proposed rule may be considered radical in that they represent a dramatic shift in the way in which the Government and industry will conduct business in the future However, we can no longer afford to operate within the traditional process-onented, bureaucratic framework which constrains our ability to acquire goods and services in the most timely and efficient manner practicable The realities of reduced budgets and a significantly downsized acquisition workforce mandate that the Government adopt a more results-oriented, commercial-style approach to acquisition The proposed rule successfully embodies this approach by embracing several commercially-onented business practices, including the use of such techniques as oral presentations, multı-phase proposals and the comparative evaluation of offers

The rule contains other notable reforms which will empower agencies and the private sector to achieve critical time and resource savings for negotiated acquisitions For example, the coverage authonzing and encouraging more open communications throughout the source selection process, and the elimination of non-value added process requirements associated with the conduct of discussions will enable the Government to more fully understand each offeror proposal This, in turn, will facilitate more timely evaluations of offers and greater objectivity in making best value determinations In addition, the authonties which provide the contracting officer with more flexibility and discretion in making competitive range determinations will discourage, if not eliminate, the longstanding practice of including firms in the competitive range whose proposals, while acceptable, clearly are not likely to receive the award While all proposals will be objectively evaluated based upon the criteria set forth in the solicitation, this coverage will enable
agencies to focus their resources on those proposals which are determined to have the greatest likelihood for award, while permitting companies that are not likely to receive the award to free their valuable resources to pursue other business opportunities Accordingly, use of these authorities will promote greater discipline and efficiency in the competitive source selection process by encouraging offerors to provide their "best offer" in their initial proposal

The innovative reforms developed under Phase I of the FAR Part 15 rewrite effort will effect a much overdue fundamental change to the current, process-driven approach of conducting competitive negotiated acquisitions, an approach which has proven to be far too inefficient and costly to be sustained in today's budgetary environment These reforms offer new opportunities and benefits for both the Government and industry, while ensuring fairness, impartiality and integnty in the Federal procurement system

We look forward to the expeditious promulgation of the final rule implementing the reforms proposed under Phase I of the FAR Part 15 rewrite effort, and pledge our continued support through Phase II of this important initiative

Sincerely,


Richard H Hopi
Deputy Assistant Secretary for
Procurement and Assistance Management
in reply refer to
4200
OR: 0285/DPC
Ser: 02B/538
14 NOV 1996

From: Commander, Naval Sea Systems Command (SEA 02)
To: General Services Administration, FAR Secretariat (MVRS), 18th \& F Streets, NW, Room 4037 Washington, DC 20405

Subj: FAR CASE 95-029
Ref: (a) RD\&A ABM-PP memo of 30 Sep 1996
Encl: (1) NAVSEA FAR Case 95-029 Rewrite Suggestions

1. Reference (a) requested recommended changes and comments relative to a proposed FAR Part 15 rewrite as published in the Federal Register. Our suggestions are attached as enclosure (1).
2. The NAVSEA point of contact is Sharon Ellis. SEA 028311, (703) 602-1427 x 287.


PAUL P. BUONACCORSI
Assistant Deputy Commander for Contracts

Copy to:
RD\&A ABM-PP
SEA 028

- Far 15.103(d):

Background: This section defines "advisory down-selects" and identifies that they cannot be formally excluded from a competition because no binding offer was requested from the Government. Therefore, they are not entitled to a offeror's debrief. Conversely, the supporting rationale for exclusion from the competitive range is required to be disclosed to the prospective offeror.

Recommendation: Modify $15.103(d)(2)(111)$ section to include:
"An advisory down-select may request a debrief after contract award. The debrief would be conducted in accordance with FAR 15.806."

Modify $15.103(d)(2)(11)$ to include:
"Supporting rationale provided to Justify advisory downselect should be limited to the criteria specified in 15.407(b) (3)."

Discussion: Without the first modification, the down-select cannot benefit from the expertise of the review process and learn from the mistakes that placed the company at a competitive disadvantage. By waiting until after contract award, a down-select cannot use information gained in a debrief to reenter the contracting process of that specific procurement as allowed in 15.103.(d) (2) (II).

The second modification provides the contracting officer with a baseline to differentiate between a debrief and supporting rationale for a down-select. This will help standardize the information divulged to prospective offerors who will be eliminated from the competitive range.

## - EAR 15.201 (f)

Background: This section discusses presolicitation exchanges with industry.

Recommendation: Remove the second and third sentences and replace with "It is the contracting officer's responsibility to ensure that information disclosed to a single offeror through any exchange medium described in 15.201 (c) is made available to all offerors, thus ensuring no one offeror has an unfair competitive advantage."

Note: If this recommendation is accepted, the reference to $15.201(f)$ in $15.201(c)$ should be deleted.

Discussion: The second sentence discusses information that would affect the preparation of proposals. The final terms and conditions are not defined until the issuance of the solicitation and any offeror who begins preparation of a proposal before the solicitation is issued does so at their own risk. The single most important action of a contracting officer at this point in the process is the appearance of fairness in disseminating information to all offeror. The third sentence imparts some of the significance of this action but does not blanket all possible exchange mediums.

- FAR 15.807

Background: FAR 15.807 references FAR 33.1 for specific actions to be taken in the case of a protest against award and encourages use of agency ADR.

Recommendation: The rewrite committee further review protest procedures to incentivize use of ADR by the contractor as well as the Government. The use of the formal protest process should be discouraged until all other means of resolution have been exhausted.

Discussion: The formal protest method is burdensome and does not share risk with the contractor filing a protest. The contractor should be required to use ADR methods for resolution. In the event a formal protest is filed before ADR is attempted and if the protest is summarily dismissed without hearing, the contractor should be penalized for abuse of the protest system. This approach recognizes that $A D R$ is the primary means of dispute resolution and places a small measure of risk on the contractor for falling to use ADR as the primary method of resolution.

- FAR 52.215-1

Background: The clause and its alternate provide instructions to offeror in a negotiated acquisition. The primary clause is used for negotiation where no discussions or Best and Finals Offers are anticipated. The alternate is used when discussions and Best and Final Offers are expected.

Recommendation: Add to the clause a subtitle delineating its primary purpose:

Primary: Award without Discussions
Alternate: Award with Discussions

Discussion: The intent of the clause is burled 145 lines into the clause. Highlighting the intent an a subtitle clarifies the Government's position for the contractor.

General Services Administration
FAR Secretariat (MVRS)
18th and F Streets, NW
Room 4037
Washington, DC 20405
Dear FAR Secretariat
At the recent public meeting concerning the proposed rulemaking on the rewrite of Part 15 of the Federal Acquisition Regulation (FAR), Dr Steven Kelman, Administrator, Office of Federal Procurement Policy, asked that I provide you with several documents relevant to the FAR 15 rewnte effort Although both documents already may have been submitted under separate cover, we are nonetheless sending them to you to ensure that they are included in the official record

The first document provides information concerning the number of times that a contract was awarded by the Department of Energy to other than one of the three top rated firms The second document. which was prepared by the Department's management and operating contractor for the Sandra National Laboratory, presents the results of their recent efforts to streamline their source selection process

I hope that you will find the information useful in both developing the final coverage for FAR 15 and assessing the public comments Should you have questions on either of these documents, or wish to discuss them further, please contact Ed Simpson of my staff at 202-586-3168


Richard H Hopf
Deputy Assistant Secretary for
Procurement and Assistance Management

Attachments

The Honorable Steven Keiman<br>Administrator<br>Office of Federal Procurement Policy<br>725 17th Street, N.W<br>Washington, DC 20503

Dear Dr. Kelman:
You asked that we survey approximately 20 procurements over $\$ 5,000,000$ using formal source selection techniques to determine how often award was made to a firm which was not ranked among the three top firms. We surveyed 43 contracts that met your criteria.

Only once was a contract awarded to a firm other than one ranked in the top three. It is noteworthy that in that one instance, the evaluation board considered six firms to be essentially equal, and award was made based on price

If I can be of further assistance, please call, or have your staff contact Ed Lovett at 5868614
Sincerely,

cc Nathan Tosh, OFPP

Donald J. Larrichio
Manager, 10217

Albuquerque, NM 87185-0202
Phone (505) 845-8137 Fax: (505) 844-0613 internet djamiessandia gov

Office of Management and Budget
October 14, 1996


Office of Federal Procurement Policy
Administrator's Office
Old Executive Office Building, \#352
Washington, DC 20503
Attn: Steven Kelman, Ph.D.

## Gentlemen:

Subject: Federal Procurement Streamlining
Sandia National Laboratones has been monitoring the Federal Acquisition Regulatory Council's attempt to change the way federal agencies accomplish source selection.

Having recently gone through our own reassessment of how we select contractors, we though you might be interested in some of our analysis and conclusions.

As you know, Sandia is a DOE laboratory managed by Lockheed Martin Corporation. Until recently, we conducted our purchasing activities in concert with federal purchasing principles and processes. In 1995, however, as part of its procurement reform efforts, DOE radically changed our purchasing environment by eliminating the regulatory concept of the Federal Norm. In its place, we are now adhering to eight guiding principles and strive to adopt the best of commercial purchasing practices. To accomplish the latter, Sandia, in conjunction with other DOE-complex contractors and DOE Procurement, has engaged in extensive benchmarking of commercial practices, focusing on identifying the best in class. One of our areas of focus was the commercial equivalent of source selection.

The objective of our proposed source selection is to minimize cost, complexity, and cycle time. We feel that this objective cannot be achieved under the current federal source selection process, which is characterized by a mechanical-lıke approach.

The results of our benchmarking activity are reflected in the enclosed, titled "Best Value Source Selection, Commercial-like Practice." Some of the concepts identified center around proposal evaluation methods, communication with contractors (which basically replaces competitive range, meaningful discussions, and BAFOs), and commercial competitive techniques.

If you are interested in discussing this further, please call me at (505) 845-8137.

Sincerely,


Donald J. Larrichio
Manager, 10217
Procurement Policies and Procedures SANDIA NATIONAL LABORATORIES

## DJL/jkr

Enclosure with all copies

1. "Best Value Source Selection Commercial-like Practices"

Copy to:
Richard H. Hopf
Deputy Assistant Secretary for Procurement and Assistance Management
Department of Energy, HR-5
1000 Independence Avenue, SW
Washungton, DC 20585
Mr. Charles Lielikis
Vice President, Central Procurement
Lockheed Martin Corporation
6801 Rockledge Drive
Bethesda, MD 20817


09/27/96
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& \text { This selection process represents commercial- } \\
& \text { like practices. Such practices place emphasis } \\
& \text { on achieving desired best-value results. } \\
& \text { Fairness is indicated by the ethical conduct of } \\
& \text { the procurement team and by a consistent } \\
& \text { selection process that results in the most } \\
& \text { advantageous business relationship. }
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Current System

- Federal Norm
OFairness
- Rigid Process
OCompetitive Range
OMeaningful Discussions
OBAFO
- Award Basis/Criteria
ORule Driven
OTechnically Oriented
OPredetermined Criteria

Evaluation/Selection
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RFQ Criteria

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& \text { making a best value source selection, such as: }
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& \text { Narrative - statement describing the proposal's } \\
& \text { relative strengths, weaknesses, and risks. } \\
& \text { Numerical - a method used to measure the } \\
& \text { various evaluation factors by developing a } \\
& \text { scoring measurement scale for each factor. } \\
& \text { Risk assessment - a method in which a pass/fail } \\
& \text { factor and the probability of success are used to } \\
& \text { determine the expected value. }
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& \text { - Communicate with only those contractors whose } \\
& \text { proposals have the highest probability of success, } \\
& \text { and provide the best-value. Communications can } \\
& \text { take place at anytime throughout the source- } \\
& \text { selection process. } \\
& \text { - Communication may occur orally or in writing with } \\
& \text { any of the offerors to obtain information to } \\
& \text { facilitate selection or to negotiate the best value. }
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A/C 96199
November 15, 1996

General Services Administration<br>FAR Secretariat (VRS)<br>Attention: Beverly Fayson<br>18th and F Streets, NW, Room 4037<br>Washington, DC 20405

Re: FAR Case $95-029$
Dear Ms. Fayson:
Logicon, Inc. would like to express our appreciation for being provided with this opportunity to submit our comments on this revisions of FAR Part 15. Logicon is a Government contractor with revenues approaching $\$ 500$ million, of which $99 \%$ are from contracts with the Federal Government. We have almost 5,000 employees and conduct operations from 165 offices around the world. Since almost all of our revenues come from negotiated contracts with the Government, this revision to FAR Part 15 Contracting by Negotiation is of particular importance to us.

We would like to express our sincere appreciation to Ms. Melissa Rider and the members of the FAR Part 15 Rewrite Committee for the many hours of hard work that they have spent on this critically important project. We believe that they have performed outstandingly by developing new and innovative contracting methods which are expected to increase the efficiency of the contracting process, reduce the current contract cycle time and allow contractors use their bid and proposal expenses more efficiently and effectively.

We realize that the current FAR describes a process that procures the goods and services required by the Government as efficiently as possible while treating all contractors in a fair and equal manner. In the past, there have been some comments from both inside and outside the Government that the current procurement system is weighted more towards fairness towards all offerors than to the efficient procurement of goods and services. We have noted that these revisions to FAR Part 15 improve the efficiency of the procurement but at a decrease in the perceived fairness of the procurement system. The comments in Attachment 1 seek to build on the creative thinking that has already gone into the development of these regulations while restoring some of the perceived fairness in the current FAR process without a significant decrease in the desired efficiency of the procurement system. Attachment 2 summarizes our suggested revisions in the wording of FAR Part 15.

AdC 96199
Page 2


Since this rewrite of FAR Part 15 constitutes such a significant change in the procurement process, we propose that the Rewrite Committee review all of the comments submitted at this time, make appropriate revisions and issue the revised (or perhaps re-revised) FAR Part 15 for an additional round of public comments. By allowing a second round of comments, the Rewrite Committee would insure that all parties affected by these regulations would have ample opportunity to express any concerns and the use of this second round of comments would also be expected to reduce any court challenges of these regulations, thereby saving money for both the Government and contractors.

Thank you very much again for providing us with this opportunity to comment on this revision to FAR Part 15. Please don't hesitate to contact me directly at the above telephone number if I can provide any additional information on any of these comments.

Sincerely, LOGICON, INC.

N. Roy Easton, Jr., Ph.D.

Director of Accounting Controls

## Attachment 1

November 15, 1996

## LOGICON, INC. <br> COMMENTS ON THE REWRITE OF FAR PART 15

Please note that the proposed revised wording is in Italic Type.

1. EAR 1.102(c)(3) The definition of "fair treatment" should be strengthened as follows:
"Fair treatment requires that the members of the acquisition team abide by both the solicitation and acquisition plan (if any) and not act in an arbitrary or capricious manner when dealing with offerors and contractors. It means that all offerors and contractors shall be treated equitably but does not mean that offerors and contractors of differing capabilities, past performance, or other relevant factors, must be treated the same."

We believe that the concept of "fair treatment" requires the equitable treatment of all offerors (ie, offerors and contractors in similar circumstances must be treated the same while offeror and contractors in differing circumstances may be treated differently) and recommend the inclusion of the term "equitably" in this subpart.
2. FAR 2.101 The definition of Best Value in this subpart should be revised as follows:
"Best Value means an offer or quote which is most advantageous to the Government after considering any trade-offs between the cost or price and the technical or management factors in the proposal."

This minor revision clarifies that any trade-offs between cost or price and the other factors must be explicitly considered during the determination of the "best value" to the Government.
3. FAR 15.001 We were unable to locate any reference to the term "Best and Final Offer (BAFO) among the definitions in this section. Under these revised regulations, will BAFOs be considered to be "Proposal modifications," "Proposal revisions," something else entirely, or will they be prohibited? We suggest that you indicate somewhere in this section, preferably in $15.101(\mathrm{~b})(3)$, the procedures for dealing with BAFOs under these revived regulations.
4. FAR 15.002(b) The phrase "while maintaining a process designed to foster an impartial and comprehensive evaluation of offerors' proposals" should be changed to "while maintaining a process which insures an impartial and comprehensive evaluation of offerors' proposals."

The original term "designed to foster" is not considered to be strong enough in circumstances such as these in which the process should "insure" the impartial treatment of all offerors' or contractors' proposals.
5. EAR 15.100 The last sentence in this subpart should be revised to read as follows:
*The source selection authority (SSA) should select the process most appropriate to the particular acquisition that is expected to result in the fairest evaluation of the competing proposals."

From our perspective, the main objective of the selection of the appropriate process in this subpart should be to select that which results in the "fairest evaluation of the competing proposals" since this process will then be the best one to use to obtain the "best value" to the Government. The goals for the selection of the procurement process (fairest evaluation) and the actual procurement (best value) do not have to be the same.
6. FAR 15.101(b)(2) Since the term "pass-fail basis" used in this subsection is not defined anywhere in the FAR, we suggest that the second sentence in this subpart be deleted as unnecessary.
7. EAR _15.101(b)(3) The word "all" should be inserted between the words "with" and "offerors" to insure that no offeror or contractor will be treated unfairly by not being provided with information which has been provided to other offeror or contractors. This subpart would then read as follows:
"If discussions are necessary, the Government's concerns shall be discussed with all offerors and a revised proposal may be requested as described in 15.409(c)."

As noted earlier in our comments on 15.001 , this may be the most appropriate place to indicate that this is the new process for handling BAFOs.
8. FAR 15.103(d)(1) After reading this subpart we have concluded that it would be impossible for a contractor to make the required "binding offer" unless all of the criteria and processes that will be used to evaluate the offers in all phases of the procurement are specifically identified in the solicitation. We therefore suggest that the first sentence in this subpart be revised to read as follows:
"The Government may make a "mandatory" down-select only if it identified all of the criteria or processes that will be used to evaluate offers in all phases of the procurement and requested sufficient information (including cost information) for there to be binding offers.
9. EAR15.103(d)(2)(ii) This FAR subpart should include an explanation of the difference between the "supporting rationale" which is required to be provided to unselected offerors by this subpart and the "debriefing" which is required to be provided to unselected offerors by the provisions of subpart 15.103(d)(2)(iii).

We also suggest that this FAR subpart include a definition of the term "unlikely to receive an award". Does this term simply mean that there are several other offeror with higher scores or ratings already in the competitive range or does it mean that the offeror's proposal is so bad that there are no possible modifications that can be made to it that will enable that offeror to receive that contract?
10. FAR 15,104(c) We believe that the provisions of this subpart should be mandatory rather than discretionary and therefore recommend that the final sentence read as follows:
"Accordingly, the solicitation shall describe--"
We also recommend that a new subpart (8) be added that would permit either the Government or the offeror to record the oral presentation either on video or audio tape without requiring the permission or approval of the other side. The existence of a video or audio recording of the information provided in the oral presentation would prevent any future misunderstanding or misinterpretation of this information. We also recommend that the party taping the oral presentation provide a copy of this tape to the other party without additional cost to the other party. The proposed subpart (8) would read as follows:
"(8) Either party, the Government or the offeror, may record the oral presentation on video or audio tape by simply informing the other party of its intent to do so. The recording party shall provide an unedited copy of the resulting video or audio tape to the other party without any additional cost to the other party."
11. FAR 15.201 We are pleased to note the Government's interest in exchanging as much information with potential offerors as early in the procurement process as possible. This is a much-needed provision and we applaud the Government's inclusion in this FAR revision.
12. EAR 15,201(f) We believe that this essential subpart should be strengthened to insure that all such information which is necessary for the preparation of a specific proposal be disseminated to all interested potential offerors in a timely manner. We also recommend that all offeror be afforded at least 7 days in which to review the information and incorporate in into their proposals. In a well-planned acquisition, it is unnecessary for the Government to make any modifications or revisions to the RFP within 7 days of its due-date. We recommend that this subpart be revised to read as follows:
"Government personnel may disclose general information about agency mission needs and future requirements. If Government personnel disclose specific information abut a proposed acquisition which is necessary for the preparation of proposals, that information shall be made available to the public as well as to all potential offeror who have indicated an interest in this acquisition as soon as possible, but no later than the next release of information in order to avoid creating an unfair competitive advantage. In no event shall information which is expected to affect the preparation of a proposal be released less than 7 calendar days before the date on which that proposal is due to be submitted to the Government When a presolicitation or preproposal conference is conducted, distributed materials should be made available to all potential offerors upon their request."
13. FAR 15,202(a)(2) We are concerned that allowing offerors to propose changes in the CLIN structure could cause significant effects on the cost evaluation model which the Government is using to evaluate the proposal. We are aware that the Government has developed some complex cost evaluation models in the past in which a relatively minor change in the CLIN structure could produce a significant difference in the evaluated cost produced by the model. In these circumstances, the Government's acceptance of an alternative proposal containing a change in the CLIN structure should be limited to those solicitations in which a willingness to accept such alternative proposals was clearly described in the RFP and the effect of such changes on the Government's cost evaluation model clearly described. We therefore recommend that subpart (i) be revised to read as follows:
"(i) Contracting officers may allow offerors to propose alternative terms and conditions, including a contract line item number (CLIN) structure that is different from the model in the solicitation only when the Government's willingness to accept such alternative terms and conditions is clearly described in the RFP and the effect of these changes on the Government's cost evaluation model is clearly explained."
14. FAR 15.202(e) We suggest that this subpart include an explanation of the differences between the "letter RFP" referred to herein and the written RFP that is currently being used.
15. EAR 15.202(f) Our review of this subpart has resulted in the conclusion that the use of oral RPs could be very dangerous for small businesses which are expected to be the main users. We are concerned that the use of oral REPs could cause unintentional misunderstandings due to the differing memories of the involved parties. We believe that small businesses are best protected against any misinterpretation of contract terms and conditions through the use of written REPs and therefore recommend that this entire subpart be deleted. All REPs should be written to protect the interests of both the Government and contractor.
16. FAR 15.203-2 We recommend that the word "summary" be deleted from the first line as unnecessary.
17. FAR $15,205(b)$ and (c) We recommend that these provisions be strengthened to protect the interests of both the Government and all of the offeror by revising it in the same manner as was recommended for $15.201(\mathrm{f})$ above:
"(b) Amendments issued before the established time and date for receipt of proposals shall be issued to all parties receiving the solicitation, and should be issued in the same manner as the solicitation. In no event shall an amendment which is expected to affect the preparation of a proposal be released less than 7 calendar days before the date on which that proposal is due to be submitted to the Government."
"(c) Amendments issued after the established time and date for receipt for receipt of proposals shall be issued--
(1) To all offerors who have submitted proposals; and
(2) In the same manner as the solicitation."
18. EAR $\mathbf{1 5 , 2 0 5 ( f )}$ We could like to commend the Government for realizing that concept of "fairness to all offerors" requires that all offerors who submitted proposals have an opportunity to revise their proposals in light of the revised Government requirements. We therefore recommend that this subpart be revised to require that all offerors be provided the opportunity to revise their proposals as follows:
"If the proposal considered to be most advantageous to the Government (determined according to the established evaluation criteria) involves a departure from the stated requirements, the contracting officer shall provide all offerors an opportunity to submit new or amended proposals on the basis of the revised requirements in such a way as to not reveal to the other offerors the solution proposed in the original departure or any other information that is entitled to protection (see 15.206(b) and 15.409(d))."
19. EAR 15,206(c) We agree with these provisions regarding the requirement for requesting the retransmission of a proposal received in unreadable form and recommend that an additional provision be added to insure that the resubmitted proposal will be considered to have been received "on time" as long as the original unreadable proposal was also received "on time." We recommend that this subpart be revised to read as follows:
"(c) If a proposal received by the contrac ing officer in electronic format is unreadable to the degree that conformance to the essential requirements of the solicitation cannot be ascertained from the document, the contracting officer shall immediately notify the offeror and request retransmission of the proposal or, at the contracting officer's discretion, resubmittal of the proposal in another format. If the retransmitted proposal is still unreadable, it may be rejected. A proposal retransmitted or resubmitted at the request of the contracting officer shall be considered to have been received timely as long as the original unreadable proposal was received timely."
20. EAR 15.207(b) Following the discussions relating to this subject during the November 8 Public Meeting, we understand that this section was revised to allow the Government to accept late proposals for which there were extenuating circumstances, e.g. inclement weather, public or civic activities (ie. the Million Man March), Government shut-downs, airline accidents, etc. While we agree that there are times when the Government should accept such late proposals, we also believe that this FAR subpart should provide additional guidance as to those circumstances which would allow the acceptance of late proposals in order to eliminate any "game-playing" by competing contractors. We suggest the following wording for this subpart:
"(b) Proposals, modifications, and revisions received in the designated Government office after the exact time specified are "late" but may be considered if the late receipt was due to conditions beyond the control of the offeror (such as inclement weather, public or civic activities, transportation accidents, or closures of Government facilities) and the offeror presents evidence that it consigned its proposal to a recognized public carrier on the day before the proposal was due. Government mishandling..."
21. EAR 15,405(a) We are concerned that the Government believes that preaward testing or product demonstration does not need to be performed in accordance with a formal test plan and consider that this provision is unfair to small business and other offerors who may be discriminated against through this process. The test plan should be described in the solicitation so that all offeror and contractors will understand how their products) will be tested. We therefore recommend that the last two lines of this subpart be revised as follows:
"If preaward testing or product demonstration is required, it shall be performed in accordance with a formal test plan which is described in the solicitation in sufficient detail so that the prospective offeror understand all of the criteria against which their product will be tested."

A/C 96200
Page 7
22. EAR $15,405(a)(2)($ ii) We believe small businesses and other offerors should be afforded an opportunity to describe their evaluation of their own past performance rather than simply identifying past contracts for similar work. Since an offeror's past performance has become so important, small businesses and other offerors are often at a disadvantage if they are not allowed an opportunity to explain their past performances and describe the actions which they have taken to improve their processes to eliminate any problems encountered in the past without leaving the request for this information to the discretion of the contracting officer. We therefore suggest that this subpart be revised as follows:
"(ii) The solicitation shall provide offerors an opportunity to identify contracts completed within the past 3 years (including Federal, State, and local Government and private) for efforts similar to the current Government requirement, to describe their evaluation of their own performance on these contracts, and to provide information on any problems encountered on the identified contracts and the offeror's related corrective actions. The Government shall use this information as well as information obtained from any other sources to evaluate the offeror's past performance, provided that the offeror is provided the opportunity to respond to any negative reports on its past performance which the contracting officer received from the other sources mentioned above."

We suggest that this subpart provide some guidance as to the appropriate methods that a contractor could use to provide past performance information on delivery and task order contracts. Since these contracts have a number of individual tasks or deliveries, each of which is normally treated as if it were a separate contract, should the contractor treat each task or delivery as if it were a separate contract for past performance purposes or is there an appropriate method for developing some form of "weighted average" performance on all of the deliveries or tasks so as to develop some form of overall performance rating for the contract?
23. FAR 15,405(a)(4) We do not understand the benefits that are expected to be obtained by providing cost data to the members of the technical evaluation team and we are concerned that this action could serve to prejudice its decision. Since we believe that the main overall goal of the evaluation process should be the "fairest evaluation of the competing proposals" as discussed under subpart 15.100 above, we have concluded that a fair technical evaluation can only be performed when the members of the technical evaluation team are not provided with any cost information as is the case under the current FAR regulations. Accordingly, we recommend that this subpart be deleted.
24. FAR $15,406(a)$ We recommend that the word "all" be inserted between the words "include" and "proposals" so that this subpart will read as follows:
"(a) The contracting officer shall establish a competitive range for the purpose of conducting written or oral discussions (see 15.409 (c)). The competitive range shall include all proposals having the greatest likelihood of award based on the factors and subfactors in the solicitation."
25. EAR $15,406(\mathrm{~b})$ We recommend that this subpart be deleted since we do not believe that it is appropriate to eliminate proposals from contractors that have "the greatest likelihood of award based on the factors and subfactors in the solicitation" for the sole stated purpose of "efficiency."
26. EAR 15.406(c) We believe that the most appropriate method for the contracting officer to determine the extent of the competitive range would be to rank the proposals by technical score and limit the competitive range to all proposals with scores above a number which was selected as a cutoff such that all scores above this number are considered to have "the greatest likelihood of award based on the factors and subfactors in the solicitation." We therefore recommend that this subpart be replaced with the following:
(c) After evaluating offers, the contracting officer shall rank order the offers based upon the evaluation criteria set forth in the solicitation and select a cut-off point such that all offers above this level are considered to have "the greatest likelihood of award based on the factors and subfactors in the solicitation."
27. EAR $15,410(b)$ We recommend that the contracting officer be required to specify the perceived benefits to be received for any total additional cost and describe the specific tradeoffs in terms of cost/price impact. Since the contracting officer will have to quantify the specific tradeoffs in terms of their impact on the proposal's cost or price in order to properly perform the first action, there will be no decrease in efficiency to require him or her to provide adequate documentation of these tradeoffs in his or her file. Accordingly, this subpart should be revised to read as follows:
"(b) The basis for the source selection decision shall be documented and shall reflect the rationale for any tradeoffs among the factors and subfactors in the solicitation. The added value expected to be received should be specified along with the expected impact on the proposal's cost or price."
28. FAR $15.805(\mathrm{a})$ We applaud the Government's willingness to provide preaward debriefings for those offerors who have been eliminated during one of the earlier stages of the procurement process although we understand that there are reasons that the contracting officer may not be able to provide as complete a debriefing as could be provided after the conclusion of the process and the award of the contract. In these circumstances, we propose that the contractor be permitted to request either the lessinformative preaward debriefing or the more-informative normal postaward debriefing. We recommend that this section be revised to read as follows:
"Offeror excluded from the competitive range or otherwise excluded from the competition before award may request a debriefing before award ( 10 U.S.C. 2305(b)(6)(A) and 41 U.S.C. 253 (f) - (h)).

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(a) Within three (3) days after receipt of notice of exclusion from the competition, the offeror may submit a written request to the contracting officer for either a preaward or a normal postaward debriefing as described in 15.806. Offerors are entitled to no more than one debriefing for each proposal.

We have verified with Ms. Meredith Murphy of McDonnell Douglas our understanding that the abovementioned laws only require that the preaward debriefing be offered to those offerors eliminated from the competition before the establishment of the competitive range and that there is no prohibition in the statutes preventing the offeror from waiving their rights to receive the offered preaward debriefing and choosing to accept the postaward debriefing in place of the preaward debriefing.
29. FAR 15,805(c) We suggest that this subpart include an explanation of the meaning of the phrase "or by any other method acceptable to the contracting officer."
30. EAR 15.806(a) As noted in our comments on subpart 15.805 (a) above, we believe that an offeror who does not submit a timely request for a preaward debriefing should remain eligible for the normal postaward debriefing as long as the required request is submitted in compliance with the provisions of this subpart. We would also like to expand the methods which can be used to make such requests for debriefings. Our recommended wording of this subpart is provided below:
"(a) An offeror, upon its written request received by the agency within three days after the date on which that offeror has received notice of contract award, shall be debriefed and furnished the basis for the selection decision and contract award. This request may be submitted by mail or facsimile, or by any other means, including electronic commerce, as stated by the contracting officer in the notice of contract award. An offeror who was notified of exclusion from the competition (15.805(a)), but failed to submit a timely request for a preaward debriefing remains entitled to a postaward debriefing under the provisions of this subpart provided that his or her request for such a postaward debriefing was received in a timely manner as described above. When practicable ...
31. EAR 15.806(e) We do not understand why the contracting officer should be prohibited from providing any information to the unsuccessful offeror that the offeror is legally entitled to receive. A point-by-point comparison between the successful offer and that of the offeror being debriefed is expected to provide significant information which will help the offeror prepare better offers or proposals in the future and is therefore considered important to maintaining adequate competition in this area. Our recommended wording of this subpart is provided below:
"(e) The debriefing shall include a point-by-point comparison of the debriefed offeror's proposal with that of the successful offeror.
32. FAR $52,215-1(0)(4)$ We are concerned that the provisions of this subpart conflict with those of 15.406 which require that the "competitive range shall include all proposals having the greatest likelihood of award based on the factors and subfactors in the solicitation." Since, it is always in the Government's best interest to insure that all such offerors remain in competition for the contract award, we can see no reason for the ability to artificially limit the competitive range as provided in the last sentence of this subpart. Our recommended wording of this subpart is provided below:
"(4) The Government intends to evaluate proposals and award a contract without discussions with offerors. Therefore, each individual offer should contain the offeror's best terms in both the cost or price and technical portions of the proposal. The Government reserves the right to conduct discussions if the Contracting Officer later determines them to be necessary. In accordance with 15.406, the Contracting Officer shall include within the competitive range all proposals having the greatest likelihood of receiving the contract award based on the factors and subfactors in the solicitation.
33. FAR 52.215-1 Alternate I(4) In order to bring the wording of Alternate 1 into agreement with the recommended wording for $52.215-1(4)$, the following phrase should be deleted:
"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."
34. EAR 52.215-1 Alternate II(4) As discussed above, we recommend that this subpart be deleted.
35. FAR 52.215-5 A facsimile proposal should be considered as an electronic proposal for purposes of retransmission authorized under 15.206.

LOGICON, INC.
FAR PART 15 REWF

| FAR REFERENCE | RECOMMENDED WORDING |
| :--- | :--- |
| 3. FAR 15.001 | Will the practice of requesting "Best and Final <br> Offers" be continued? |
| 4. FAR $15.002(\mathrm{~b})$ | "while maintaining a process which insures an <br> impartial and comprehensive evaluation of <br> offerors' proposals." |

RECOMMENDED WORDING
"The source selection authority (SSA) should select the
process most appropriate to the particular
acquisition that is expected to result in the fairest
evaluation of the competing proposals."
Delete second sentence in this subpart.
"If discussions are necessary, the Government's
concerns shall be discussed with all offerors and a
revised proposal may be requested as described in
$15.409(\mathrm{c})$. ."


7. FAR 15.101(b)(3)


FAR REFERENCE

 may record the oral presentation on video or aural tape by simply informing the other party of its intent to do so. The recording party shall

or aural tape to the other party without any
additional cost to the other party."

 public as well as to all potential offerors who have indicated an interest in this acquisition as soon as
 information in order to avoid creating an unfair
 information which is expected to affect the

 is due to be submitted to the Government. When a presolicitation or preproposal conference is conducted, distributed materials should be made their available to all potential offerors upon request."

FAR REFERENCE

14. FAR 15.202(e)

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RECOMMENDED WORDING
"If the proposal considered to be most
advantageous to the Government
(determined according to the established
evaluation criteria) involves a departure
from the stated requirements, the
contracting officer shall provide all offerors
an opportunity to submit new or amended
proposals on the basis of the revised
requirements in such a way as to not reveal
to the other offerors the solution proposed
in the original departure or any other
information that is entitled to protection
(see $15.206(b)$ and $15.409(\mathrm{~d})$ ).

- officer in electronic format is unreadable to the Iセ! ! requirements of the solicitation cannot be
 officer shall immediately notify the offeror and
 the contracting officer's discretion, resubmittal of the proposal in another format. If the retransmitted proposal is still unreadable, it
 resubmitted at the request of the contracting

 proposal was received timely."


LOGICON, INC.
FAR PART 15 REWRITE
 mentioned above."
Delete this subpart.
(a) The contracting officer shall establish a
competitive range for the purpose of conducting
written or oral discussions (see $15.409(\mathrm{c})$. The
competitive range shall include all proposals
having the greatest likelihood of award based on
the factors and subfactors in the solicitation."
Delete this subpart.
(c) After evaluating offers, the contracting officer
shall rank order the offers based upon the
evaluation criteria set forth in the solicitation and
select a cut-off point such that all offers above this
level are considered to have "the greatest likelihood
of award based on the factors and subfactors in the
solicitation."
$95^{\prime}-227-39$

RECOMMENDED WORDING
"...(a) Within three (3) days after receipt of notice
of exclusion from the competition, the offeror
may submit a written request to the contracting
officer for either a preaward or a normal
postaward debriefing as described in 15.806.
Offerors are entitled to no more than one
debriefing for each proposal."
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FAR REFERENCE

29. FAR $15.805(\mathrm{c})$
30. FAR $15.806(\mathrm{a})$

RECOMMENDED WORDING
Subpart should include an explanation of "or by any
other method acceptable to the contracting
officer."
 means, including electronic commerce, as stated by
 uo!snjoxว jO po!!! from the competition (15.805(a)), but failed to submit a timely request for a preaward debriefing remains entitled to a postaward debriefing under the provisions of this subpart provided that his or her request for such a postaward debriefing was her request for such a postaward debriefing was
received in a timely manner as described above. When practicable..."

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$95-129-39$
RECOMMENDED WORDING
Delete "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."
Delete this subpart.
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$\frac{\text { FAR REFERENCE }}{\text { 33. FAR } 52.215-1} \begin{gathered}\text { Alternate } \mathrm{I}(4)\end{gathered}$


Alternate II(4)
35. FAR 52.215-5

National Law Center

November 14, 1996

General Services Administration<br>FAR Secretariat (MVRS)<br>$18^{\text {th }}$ \& F Streets, NW, Room 4037<br>Washington, DC 20405

FAR Case: 95-029

## Dear Colleagues

I applaud the project and your efforts to rewnte FAR Part 15 in order to streamline the source selection process and improve communications between the Government and competing offerors. The draft of the rewrite describes many excellent ideas, such as multiphase source selections, oral presentations, and considering late proposals

However, I urge you to revise the draft in order to clarify and simplify the proposed rules and eliminate many needless new rules Several sections are vague and confusing, some are apparently self-contradictory, and others are ill-advised These sections would, if issued as final rules, create serious operational problems The following comments address specific sections

## Communications with Offeror

Proposed rule 15 407(b), Communications with offeror prior to establishment of the competitive range, encourages communication with offeror before discussions in order to "obtain information "It states that such communications may be used to resolve perceived omissions and deficiencies in proposals. Then it states that such communications do not permit changes in an offeror's proposal, except to correct mistakes

What if the "perceived" omission or deficiency turns out to be real" Can it be "resolved" without discussions? May an offeror change its proposal in order to provide omitted material or to eliminate deficiencies? If not, then the only communications that the parties may have prior to discussions are to correct mistakes and to determine whether or not perceived omissions and deficiencies are real. And since many contracting officers and contract attorneys now interpret "proposal" to include all of the information submitted in response to an RFP-instead of just the offer-the new rule will not allow more communication than the existing rule, unless we declare that all omissions and deficiencies are "mistakes"

If the goal of the rewrite is to encourage communications and streamline the process, then the solution to this problem is to distinguish between offers/proposals and the other information which offerors must submit in response to an RFP--eg, information about experience and past
performance, sample tasks, nonbinding plans, etc The rule should state that offeror may change their offers only in response to an RFP amendment or during discussions, but that the parties may exchange any other information before the determination of the competitive range, as long as all offeror are treated fairly in that regard This simple change would eliminate the need for the awkward definitions "proposal modification" and "revision" in proposed rule 15001 It would also bring the language in proposed rule 15407 into conformity with the language in proposed rule 52 215-1, which addresses submission, revision, withdrawal, and acceptance of "offers," and proposed rule 53 215-1, which identifies key forms as follows "Solicitation and Offer," "Solicitation, Offer, and Award," and "Offer Label"

## Improper Discussions and Communications

Proposed rule 15 407(d)(1) is more restrictive of communications than FAR 15 610(d), which prohibits technical leveling. The Comptroller General has held that technical leveling cannot take place in the initial round of discussions, but can only take place in the course of multiple rounds of discussion. See CBIS Fed. Inc., 71 Comp Gen. 319 (B-245844 2), 92-1 CPD ๆ308 The proposed rule would effectively preclude any bargaining-except, perhaps, with the most highly ranked offeror However, when Congress enacted P L. 87-653 in 1962, it wanted to force agencies to bargain (conduct discussions) FAR should encourage bargaining

Historically, technical leveling, and technical transfusion, which is the disclosure of trade secrets, went hand in hand However, some agency personnel think that the technical leveling rule prohibits any bargaining for improvements in a technical proposal, other than the elimination of deficiencies, excesses, and weaknesses It does not I urge the FAR councils to read the original Aerospace Industries Association report about technical leveling and technical transfusion (1970), which led to the ASPR prohibition. The councils should then fashion a rule which prohibits technical leveling through technical transfusion, but which permits bargaining for technical improvements in order to obtain best value (I have a copy of the ALA report, if you would like to read it I will loan it to you at your request )

## Model Contract Format

The proposed change to the Uniform Contract Format is extremely ill-advised It's adopion would require the expenditure of millions of dollars in order to modify agency automated document preparation systems The new format would permit greater vanation among Government solicitations and contracts, which will be confusing to agency personnel and to contractors, especially to small business firms While the Uniform Contract Format is not perfect, it is well established and understood It is difficult to see any advantage to this change that will offset the disadvantages. I strongly urge you to withdraw this proposal

## Competitive Range

The proposed rule would require that contracting officers divide the set of all proposals into the subsets of (1) proposals having the "greatest likelihood" of award and (2) proposals not having the greatest likelihood of award The rule would then permit contracting officers to divide the set of proposals having the greatest likelihood of award into the subsets of (a) proposals having the greatest likelihood that are included in the competitive range and (b) proposals having the greatest likelihood that are not included in the competitive range The regulation does not pere-
scribe any principle for deciding which proposals having the greatest likelihood of award are to be included and which are not This is a significant deficiency

The use of the phrase "greatest likelihood of award" is strange in that it contemplates the possibility that more than one proposal will have the greatest likelihood of award, which, except in the case of tie scores, seems contrary to reason. (Proper use of an adjective in the comparative sense precludes multiple superlatives ) Better wording would be as follows

The competitive range shall include the leading contenders for the award, which are to be identified on the basis of evaluation and ranking in accordance with the stated evaluation factors for award

In addition, the requirement that contracting officers predetermine whether or not to limit the size of the competitive range and that they notify offerors of their intent to do so will raise the specter of preemptive protests and will discourage contracting officers from using the procedure The requirement to predetermine and notify is not in the statute If one of the purposes of the rewrite is to streamline the source selection process, then why impose this unnecessary requiremont?

## Multiphase Acquisition Technique

Multiphase source selection is permitted under the current rules It has been in use for many years. Why, if the goal is to streamline, did you add the requirements in proposed rule 15103 (b), (c), (d), and (e)? They are unnecessary

The proposed rule should state that agencies may conduct source selections in phases in which they progressively reduce the number of offeror It should state that REPs must identify the evaluation factors to be applied in each phase It should state whether or not price must be an evaluation factor in the initial phases This is all that it should state Let agency personnel decide how best to design their processes

## Source Selection Processes and Techniques

Proposed rule 15 101(a) states that a lowest priced technically acceptable process requires fewer resources than a tradeoff process Proposed rule 15 102(a) states that a tradeoff process is more resource intensive than a lowest price technically acceptable process. Neither of these statements is necessarily true

Some agencies conduct tradeoft processes using only price and past performance as evaluation factors These and other best value source selections are often less costly and time consuming than lowest price technically acceptable processes in which there are numerous criteria for technical acceptability Not all best value source selections are for major system acquisitions, or employ large evaluation boards

Delete these statements They are not necessary, they are not valid, and they could unreasonably discourage the use of best value source selection Also, change "lowest price technically acceptable" to "lowest price acceptable" A technical proposal is not always necessary

## Presolicitation Exchanges with Industry

Presolicitation conferences and draft RFPs are costly to Government and industry and they extend procurement lead time Their benefits are often theoretical, rather than actual They should
be the exception, rather than the rule They are manly useful in major acquisitions in which the industry is small and unusually well-informed. Continuing to encourage overuse of presolicitation conferences and draft RPs is the opposite of streamlining and very costly to the taxpayers (Companies charge the cost of participating to bid and proposal accounts, which end up being passed on to the Government as a general and administrative expense ) Rewrite proposed rule 15.201 to encourage contracting officers to weigh costs and benefits before conducting presolicitation conferences or issuing draft RPs

## Proposal Evaluation

Proposed rule 15 405(a) retains the sentence in FAR 15 608(a) "Proposal evaluation is an assessment of both the proposal and the offeror's ability to accomplish the prospective contract successfully " This sentence is slightly absurd Assessment of proposals is assessment of proposads Assessment of the offeror's ability to do the work is assessment of the offeror's ability to do the work They are different problems

Delete this sentence. It states no rule and it serves no purpose Worse, it confuses aproposads, which are sets of promises, with capability data, which are assertions of fact

## The Neutral Rule for Past Performance

The "neutral" rule, FAR 16 608(a)(2)(iii), proposed rule 15 405(a)(2)(ii1), is ambiguous and confusing See Excalibur Systems, Inc., Comp Gen Dec B-272017, July 12, 1996, and Hughes Georgia, Inc., Comp Gen Dec B-272526, October 21, 1996 The rule should state that An agency may not give an offeror an unfavorable past performance rating just because the offeror has no experience, but an agency may make a tradeoff between an offeror with favorable past performance at a higher price and an offeror with no expenence at a lower price In Exaltbur, the Comptroller held as follows

We think that the use of a neutral rating approach, to avoid penalizing a vendor without prior experience and thereby enhance competition, does not preclude, in a best value procurement, a determination to award to a higher-priced offeror with a good past performance record over a lower-cost vendor with a neutral past performance rating Indeed such a determination is inherent in the concept of best value

Many contracting officers interpret the neutral rule to mean that such tradeoffs are impermissible I urge you to rewrite this rule to bring it into line with the Comptroller's decisions

## Deficiency

The new definition of deficiency in proposed rule 15401 is needlessly vague with regard to "material" and "flaw" Why change this definition" The new definition is not clearer than the old one

## Responsibilities

Proposed rule 15 403(b)(1) requires that the source selection authonty establish a team Why? There may be no need for a team Not all procurements are major system acquisitions We teach that in some simple source selections a single person can evaluate proposals and select a
winner, and we teach how to do it Let agencies design their own processes Remember-the goal is to streamline

## Summary

The proposed rule does not streamline source selection Instead of eliminating unnecessary rules, it adds new ones As written, the rule will not encourage communications with offeror It does not clarify vague and ambiguous rules that are now in FAR Part 15 Some passages are redundant of others (e.g, 15101 and 15102 and 15 402) Changes in definitions are likely to cause confusion and uncertainty. The proposed change to the Uniform Contract Format will cause confusion and the needless expenditure of millions of dollars. The entire draft rewrite would benefit from the services of a professional editor

I recommend that the FAR councils rewrite the rule for greater simplicity and clanty, eliminate all unnecessary statements and requirements, and issue another draft proposed rule

Sincerely,


Vernon J Edwards
Instructor

cc • Steven Kelman

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From Commander, Naval Air Systems Command
To- General Services Administration, FAR Secretanat (VRS)
18th and F Streets, NW (Room 4037)
Washington, DC 20405 ATTN: Beverly Fayson
Subj • FAR PART 15 REWRITE--PHASE I, FAR CASE 95-029
Ref: OASN (RDA) ABM memo of 30 Sep 96
Encl. (1) NAVAIR Comments on FAR Part 15 Rewrite - Phase I
1 In response to reference (a), the Naval Air Systems Command has reviewed the subject rewrite While the FAR rewrite is intended to streamline the procurement process and eliminate certain banners, some of the proposed rewrite may lead to a compromise in the integnty of the source selection process. We are concerned that aspects of the rewrite may create an atmosphere which could be perceived to allow arbitrary and unequal actions by source selection officials Specific comments are contained in enclosure (1)

2 If there are any questions, please contact Judy Richardson, AIR-2.1 1, at (703) 604-2005, X6119


## NAVAR COMMENTS ON FAR PART 15 REWRITE, PHASE I

## 1 FAR 1 102(c)(3), Performance standards

States that fair treatment requires members of the acquisition team abide by the solicitation and the "acquisition plan (if any). ." Acquisition plans do not address the specific source selection The term should be changed to "source selection plan."

## 2. FAR 2.101, Definitions

Best value definition - Although lowest price technically acceptable (LPTA) process is described in 15.101 and 15.402 further identifies LPTA as a best value approach, the best value definition does not address LPTA. The definition should be revised to reflect this approach also.
3. FAR 14.404-1, Cancellation of invitations after opening

Agency Head should be changed to Head of Contracting Activity or lower (Chief of Contracting Activity). Certainly, the Secretary of the Navy should not get involved in decisions regarding cancellation of IFB's.

## 4 FAR 15001 , Definitions

Definition of "Proposal modification" - Correct "solicitation is closing" to "solicitation's closing date."

5 FAR 15.101(b)(2), Lowest Price technically acceptable process, 15 404(d)(3), Evaluation factors and subfactors, and $15.405(a)(2)$, Proposal evaluation

The issue of past performance as an evaluation factor for award in pass/fall lowest price technically acceptable process needs to be clarified throughout the reference sections to ether make it a responsibility determination or make it the only comparative assessment of an otherwise pass/fanl process.
6. FAR 15 102(b)(3), Tradeoff process

States that specific tradeoffs do not have to be described in terms of cost and price While they do not have to be precisely measured and quantified, the SSA does have to document why the higher priced item may be a better bargain and must do so in terms of cost to the extent practicable That analysis should yield a conclusion that implies a dollar value Court cases have shown that best value decisions required some sort of actual cost benefit tradeoff to be performed showing how the higher cost of the selected awardee was offset by the technical superionty of its higher priced products The FAR Council needs to check to see if this standard will successfully withstand scrutiny within the judicial system

## 7. FAR 15 103, Multiphase acquisition technque

Should include a definition of "down-select."

FAR 15.103(d)(l) - Uses the phrase "binding offer" which has never been defined in the FAR. Either the term must be defined or change language to reflect "qualifying offer" instead and then define "offer" in FAR 2.101 with minmum requrred information noted.

## 8. FAR 15.104, Oral Presentations

FAR 15.104(a) - The statement that oral presentations are most beneficial when they substitute for rather than augment wntten information should be deleted. Due to legal concerns, potential for miscommunication, and protest, some form of written record or video is necessary Therefore, the FAR should not state this preference

FAR $15.104(c)(4)$ - The impact of oral presentations on small business is not an appropriate item to list as being required in the solicitation The contracting officer cannot describe the impact, the offerors need to describe the impact. This is an item that should be considered in acquisition planning but certainly cannot be included in the solicitation
9. FAR 15 201, Presolicitation exchanges with industry

FAR 15.201(c)(4) - This section which allows one on one meetings with potential offerors should be deleted. This type of meeting creates a good chance of inadvertent release of procurement specific information which creates an unfair competitive damage which public release of information at a later date cannot cure The potentral for competitive harm is made worse by 15.201 (f) which allows agencies to wat until next public release of information to remedy the potential competitive harm.

FAR 15 201(f) - States that if government personnel disclose specific information about a procurement that information should be made avalable to the pubhe no later than the next release of information in order to avoid creating an unfarr competitive advantage The entire paragraph should be deleted. An unfarr competitive advantage has, in fact, already been created if information is provided to potential offerors. Any information provided to industry should go through the contracting officer to ensure integnity of the process

## 10. FAR 15.202(e), Request for Proposals

This section contains contradictory information It states that letter RFP's may be used for sole source follow-on procurement. However, (7) refers to "for other than sole source actions"
11. FAR 15.203, Model contract format

The new model contract format should be elminated This is a major change that would force acquisition and contractor personnel to become familiar with a new contract format and dramatically affect automated contract formats. Yet no reason or benefit is provided for this
significant change which would have far reaching implications. The new sections are unstructured, making it difficult for contracting personnel to find information The same information can be in different places in different contracts Other information (deliveries - Old Section F) would now be buned in the Statement of Work making it more difficult to find and creating more confusion It is not clear which clauses go in which sections nor why Full text clauses should not clutter sections with clauses included by reference. The same data is still required, it is just moved around The current format is orderly and sets out the key, salient features of the contract in predictable places. With so much potential for variability, this new format would severely impact automated systems that are currently being developed to the A through $M$ format. A great deal of effort and resources have been expended on these streamlining initiatives that would be wiped out with this change

## 12. FAR 15.203-1, Section I, Cover Sheet/supplemental information

Although this section Insts items to be included on the cover sheet, it does not require a specified form. Lack of a standard form will create a great deal of varnance which will be undesirable from a review/control standpoint

## 13. FAR 15 203-3, Section III, Financial and Administrative Information

This section should clearly state that it includes negotiated or unique contract clauses It is unclear where these clauses would go otherwise.

## 14. FAR $15.205(\mathrm{f})$, Amending the solicitation

This section allows the government to consider offers that depart from the solicitation requirements if it is more advantageous to the government The agency must allow all offerors the chance to submit new or arnended proposals if it can be done without revealing to other offerors the solution proposed by the offeror that caused the departure from the solicitation requirement. The inference, then, is that if this cannot be done, the agency can award to the offeror even though the proposal does not meet the solicitation requirements. It is believed that this is not the intent of the language The language should be revised to clearly state the intent

15 FAR 15.207 (b), Submission, modification, revision, and withdrawal of proposals
This section allows the government to accept late offers if in the best interest of the government. This section should be deleted in its entirely and paragraphs (b) through (d) under the current 15412 should be reinstated. This rewrite is likely to result in signuficant litigation The standard of faimess that must be present in government contracting is higher than that required in commercial transactions Protecting that farness standard with respect to late proposals is worth more than the few occasions when we might be able to use an advantageous proposal whech was late through the fault of the contractor Allowing late proposals rases potential for perception of arbitrary, unfair treatment (e.g, why consider some late proposals and not others?) Other problems arise such as later offeror obtaning propnetary information after proposal due date to obtain award Integrity of the process is jeopardized with this change With this provision, contractors will not take solicitation due dates seriously and we may see many proposals come in
late. Contractors will take extra time assuming the Government would accept their proposal since another proposal is always "in the Government's best interest" Also, the language "but may be considered if in the best interests of the government" is different from the proposed language in FAR 52.215-1(c)(3) which states "and shall be considered at the Source Selection Authonty's discretion."

## 16. FAR 15.401, Definitions

The definition of "deficiency" refers to a "single" material failure. Clearly there can be more and it is not clear why the word "single" is included. The word should be deleted. Further, there is no reference to the deficiency being in the proposal The definition should be revised to read "is a failure of a proposal or proposed approach to met a material Government requirement or a flaw in a proposal or proposed approach that appreciably increases the risk of unsuccessful contract performance."

## 17. FAR 15.403, Responsibihties

Paragraph (a) states that the contracting officer is designated the source selection authonty (SSA) unless the agency head appoints another SSA. Revise to "unless head of contracting activity appoints another SSA" As written, for major competitions where the Program Executive Officer (PEO) or Head of Contracting Activity is typically the SSA, NAVAIR would have to request SECNAV for approval for this designation This is clearly not a streamlining approach, nor what was intended.

## 18. FAR 15.404, Evaluation factors and subfactors

This section should be expanded to include a section relative to the lowest price technically acceptable process, specifically language that distinguishes between evaluation factors and subfactors, and the thresholds of technical acceptability as referenced in 15 101(b)(1) 15.404(b)(2).

FAR 15 404(b)(2) states that the factors and subfactors should "support meaningful discrimination and companion between and among competing proposals" The initial evaluation should be measuring and evaluating only against the critena in the sohitation Proposals should only be measured against one another after this review has been performed at or very close to the decision point. The use of the word "comparison" here and elsewhere should be removed in order to discourage a practice where proposals are compared with one another before they are measured against the criteria

## 19 FAR 15 405(a), Proposal evaluation

Use of numerical weights in a competitive evaluation imbues the final decision making process with a sense of inevitability and mathematical certainty which it should not have. The selection is more often characterized by a complicated tradeoff between many shades of gray made by an expenenced executive or manager It is a complicated and multidimensional decision which is

over-simplified by the use of numerical weights. It is strongly suggested that reference to numerical weights be deleted.

Last sentence states, "The evaluation method used by the agency need not be disclosed in the solicitation." This is contrary to the basic tenet of informing all potential offerors of the evaluation criteria. This sentence should be clarified or deleted

FAR 15 405(a)(3)(11) - Delete the word "quantitative" for same reasons noted above for deleting numencal weights.

## 20. FAR 15 406(b), Competitive range

Allowing the contracting officer to limit the number of proposals in the competitive range for efficiency creates the opportunity for arbitrary cutoffs, unfair treatment of offerors, and opens the door to a myriad of possible protests How does the contracting officer determine what is efficient? It would be difficult to justify that evaluating 5 proposals was efficient, but evaluating 6 was inefficient. Offeror number 6 may be able to correct one deficiency during discussions that would bring it ahead of number 5 . The government could actually be harmed by eliminating a potential source in this fashion. The language in subparagraph (b) and (c) should either be eliminated or greatly revised to ensure the integrity of the process

## 21 FAR 15.407(b), Communication With Offerors Prior to Establishment of The Competitive Range

This section is very ambiguous, contradictory, and has the potential to create the basis for many protests It needs to be rewritten to better define and narrow the scope of communication This section states that the government may use information obtained during communication prior to establishment of the competitive range in proposal evaluation, yet these communications are not considered "discussions" In paragraph (2), it is stated that these communications "do not permit changes in an offeror's proposal other than correction of mistake," while (3) allows obtaining information to explain or resolve ambiguities or concerns to include "perceived deficiencies" This is clearly a contradiction As these communications require confirmation in writing, what is the clarification of a deficiency considered? Clearly it would be a change to the offeror's proposal and considered "discussions." There appears to be no real distinction as to what can be discussed prior to establishment of the competitive range or after. This section needs to be rewritten to make very clear what can and cannot be "communicated," as well as clarify the types of mistakes that may be corrected.

## 22. FAR 15407 (c), Communication with offerors after establishment of the competitive range

We should not rely upon any "agreement" reached during discussions until that "agreement" is put in writing amending or amplifying the proposal Also, during discussions, "agreements" cannot be reached. The contractor may make a "commitment" but the government and the contractor cannot have an "agreement" at this stage in the competition
23. FAR 15 407(d)(4), Improper discussions and communications

States that revealing names of individuals providing reference information about an offeror's past performance is improper. This language should also be added to FAR Part 33 to ensure that this information is not required to be disclosed in GAO protest proceedings except under protective orders.

## 24 FAR 15.409, Proposal Revisions

FAR 15.409(a) - Common cut-off dates should be mandatory in paragraph (a). Allowing the contracting officers to determine at which point award will be made without a required notification injects the possibility of unfair treatment and is ripe for abuse and protest Paragraph (c) states that the requests for proposal revisions should advise offerors that the government may make award without obtaining further revisions. This sentence should be deleted. The intent in rewriting this section was to avoid the "rounds of discussions" that some felt were necessary each time discussions were held with one offeror Under the current procedures, these "rounds of discussions" with all in the competitive range is not required. We currently have the latitude to conduct discussions with one offeror one time and another multiple times At the conclusion of each discussion, the contractor would address the government's concerns and discussions would continue until all issues are addressed. Once this has occurred, a best and final offer is requested from all offeror in the competitive range with a common cut-off date This approach accomplishes the desired goal of eliminating multiple rounds with all offerors but keeps impartiality in the process by establishing a common cut-off date so that all are aware when this process is over Without this date and notification to all offerors, the contracting officer can decide at any point when to make award while a contractor is preparing a proposal revision that may be more advantageous to the government.

FAR 15 409(b) - This section violates the basic tenet of fairness If an offeror is considered in the competitive range and after discussions can be eliminated from the range without being afforded an opportunity to submit a proposal revision, it prejudges that the offeror's revised proposal will be unacceptable There is no basis for knowing what will actually appear in the proposal

## 25 FAR 15410 , Source Selection

Delete the word "independently" in the second sentence This could be construed to mean that the SSA is required to perform the evaluation of the technical and cost proposals in addition to the evaluation performed by the evaluation team What is intended is that the SSA's decision is made independently after assessing all the information presented by the evaluation team

FAR $15410(b)$ - The last sentence states that specific tradeoffs need not be described in terms of cost/price impacts nor do the tradeoffs need to be quantified in any other manner" (the same language as used in 15 102(b)(3)) See discussion under number 6 above

## 26. FAR 15 803(a), Preaward notices

Add a new subparagraph (3) as follows.
"(3) Preaward notices for SBA 8(a) Program set-asides In SBA 8(a) Program set-asides (see Subpart 19-805-2), the notification requirement called out in the preceding subparagraph (2) is not required. The SBA is responsible for determinung that an 8(a) offeror is eligible for award under the 8(a) Program when the award package/contract is forwarded to them for execution "

This new subparagraph is added to clarify that preaward notification requirements do not apply in the 8(a) Program. In the small business arena, the preaward notice is given as a means of allowing small businesses to police each other and notıfy the SBA if they think an apparent successful offeror no longer meets the SIC Code requirements for a small business set-aside award. In the 8(a) arena, the contracting agency must obtain a Notification of Eligibility from the SBA for the prospective awardee prior to award. The agency does this by contacting the SBA's 8(a) program office in the appropriate region. The SBA then confirms the apparent successful offeror's status in the 8(a) Program Accordingly, there is no need for policing by other 8(a) contractors, hence, the notification requirement is not necessary or required

27 FAR 15 803(b), Postaward notices
The word "award" is missing from the end of the first sentence
28 FAR 15 806(d)(3), Postaward debnefing of offerors
Delete subparagraph entirely This subparagraph states that the debriefing shall including the "overall ranking of all offerors. "Providing this information serves no useful purpose Industry deserves to know how it did and how it compares with the winner Providing insight into how the rest of the competitors fared adds no value and could create unneeded controversy and possible protest

## 29 FAR 52.215-1, Instructions to Offerors - Negotiated Acquisition

Paragraph (c)(3) - Late proposals, see comments in number 15 above
Paragraph (f)(4) - The language on limiting competitive range for "efficiency" should be reconsidered See comments in number 20 above

Paragraph (f)(7) - The proposed language describing materially unbalanced offers is very unclear The current FAR 15.814(b) language is more succint

Paragraph(f)(10)(11) - Overall ranking of offerors, see discussion in number 28 above

General Services Admınıstratıon<br>FAR Secretariat (MVRS)<br>18th \& F Streets, N.W<br>Room 4037<br>Washington, D C. 20405

## RE: FAR case 95-029

The procedures specified in the Federal Acquisition Regulation( FAR) Part 15 (Contracting by Negotiation) are used to award between 60 and 70 percent of federal procurement dollars. Therefore, we request the proposed rewrite of FAR Part 15 be designated a "major rule" under the Small Busıness Regulatory Enforcement Fairness Act of 1996 (SBREFA). Under SBREFA and Executive Order 12866, a proposed rule is a major rule if it is likely to result in an annual effect on the economy of $\$ 100$ milion or more, or have a signuficant adverse effect on competition. Unless this regulation will have less than a one percent impact on Federal procurement, it must be recognized as a major rule

The National Association of Surety Bond Producers (NASBP) is an organization of 560 insurance agencies and brokerages that are recognized as specialists in providing surety bonds and msurance to construction contractors. We are commenting on this proposed ruie because Section 52 236-XX provides for the inclusion of construction among the types of contracts that can be awarded by negottation under FAR Part 15 (Contracting by Negotiation).

NASBP supports reforms that improve efficiency and streamine acquisitions. However, we have a responsibility to highlight potential vulnerabilities in the proposed system and we want to preserve the practice of full and open competition We contend that this proposal as drafted would sacrifice farness in competition for the sake of efficiency

Our specific concerns with the Part 15 proposal include the procedure for determining the number of proposals in the competitive range prior to submission of proposals in addition, the lack of provisions for minimum number of offers that must be included in the competitive range and the lack methodology for eliminating potential bidders The bases for eliminating bidders are listed as' results of market research; historical data from previous acquisitions for similar supplies and services, and the resources available to conduct the source selection These guidelmes are unlikely to match the sureties prequalification process and we caution that Miller Act bonds are indeed required on negotiated federal construction contracts of $\$ 100,000$ or more under FAR Part 28 (Bonds and Insurance)

GSA
FAR case 95-029
Page 2

NASBP has been frustrated by the draft rewrite of FAR Part 15 due to its potential harm to small contractors. This draft proposal represents a major policy shift in the current competition standards by allowing a "competitive range" policy that encourages retainment of only the bidders "with the greatest likelihood of award" and allowing contracting officers to further limit the competitive range in the interest of "efficiency". From the surety producers perspective, the idea of contracting officers picking and choosing winners and losers without a true competition is abhorrent.

The dividing line between those who are within and those who are outside the competitive range should be based on significant evaluation differences between groups of proposals. If two offerors have similar scores, based on weighted award evaluation criteria, both offeror should ether be within or outside the competitive range. There should be no allowances for setting limits on the number of offers accepted.

Giving contracting officers increased discretion is not without risk. After proposals have been received and considered, how are contracting officers to determine the competitive range from the "most highly rated proposals," if they are unqualified to rate proposals in an industry like construction. Proponents of this system challenge critics in the small business community to come up with examples of negotiated federal contracts where an offeror who is not among the top five qualified wins the award. This argument misses the point. Contracting officers will not always have the technical or managerial skills or objective criteria to determine the "top five" offers. Contracting officers may also be seduced by the ability of larger firms to market themselves over smaller firms

Increasing the importance of initial proposals and oral presentations during competitions; and allowing the government to essentially eliminate Best and Final Offers until contract award would allow contracts to be funneled to certain contractors and not others. Contractors will determine that they don't need contracting personnel but rather marketing executives. Both large and small offeror will have to spend more money on their bid preparations giving larger firms the upper hand.

The proposed regulations allow communication with bidders throughout the solicitation process to ensure competitive range determinations are informed decisions. NASBP holds that under competitive range determinations, proprietary information such as construction methods from the bidders proposal could conceivably be transferred by a contracting officer to other bidders. Although communication with bidders is not to include "discussions," NASBP has argued that the rule cannot prevent discussion in secret after proposals are submitted, between contracting officers and certain bidders, but not others

GSA
FAR case 95-029

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The increased use of negotiated, multi-task contracts for construction is of concern to the surety industry because short-term efficiencies in the procurement process have taken priority over the long-term tenets of promoting the lowest responsible bidder. NASBP argues that the use of pre-award evaluations in federal contracting should have a primary objective of preserving the competitive bidding process. Any evaluation of contractors performed by contracting officers should be based on clearly stated, objective catena. Once prequalified, every bidder should be eligible to be awarded the contract, provided it submits the lowest, responsive bid No additional review of a bidders "past performance" should take place after the opening of bids

In summary, the benefits to the Government and small contractors, does not exceed the risks. We doubt that is policy shift will yield the best value to the government The Clinger-Cohen Act preserved full and open competition, yet this proposal stifles full and open competition. Again, our major concerns are as follows:

1) the procedure at 15.406 for determining the number of proposals in the competitive range prior to submission of proposals is contrary to report language accompanying the Clinger-Cohen Act that specifically states that the limitation of the competitive range can take place only after the initial evaluation of proposals.
2) the lack of a provision for a minimum number of offers that must be included in the competitive range gives contracting officers the power to arbitrarily establish a competitive range of as few as two offerors,
3) and, the lack of guidelines or standards to govern the method of reasons for eliminating a potential offeror from the competitive range is contrary to Sections 4101 and 4103 of the Clinger-Cohen Act.


FAR Secretariat (MVRS)

General Services Administration
18th \& F Streets, NW
Room 4037
Washington, DC 20405
Subject FAR Case 95-029, FAR Part 15 Rewrite

## Dear Sir or Madam

The purpose of this letter is to provide comments on the proposed revisions of FAR Part 15 I am writing on behalf of DynCorp, an information technology and technical support services firm with nearly $\$ 1$ billion in annual revenues, primanly as a prime or subcontractor to the Federal Government

On the whole, we are pleased with the proposed revision of FAR Part 15 We believe that the revision codifies current practices, eliminates tıme-consuming and expensive review procedures and expedites the procurement process in a way that benefits everyone involved

However, we do believe certain changes should be made to the source selection section

The most significant area which we believe should be strengthened concerns the evaluation of cost proposals when the contract to be awarded is a cost-rembursement contract Our experience has been that the evaluation of costs proposed by offeror is not uniformly performed throughout the government In fact, frequently, we beheve the government does not have an adequate understanding of costs proposed by offerors

Unless a company is proposing a drastically different approach to performing an existing contract, it is unlikely that the labor costs and other direct costs in a cost-

November 18, 1996
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reimbursement contract will change significantly from one contractor to another Therefore, any attempt by the government to evaluate proposals on the basis of cost differences in this regard places undue emphasis on cost and may support an award on a false expectation of cost savings

On the other hand, it would be a legitimate cost evaluation to analyze offeror on the basis of G\&A and fee proposed We encourage consideration of this approach

As noted above, we believe that the elements of a cost realism analysis to be performed in connection with a federal procurement should be uniform throughout the government Elements to be moluded should be the cost of current performance, current market conditions, and the government estimate There should be a requirement that the contracting officer performing the cost realism analysis justify any cost differential from the current cost experience for the particular program Such justification should be required to contain specific explanations as to why any cost savings will occur, taking into consideration the technical solution proposed by the offeror and whether that solution can realistically be implemented and be implemented within the timeframe of the contract Particularly with regard to multi-million dollar programs, we beheve that a government representative with a background in finance and economics should review any cost realism analysis performed on cost proposals to ensure that the government is accurately evaluating costs and to make certain that proposals are evaluated fairly

Unless these steps are undertaken, we believe that it will be inappropriate to include cost reimbursement contracts in cost technical tradeoffs or evaluations which permit award to be made on the basis of low cost

We are available to provide you with more information if that would be of assistance


RYM/ks

# DEPARTMENT OF DEFENSE DEFENsE SYSTEMS MANAGEMENT COLLEGE gByO BELVOR ROAD FORT GELVOHR, VA zZOsO-EABE 

21 November 1996
DSMC-FD-CM

MEMORANDUM FOR FAR Part 15 Rewrite Committee Chair

SUBJECT: FAR Part 15 Rewrite - Phase I
Enclosed are comments on the proposed rule for the Phase I rewrite.


L Peggy O Sired LTCOL USAF
Department Chair
Encl: ass

## Reference: FAR Case 95-029

## The following comments on the FAR Part 15 rewrite are provided from the Contract Management Department at the Defense Systems Management College, Ft Belvoir, VA.

2.101 - The rewrite includes a definition of Best Value. Recommend that a definition of Lowest Price, Technically Acceptable also be added.
15.104 - Oral presentations-This subject does not seem to be at the same level as the topics in 15.101, 15.102 and 15.103. Nothing in the FAR prohibits the use of oral presentations now and in keeping with the FAR Guiding Principles, recommend that this be covered in a Best Practices Guide or some similar book.
15.207(b) -There is a potential for abuse here. If the government has communications with one offeror prior to making a determination of competitive range, (even though the government has not made a determination of competitive range, had discussions with offerors, nor did the contracting officer call for proposal revisions), the offeror could interpret the content of the communications in such a way as to decide to submit a change to its proposal which the government could accept as a late proposal (being in its best interest). The govemment could then decide to award to this offeror without having discussions.
15.401. It is not clear why "a single flaw that appreciably increases risk of unsuccessful contract performance" is included in the definition of the term deficiency. A deficiency as now defined means that the offeror's proposal does not meet a mandatory government requirement, in other words a "showstopper". The single flaw test seems counter to the concept of risk management vice risk aversion.

15,404(e) - Some agency/organization procedures are allowing for disclosure of rating method. Recommend that the last sentence be changed to "The rating method may be disclosed in the solicitation, consistent with agency procedures."
15.405(a)(2)(ii) _ Recommend adding to the last sentence the following: "...however, such information, if negative, shall be communicated to offeror during discussions."
15.406(b) and (c) - Refers to efficient competition; however, there is no definition of what efficient competition means Recommend adding such a definition.
15.407(b)(3) - Obtain information that explains or resolves ambiguities, including perceived deficiencies. During these communications, an offeror can "perceive" there to be an ambiguity in its proposal and submit a late proposal or revision to its proposal, not called for by the contracting officer, but yet could be accepted as being in the best interests of the govemment. (See 15.207 (b). Award can then be made without discussions with any other offeror per 15.407(b)(5). This scenano could severely test the integrity of the competitive process. Whether or not the offeror is able to make changes in its proposal (b)(2), this de facto permits the government to upgrade the offeror's score. This area needs more guidance. I would prefer adhering to the standard that was used in the existing definition of Clarification in 15.601. The proposed definition in 15.407 (b)(3) is too broad.
15.408 - Award without discussions - The contracting officer may permit minor clarifications to allow proposal modifications that resolve ambiguities or correct apparent mistakes. Is the current definition of clarifications being retained? It could be confused with "communications" that are conducted prior to establishing a competitive range. If discussions are held, although not envisioned when the solicitation was issued, the business clearance memorandum or price negotiation memorandum should include the rationale for conducting discussions. Separate documentation should not be required. Also recommend that the tenn clarification be used without "minor" as a modifier All clarifications are by definition minor.
15.409(b) - Recommend adding that the offeror shall be notified in accordance with FAR 15.803.

15,803(b)(1) Selected for "award". Word left out at the end of the first sentence.
15.805(b) - It is unlikely that the government will find it to be in its best interests to conduct a preaward debriefing prior to award of the contract. Conducting the debriefings postaward will provide the unsuccessful offeror the fullest amount of information in light of 15.805 (a) which states that an offeror is only entitled to one debriefing per proposal submitted and $15.805(\mathrm{f})$ which limits the information that can be provided in a preaward debriefing.
52.215-1(f)(4) and its alternates This provision is far more specific and potentially arbitrary than the statements made by Administrator, OFPP regarding the finality of the contracting officer's discretion to limit the number of proposals in the competitive range -- "...is just an estimate of the competitive range...".

DEPARTMENT OF THE NAVY office of the mabgatany secretary RESEARCH, DEVELOPMENT AND ACCUIETTION

1040 NAVY PENTAGON
WASHINGTON DC 203B0-1000

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General Services Administration FAR Secretariat (MVRS)
18 th F streets, \(\mathrm{NW}, \mathrm{RODm} 4037\)
Washington, DC 20405
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Gentlamen/Lades:
We appreciate this opportunity to provide comments regarding FAR Case 95-029, Part 15 Rewrite, Phase I. The Navy strongly supports the concept of a more steamlined and empowering FAR Part 15. However, as discussed in more detail in Attachment A, we are concerned that the proposed rewrite may be successfully chatlonged in litigation or on administrative appeal in a number of areas. principal among these are the proposed rule's treatment of:

- The acceptance of late proposals:
- The use of pre-competative range communications to discuss perceived deficiencies, which would appear to initiate discussions, as that tori has been intorpratod by GAO applying the requirements of $10 \mathrm{U} . \mathrm{S}, \mathrm{C} .2305$; and
- The lack of some common out off for negotiations with offarors.

In addition, from a contract policy standpoint, we believe that the following areas could use more refinement:

- The concept of mandatory down-selects in multiphase acquisitions as something distinguishable from oompatitive range determinations:
- The apparent lack of parameters regarding use of oral presencariong; and
- The use of the model contract format in lieu of the current Uniform Contract Format.

While the goal of the drafters has been, and eomundably so, to make government procurement more fully align with commercial practice, it must be acknowledged that the Government will never be able to adopt all commercial practices. In a number of respects, government procurement is fundamentally different from private procurement. It uses public funds, appropriated by Congress; it is enbjeat to review and scrutiny; its contracting officers are held to high etandards of accountability; and its processes and results are answerable to Congress and the courts. Historically, the government procurement process has been proseller and has afforded sellers maximum opportunities to share in the Government's procurement dollar. Commercial practice, on the other hand, 15 pro-buyer, arbitrary and, absent criminal

The commenta provided in Attachment $B$ are issues of lesser impaftence or of an editorial nature regaraing varioug aifpecte of the proposed rule. In addition, the Part 15 proposed rewrite was given wade dastribution throughout the Navy acquisition commundty for reviaw whth a requast that conments generated by auch review be forwarded directly to the FAR Gecretarlat.


Elluott B. Branch
Executive Director
Acquisition \& Business
Management

Encls.

## ATMACPMENTM IVA

I. Late Proposals. $15.207(b)$, Submission, modification, revision and withdrawal of proposals. Section 15.207 (b) permute the Government to consider late proposals, 7 .e., proposals received after the exact time specified. There are no apparent limitations on this right. Without come standards, there is a significant rask of abuse. unlike commercial buyers, the Government has historically been held to a standard of fairness, both in actual fact and in peroeption. This proposed change creates the obvious perception that late proposals may arbitrarily be accepted, especially if the price is favorable. In our view, these are bargains that the Government cannot afford. Ar minimum, there should be some standard for dealing under what circumstances a late proposal can be accepted. For example, the offeror might need to demonstrate that it made a reasonable attempt to submit on time and that it was late as a result of some excusable delay factor. combined with this, the contracting officer might have to determine that there is no evidence chat the offeror knew of, or was influenced by, any of the previously submitted proposals. Additionally, it might be appropriate for part 15 to set forth a relatively short time init on when late submissions could be accepted after the due date.
II. Commurications/Discusetone. 25.407, Communication with offerore, Historically, GAO and the Courts have permitted clarifications (which did not go to the proposal itself) before a determination of the competitive range, at which point 10 U.S.C. 2305 required dieauseions with all offeror in that range. The attempt to expand communications to include interaction with the contractor regarding perceived deficiencies, which are defined (15. 401 ) as a material flaw to meet a government requirement, or a Elam that increases the risk of contract performance, is too transparently discussion without the determination of the competitive range.

Absent statutory change, we believe that part 15 can expand pre-competitive range communications to encompass more than minor clarifications and correction of mistakes. We believe they can be used to:

- review part performance,
- obtain preaward eurvey-type information, and
- assess capability and capacity.

In our view, all of these areas currently can be legally addressed without invoking discussion under lo U.S.C. 2305. on the other hand, discussion of "defleiencles" in proposals, Including prices, would under current law, necessitate a determination of the competitive range. We believe by recasting 15.407 (b) (3) this section could pass legal review and improve the efficiency of the source selection process significantly.
III. contract Format. 15.a03, Model contract format. Although the Model Contract Format (MCF) may have pome merit, we question whether it represents a significant improvement over the existing Umanorn Contract Forgat (UCF). Additionally, we believe that the rewire team has underestimated the administrative impact, and the problem of accommodating existing automated eyeteme to much a format. Ne urge that the MCF not be adopted or that lite una bo made very clearly optional as an alternative to the UCF.
IV. orel Eresentarione. 18.104; oral presentariona. The Navy agrees that oral presentations can, and should, be used to improve the efficiency of the source selection process. However, under the proposed rule, it would be possible to have essentially a completely oral proposal 37 response to an oral KPP
(15.202(f)). We believe this would present obvious problems, and that some restraining parameters should be placed on the use of oral proposals/presentations and oral solicitations.
$V$ Multiphase source selections. 2\%.103. Multiphase acquisition technique. Although we have no problem with the concept of downselections as part of multiphase acquisitions, we believe the down-select process esentially constitutes a competitive range determination and must be recognized as such to withstand legal challenge. Thus, down-selected offarors must be given an opportunity to request a debriefing. With rempect to advisory down-belecte, it might be appropriate for Part 15 to advice contracting officers that they should withhold prewaward debriefings until after proposals for the next phase are submitted. This would ensure that offeror are not provided with information that would potentially give them a competitive advantage in the event they elect to submit a proposal for the later phase
VI. common Cut off. 15.409, Proposal Revisions. Paragraph (c) undercuts the traditional approach where all offerors in the competitive range are notified of a common cut off tor negotiations and submission of best and final offers. Thin approach provides all of these afterors the opportunity to submit final revisions and to provide beat prices. Although chis may not be typical industry practice, it has been an integral part of Government procurement and seems to give our system an appearance of evenhandedness and fairness. Leaving it up to the contracting officer to decade from whom proposal revisions and final prices should be requested can be argued to run counter to The tao concepts of "fill and open negotiations" and of "meaningfl" negotiations.
15.100 - Scope of aubpart. Change the last sentence to read: "The source selection authority (SSA) should select the process most appropriate to the particular acquisition. Reason: The desired result $1 s$ not part of the process.
15.101 - Lowest price toohnicmily adoptable process. Under (a) (1) change the last sentence by ingefting the word "technical" $1 \pi$ front of the final word "thresholds)". Under (a) (3) change to first sentence by inserting the word "technical" in front of the second word "discussions" and also between the words "revised" and "proposal" Reason: In this process we only evaluate the technical proposal
15.201 Rresolicitation exchanges with industry. Under (a) change the first sentence to read as follows. Exchanges of information among parties interested in an acquisition is encouraged commencing with identification of a requirement through release of a solicitation. Reason: Editorial.

Under (c) change the first sentence to read as follows: Agencies are encouraged to promote exchanges of information about future acquisitions as early as practicable. Reason: Editorial.
15. 202 - Change (a) (3) to read as follows Information required to be included in the offeror's proposal: Reason: Editorial.

Change (d) to read: Contracting officers may issue and authorize receipt of REPs by facsimile. Reason: In order to match the receipt of facsimile proposals to equipment capacity the solicitation should specifically state whether or not proposals may be submitted by facsimile.
15.206 gocenpt of proposals and requests far information. Under paragraph (c) delete the last sentence "If the retransmitted proposal is still unreadable, at may be rejected," Reason: This unfairly presumes the fault resides solely with the sender or the sender's equipment. There should either bo a standard set for rejection of an unreadable facsimile or the Government should reserve the right to require it be resubmitted by another means

15207 submission, modification, revision and withdrawal of proposal - Under (c) insert the following modification at the beginning of the paragraph: "Subsequent to the closing date and time" offeror may not. Reason; Offerors may revise their proposals al day time up to the ciosmg date and time stated 10 the solicitation.
15.209 Forms. Use of non-standard forms is adranistratively inadvisable. It is agreed, however, that updating, streamlining, or replacing the current forme is desirable
15.402 (a) - The statutory formulation is the "responsible source

## SENT BY

$11-25-96,10.53$
whose proposal is most advantageous to the United states." since there is no difference botween the best value concept of doliars traded for incremental value where coot 19 only one factor, and not the controlling factor, and the otatutoty "most advantageoms" concept there appears to be no gound basis to move away from the statutory formulation other than to embrace a currently preferred designation.
15.402(b) - Change to read as follows: A lowest price technically acceprable process 45 used when it has been determined that the Gavernment's interests are best served by selection of the lowest price offer that has been evaluated to bo technically acceptable on a pass/fall basis. Eroposals need not be technzcally ranked under this process nor are communications precluded, Reason. Proposed language 15 very convoluted
15.403-We recommend that language be inserted to replace the curfent 15.603 (a) coverage emphasizing maximizing compelition. The emphasis on maximizing competition is compatible with the EARA concept of keeping the largest number of sources in the competition consistent with efficiency.
15.404 (b) (2) Change to read as follows. Support a chorough and objeclive evaluation of competing proposals and a meaningful discrimination between compcting proposals. Reason "amd among" 13 unnecessary.
15.404(d) (2) - add a scheduling plan to the atems to be addreased as a non-cost evaluation factor. Redson: A scheduling plan is often a major evaluation atem.
15. $4(5$ (a) (1) Cogt or price ovaluation Make the Tollowing chantes: Normally, competition should eatablush price reasonableness and a cost analyaie will not be necessary. Reason Editorial.
15.405(a) (4) Delete. This has not previously been a FAR matter and its addition effectively removes the discretion now available to an agency to treat cost information in a manner most suitable to their internal policies and procedures.

15408 Araxd wathout discusaions. Delete the gecond and third sentences. Reason; Why do we need to jusL」fy a decasion to hold discussions in a negotlated acquiattion
$15420(a)$ Change to read ag follows. The Saurce Selection Authority is reapontible for performing the integrated comparative assessment of proposals. Thls comparative assessment may be deleqated to the rechnical evaluator's or to any other advisory group appointed by the Source Selection Authority. Reason: since the comparison of proposals follows, and 18 based on, the results of the technical evaluation the primary responsibility for the comparatuve asgessment should be at a level above the evaluators. The ability of the SSA to delegate
this aspect of the evaluation process accommodates both chose situations where it is possible for the evaluators to perform an objectuve comparison of their evaluation results and where, as in major acquisitions, the extent and complexity of the evaluation process precludes the evaluators from performing the comparison task
15.802 Applicability In the second sentence delete the word "however".
15.215-1(a) (6) - Revise to include language chal makes it clear offerors may revise proposals at any time before the closing time Reason: Current language would prohibit offerors from changing their proposal after submittal but prior to closing tame (See related comment under 15.207 (c)).
15.215-1(f) (9) - change to read "Award of a contract is effective upon "elther the date the contract is sugned by the Government or the date entered on the cover form in the block tatle "Effective Date." Reason: The transmittal date should not govern. Also, the contract process and standard award forms recognize both an effective date and an signature date as applicable to the executed award document.

52 215-8 Ordar of Precedence - this appears to presume the Model Contract Formal (MCF) is used.

## Enclosure

FAR 15 Phase I Rewrite Subpart Comments and Recommendations

## Goals

## 1 Enhance Efficiency

The increase in the amount of discretion given to the Procuring Contracting Officer (PCO), the reliance on oral proposals, the use of simple and clear evaluation criteria, the reduction in proposal revisions, the flexibility in competitive range determinations, and the increase in the amount of communication will all serve to enhance efficiency in the acquisition process The necessary balance between e iciency and fairness (equity) has been achieved

## 2 Eliminate Unnecessary Effort to Support Prices

The use of oral proposals, the reduction in the number and extent of proposal revisions, the adoption of best value principles and the increased amount and flexibility of communication will help in meeting this goal However, the most useful improvements will come from the changes to the Phase II pricing sections

## 3 Ensure an Accurate Understanding of Evaluation Criteria

The greatest ald in meeting this goal will be the increased amount and flexibility of communication However, little guidance is provided as to how to structure evaluation criteria Such guidance might usefully be placed in a guidebook or best practices reference tool

## 4 Allow the Government to make Informed Competitive Range Decisions

The change allowing the PCO to include proposals having the greatest likelihood of award is good. It will result in a faster acquisition cycle with less process cost and little or no reduction in the quality of acquired products and services The concept of efficient competition is important to consider because it addresses the very real problem of the cost of competition This is particularly important in services contracting However, the important element in competitive range determinations should be the likelihood of award To the extent that the concept of efficient competition detracts from or puts that at risk, it should be discarded

5 Rely on Agreements reached during Discussions without resort to Revised Proposals
This change will reduce the cost of the acquisition process and reduce cycle time The reliance on communication between buyer and seller to reach agreements to be documented in a resultant contract is a common and straightforward methodology The sometimes cited problem of lack of a written record is accommodated with notes and working papers in the event a protest or dispute is later lodged

6 Eliminate Offerors without resort to Revised Proposals
This change injects needed flexibility into the process Allowing an offeror to be eliminated after a competitive range determination as a result of discussions and without resort to a revised proposal will reduce process cost for both buyer and seller It will reduce cycle time for the buyer It will help the seller by protecting scarce resources to be applied to more promising opportunities

## Features

## 1 Discussions and Communications

The distinction between communications before the compertive range determination and discussions after that point in the process may actually create a barrier to communication Experience in successful commercial transactions indicates that the amount of communication between buyer and seller increases as the parties near settlement There should be no impediments to communication The term "discussions" may have outlived its usefulness The generic term "communication" may be more appropriate The rules of communication throughout the acquisition cycle should be made clear The General Services Administration's (GSA) commissioned study on communication prepared by the GSA Industry Advisory Committee (IAC) is helpful in this regard and serves as a best practices guide.

It is recommended that Subpart 15407 be rewritten in accordance with the recommendations of the Professional Services Council FAR Case 95-029 letter of October 31, 1996

## 2 Source Selection Objective

While it is clear that the objective of source selection is to select the offer which represents the best value, the two techniques cited in Subpart 15402 are not helpful in reaching that objective Subpart 15402 might be usefully structured to cite a definition of best value with an accompanying definition of a tradeoff process that is to be used in all source selections regardless of technique In this sense all procurement techniques must deliver a product or service to the federal government that represents the best value based on the conduct of a tradeoff between all evaluation factors It is particularly inappropriate to cite a "lowest price technically acceptable" process All procurements should be subjected to the best value objective and the tradeoff process Specific techniques on how to reach that objective should be characterized in a best practices guide Subpart 2101 should be changed to read
"Best Value" is a process that results in an offer or quote that is most advantageous to the Government and is based on a tradeoff among factors such as quality, past performance, price, approach and others The best value process is applicable to all negotiated procurement across the entire lifecycle of acquired products and services from developmental products and services to commercial off-the-shelf products and services "

## 3 Multiphase Acquisition Technique

The concept of a multiphase acquisition technique is good However, it should be characterized as an advisory downselect only The opportunity to make a mandatory downselect should not be made available to the Government under this technique The nature of the notice to the public and the vagueness, by its very nature, in the characterization of the requirement or problem to be solved make an advisory downselect more appropriate

## 4 Past Performance

The use of past performance in source selection is appropriate and to be encouraged However, there is a need for the correction of inaccurate information and the rebuttal of tainted information. It should be mandatory for the PCO to obtain a contractor response for any negative past performance information that has not previously been responded to This would include all forms of past performance information, including reference checks and market research findings

## BY MESSENGER

General Services Administration
FAR Secretariat (VAS)
Attention Beverly Fayson
$18^{\text {th }}$ and F Streets, NW, Room 4037
Washington, DC 20405
Reference FAR Case 95-029 Federal Acquisition Regulation, Part 15 Rewrite-Phase I
Dear Ms Fayson.
BDM International Inc (BDM) is pleased to submit comments on the Phase I rewrite of Federal Acquisition Regulation Part 15, Contracting by Negotiation, covering acquisition techniques and source selection A review of each subpart of the proposed rule with recommended changes is enclosed

BDM is an information technology company of 8,000 employees operating worldwide with annual revenue approaching $\$ 1$ billion Since its founding in 1960, BDM has sold services to virtually all of the major agencies of the federal government under thousands of negotiated contracts

BDM offers its full and enthusiastic support to the proposed rule The ad hoc interagency committee that completed the Phase I rewrite of FAR Part 15 and the FAR Council that initiated the effort are both to be commended for the excellent result. This change to the Federal Acquisition Regulation is important to the reform of the system by which the federal government acquires $\$ 200$ billion dollars of products and services annually Embedded in the proposed rule is the notion that the federal government must acquire products and services from a common technology base and a common marketplace A separated federal market served by captive businesses or stand-alone divisions of firms will not effectively or efficiently serve the pubic ins notion will be particularity important for the ad hoc interagency committee and FAR Council to consider in Phase II of the FAR Part 15 rewrite as it deals with issues related to contract pricing.

BDM is pleased to offer comments on the proposed rule and to participate in the rulemaking process If you have questions, please contact Mr. Mitchell J Ross, Vice President, at 703-845-3342 or mross@bdm com


### 95.129 .46

## vIII

## General Services Administration

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November 24, 1996
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cc Mr Bert M Concklin
President
Professional Services Council
Suite 204
8607 Westwood Center Drive
Vienna, VA 22182
The Honorable Steven Kelman
Office of Federal Procurement Policy
Office of Management and Budget
Old Executive Office Building
Room 352
Washington, DC 20503
Mitchell J Ross
BD

General Services Admınıstration<br>FAR Secretanat (VRS)<br>18th \& F Streets, N W , Room 4037<br>Washington, DC 20405

## Attention Beverly Fason

## Re Comment on Proposed Rewrite of Federal Acquisition Regulation Part 15 FAR Case 95-029

The Associated Specialty Contractors is a construction industry coalition of eight specialty construction industry associations ASC member associations are listed below ASC represents the trade contractors that directly perform fully 60 to $70 \%$ of actual construction work on new federal projects and deliver those services both as prime contractors and specialty subcontractors over the full range of project delivery systems, from single prime contract, multiple prime contract, construction management, and design-build delivery systems On renovation and repair projects, specialty firms typically contract directly for the entire project

ASC member groups each have a vanety of specific positions relative to public procurement issues challenging traditional practices Overall, however, ASC member firms accept that the traditional contractor selection procedures, public contracting methods, and construction delivery systems are undergoing rapid change and that all affected industry groups must become actively involved in the regulatory process that addresses these issues

Just as ASC member associations and firms have commented on the detrımental effect of treating construction project services in the same way as commercial items in the FAR Part 13 proposals, these same groups now join in these comments seeking the essential recognition again that construction procurement presents unique characteristics that should be recognized in the Federal Acquisition Regulations

Following are ASC's specific comments on the FAR proposal (61 FR 57622, Nov 7, 1996)

1 Sealed bidding for fixed price construction contracts among responsive responsible and qualified firms should remain the predominant method of public construction where appropnate The quality of routine construction projects can be assured through the standards set out in the plans and specifications, combined with

Mason Contractors Association of America - Mechanıcal Contractors Association of America - National Association of Plumbing Heating and Cooling Contractors - National Electrical Contractors Association - National Insulation and Abatement Contractors Association - National Roofing Contractors Association - Painting and Decorating Contractors of America Sheet Metal and Air Conditioning Contractors National Association


proper inspection and testing procedures Furthermore, the taxpayers benefit not only from absolutely objective selection critena, but also because the development of plans and specifications ensures that the Government carefully plans tits construction projects in advance The Government's planning and purchasing systems need more-not less--discipline

2 In those cases where negotiated procurement must be used, the FAR should establish a preference for the FAR 101 "Lowest price technically acceptable process" This process ensures award to a qualified bidder, however, it still places the emphasis on the lowest price and results in a more objective selection process and decision

3 If the Government elects to use the Trade-off Process (FAR 15 102) for a fixed price construction contract, the solicitation should state that price will be at least as important as technical considerations

4 While past performance evaluations interject strong market disciple, there must be safeguards (See FAR 15 405(a)(2)) Specifically, there should be a procedure established for reviewing an agency's evaluation of past performance on previous projects As written, an offeror may be excluded from the competitive range without discussions An offeror might not be aware of an unfavorable past performance rating until the debnefing process--which can be delayed until after award Thus, a contractor would be deprived of the opportunity to challenge an improper performance evaluation Due process and public program fairness demand more Moreover, controls should be used to prevent the abuse of evaluation criteria as a way to discourage the submission of otherwise valid claims and requests for equitable adjustments on construction projects

Without careful controls and rigorous discipline, the use of highly discretionary contractor selection criteria raises the potential that the public procurement programs will be exclusionary, insular, and subject to abuses and inefficiencies that the current system discourages

cc Adrian Bastuanellı, Esquire
Donald Tobin, Esquire
Bastianell, Brown, Touhey \& Kelley
2828 Pennsylvania Avenue, NW
Washington, DC 20007
ASC Board of Trustees

MK JJ
1470

# MEMORANDUM TO. FAR Secretariat 

## FROM Bureau Chief Procurement Officer

SUBJECT Comments on FAR Part 15 Rewrite (Case 95-029)

The following comments are provided in response to the proposed rule published in the Federal Register

Improvement of the procurement process, especially the area of source selection, is a worthy goal The process is generally too long, requires too many resources, and is burdensome to both the Government and the offerors However, serious consideration needs to be given to accomplishing this through incremental change and educating our acquisition personnel to the authority and leeway they possess through the FAR Adequate training is probably a greater need than rewriting FAR Part 15 Recognition needs to be given to the fact that much of this authority and leeway is taken away by agency supplementation and apocryphal stories of acceptable and unacceptable procedures

For example, there is nothing in the FAR that precludes holding discussions with offeror prior to a competitive range determination or, under those circumstances holding discussions with offerors who never make the range, but that is not the way we conduct discussions However, we seem to be back in the same box concerning awards without discussions, notwithstanding the creation of "communications" The new FAR 15408 and, perhaps, $52.215-1$ (a)(5) appear to limit the leeway for award without discussions

There is also a danger associated with change Some changes that adopt more generally used terminology (eg, best value vis greatest value, statement of work vis work statement) are probably transparent to the community However, wholesale change will thrust us into a state of flux for years to come as the boards and courts sort out the "real" meaning of the FAR Part 15 revision

If our purpose is to make the process simpler, and allow the contracting officer greater flexibility, we can and this by moving acquisitions out of Part 15 and into Part 12 A change to the definition of services under the commercial item definition in Part 2 would assist this endeavor The definition in the Federal Acquisition Streamlining Act (FASA) reads, "(F) Services offered and sold competitively, in substantial! quantities, in the commercial marketplace based on established catalog prices for specific tasks performed

and under standard commercial terms and conditions " However, the following limitation appears to have been added in the translation into FAR, "This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed " This addition appears intended to further limit commercial services As such, it should be elimenated If it is not meant as a further limitation, but as clarification, then it should be eliminated, as the statutory language is adequate

Contracting by negotiating is an acceptable and extensively used procedure As such, it should stand on its own as much as possible The rewrite should include full text discussion of procedures, here, and elımınate cross references to FAR Part 14 as much as possible

The terms "proposal" and "offer" are used inconsistently and in different contexts in this rewrite Sometimes they are used as different terms, sometimes as subsets This is confusing, espectally as the current definition makes ase to a soltitation and a proposal a response to a specific kind of solicitation ( 1 e, RFP) To acheve the goal of this rewrite concerning opening commumication, we must have two distinct terms to differentrate those parts of a response to an RFP that are susceptuble to open communcations and changes and those that are not These definitions must then be included in Part 2 There needs to be an overarching term (e g, "response") that includes two parts, a set of binding promises (e g, "offer"), and that additional information that is necessary to select that offeror/offer that is most advantageous to the Government (e g , "proposal")

Outside of this rewrite "communication" is an all-encompassing term that includes discussion, negotiation, bargaining, etc, but here it is being used as a subset of some other, unspecified, term Unfortunately, the FAR has chosen to use the term negotation to define a procedure, rather than as a subset of communication This precludes its use unless we establish a new name for the procedure, or use the term to have to different meanings The former would be the better solution, calling Part 14, Bidding or Bids, and Part 15, Offering (?)or Offers However, assuming this will not happen, communication should be used in its more standard sense, with the two subdivisions of "discussions", which would not allow revised offers, and "bargaming," which would

Establishment of the Model Contract Format (MCF) does not make sense We appear to be going in the wrong direction in trying to make it easier for organizations to do business with the Government, and for us to do business The Government have recently established a contract format for the acquisition of commercial items. This was in addition to the Uniform Contract Format (UCF) and a myriad of organization specıfic formats for simplified acquisitions Even using the UCF, there is great inconsistency across Government RFPs, the MCF will only exacerbate that problem Part 15 should stay with the UCF If change is necessary, don't adopt the MCF, use the commercial format in Part 12 It is farly close to the MCF and will allow for greater consistency across types of acquisitions Finally, if the MCF is to be adopted, then the UCF in Part 14 should be eliminated, and the MCF substituted

Perhaps worse than the establishment of the MCF, is the proliferation of forms that could come about as a result of the flexibility provided in the rewrite Flexibility can be good, but some things are clearly worth standardizing across Government, this is one. This approach will just cause confusion for our contractors/vendors Forms should be used to

develop sohcitations and they should be mandationary Perhaps one of the greater failings of the UCF is that it does not, even currently, provide enough internal structure for consistency across organizations Forms within the UCF, rather than just the cover sheet, could provide such consistency, and ease the burden we create for contractors

The term "practicable" is used throughout the rewrite Accomplishing things to the extent practicable is a much more burdensome requirement than doing things to the extent "practical" According to Webster's, "Practicable is something that can be put into effect Practical refers to something that is also sensible and worthwhile Thus, it might be practicable to transport students to school by balloon, but it would not be practical" In the context of acquisition this could create a huge burden, if followed It is unfortunate that practicable is used so extensively, probably inappropriately, in legislation, rather than practical We should not repeat that error here

Conduct a global search and edit on contracting officer, which is both capitalized and in lower case
$1102(\mathrm{c})(3)$ FAR 7 102(a) requires that acquisition planning be conducted for ail acquisitions If the intent here is to abide only by written acquisition plans, it should be so stated However, recommend deletion of acquisition plan and making the solicitation binding Remember, the acquisition plan is just that, a plan or guide from which deviations may be made The final solicitation should be the definitive document to follow

2101 Drop quote from the definition, because the Government will not make a selection based on a quote resulting from an RFQ as it is not an offer as defined in FAR 2101

14404-1(f) The original reference at $14404(e)(1)$ was to 15103 , which is now changed and incorporated here as (f) The reference at $14404(e)(1)$ needs to be changed to reference this new citation

15000 Insert "all" between "governing" and "acquisitions" and end the sentence after "procedures " Something should be said about not only differentiating these procedures from Parts 13 and 14, but also Parts 8, Required Sources of Supplies and Services, and 12, Acquisition of Commercial Items

15001 The definitions of modification and revision appear to be all encompassing and do not allow other changes to proposals However, other changes appear to have been envisioned as occurring, as evidence by the language at 15207 (b)

15002 Recommend deleting this whole Section as unnecessary and 11 advised When contracting in a sole source environment we should be significantly more flexible than in a competitive environment Failing total elimination, at least eliminate the introductory sentence as it only states the obvious and was adequately covered at 15000

15100 In the first sentence, delete "amount of "
$15101,15102,15103$, and 15104 would all seem to be out of place As they all deal with source selection, they should be Sections or Subsections under Subpart 154 , Source

Selection The material in 15101 and 15102 is already included, to some extent in 15402 (b), where they are presented in a different order

15101 The statement at 15 102(b)(2) is a statutory requirement Although somewhat absurd, shouldn't it be included in this section, or a statement that minimal technical acceptability is more important than cost

15 101(a) This implies that communications are not allowed under other processes, presumably the trade-off process, but that is not clear from any prohibitions elsewhere

15 101(b) Delete "evaluation considerations," because not all of those teems that follow are evaluation considerations
$15101(b)(2)$ The phrase should be " price and non-price factors "Should also address cost and price related factors Substitute here, and elsewhere as necessary, "acceptable/unacceptable" for "pass/fall," as being more descriptive and more consistent with the title of the process

15101 (b)(3) Here is one example of the problem with the "proposal/offer" and "communication/discussion" terminology, offerors revising proposals as a result of discussions [Not er At this point in the regulation, discussions and communications have yet to be defined ] From a grammatical standpoint, multiple offeror are submitting a single revised proposal

15102 Should be entitles "Best Value," unless the interpretation of best value is going to stretched to elude the lowest price technically acceptable process
$15102(\mathrm{a})$ Delete the phrase " but also more resource intensive "The FAR does not dictate amount of resources for ether approach Any intensive use of resources is a self-inflicted wound on the part of the implementing organization A "simple" desktop computer buy that established 2,000 to 5,000 minimum mandatory requirements can also be extremely resource intensive

15 102(b)(1) Add commas around the parenthetical phrase
15 102(b)(3) The phrase should be " cost or price and non-cost or price "Should also address cost and price related factors

15103 This is both too much and not enough In addition, the title is somewhat confusing, this section appears to be dealing with multi-phase source selection, not multi-phase acquisitions, although the later can encompass the former in some cases This attempts to add legitimacy to procedures that are already being used, but it doe not do a good job of differentiating procedures This should concisely address the use of market research capability statements as a mechanism for prescreening potential offerors and competitive down-selects in multt-phase acquisitions

15103 (b) If this is expanded to address the use of market research capability statements as a mechanism for prescreening potential offeror and competitive down-selects in multi-phase acquisitions, then the last sentence needs to be deleted, or modified accordingly

15 103(d)(1) There appears to be a potential danger in conducting a source selection in which offerors are eliminated, even on an "advisory" basis before a binding offer has been submitted This certainly allows the Government to be susceptible to "batt and switch "
$15103(\mathrm{~d})(2)(\mathrm{ini})$ This is does not follow from the next higher level of indenture This should be either 15103 (e) or (f)

15103 (e) It would seem impossible that an acquisition that is so complex as to require this elongated process, would be susceptible of award without discussions Recommend deletion of award without discussions and possible substitution of a statement that award without discussions would probably be inappropriate

15 104(c) Delete "Accordingly" in the second sentence
15 104(c)(3) Insert "and" before "any "
15104 (c)(4) This seems to be inappropriate for solicitation content, and should be deleted If there is some specific intent for inclusion, the area needs expansion, because it is not intuitively obvious The impact on small businesses of using oral presentations should be a consideration prior to the release of the solicitation, if anywhere It's really unclear that the use of oral presentations would be anything but a boon to small business, versus preparing costly written proposals

15 201(a) In the first sentence, substitute "among" for "by "
15 201(b) Recommend deleting in its entirety The information in (c) provides essentially the same information, but more eloquently Whatever is finally decided, the resulting language should be part of (a) Substitute "of" for "in "

15201 (c) Include as part of (a)
15202 The information provided is much to diverse and needs be sub-categonized The information m (a) through (d) should be under a new 15 202-1, the mformation in (e) should be in 15 202-2, and the information in (f) should be in 15 202-3

15 202(a) Should be under 15 202-1 Delete," and therefore, shall not be used as a solicitation for information or planning purposes "This is unnecessary, as that is the request for quotation definition

15 202(a)(2)(11) Delete as unnecessary This is one of those bridges that should be crossed when we come to it

15 202(a)(4) Include statement dealing with relative importance of cost or price and other factors
$15202(\mathrm{~d})(1)(1)$ through (iv) Combine together under (1)
15 202(e) Should be 15 202-2 Define and describe letter RFP One example is insufficient, provide more, especially where a later RFP might be used in competitive negotiated procurements If this is the only situation for use, so state


15 202(f) Should be 15 202-3
15 203(a)(5) Delete, or place at a much lower level (eg, contracting officer)
Table 15-1 Substitute Arabic numerals for the Roman numerals
15 203-1 Specify Form
15 203-2 Delete "eg," it is misplaced and unnecessary
15 203-4 Availability of clauses " through the Internet " is much too limited Expand to include electronic means (eeg, bulletin boards, interactive fax) Additionally, it makes no sense to include a clause in full text in a different section of the RFP if it has not been tailored It will make for an interesting argument vis the Order of Precedence clause [Note Although the parenthetical requires placement in the Financial and Administrative Information section, the instructions for that section do not, at least not clearly ]

15 203-5 Is the intent of this section to totally abandon the use of the term specification as applied to negotiated procurements? If not, please include here It would seem that contract specifications are stull viable documents, especially when buying supplies

15 203-6(a) Place parentheses around the example and move to after "information," otherwise the modification is confusing

15 203-6(b) The existing requirement (FAR 15 406-1(b)) for incorporation of representations, certifications, and other statements of offerors or quoters into the contract by reference goes away with this construction This information now becomes file fodder and not part of the contract Was this the intent?

15 204(b) Create as stand-alone in Part 15
15205 Add a new subparagraph that deals with responding to offeror questions through solicitations amendments A good format would be "Question, Answer, Changed Requirement " This subparagraph should also point out that requests for interpretation of solicitation language require more than simply referring back to the solicitation language

15205 (a) Delete " relaxes, increases, or otherwise modifies " as unnecessary Each of these is a change, in one form or another, of the Governments requirements If a decision 25 made to retain some of this language, please differentiate between "changes" and "otherwise modifies"

15 206(a) Refers to "source selection officials," which are undefined in this regulation In any event, this should be changed to contracting officer

15 207(b) These circumstances are significantly changed from those currently in Part 15 With the ability of an offeror to withdraw a proposal or modification at any time, this sets up an interesting opportunity for the offerors to game the system, possibly creating a sort of reverse auction by withdrawing modifications


15207 (c) Another example of proposal/offer inconsistency The only place where revision appears to be defined is at 52215-1(a)(3), but that definition refers to offers, not proposals Of course an offeror can modify its proposal at any time, although they run the risk of the contracting officer not accepting it But what contracting officer would not accept a modification that improves a good proposal/offer?

15207 (d) Yet another example of proposal/offer inconsistency "Written proposals" and "Oral offers" Shouldn't at least one copy of the withdrawn proposal be retained for documenting the file (FAR $4803(\mathrm{a})(10))^{\text {? }}$

15208 Delete the introductory phrase as unnecessary, since this whole Part deals with contracting by negotiation

15 208(a) In the fervor to make awards without discussions, we are losing sight of the fact that one of the four reasons we, use negotiated contracting, or don't use sealed bids, is to hold discussions (FAR 6401 (a)(3)) As such, this subdivision and the provision should be rewritten to make award with discussions the norm This is the norm, and is what offeror expect even if we say we plan to make award without discussions Unfortunately, sealed bidding, including two-step sealed bidding, is a good tool that we allow to languish as we try to shape and reshape the negotiated process to do the same thing

15 208(b)(1) Delete as unnecessary, FAR 15000 already creates this exclusion
$15208(\mathrm{~b})(3), 15208$ (b)(4) and 15208 (b)(5) These are not exceptions to the use of the clause, as stipulated at 15 208(b), but additions to or deletions from the basic clause

15209 (c) If a decision is made to proceed with use of the MCF, created a Standard Form for its use

15401 Delete "material "First, material fallure is undefined Second, this gives the impression that a failure to meet a Government requirement is not a deficiency However, in a lowest price technically acceptable acquisition it should prevent award In addition, this appears to preclude the possibility that a series of failures or flaws could combine to create a deficiency

The definition of "discussion" should be "bargammg" There should be a third definition, "discussion," that addresses communication before the competitive range The previous discussion deals with the communication/discussion/bargaining issue

15 402(a) Insert "and significant subfactors" after "factors in the first line
15 402(b) End after the word "acceptable "
15 403(a) Do not specify the contracting officer as the source selection authority Allow maximum discretion to the agency head in making that decision
$15403(b)(1)$ The words here are driving us to do additional work The inclusion of "team" will drive organizations to establish teams, even when a contracting officer could
make the decision on his/her own Delete "contracting, legal, logistics, technical, and other," or they will be on every team Substitute "complete" for comprehensive

15 404(a) The use of the word "criteria" creates an intermediate, unnecessary step The award decision should be based directly on the evaluation factors and subfactors

15 404(c) Delete This is required for any competitive negotiated acquisition
15 wording gives the impression that quality of the product or service cannot be evaluated on its own, but only as a part of some other evaluation factors The evaluation factors that are offered up are not ones that would deal with the quality of the product or service

15405 and 15 405(a) Change the title of the section to "Evaluation," as 15 405(a) immediately states that proposal evaluation is an assessment of both the proposal and the offeror's ability to accomplish the contract This repeats the proposal/offer use issue, previously discussed It also introduces a new problem, using proposal evaluation to mean both assessment of the proposal and the offeror's ability

15 405(a) Delete "solely" in the second sentence and "specified in the solicitation" in the third sentence as the courts and boards have consistently held that decisions can be made based on discriminators that logically follow from the evaluation factors or the purpose of the acquisition, even if not explicitly stated in the solicitation Replace the virgule (/) in "color/adjectival" with a space As currently written, this presumes that colors and adjectives must be used together However, colors can be used with adjectives or numerical ratings, and adjectives need not be used with colors This sentence also combines, and thus confuses, ratings, weightings, and rankings What is really critical, and unmentioned, is a good narrative write-up

15 405(a)(1) The last two sentences are said to be related to cost realism and to be used for other than FFP and FP/EPA But for the most part, these are more than cost realism and should be done for all contract types Also, hyphenate fixed-price

15 405(a)(2) Statutory citations have been provided elsewhere and should be provided here
$15405(\mathrm{a})(2)$ (111) This picks up from the current FAR concerning firms that lack relevant past performance information, using "neutral evaluation" and not rewarding or penalizing firms However, this uses non-statutory language when the statutory language was sufficient FASA reads, "In the case of an offeror with respect to which there is no information on past performance or with respect to which information on past performance is not available, the offeror may not be evaluated favorably or unfavorably on the factor of past contract performance "

15 405(a)(3)(11) The technical evaluation must contain a narrative statement that explains and summary, matrix, or quantitative ranking

15 405(a)(4) Add a statement that this probably necessary to accomplish an adequate technical and cost/price evaluation

15406 (a) The ultimate source selection decision is going to be made based on offers, the competitive range determination should be made on the same basis (Or is this another proposal/offer problem?) Also, change "discussion" to "discussions"

15 406(b) The discussion of the use of Alternate II refers to " the Government's estimate of the greatest number of proposals that will be included in the competitive range "The language is indicative of flexibility However the language in alternate II is only downwardly flexible, there the number becomes a maximum, eliminating the Government's ability to add one more great proposal

15406 (b) and (c) Eliminate "greatest," it's implicit
15 406(e) The debriefing request must be in writing
15407 The correct title should be "Communication with offerors" From a technical viewpoint, communication is both singular and plural and deals with human communication, while communications addresses the medium Make similar adjustments elsewhere in 15407
15.407(a) As written, this precludes award without discusston/communication (?) Sealed bidding is for the purpose of making award on price alone

15 407(c) Add a statement that indicates that discussions should disclose deficiencies, weaknesses, etc that, if unresolved, would preclude award Any agreements should not only be confirmed in offer revisions, but should be incorporated in any resulting contract The reference to 15410 does not appear relevant Even assuming that it could be a typographical error for 15401 , it does not appear relevant
$15407(\mathrm{~d})(1)$ Although the term technical leveling has been dropped, include the court'board language that discusses the necessity of successive round of discussions being necessary for technical leveling to occur

15 407(d)(3) The BankStreet indicates that you don't have to disclose the Government's estimate to all offeror Include specific language about disclosure of the Government's ICE, IGCE, MPC

15408 This section should clearly differentiate between minor clarifications, which do not preclude award without discussions, and communication ( 15 407(b)), which apparently would If that is not the case, both this section and the clause need to be modified

15409 In the second sentence change "may" to "need not "
15410 Here the best value relates to proposals, not offers.
15410 (b) 15410 refers to "An integrated comparative assessment of proposals 15 405(a) sard that the evaluation must be based solely on evaluation factors and subfactors But now we introduce business judgement in addition to factors and subfactors, and separate from an integrated comparative assessment But isn't an integrated comparative assessment busies judgement?

110n uses the term "legal holiday," however the definition at 52 215-1(a)(1) uses the term "Federal Holidays"

15802 Substitute "innovative" and "innovation "
15 804(a) Delete as this is included in (b)
15 805(e)(1) This introduces a new, undefined term Define or delete, preferably the latter The agency is supposed to evaluate factors and subfactors, and that is what should be debriefed If these are elements, as in the Air Force's areas items and elements, they should be deleted, as the factors/subfactors terminology should be adequate We shouldn't create a second lexicon to superimpose on the first

15 806(b) Assuming that debriefings will not be given non-verbally, oral and written about cover the map of acceptable methods However, if this refers to medium, it should be as a separate sentence and provide some examples
$15806(\mathrm{~d})(1)$ Delete "if any." Since we debrief unsuccessful offers, they will have weaknesses or deficiencies, even if it was only too high a price Deficiencies are defined at 15401 , but a definition of weaknesses needs to be provided

15 806(d)(4) Substitute "determining best value" for "award "
15 806(d)(5) This would seem to more appropriately belong in Part 12
15807 (b) Substitute "all offerors" for "prospective offerors or original offeror still within the competitive range, respectively "

15 809(b) In the first sentence, if there are more examples, please list some However, if there are no other appropriate modifications, change "e g " to " 1 e " In the second sentence, delete the parenthetical statement and write the sentence directly, "If so modified, the contracting officer shall remove the standard form number "

52215-1(a)(1) This definition uses the term "Federal Holidays," however the definition at 15801 uses the term "legal holiday "

52215-1(a)(2) This seem terribly complex Unless there is a specific legal reason, recommend using, "'In writing or written' includes electronic media "

52215-1(a)(1) This repeats the problem at 15.408, but with a slightly different twist 15408 allowed for " minor clarifications to allow proposal modifications that resolve ambiguities, or correct apparent mistakes "" while $52215-1(a)(1)$ allows for obtaining " information which explant or resolves ambiguities or for minor clarifications." In the former minor clarifications is the whole, in the latter it is a component The former requests minor clarifications, while the latter requests information As this is the basis on which award without discussions will be made, it should clearly differentiate between minor clarifications, which do not preclude award without discussions, and communication (or information) that resolves ambiguities, which apparently would. or may Both this clause and 15408 need to be rewritten Additionally, this leaves out "correct apparent mistakes," which is included in 15408
$52215-1(\mathrm{~b})$ What happens to an offeror that doesn't acknowledge an amendment?
$52215-1$ (c) Don't use e $g$ and etc in the same parenthetical, they are duplicative
$52215-1$ (c)(2)(iv) Because of the way $52215-1$ (c) is written "its" refers to the first page of the offer, not the offeror

52215-1(c)(3) Delete all instances of "requested" Definitionally, all revisions are requested

52215-1(c)(6) Change to read positively, "Offerors may revise offers only if requested by the contracting officer "

52215-1(c)(7) May modifications and revisions to an offer be withdrawn separately from withdrawal of an offer? Does this include after selection, but prior to award? Please specify one way or another

52 215-1(d). Substitute "longer" for "different " Close parenthesis
52215-1(e)(1) The specified legend precludes the Government from using the proposal for historical/comparative purposes during contract administration (e g , pricing change proposals), unless the resultant contract so specifies After award the first thing that usually happens with copies of the successful offeror's proposal is distribution within the program office to establish the baseline of what was acquired

52215-1(f)(4) Delete "(except communications)" Defintionally communication is not discussions As in 15406 (b) and (c), eliminate "greatest," it's implicit
$52215-1(\mathrm{f})(5), 52215-1(\mathrm{f})(6), 52215-1(\mathrm{f})(7)$, and $52215-1(\mathrm{f})(8)$ Delete $52215-1(\mathrm{f})(6)$ as unnecessary Reorder to place 52 215-1(f)(8)immediately after 52 215-1(f)(5), for greater continuity
52.215-1(f)(10) As in $15806(\mathrm{~d})(4)$, substitute "determining best value" for "award "

52215-1(f)(4) Alternate I As in 15 406(b) and (c) and 52215-1(f)(4), elımınate "greatest," it's implicit

52215-3(b) As responses to requests for information are definitionally not offers, and the submitters, therefore, are not offerors, find substitute wording (eg, submission and submitter, information and informant)
$52215-5(\mathrm{~d})$ This provides a long list of failures for which the Government will not be responsible As "any" is all inclusive, the list is unnecessary Delete the list and the phrase "but not limited to the following" and substitute "delay in transmission/receipt " If there are any failures for which the Government were willing to accept responsibility, they should be specified
$52215-5(\mathrm{~d})$ Delete "However, if requested to do so by the Contracting Officer "We should always obtain the original for our files
$53215-1(\mathrm{a}), 53215-1$ (b), $53215-1(\mathrm{~d}), 53215-1$ (g) There is no 15210 , the correct reference is 15209

If large scale change such as this is inevitable, this rewrite should be treated as a first draft effort, with another round of comments prior to issuance of a final rule

Should you have any questions, please contact John Krteger at 927-8021

# SOCIAL SECURITY 

NOV 251996.
General Services Administration FAR Secretariat (MVRS) 18th \& F Streets, N.W., Room 4037
Washington, D.C. 20405

Subject: FAR Case 95-029, Comments on Proposed Phase I Rewrite of Federal Acquisition Regulation Part 15

By letter dated November 7, 1996, Commissioner Chater conveyed our general support of the proposed rewrite of Part 15 of the Federal Acquisition Regulations (FAR) and advised that specific comments would be provided under separate cover. This letter constitutes the specific comments offered by our contracting staff and our General Counsel. For ease of application, the comments are in order by FAR part.

Subpart $1.102(c)(3)$ - Federal Acquisition Regulation System
We recommend deletion of the sentence, "Fairness does not mean that offerors and contractors of differing capabilities, past performance, or other relevant factors, must be treated the same." It was the consensus that the remainder of the definition is sufficient and that, as long as that portion of the definition is adhered to, offeror and contractors will be treated appropriately.

## Subpart 14.404-1(f) - Sealed Bidding

Based on our interpretation of the language contained in this part, we assume that all responsible bidders would be included in the negotiation process. Those bidders who submitted late bids would not be included under the negotiation provisions allowing acceptance of late proposals since the terms and conditions of the Invitation for Bids would have already decided this issue. Is this a correct interpretation?

## Subpart $15.101(\mathrm{~b})(2)$ - Lowest price technically acceptable process

Assuming that your intent is that Past Performance is considered a separate evaluation/award criteria and not included in "non-cost factors/subfactors", we concur with the proposed language. If this is not a correct assumption, we have concerns with the proposed
language. Typically, past performance would not be scored on a "pass/fail" criterion.

Subpart 15.103 - Multiphase acquisition technique
There was significant concern whether the mandatory down-select phase of the multiphase process would result in a more effective acquisition technique than the normal negotiated process involving the establishment of competitive ranges. Prohibiting offerors from further participation in subsequent phases may result in more protests if they feel they are being unfairly excluded from competing.

Subpart 15.104 - Oral presentations
Based on actual experience utilizing oral presentations in agency acquisitions, we have not found these to be particularly useful. Contrary to the language in 15104 (a), we have found oral presentations to be most useful when they augment, rather than substitute for, written proposals. We do not recommend eliminating the ability to utilize oral presentations during the course of a negotiated acquisition and do recommend retaining it as a viable alternative to be utilized when determined to be appropriate by the contracting officer.

FAR subsections 15.104, 15.407, 15 408, and 15.808 - These provisions concern when the contracting officer may communicate with the offeror and when he or she may allow changes to the proposals as a result of the communications These provisions appear to alter substantially the concepts of "discussions" and "clarifications" as these terms are now defined in the existing FAR. FAR subsection 15.407 authorizes greater leeway to make contacts with individual vendors prior to establishing the competitive range. FAR subsection 15.104 permits oral presentations, but leaves unaddressed, the discretion to consider and revise proposals as a result of these communications. We believe that these proposed changes will significantly affect when and how the contracting officer may resolve ambiguities and correct apparent mistakes. We, therefore, urge that the revised provisions clarify in one comprehensive section how the changes will affect the discretion to make corrections without reopening negotiations.

Even before the proposed revisions to FAR Part 15, there was some difficulty reconciling how a communication affected the agency's discretion to revise proposals without reopening negotiations With

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regard to post-award mistakes, FAR subsection 15.808 , merely refers one back to the existing FAR subsection 14.407 as does the current FAR provision regarding corrections. Preaward errors or ambiguities apparently will be governed by FAR subsection 15.408 which permits clarifications, without discussions, to allow modifications that resolve ambiguities or correct apparent mistakes. In the past, applying these guidelines was difficult because the bid setting described In FAR Par 14.4 is not strictly comparable to that of the negotiated procurement. We believe that the proposed new distinctions between a "clarification" and "discussions" will exacerbate the difficulty. For example, the proposed regulation allows communications with individual vendors after receipt of proposals and before establishing the competitive range, but it also precludes revisions in the offeror's proposal other than correction of mistakes. This issue will be further complicated by the potential impact of oral presentations. The revised provisions provide little guidance concerning oral presentations. FAR subsection 15.104(c)(7) states only that a solicitation may describe "the extent of communications that may occur between the Government participants and the offeror's representatives as part of the oral presentations (egg., will communications encompass discussions)."

We urge that the regulations address how oral presentations can be considered both for purposes of evaluation and for correction of the proposal. For example, if an offeror's oral presentation puts the contracting officer on notice of a discrepancy in the proposal or a material deviation, how will these proposed rules governing communication operate? Can the contracting officer consider oral information if the offeror's actual intent becomes clear after the oral presentation, but this new understanding is patently ambiguous with the written proposal?

As a review of Comptroller General decisions will show, offeror frequently litigate whether communications constitute clarifications or discussions requiring reopening negotiations. Thus, it is important to have clear instructions how these provisions will work hand-in-hand. We, therefore, urge that the implication of these new distinctions be developed further and set forth more fully in a revised FAR Part 15 section.

Subpart 15.202(a)(2)(i) - Requests for Proposals
This provision authorizes contracting officers to permit offerors to propose "alternative terms and conditions." This provision needs to be more specific as to what types of alternative terms and conditions
may be proposed, perhaps by referring in the body of this provision to applicable limitations which appear elsewhere in the FAR.

Does this include section IV contract clauses as discussed under FAR Subsection 15.203-4 (standard FAR clauses) ? Does this authority include allowing alternatives to the evaluation factors identified in the solicitation and would such a proposed deviation violate FAR Subsection 15.403 (b) (4)? If this provision is limited to format-type terms and conditions, the EAR should more expressly state so.

Subpart 15.203 - Model contract format
There was a consensus amongst our operational staffs to delete these provisions entirely or to offer the model contract format (MCF) as an alternative to the uniform contract format (UCF) that is currently included in the FAR. Many agencies have automated systems that utilize the existing UCF. To change this format would involve costs to the agencies relative to converting their existing systems to the new format without any real perceived benefit. It is understood that some agencies may not be using the UCF appropriately (e.g., duplicating information from one section in other sections); however, merely changing formats and condensing 11 sections into six will not solve that problem That is a problem that needs to be addressed within each agency where it occurs.

The philosophy behind the development of the UCF was that there would be a uniform format for government solicitations and contracts to assist vendors in dealing with the government. It was expected that vendors would be able to consistently turn to a particular section of the document to obtain information about a specific aspect of the solıcitation/contract. With the development of simplified acquisition procedures and commercial item contracting formats the government has already gotten away from the uniform solıcitation/contract document. This is not bad as these new, simplified procedures are more effective. However, lt may lead to confusion on the parts of some vendors.

Generally, standardization is considered beneficial. We have, however, gotten away from the "standard" government solicitation document. As a minimum, it is suggested that there be a requirement for an index or table of contents in each solicitation that will direct reviewers to the
appropriate section/page, but that specific document format be left up to the individual agency or contracting officer consistent with generalized guidelines such as the MCF or UCF .

## Subpart 15.207 - Submission, modification, revision, and withdrawal of proposals

It is our interpretation that this provision gives agencies the latitude to establish cutoff dates for receipt and acceptance of late proposals. For example, a solicitation could state that all proposals, modifications and revisions must be received in the designated Government office by a specific date and time and that late offers wall not be accepted. This is based on the language at 15.207 (b) which states that late offers "may be" considered. If they will not be considered, we believe the solicitation should so state.

Subpart 15.208(c) - Solicitation provisions and contract clauses

How is a Solicitation for Information or Planning Purposes different from a Request for Information referenced at FAR subsection $15.201(e)^{?}$ The two documents appear to refer to the same type of informational request to prospective offeror and to serve the same purpose If they are the same, a uniform term should be used. Otherwise, we urge adding some explanation of the distinction which the drafters had in mind.

Subpart 15.402 - Source selection objective
It appears that there is some repetition in paragraph (b). Recommend that the following language be deleted. "...where proposals are evaluated on a pass/fall basis, and award is made to the lowest cost (price) technically acceptable offeror "

Subpart 15.406 - Competitive range
FAR Subsection $15.406(\mathrm{~b})$ - This provision would allow the contracting officer to estimate the maximum number of proposals to be included in the competitive range while the acquisition is in the planning phase, $1 . e .$, before proposals have been received. We recommend deletion of this provision because it serves no apparent purpose and any "estimate" of a workable competitive range before receiving proposals seems highly vulnerable to charges by vendors that the estimate is speculative and unduly restrictive of competition.

In any case, the deletion of this provision would not diminish efficiency. Although the purpose of this estimate is ostensibly to reduce unnecessary work, the proposed provision does not reduce the work that a contracting officer would otherwise have to perform Even if a preliminary range is established in the planning stages, the contracting officer still has to review all proposals in order to score them and to ascertain which proposals should remain in the competitive range The efficiency which may be achieved by limiting the competitive range really occurs after this point of an evaluation, and the revision already includes a provision which should achieve the desired efficiency. FAR subsection 15.406 (c) achieves the objective, that is, to limit review to vendors having the greatest likelihood of award, because it provides the contracting officer, after receipt of proposals, latitude to determine a workable competitive range.

With respect to litigative risk, making such an estimate wall probably lead to protests of the estimate before award, causing undesirable delays. Any exclusion of interested prospective offerors would be vulnerable to charges that the contracting officer has unduly restricted competition and may lead to the perception that the agency is improperly favoring a select group of offeror over others by making a low estimate unrelated to efficiency concerns. We also foresee that it would be difficult to establish a persuasive documentary record, except in rare instances, to support an estimate made while the acquisition is in the planning stage.

Subpart $15.407(\mathrm{~d})(3)$ - Communications with offerors
We do not agree with the language in (d) (3) which permits the contracting officer to inform all offeror of the Government's independent price estimate. This tactic is not relevant to the competive process nor in the best interests of the Government. It is industry's responsibility to develop competent pricing strategies based on their knowledge of the marketplace and the Government's statement of requirements.

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The above constitutes our comments based on our evaluation of the proposed rewrite of FAR Part 15. Overall, we believe that the rewrite has developed a more flexible negotiated acquisition procedure that will result in an improved acquisition process. Should you have any questions concerning the above comments, please contact Helen Hurcombe, Office of Acquisition Support, at (410) 965-9538.

Sincerely


November 25， 1996

FAR Secretariat（MVRS）
General Services Administration
Room 4037
$18^{\text {th }} \& F$ Streets，NW
Washington，DC 20405

## RE：FAR Case 95－029

## Dear FAR Secretariat

The information Technology Association of America（ITAA）is pleased to provide comments on your notice of proposed rulemaking published in Federal Register September 12，1996，（Volume 61，Number 178）ITAA is an industry association representing firms who offer computer software，professional services， networking services，and systems integration in both the public and private sectors We have over 250 corporate members and 9000 affiliate members across the United States

ITAA supports the proposed revision of FAR Part 15 and strongly endorses the principles on which it is based The revision will significantly improve and streamline current negotiated procurement procedures，to the benefit of both the government and competing offeror By encouraging greater communication between the government and offerors，by giving the government greater flexibility to narrow the competitive range，and by introducing new procedures for the submission and presentation of proposals，the revision will bring the government＇s process of awarding negotiated contracts more closely in line with commercial practices

ITAA＇s comments on the proposed revision of FAR Part 15 fall into two categories（a）those that address a significant issue as to the substance of a

proposed rule change, and (b) those that suggest technical or relatively minor wording changes, or raise questions as to the meaning of certain language ITAA's substantive comments are relatively few in number, and in no case do they take issue with a proposed rule change in principle They do, however, address important issues that ITAA strongly feels must be taken into account in the implementation of the final rule

## Substantive Comments

## 1. Competitive range. [FAR 15.406]

ITAA supports the principles underlying this section, and is generally in agreement with the section's wording ITAA believes, however, that the competitive range section of FAR Part 15 should provide some additional guidance to contracting officers on how the "greatest likelihood of award" and "efficient competition" tests are to be applied

One problem of interpretation with respect to the "greatest likelihood of award" test is that the word "greatest" is somewhat elastic If one is asked to name the "greatest" American presidents, the answer could include just a few names, or a dozen or more The question is how far down the list to go, and the words "greatest likelihood of award" do not in themselves answer that question They do not enable a contracting officer to decide, for example, whether to narrow the competitive range to the three offers with the "greatest likelihood of award", or the five offers with the "greatest likelihood of award"

One way to solve this problem is to specify in FAR Section 15406 how likely it must be that award will be made to one of the top " $X$ " offers in order to narrow the competitive range to those " X " offers Under current law, as a practical matter the standard of likelihood is very high That is, since the contracting officer must include in the competitive range any offer that has a "reasonable chance of being selected for award", the contracting officer must be virtually certain in setting the competitive range that he has not excluded an offer that might ultimately be selected for award ITAA agrees that that standard is much too high A possible alternative standard might be "high degree of confidence" -- meaning that if the contracting officer has a high degree of confidence that the contract will be awarded to one of the top " $X$ " offerors, then the top " $X$ " offerors may be said to be the group with the "greatest likelihood of award" The "high degree of confidence" standard gives some definition to the concept of "greatest likelihood of award", but makes it clear that the decision is one that is entrusted to the contracting officer's judgment

If no standard of likelihood is adopted to give meaning to the "greatest likelihood of award" test, then it seems probable that contracting officers will decide
how many offers to include within the "greatest likelihood" range on the basis of efficiency That is, in deciding whether to include the three offers with the greatest likelihood of award" or the five offers with the "greatest likelihood of award", a contracting officer is likely to consider whether a competitive range of as many as five is conducive to conducting an efficient competition The structure of proposed FAR 15 406, however, implies that "efficiency" may be considered solely under subsections (b) and (c), not subsection (a) In the absence of any definition of the "greatest likelihood of award", standard, therefore, it is unclear why "efficiency" should be treated as a separate consideration

For purposes of these comments, therefore, ITAA does not distinguish between the "greatest likelihood" test and the "efficient competition" test Regardless of how the test or tests are characterized, ITAA believes that the basic criteria for including a proposal ini the competitive range should be as follows

First, the competitive range should not be limited more than is strictly necessary to achieve an "efficient competition" For example, if an efficient competition can be conducted with between three and five proposals, the competitive range should not include fewer than five proposals

Second, any cut-off should be at a clear "break-point" in the ordering of proposals For example, if combined scores of competing firms were 95, 95, 94, 93, 80,70 , and four in the 60 s , the competitive range should not be limited to three proposals, but could be limited to four ITAA suggests adding the following language "in making the determination of the firms to be included in the competitive range, the contracting officer shall consider the relative distribution of proposal ratings resulting from the evaluation of the proposals submitted, and shall not exclude a proposal that is close in overall value to a proposal included in the competitive range "

Third, it should be made clear that a shortage of agency resources is not enough in itself to justify limiting the competitive range in these days of tight budgets, if the FAR does not require agency resources to be expended on a particular procurement, they will have a tendency to become "unavailable" for that procurement

Fourth, the contracting officer should take care to avoid excluding an acceptable offer from the competitive range on the basis of "status" considerations (such as capability and past performance) without first ensuring that all reasonable steps have been taken to ensure that the factual basis for the agency's judgment is correct Similarly, offers should generally not be excluded on the basis of price where it is expected that offerors in the competitive range will be given the opportunity to revise their price proposals Finally, offers should not be excluded for failure to satisfy a solicitation requirement that is subject to revision at some later stage in the procurement
2. Advance notice of competitive range limitation. [FAR 15.406(b)]

ITAA supports the procedure of proposed $15406(\mathrm{~b})$, whereby a contracting officer may determine in advance and announce in the solicitation the greatest number of proposals which, in his judgment, would permit an efficient competition to be conducted Proposed FAR $15406(b)$ should clearly state, however, that the contracting officer must review his determination in light of the proposals actually received, and that he is free to establish a competitive range with more or fewer proposals than the number announced in the solicitation This procedure has the advantage of putting offeror on notice in advance of the likely size of the competitive range, without committing the agency irrevocably to that number

## 3. Pre-award debriefing. [FAR 15.805]

ITAA believes that offerors excluded from the competitive range should, if they so request, be given a pre-award debriefing unless compelling circumstances require that the debriefing be conducted post-award Contracting officers should therefore be instructed that, in exercising their judgment as to whether a pre-award debriefing is in the "best interests of the government", only compelling circumstances should be allowed to support a decision to hold the debriefing post-award

## 4. Tradeoff process. [FAR 15.102]

ITAA believes that FAR 15102 should be substantially expanded to provide better guidance to procuring agencies as to the conduct of a "tradeoff acquisition" Such acquisitions, better known as "best value procurements" in actual practice, typically involve some of the most important, complex, and costly purchases that the Federal government makes The process of making cost/technical tradeoffs in such acquisitions is one that demands a high level of objectivity, sophistication and professional analysis by source selection personnel There have, unfortunately, been many important "best value" procurements in the past several years in which the government's methodology for making the necessary cost/technical tradeoffs has been exposed as irrational Although ITAA recognizes that it is impossible to specify in the FAR the precise methodology for conducting a "best value" tradeoff, at a minimum the FAR should provide as follows

Any technical "benefits" attributed to an offeror's proposal should be benefits that the procuring agency asked for in the solicitation

The procuring agency should disclose in the solicitation document, in as much detail as possible, the process that the agency intends to follow in evaluating proposals and making the cost-technical tradeoff
"Benefits" should be quantified where possible, but may be considered
qualitatively if quantification is not reasonably feasible
Procuring agencies should not in general attribute "benefits" to a proposal feature that are disproportionate in amount to the cost of acquiring the same functionality from other offeror Instead, procuring agencies should consider amending the solicitation to allow all offeror to propose the same functionality, inviting them to do so during discussions, or adding the desired functionality by contract modification after award

Firm fixed price offers should not be "adjusted" for "cost realism" unless the solicitation has stated that such an adjustment will be made and specified the factors that will be considered in making the adjustment

## 5. Multiphase acquisition technique. [FAR 15.103]

ITAA generally supports the concept of a "multiphase acquisition technique" as defined in proposed FAR 15103 For certain kinds of acquisitions, the technique is a useful alternative to a traditional negotiated procurement ITAA has a serious concern, however, that the absence of any restrictions on the use of this technique may encourage contracting officers to use it in inappropriate cases

There is some potential for abuse of the "multiphase acquisition technique", because it allows procuring agencies to "down-select" with far more freedom than is available in non-multiphase procurements The ability to downselect is not even limited, as in the case of competitive range determinations, to those offers with the greatest likelihood of award, or to the greatest number of offers which would permit an efficient procurement to be conducted For example, assume that in a non-multiphase procurement the procuring agency received ten full proposals, and decided after reviewing all of the proposals that under proposed FAR 15406 the competitive range must include five proposals If the same procuring agency, using the "multiphase acquisition technique", had solicited only partial proposals in the first phase, it apparently would be free to down-select (at least on an advisory basis) to three or even two proposals it seems highly anomalous to allow a procuring agency more latitude to exclude proposals from further consideration where the proposals contain only partial information, than where the agency has the benefit of full-fledged proposals

ITAA recommends that proposed FAR 15103 include the following instructions on use of the multiphase acquisition technique

The "multiphase acquisition technique" should be used where the procurement involves one or more particularly high "thresholds" that only a limited number of offeror are expected to be able to meet, and the cost of preparing and evaluating full-fledged proposals is very high For example, in a procurement involving the development of a highly complex, mission-critical imaging system, an agency might reasonably decide in advance that only those companies with significant proven capabilities in the development of complex imaging systems should be considered it could then solicit information in the first phase on proposed technical concept, experience and past performance, and limited pricing information, and down-select to a few firms On the other hand, a procurement for the purchase of commercially available commodity products would not, in most cases, be suitable for use of the "multiphase acquisition technique"

The first phase of the "multiphase acquisition technique" should not, except in unusual cases, be limited to solicitation of "status" information such as information on capabilities, experience, and past performance Some consideration of technical concept and price should always be included

Offers should generally not be excluded from the next phase solely on the basis of price where it is expected that offeror will later be given the opportunity to revise their price proposals Similarly, offers should not be excluded for failure to satisfy a solicitation requirement that is subject to revision at some later phase in the procurement

## 6. Communications with offeror before competitive range determination. [FAR 15.407(b)]

ITAA agrees with the objective of encouraging pre-competitive range communications with offerors, and agrees that such communications need not be conducted with all offeror ITAA is concerned, however, that proposed FAR 15407 (b) does not provide enough guidance to contracting personnel as to how to decide who to communicate with, and how ITAA proposes the following additional criteria

A communication should be designed to obtain information that would or may result in the inclusion of an offeror that might otherwise be excluded, or the exclusion of an offeror that might otherwise be included

Communications should not address cost or price, except to clarify ambiguities or correct apparent mistakes in an offeror's proposal

## 7. Definition of deficiency. [FAR 15.401]

The significance of this definition is that, under the proposed FAR 15407 (c), the contracting officer is required to disclose only "evaluated deficiencies" during discussions with offeror in the competitive range ITAA strongly believes that the required scope of discussions should be broader than just "evaluated deficiencies" as defined in FAR 15401 ITAA's preferred approach, however, would be to leave the definition of "deficiency" unchanged, and expand the required scope of discussions in FAR 15 407(c) See comment 8 below

## 8. Discussions with offeror after competitive range determination. [FAR 15.407(c)]

As stated above in comment 6, ITAA believes that the required scope of discussions under proposed FAR 15 407(c) is too narrow As currently proposed, FAR 15407 (c) requires discussion only of "evaluated deficiencies" (Although technically the contracting officer is also "required" to discuss other issues which "in the judgment of the contracting officer, should be brought to the offeror's attention", this "requirement" is illusory because it depends entirely on the contracting officer's judgment) In the spirit of the rest of the proposed FAR Part 15, ITAA believes that communications, discussions, and negotiations during the critical post-competitive range stage should be strongly encouraged rather than limited ITAA therefore recommends that the penultimate sentence of proposed FAR 15 407(c) be replaced by the following

> "During the conduct of discussions the contracting officer shall disclose to and discuss with each offeror all perceived deficiencies in the offeror's proposal, and all significant weaknesses that appear to be susceptible of correction or improvement In addition, the contracting officer shall disclose to the offeror any less than fully favorable reports on the offeror's past performance, and give the offeror a reasonable opportu'ity to respond to those reports"

The requirement to discuss past performance is particularly important, because it is clear that the current systems for capturing and reliably assessing information on contractor past performance are not adequate Requiring contracting personnel to discuss past performance issues during the discussions phase should reduce the prejudicial effect of the mistakes and misperception that now frequently mar agencies' use of past performance data

## 9. Improper discussions. [FAR 15.407(d)]

ITAA supports subsections (2) and (5) of proposed FAR 15 407(d) as drafted

With respect to subsection (3), ITAA notes that the express prohibition of "auction technıques" in the current FAR $15610(\mathrm{e})(2)$ has been removed One of the "auction techniques" currently prohibited by FAR $15610(e)(3)$ is "Advising an offeror of its price standing relative to another offeror" ITAA considers this prohibition to be an essential element of fair and equal treatment of offerors if the contracting officer tells Offeror A that its price is higher than Offeror B's, and Offeror A then lowers its price below Offeror B's price, does the contracting officer then have an obligation to inform Offeror $B$ that its price is now higher than Offeror A's? If not, Offeror B has not received equal treatment with Offeror A If so, where does the cycle end? ITAA strongly urges the retention of the prohibition against advising an offeror of its price standing relative to another offeror

ITAA does not support subsection (4), which prohibits a procuring agency from revealing the names of individuals providing reference information about an offeror's past performance It is often critical to an offeror's ability to respond to past performance information to know who has supplied it The government employees who furnish such past performance or reference information do so as part of their official responsibilities, and have no reasonable expectation of anonymity with respect to that information

Subsection (1) presents a difficult but very important policy decision On the one hand, under the principle of equal treatment of offerors, contracting officers should certainly be prohibited from "helping" one offeror to bring its proposal up to the level of competing proposals This is particularly the case where the competing proposals sontain innovative approaches or approaches that have taken considerable effort and expense to develop On the other hand, if negotiations under FAR Part 15 are to be (a) meaningful and (b) consistent with commercial practice, the government should be permitted, in some narrowly defined circumstances, to discuss with Offeror A the possibility of Offeror A's proposing a feature, functionality, or contract term proposed by Offeror B

ITAA opposes technical leveling that involves innovative proposal features or proposal features that are developed through a substantial investment of resources Of course, the prohibition against technical transfusion (which is preserved in subsection (2)) would prohibit the agency from revealing one offeror's proprietary feature to another offeror The more difficult question is whether the government should be permitted to seek the same functionality from the other offeror For example, assume that in a complex digital imaging systems procurement one offeror's proposal is distinguished by a highly innovative feature, not expressly required by the solicitation, that permits the user to maximize the legibility of
scanned documents May the government properly ask other offeror to propose similar functionality, without disclosing the actual feature proposed by the first offeror?

ITAA believes that the answer to this question should generally be no, unless the feature proposed by the first offeror is such that it must be regarded as a "departure" from the original solicitation, as opposed to merely a superior response to the solicitation A feature should be considered a departure from the solicitation if it is a feature that other offeror could not reasonably have expected the government to require or desire, based on the solicitation if it is not a departure, then the government's strong interests in treating offerors fairly and rewarding innovation in the development of proposals strongly argue in favor of not "leveling" the playing field in this case

The proposed rule on technical leveling (FAR $15407(\mathrm{~d})(1)$ ) could be interpreted to impose greater limitations on technical leveling than those that exist under the current FAR Part 15 Although ITAA is not currently prepared to take a general position on the subject of technical leveling, ITAA sees no basis for tightening the restrictions that currently exist Consistent with the spirit and purpose of the proposed FAR Part 15 revision, ITAA believes that the flexibility of procuring agencies in conducting procurements should be enhanced rather than restricted

## 10 Acceptance of revised proposals. [FAR 15 207(c)]

ITAA strongly believes that an offeror should be allowed to submit a revised proposal even if the contracting officer has not requested one The opportunity to submit proposal revisions is one of the most valuable rights an offeror has in dealing with the government Offerors must be free to make their own judgments as to whether to submit a revised proposal based on information obtained in communications or discussions with the government, changing market conditions, discovery of mistakes or misunderstandings, new ideas, competitive intelligence, or any one of many other grounds

ITAA assumes that FAR 15 207(c) is designed to prevent offeror from deluging contracting officers with unsolicited proposal revisions There is no reason to expect that this will happen, however, especially if contracting officers establish in advance a deadline or target date for submission of revised proposals Given such a deadline, offeror can be expected in most cases to combine all of their intended revisions in a single revision package to be submitted on or before the due date That is what generally happens now in the case of BAFO deadinnes

## 11. Late proposals. [FAR 15.207(b)]

ITAA believes that the proposal to allow the contracting officer to accept late proposals will give rise to more difficulty, disputes, and suspicions than it is worth Most contractors have accommodated to the current strict and simple rule ("late is late"), and as a result late proposals are relatively rare Although relaxation of the rule might give the government the opportunity to consider a few late proposals that it would otherwise have to reject, that benefit is counterbalanced by the certainty that relaxation of the rule will result in more late proposals and many more disputes over whether they should be accepted

It should be noted that as a practical matter the rule against late proposals would, under the proposed rule, probably affect only initial proposals, because the proposed FAR Part 15 contains no limitations on the contracting officer's acceptance of revised proposals (That is, even where a contracting officer has set a deadline for submission of revised proposals, it appears that he could elect to accept a further revised proposal from one offeror after the deadline without "reopening" discussions with all offeror )

## Technical Comments and Questions

## 1. "Fairness" standard. [FAR 1.102(c)(3)]

ITAA supports the new "fairness" standard expressed in proposed FAR 1 102(c)(3), but would suggest two amendments to its wording First, fairness requires not only that the government not act in an "arbitrary or capricious manner", but also that it act in accordance with applicable laws and regulations Second, although ITAA agrees that offerors with different "capabilities, past performance, or other relevant factors" need not be treated the same, any differences in treatment of offeror should be rationally related to the differences between or among them For example, the fact that Offeror A is perceived to have greater "capabilities" than Offeror B would not justify giving Offeror A more time to prepare its proposal, or giving Offeror A more insight into the government's requirements ITAA proposes that proposed FAR 1 102(c)(3) be amended to read as follows
(3) All offerors and contractors are entitled to fair treatment Fair treatment requires that the members of the acquisition team abide by the solicitation and acquisition plan (if any) and not act in an arbitrary or capricious manner or in violation of applicable law or regulation when dealing with offeror and contractors Fairness does not require equal treatment of offerors of differing capabilities, past performance, or other relevant factors where such differences warrant disparate treatment
2. "Proposal modification" and "revision" definitions. [FAR

ITAA recommends deleting the "proposal modification" and "revision" definitions in proposed FAR 15001 The purpose of the two definitions appears to be to maintain a distinction between proposal changes that may only be made at the request of the contracting officer as a result of discussions ("revisions"), and proposal changes that can be made without a contracting officer request in other circumstances ("proposal modifications") For reasons stated above, however, ITAA believes that offerors should be allowed to make revisions to their proposals even without a specific contracting officer request to do so Under this approach, there is no need to make a distinction between "revisions" and "proposal modifications"

## 3. Oral presentations. [FAR 15.104]

ITAA endorses the concept of oral presentations and supports the language of proposed FAR 15104 ITAA recommends, however, (a) that the procuring agency be required to state clearly in advance of any oral presentation which parts of the presentation will be considered binding parts of any resulting contract, and (b) that any such contractually binding parts be transcribed or recorded

## 4. Presolicitation exchanges with industry. [FAR 15.201]

ITAA strongly endorses the concept of improving and expanding presolicitation exchanges of information with industry, and in general approves the language of FAR 15201 It is not clear, however, what if any restrictions will apply to "one on one meetings with potential offerors" ITAA has the following questions and comments on this issue

Does the reference to "paragraph (f)" following the reference to one on one meetings mean that paragraph (f) limits what the government may disclose in a one on one meeting? If so, this should be stated more clearly

If paragraph (f) is designed as a limitation, it should be substantially tightened The distinction between "general information about agency mission needs" and "specific information about a proposed acquisition" is very imprecise In many cases, "general information about agency mission needs" can be extremely valuable, and selective dissemination of such information can create significant competitive advantages and disadvantages for competing offeror

Does paragraph (f) mean that the government may selectively release even "specific information about a proposed acquisition" in one on one meetings, as long as it makes the information avalable to the public "as soon as possible"? If so, ITAA would strongly oppose this provision Such a selective release of source selection information, even if not directly prohibited by the Procurement Integrity Act, would give a significant and unjustified competitive advantage to the offeror receiving the information

## 5. Amending the solicitation. [FAR 15.205]

The proviso in paragraph (f) of proposed FAR 15205 could be read to mean that the government may, in the circumstances described in the proviso, award a contract to an offeror whose proposal "involves a departure from the stated requirements" of the solicitation without amending the solicitation to allow other offerors to submit new or amended proposals if the word "departure" means or includes a fallure to meet a mandatory solicitation requirement, such a provision would be unacceptable in no case should an offeror be awarded a contract if it has falled to meet a mandatory solicitation requirement if the word "departure" refers only to a proposal feature that goes beyond what the solicitation asked for, it is not clear that amendment of the solicitation should be required as a general rule for example, where a solicitation asks for a one-year warranty, is an offer of a two-year warranty a "departure from the stated requirements" that would require a solicitation amendment before it could be accepted? If an offeror proposes something that the solicitation does not ask for at all, such as free software in a procurement of PCs, is this a "departure" that requires an amendment? Does the answer depend on whether the value of the free software has been considered in the evaluation?

This last question raises a broader issue as to the scope and meaning of paragraph (f) By Its terms, paragraph (f) appears to apply only where a proposal is considered "most advantageous to the government (determined according to the established evaluation criteria)" This implies that the proposal in question is already the winner, even without considering the "departure" Assuming the "departure" is not a deficiency (which presumably it is not, since the proposal has already been rated "most advantageous" under the "established evaluation criteria"), why must the procuring agency amend the solictation to allow other offerors to propose the same "departure"?

ITAA proposes the following substitute language
(f) Before accepting any proposal that involves a significant departure from the stated requirements of the solicitation, the contracting officer shall, except as stated in paragraphs (g) and (h), provide all offerors an opportunity to submit revised proposals on the basis of the government's revised requirements For purposes of this section, a proposal involves a significant departure from the stated requirements of the solicitation if it (1) fails to meet a mandatory requirement of the solicitation, or (2) offers a feature or function to meet a government requirement not stated or reasonably implied in the solicitation, or (3) exceeds minimum mandatory requirements of the solicitation to a degree that offeror could not, on the basis of the solicitation, reasonably have expected the government to require or desire
(g) Paragraph (f) shall not apply if the proposal in question meets the mandatory requirements of the solicitation and is considered the proposal most advantageous to the government under the solicitation's established evaluation criteria, without considering the departure from the stated requirements of the solicitation
(h) If the conditions in paragraph (f) apply but it is not possible to give other offerors the opportunity to submit revised proposals without revealing information in the proposal of the original offeror that is entitled to protection, then all proposals must be evaluated strictly in accordarice with the requirements and evaluation criteria of the original solicitation

## 6. Source selection objective. [FAR 15.402(b)]

ITAA assumes that in the last sentence of FAR 15 402(b) the word "communications" should be changed to "communications or discussions" It might be necessary to accept proposal revisions in order to allow one or more offeror to become technically acceptable, in which case "communications" alone would be insufficient

## 7. Proposal evaluation. [FAR 15.405]

Proposed FAR 15 405(a)(1) provides that evaluations should include a cost realism analysis "when contracting on other than a firm fixed price or fixed price with economic price adjustment basis" Does this mean that cost realism analysis should not be conducted in firm fixed price procurements? This has been an issue in
some best value procurements, in which the agency has "adjusted" offerors' total firm fixed price proposals on the ground that the cost model did not necessarily reflect the costs that the government would actually incur Such adjustments are based on the likelihood of different buying patterns, the possibility of technology refreshment, and other factors The practice of making such adjustments is a controversial one that merits attention in this section ITAA recommends that the following sentence be added to the end of FAR 15 405(a)(1)

Cost realism analysis should not be conducted when contracting on a firm fixed price or fixed price with economic price adjustment basis, unless the solicitation has stated that such an analysis may be conducted and specified the factors that will be considered in such an analysis

## Conclusion

ITAA is pleased to participate in the public discussion of the important and beneficial procurement reform measures contained in the proposed revision of FAR Part 15 Those responsible for the conception and drafting of these reform measures are to be congratulated on the breadth and depth of what has been proposed ITAA looks forward to continuing to work with government representatives to finalize and implement this very significant procurement reform effort

Again, we are pleased to have this opportunity to submit our views
Please contact me at 703/284-5311 or ogrkavac@itaa org, if you have any questions

Sincerely,


Olga Grkavac
Senior Vice President
Systems Integration Division

# THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA 

1957 E Street, NW • Washington, DC 20006 • (202) 393-2040 • FAX (202) 347-4004
LEE WRAY RUSSEI.I, President
J HOWARD MOCK, Senior Vie er President
PE FER KW WERT, Vice President
PETER D WICK, JR, Treasurer
THORNE AUCHTER, Executive Vice President

November 25, 1996

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, NW
Room 4037
Washington, DC 20405
RE FAR Case 95-029

## To the Secretariat

The Associated General Contractors of America (AGC) appreciates this opportunity to share concerns regarding the FAR Part 15 rewrite undertaken by the Administration Many of the suggested changes contained within the rewrite are troublesome and without merit The proposed rule suggests that this rewrite is undertaken given the "spirit of the National Performance Review, Federal Acquisition Streamlining Act of 1994 (FASA), and Federal Acquisition Reform Act of 1995 (Clinger-Cohen Amendments) " In this regard, there is no statutory authority for the initiatives undertaken in this rule AGC believes it is unlikely that Part 15 will be used for procurement of construction and currently this section of the FAR does not apply to construction However, the intertwining of the regulations force AGC to express concern about several aspects of this proposed regulation

In the area of "discussions," the proposed rule diminishes the concept of full and open competition While AGC understands that reductions in contracting officers has occurred, this situation does not allow the government to deal with contractors differently As this proposed rule is written, the assurance of a contractor to have a proposal considered equally with other offeror is severely undermined Current regulations require that a contracting officer undertake conversations with all offerors, disseminating information equally among all parties Changing this questions the concept of fairness and would undermine recent administration efforts to restore public confidence to the procurement process

Fairness under the new definition asks the contracting officer to "abide by the solicitation and acquisition plan (if any)" and not behave in an arbitrary and capricious manner with contractors If there is no outline of a procurement, who can judge if a contracting officer is dealing with each offeror fairly and equally? Contrary to the Performance Standard at 1 102(c)(3), the government does have an obligation to treat offerors similarly despite differences in past performance and capabilities This does not mean, however, that in judging a solicitation a contractor cannot be differentiated using disclosed, weighted criteria

AGC steadfastly believes that the government receives the best value for construction services in the lowest cost, sealed bid procurement delivery system Qualified contractors are selected based on similar criteria outlined by the invitation for bid At this time, the government has been unable to point to a situation where the use of lowest cost, sealed bid has not been a successful method for procuring construction including maintenance, rehabilitation, and modernization

Rolling deadlines for solicitations is not permissible under sealed bid Each bid is opened and evaluated at the same time Section 15 205(f) allows rolling deadlines to occur when an amended solicitation is advantageous to the government This does not preclude the contracting officer from acting in an arbitrary and capricious manner toward other offerors Other offerors do not have to be notified that one offeror has been asked to submit an amendment or further clarification of the proposal. This rolling deadline is considered in 15207 excusing "late" proposals if it is in the "best interest of the government "

Using multı-phase techniques outlined in 15103 is highly unlikely for construction However, the section continues to demonstrate how arbitrary the rewrite is Creating an even playing field for contractors is not met with the government's ability to advisory down-select and then change the solicitations terms Allowing the contractor to submit an amendment to an altered solicitation even though the government has already pre-determined that the offeror has no chance to win in subsequent phases does not promulgate fairness

In previous comments, AGC expressed concern about the competitive range determination The same concerns are valid, as this proposed rule does not define competitive range based on price, quality, or any other substantial determination for the range The government has given itself the flexibility to narrow the amount of offerors, but without explaining how this decision is reached None of the alternatives to competitiveness range determinations provides a better solution to the government's proposal Such procedures will unfairly impact equally qualified, small businesses without the household name as a large business

The ability of the government to engage in counter-offers results in bid-shopping, which is frowned upon in the construction community Bid shopping is currently undertaken in the General Services Administration's schedule of technology services Possibility for abuse under this system exists, and AGC is concerned about any carry-over into the construction community

This change to the FAR is being undertaken without statutory authority or pressing need The Administration believes that contracting officers need more flexibility to operate in an environment with less resources Less accountability, though, does not serve the interest of the public trust As the government attempts to become a purchaser modeled after the private sector, it needs to realize that the overriding public good prevents it from adapting many of the changes proposed in this rewrite


David R Lukens
Senior Executive Director Market and Jobsite Services

November 22, 1996

General Services Administration
FAR Secretariat (MVRS)
18th and F St , NW, Room 4037
Washington, DC 20405
Ref FAR Case 95-029

To whom it may concern

ACEC would like to take this opportunity to comment on the proposed rewrite of FAR Part 15-Phase I

ACEC endorses the comments submitted by the Hazardous Waste Action Coalition (HWAC) It is our belief that the proposed rewrite will streamline the federal procurement process, open communication so that contractor's can be more responsive to government's needs and recognize that "best value" allows the government to evaluate on technical and qualification ments, principles that the Architectural and Engineering (A/E) community have long advocated

ACEC does concur with HWAC that some areas could be strengthened In particular, Subparts 151 (Source Selection Process and Technique), Subpart 152 (Solicitation and Receipt of Proposals and Quotations), 154 (Source Selection) and 158 (Pre-Award, Award and Post-Award Notifications, Protests and Mistakes) In addition, we would also concur that only through more definitive guidance and training for contracting officers will these proposed changes be truly effective

Finally, ACEC would like to comment on an area that is of particular concern to our industry The FAR Council is currently reviewing the proposed rule on the Two-Phase Design Build Procedure (FAR Case \#96-305) In discussions with agency officials, ACEC has learned that some agencies are proposing to utilize FAR 15 to conduct designbuild procurement Congress has clearly recognized the unique nature of design-build

procurement and enacted specific legislation to address these types of procurement ( 10 USC Sec 2305a and 41 USC 303 m ) Because of the special need to protect public safety and to assure performance by the best qualified design-build contractors at a price which provides the best value for the taxpayer, these specific procedures were demanded to be placed alongside the Qualifications Based Selection procedures in FAR Part 36 In addition, because of the Congressional desire to support a uniform approach to such procurements, it would be inconsistent for these procurements to be considered under FAR Part 15

In meetings that ACEC and its members held with Colleen Preston and Steve Kelman, both agreed that agencies should not attempt to circumvent the qualifications based procedures in FAR Part 36 and that language was needed in FAR Part 15 to avoid this confusion Therefore ACEC would like to propose the following language

FAR $15000 \quad$ Scope of Part
This part describes policies and procedures governing acquisitions that do not use sealed bid or simplified acquisition procedures, including both competitive and sole source acquisitions However, special contracting methods controlled by other, specific FAR parts shall take precedence over Part 15, i.e., Part 36 Architect-Engineering Contracting (including qualifications based selection procedures and designbuild procedures); Part 35 Research and Development Contracting (including basic and applied research procedures).
(Bold type = New Language)

We encourage you to give this addition the highest consideration

ACEC once again thanks you for the opportunity to comment If you have any further questions, I hope that you will not hesitate to contact me at (202) 347-7474


Director, Procurement Programs

## NOV 251996

General Services Administration

Dear FAR Secretariat:

The Department of Health and Human Services is responding to your request for comments on Phase I of the FAR Rewrite of Part 15 (FAR Case 95-029)

In general, we support the concept of the rewrite, but have concerns regarding some of the specifics These concerns are addressed in the enclosures

The first set of comments were prepared in my office, and the succeeding sets of comments were received from our contracting actıvıtıes We thought it would be beneficial to the FAR Part 15 Rewrite Committee to review the comments and concerns of our operational staff, as well as our policy staff.

We appreciate the opportunity to comment on the draft


Enclosures

1. FAR 1.102(c) (3)- The issue of fairness underlies everything the Government does regarding source selection. We recommend the last sentence of the paragraph be further explained, without limiting the contracting officer.
2. 15.001- Revision- This definition accounts for a change to a proposal requested by a contracting officer. Should a definition of a term also be included when the offeror unilaterally wishes to change its proposal?
3. $15.002(\mathrm{~b})$ - This paragraph consists of one overlong sentence. Recommend it reworded into two sentences.
4. 15.100- The term "source selection authority (SSA)" first appears in the Part, and must be defined. At the least, reference should be made to FAR 15.403 where SSA Is addressed.
5. 15.103- The terms "multiphase source selection or acquisition technique" (choose one or the other and stick with lt) and "downselect" must be defined
6. 15.201- This section consists of paragraphs (a) through (f) Only paragraph (e) is "titled." The FAR drafting conventions require all paragraphs be titled, or none. Recommend the title be deleted.
7. 15.203-2- Recommend this pararaph be rewritten as follows because the examples are out of place: "This section includes a summary description of the supplies and/or services (e.g, quantities, prices, item number, national stock number/part number, and title or name identifying the supplies or services), anticipated contract type, and options."
8. 15.203-6- Recommend the title be revised to read: "Section VI, Proposal Submission and Evaluation Information" to reflect the actual sequencial order of events Also, change the title in Table 15-1A.
9. 15.205- There $1 s$ a discrepancy between the prescriptions on issuing amendments in paragraphs (b) and (c) involving the use of "shall" and "should." We believe paragraph (b) is accurate, but recommend paragraph (c) be rewritten to state: "Amendments issued after the established time and date for receipt of proposals shall be issued to all offerors still eligible for award, and should be issued in the same manner as the solicitation."

In paragraph (f), on the seventh line, recommend adding "amend the solicitation and" between "the contracting officer shall" and "provide." This ensures proper sequential processing, and keeps the contracting officer out of trouble
10. 15.207- The section addresses "revisions" and "modifications " Revision has been defined; modification has not. What is the distinction, and why has it not been defined

In paragraph (c), recommend reference be made to 15409.
11. 15 208- At the end of paragraph (a), there should be a period instead of a colon.
In paragraph (b), there is a lack of parallelism in (4) and (5); this may be remedied by inserting the word "where" after "organizations," and "the" in (4), and "25.901," and "the" in (5), respectively.
In paragraph (e), the correct reference $1 s$ 15.202(d).
12. 15.401- In the definition of "deficiency," recommend the word "means" be substituted for "is".
13. 15402 - The first sentence in paragraph (b) appears to be missing some words, and is unclear as written.
14. 15 404- Recommend that paragraph (e) be redesignated as paragraph (b), because of its significance, and paragraphs (b), (c), (d), and (f) be relettered $1 n$ sequence. Also, the citation 15.205-5(c) in existing paragraph (b) is erroneous.

In existing paragraph (f), add "and significant subfactors" after "factors" and before "other."
15. 15.407- Paragraphs (b), (c), and (d) all have titles, but (a) does not; recommend (a) be given a title In (c), use lower case letters when referring to the contracting officer. At the end of the paragraph, there ls no citation "15.411."
1.
15.001 - Typo - "solicitation is" should read "solicitation's."
2.
3.
4.

> 15.002 (a) - The statement concerning "unnecessary information and requirements" in sole source RFPs should not include as an example "evaluation criteria,".
15.002 (a) and (b) - We believe FPs should be streamlined to a greater degree, one certainly possible means may be by placement of a Model Contract Format in the FAR, and merely referencing it, instead of making the full text version a part of every RFP.
15.103 - It is confusing as to whether this part is intended to make a fundamental change to FAR 5.205 which likens the "notices" to mere R\&D (only) sources sought announcements, while still requiring contracting officers to synopsize all subsequent solicitations for R\&D contracts, including those resulting from the previously synopsized notice.

Also, as subparagraph (c) et al. discusses "notice or solicitation," if the first phase consisted only of a "notice" (and no subsequent, traditional RFP will ever be required), then either the CBD "notice" needs to be very lengthy or a statement should be added in the FAR here excusing the co from including massive parts (of a RFP) in the "notice."

> Under 15,103 Multiphase Acquisition Technique the terminI "down-select" is used without defining it. The term is not self-evident and needs to be carefully defined if used. A less "slangy" term would be desirable.

It would be helpful to have information on the type of limited information that OFPP envisions for initial solicitations, and the difference it envisions between a binding offer proposal and a full proposal (i.e., what is missing from the former?).

Also there are the following more basic concerns on the proposed Subsection:

[^10]Paragraph 15.103(d)(2)(iii) appears to allow excluded offerors to protest whenever they are excluded from the process. This potentially complicates competitive process.
15.104(a) - The combining of submission of all or parts of proposals in the form of an oral presentation conflicts with Nash \& Cibinic's interpretation of a clear distinction of these two very different aspects. As presently written, this section is even more confusing as a "reasonable interpretation" of the second sentence could be that the oral proposal/presentation can be submitted after the competitive range is established. If an offeror submits its entire "proposal" orally, it cannot submit it after establishment of the competitive range, because there would be no basis on which to preestablish that range.
15.201 - This is the part of the proposed changes which causes the most concern. To establish a policy which "encourages" the exchange of information by all interested parties prior to the formal solicitation can run directly contrary to the Procurement Integrity Act's prohibitions on disclosure of (broadly interpreted) "source selection information" as well as running directly contrary to FAR 14.211(a). Even if the word "include" in subparagraph (c) is narrowly interpreted when discussing the various allowable "techniques to promote early exchange of information," undoubtedly this will spark protest from parties not included in these discussions (unless they were publicly disclosed).

This Subsection authorizes a new Request for Information (RFI) device to use in obtaining planning information (including price) from vendors. We suggest specifying that such information exchanges be conducted under the direction of or in coordination with the contracting officer. This would help ensure that the exchange is conducted without favoritism and that the Govermment obtains the needed information and no inappropriate information.

Subparagraph (f) discusses a situation when specific information necessary for proposal information is disclosed to some potential offerors, then seemingly makes the integrity of the procurement whole by requiring the information to be publicly disclosed "at the next release of information." This should be changed to "immediately." (A situation could arise when information necessary for proposal submission is disclosed to a source months in advance of the (next planned) release of information the RFP itself]. Thus, the one source would have this information available months in advance of everyone else, and would have more de facto proposal preparation time.)
7. 15.202 (f)(2)(I) - This requirement is counter intuitive and counter productive. If "oral solicitation" is allowable, it should not have to be supported in the file by a written "justification." And, on another point, the requirement for the oral solicitation to be in compliance with all requirements of the regulation certainly is not realistic in terms of RFP content, as it would take hours for the co to orally disclose all the required boilerplate information in a RFP. (Another justification for including, by reference or regulation, as much of the old traditional RFP as possible in the FAR, instead of in the solicitation itself.
8. 15.203 - See above comments concerning inclusion of the text of the Model Contract Format in the FAR only, and not having to include it in RFPs. Also, this Subsection states that contracting officers "should" follow a prescribed model contract format to the maximum extent practicable. Further, the model format would be relatively flexible. While this would not inconvenience the Government, it appears to be a move back to the pre-FAR situation in which vendors had to deal with numerous different Federal contract/solicitation formats.
9. 15.204 - See above comment. Additionally, the language should be expanded to include making electronic versions of the RFP available as well as furnishing (hard/paper) copies of the solicitation, and making the mode "as determined by the co."
10. 15.205(c)(2) - This makes it seem that the co, when amending a solicitation, is restricted to the same mode as chosen for issuing it initially. This should be changed to "as best determined by the co." As the solicitation can be amended at any time prior to acceptance of an offer, the co should be free, for example, to FAX, "Fed-Ex", or E-Mail, an amendment to responding offerors, rather than mailing out, via US Postal Service, amendments to the source list.
11. $15.206(\mathrm{a})$-It states here that the proposals and information from an RFI shall be transmitted to the "source selection officials". We question why RFI information would be transmitted to these officials rather than to the program staff or contracting officer. Also, it is unclear whether these officials are the same as the source selection authority.
15.206(c) - The word "electronic" should be deleted, as this should apply (or not at all) to any proposal received, regardless of the mode of transmission.
12. 15.207 - This proposed Subsection would basically allow agencies to accept proposals, modifications, and revisions at any time after the specified date up to award if the late submission is in the interest of the Government. We are concerned that this would make it difficult for the contracting officer to fully close the door on a competition until the actual award. Among the resulting problems, this would increase the potential for leaked source selection information situations. We sugest including parameters on the acceptance of late submissions along the line of those in the current HHS provision at PHSAR 352.215-10, "Late Proposal, Modifications of Proposal and Withdrawal of

## Proposal." That provision allows late proposals to be

 accepted if they provide significant cost or technical advantages to the Government and are received within five calendar days of the specified receipt date.Also more guidance should be provided concerning how a CO , (not being a technical reviewer) is to make the decision that considering the "late" proposal is "in the best interests of the Government." One co may consider a late proposal beneficial just because "the more the merrier;" another would determine not to consider it because there already were a sufficient number received (although the late one might have been the best valued one).
13. $15.209(c)$ - I only can assume that when the FAR states that SF $30 / 33$ may be used if modified and the $C 0$ removes the (OMB) form designation number, that the FAR has effectively "blessed" the unseen modified form revision and no OMB clearance is necessary. Most unusual, if the assumption is correct. One way or the other, this should be made clear.
14. 15.403(b)(1) - The first sentence, in part, should read: "Establish an evaluation team, as appropriate, tailored for the particular procurement..." In some instances, the $C O$, as the source selection authority, is the only one needed to proceed. The words "tailored for the particular procurement" in themselves do not allow the flexibility to not have a "team" at all.
15. FAR 15.405(a)(1)-This would prohibit performing price analysis for a fixed price award unless the price of the otherwise successful offeror was determined to be unreasonable. We suggest discouraging price analysis in those situations when at least two responsive offers were received from competing responsible sources.
15.405(2)(iii) - I realize that this is "old ground," but advice still is needed how a neutral evaluation is actually awarded point values in a competing proposal review.
16. 15.406 - Paragraph "(b)" would allow the contracting officer to make a determination during acquisition planning to limit the number of proposals to be included in the competitive range after considering such factors as the results of market research, historical data from previous acquisitions, etc. We question whether it would be in the interest of the Government to establish the size of the competitive range without seeing proposals. Further, businesses would certainly object to the possibility of being dropped from a competition for the convenience of the Govermment.

Paragraph "(c)" would allow the Government to to limit the competitive range to a manageable number of the most highly rated proposals." This wording implies that selection will be based on technical quality factors only, and needs to be refined to correct or confirm that implication.
17. 15.407(d)(3)- This would allow the Government cost estimate to be given to all offerors in the competitive range during proposal discussion. We believe such release is inadvisable because it could distort the price competition. Also, when the requirement was expressed functionally, release of the Government cost estimate could lead offerors to adopt the specific solution reflected in that estimate instead of trying to devise a better and less costly one.
18. 15.408-To eliminate the need for the $C O$ to generate a written justification to conduct discussions after stating that it was the co's "intent" to not do so, I suggest that the regulation state that "Award may be made without discussions if the solicitation states that the Government MAY evaluate proposals and make award without discussions..."
19. 15.804(a) - The procedure for awarding a contract without obtaining an offeror's signature a second time should be expanded to include the procedure for 8(a) awards.

Subpart 15.203, Model Contract Format (MCF): The reasoning for replacing the Uniform Contract Format (UCF) with the MCF is unclear. The switch to the MCF will cause an extreme financial burden to the $C D C$ as well as other federal agencies when it comes to having to modify their automated procurement systems. It is unclear what benefits the MCF could bring that would in any way justify the financial burden that would be incurred in order to make the change

Release of the Government Estimate: Release of the Government estimate could result in either unrealistic low or high offers in the event the that Government estimate was not prepared with any rational basis in mind. In a lot of cases the Government estimate may actually be "backed into" based on the amount of funds available.

Subpart 15.207, Submission, Modification, Revision, and Withdraw of Proposal. Allowing the Government to accept a late proposal "if it is in the best interest of the Government" could encourage political pressure to accept an otherwise late and unacceptable proposal.

Subpart 15.407, Communication with Offerors. the distinction made between communications and discussions will provide the flexibility needed to make more awards without "discussions".

Subpart 15.409, Proposal Revisions: Allowing submission of proposal revisions at any time and eliminating the common cut-off date associated with Best and Final Offers could provide an offeror a "stall tactic" to delay award.

Generally speaking, believes that the proposed changes are acceptable. However, we believe that part of Section 15.406, Competitive Range, should be reconsidered. Specifically, 15.406(b) clearly was written with the intention of giving the Government the prerogative of limiting the competitive range to the number of proposals that would ensure an "efficient competition". While, in theory, such flexibility may be desirable, in practice, it may have the effect of excluding highly qualified offerors prior to their proposal being received and evaluated. sell eves that a determination of exactly how many proposals will constitute an "efficient competition" for a particular procurement should be made after proposals are received and evaluated. This ensures that the Contracting Officer has an opportunity to review the technical evaluation scores (and reviewer comments) and conduct a review of the cost proposals (if required and/or appropriate) pray to determining which proposals should be included in the competitive range. The proposed change seems to assume that, in all or most instances, a Contracting officer can rely on market surveys and/or historical data from similar acquisitions to accurately predict how many proposals will be received for a particular procurement. It is not difficult to envision a scenario whereby a contracting Officer determines that five offers should be included in the competitive range, only to have six or more proposals be submitted that are very close in terms of technical merit and cost. The more "traditional" method of determining the
competitive range, utilizing technical and coat reviews prior to making the determination, would, under the situation described above, possibly result in not only a different competitive range, but, possibly, an awardee that might not otherwise have been included in the "restricted" competitive range.

Section 15 402, "Source selection objective," discusses what would typically constitute "best value" to the Government in the source selection process. While paragraph (a) thereunder could be interpreted to refer to the various factors which should be considered in a "best value procurement," we feel that the example provided in paragraph (b) does not describe best value, but merely an award to the lowest cost, technically acceptable offeror We suggest that paragraph (b) be modified accordingly.

Paragraph 15.406(b) permits contracting officers to determine "In planning an acquisition..." the number of proposals that should be included in the competitive range when the number of proposals expected to be received exceeds the number required for an efficient competition. We feel that it would be virtually impossible for a contracting officer to predict in the planning stages of an acquisition, assuming planning is conducted prior to the acquisition process in accordance with FAR Part 7, exactly how many proposals will be received. We have found that market surveys and hıstorical data are not reliable predictors of exactly how many proposals will be recelved. While we agree that agencles should have the prerogative to lımit the competıtive range to an efficient competition and that the solicitation should notify offerors that the competitive range may be limited, we feel the determination of exactly how many proposals will constitute an efficient competition on a particular procurement should be made only after proposals are recelved and evaluated. This would permit the contracting officer to review the technical evaluation scores and costs proposed prior to determining which proposals should be included in the competituve range. An example of the potential problem would be where the contracting officer has predicted that three proposals will be the greatest number that may be included in the competitive range and four proposals are recelved with scores and ratings tightly arrayed. In our opinion it may be in the Government's best interest in such a situation to have the option to include all four proposals In the competitive range, if desired.

If, however, the above recommended change cannot be implemented, it should be noted that there is a conflict between the language contalned in FAR $15.406(b)$ and Alternate II of FAR 52.215-1, "Information to Offerors - Competituve Acquisition." If FAR 15.406(b) is meant to provide only an estimate of the number of proposals that would otherwise be included in the competitive range and not a definitive number, then Alternate II should be changed to read "If the Contracting Officer exercises the Government's raght to limit the number of proposals in the competative range, the estimated number of proposals in the competituve range may be limited to no more than (insert number) "

The following comments on the proposed rule are submitted:

- Based on recent competitive procurements, it is clear the changes will allow the Government flexibility to define more narrowly those firms which should be considered for contract award. Recently, there were firms included in the competitive range which, for all practical purposes, $\beta$ did not have a chance of award, but were in the competative range because current language in FAR Part 15 requires doubtful proposals be included. This caused extra work for the evaluators and delayed award.
- When receipt of a large number of proposals is anticipated, there wall be a definite benefit to stating in the solicitation the number of proposals that will be permitted in the competitive range.
- The changes present no problem as they are optional, to be exercised at the CO's discretion and, only, to add efficiency to the procurement process.
- No negative impact on the program is anticipated, and it appears it wall be a useful tool for the co's.
- Our staff believes the proposed changes wall elıminate being faced with contractors lacking in experlence and depth. The narrower guidelines will provide bidders who are potentially more competent and responsive. The co, the PO and the offerors will be able to focus earlier on the important issues of the procurement.
- Benefits should accrue from the elimination of paperwork and through dealing with more qualified contractors.
- Retaining only those offerors with the a likelihood of award is right! Leaving offerors in, who have no chance of getting the award, benefits no one.
- Allowing the $C O$ to limat the number of proposals in the competitive range wall benefit both sides.
- A defination of "down-selects" is needed in FAR 15.001.
- Authorızing a meaningful discrımınation and comparıson between and among competing proposals" is long overdue. It's hard not to do so.
- Releasing the Government estimate to all offerors will benefit both sides. Offers receıved will be comparable, competition will be closely matched, and resulting awards will be more beneficial.
- With the many changes, it's good to see the Government stress falrness at FAR 1.102-2(c). Requiring duplicate treatment of each offeror to preclude any accusation of unfairness is counter-productive.
- The new Model Contract Format will be simpler to use and should contribute to streamlining acquisitions.

400 Seventh St SW
U.S. Department of

Office of the Secretary of transportation

November 21, 1996

Ms. Beverly Fayson
Office of Secretariat (MVRS)
General Services Administration
18th \& F Streets, NW Room 4037
Washington, DC 20405
Dear Ms. Fayson:
The Department of Transportation (DOT) has reviewed the proposed draft rule on Federal Acquisition Regulation (FAR) Phase I, Part 15 Rewrite. This coverage was published in Federal Register Volume 61, No. 178 dated September 12, 1996, and it is assigned FAR Case 95-029.

Enclosed are our comments which were sent to Dr. Steve Kelman, Administrator of the Office of Federal Procurement Policy under the signature of our Deputy Secretary, Mr. Mortimer L. Downy.

Sincerely,


David J. Luitman
Senior Procurement Executive
Enclosure

## THE DEPUTY SECRETARY OF TRANSPORTATION

WASHINGTON, DC 20590

November 21, 1996
The Honorable Steven Kelman
Administrator
office of Federal Procurement Policy
office of Management and Budget
Washington, DC 20503
Dear Dr. Kelman:
The Department of Transportation (DOT) has reviewed Federal Acquisition Regulation (FAR) Case 95-029, Phase I Rewrite of FAR Part 15, contracting by Negotiation. We commend the rewrite committee for their efforts in this challenge to improve the guidance for negotiated acquisitions. The rewrite moves us towards the goal of procurement simplification and effectiveness. It allows contracting personnel the flexibility needed in the process and it also cuts red tape. I would like to share with you some of our thoughts on the rewrite. Our detailed comments are enclosed, and a copy will be forwarded to the FAR Secretariat.

Since the rewrite is such a fundamental change in the way the Government does business, we thank it is important that the Government have a well thought out implementation strategy. We recommend that the final rule not become effective until at least 6 months after publication in the Federal Register.

As part of this implementation strategy, we believe it would be a worthwhile investment to test the new process to assess its effectiveness and identify any problem areas. If you concur, DOT would like the opportunity to query our contracting activities for a candidate suitable for testing the proposed process. Should we find such an acquisition, we would perform the test as an experiment under our Procurement Reinvention Laboratory. We suggest other agencies may want to conduct similar tests.

Additionally, we believe that the Part 15 rewrite will require extensive training to implement effectively. Since the philosophy of the rewrite is to avoid hard and fast rules and provide flexibility to the work force, this argues for a competency based approach to training. Instead of courses describing the new rules, we should be identifying the skills required to make this work (e.g., how to effectively communicate with industry, how to identify the critical discriminators in a competition and request the appropriate information to make sure they are revealed, etc.). We suggest that the next version of the rule be accompanied by a proposed implementation approach and training strategy.

We are concerned about the introduction of a new contract format in the middle of a rewrite of the source selection process. The new Model Contract Format (MCF) may have significant value and benefits. However, it will also have a huge impact on agencies' contracting operations as well as the vendor community.

The impact of changing automated systems should not be underestimated because this could have a significant cost impact. Also, by introducing this change in Part 15, it leads to questions as to the applicability of the proposed format. Does it apply to sealed bids (Part 14)? We recommend that the MCF be removed from the Part 15 rewrite and processed as a separate change to the FAR. At the very least, the coverage should be relocated where it belongs and the MCF should be offered as an "alternate" rather than "preferred" approach until a separate FAR revision can be processed.

We applaud the Committee's efforts to balance the concept of fairness with the need to maintain an acquisition process that provides best value to the taxpayer. We believe that improving communications between the Government and vendors is an important tool in improving the process. However, there are at least two areas we believe need clarification to ensure fairness of the process. The first is under section 15.201 which permits release of information necessary for preparation of a proposal to a potential contractor (s) without requiring public release of the information within a specified time. We suggest more specific guidance be provided as to an appropriate timeframe for releasing the information publicly. Secondly, under section $15.407(\mathrm{~b})$, the proposed rule permits communications with offeror which are allowed to be used in proposal evaluation even though the written proposal cannot be changed except to correct mistakes. This appears to create the anomalous situation where additional information can be provided verbally but cannot be provided in written format as a change to the proposal. The coverage needs to address how to ensure there is a common understanding of the information arising from these communications whether through written confirmation, meeting minutes, etc.

In both these cases, we support the concept of opening up communications to improve understanding of the Government's requirements and the contractor's proposal. But, we believe the coverage should be clarified to ensure the information flowing out of these communications does not create an unfair competitive environment.

3
With regard to the individual designated as the source selection Authority (SSA), we believe that confusion exists between the duties and functions of the SSA and the contracting officer. The contracting officer is the individual ultimately responsible for the acquisition. As written, it is assumed that the contracting officer is the SSA; however, this is not the case for many (especially larger) procurements. Therefore, the authorities of the SSA should be written as if that individual were not the contracting officer, and similarly, the contracting officer's authority should not assume the individual is SSA.

Finally, we suggest the committee may wish to consider restructuring the coverage. It appears to be organized more by topic than by the material flow of the source selection process. For example, the coverage on Requests of Proposals (REPs) is in section 15.202, while the coverage on evaluation criteria, an integral element of the RFP, is in section 15.404. Similarly, section 15.407, Communications with offerors, comes after the section on competitive range (15.406), even though part of it (15.407(b)) deals with actions before the competitive range decision. As currently structured, someone unfamiliar with the process may have trouble piecing it together.

Thank you for the opportunity to comment on the proposed rewrite. We believe it has significant potential for improving the acquisition process if it is thoughtfully implemented. To that end, we at DOT offer our continued assistance. Please feel free to contact Mr. David Litman, the DOT Senior Procurement Executive, should you have questions on these comments. He may be reached at (202) 366-4263.

Sincerely


DEPARTMENT OF TRANSPORTATION COMMENTS ON PHASE I-PART 15 REWRITE (FAR CASE 95-029)

1. 15.001. Please define the following terms:
a. Negotiation (language similar to the current FAR 15.001 is recommended);
b. Source Selection Authority (i.e., see the current definition of FAR 15.601);
c. Discussions;
d. Oral Presentations;
e. Communications; and,
f. Cost Realism.
2. Definitions are critical to the policy established in this FAR rewrite; therefore, we believe all definitions which are common throughout FAR Part 15 should be placed under 15.001. Also, we recommend that terms which are unique to a particular subpart be defined in that subpart.
3. $15.002(a)$. The information provided in this subsection is the current practice of most acquisition personnel and, therefore, adds no value to the process. We, therefore, suggest the subsection be revised to read: "The RFP should be tailored to remove unnecessary information and requirements (e.g., evaluation criteria, voluminous proposal preparation instructions)."
4. Intentionally left blank.
5. Intentionally left blank.
6. 15.103 (b) through (e). These paragraphs require further clarification. For instance, will the required Commerce Business Daily publicizing and response times under 5.203, apply to the "first phase notice"?. Will it apply to subsequent phases? If not, our concern is that some contracting officers will not allow sufficient time for potential offeror to respond to the notice. Offeror should be given enough time to determine whether they will participate in the proposed acquisition. By not allowing sufficient time, offerors will probably submit proposals just to meet the deadline.
7. 15.103(d). Since offeror will eventually be debriefed whether excluded under the mandatory or advisory down select process, we believe that 15.103 (d) (2) (iii) is out of sequence and should be renumbered as 15.103 (d) (3).
8. 15.103(e). Since there is no limit on the number of phases the Government can have in the process, recommend language be inserted stating the process "should be completed within a time that does not unduly delay the acquisition or burden offerors."
9. 15.104 (a). The duties specified in this paragraph are performed by the contracting officer and not the SSA.
10. 15.201(f). Disclosing specific information about a proposed acquisition which is necessary for the preparation of proposals, to one or more potential offeror before issuing the solicitation will not promote fairness or competition. We recommend that specific guidance be provided as to an appropriate timeframe for releasing the information publicly.
11. $15.202(\mathrm{e})(8)$. We believe this subparagraph should read: "Offer due date, time and location; and".
12. $15.202(f)(2)(i)$. We recommend deleting the requirement for a written justification to support an oral solicitation. Reasons for requesting oral RPs are clearly stated in this paragraph; therefore, the contracting officer should be trusted to comply with the FAR requirements. In addition, this required documentation imposes an additional administrative burden on contracting personnel.
13. 15.203. There may be advantages to the model contract format (MCF); however, we do not think it is appropriate to introduce a new contract format in the midst of major changes to the source selection process. We recommend the format be introduced as a separate FAR case. At the very least, the MCF should be placed under the proper FAR section (i.e., Part 14) and the format be offered as an "alternate" rather than a "preferred" format.
14. 15.203-1 through 15.203-5. These paragraphs require a "brief description", "summary description", and a "more detailed description" of the supplies or services. We recommend the description of the supplies or services be clearly stated once to avoid potential conflicts in defining the Government's requirements in the solicitation.
15. 15.203-3. CLINs are referred to elsewhere in this part; however, the coverage does not specify under which section of the Model Contract Format the CLINs should be placed.
16. 15.206. We believe the coverage should make a clear distinction between processing responses to RPs versus request for information (RFI). Since the source selection official (authority) may be other than the contracting officer, we recommend all information and responses from offeror be sent to the contracting officer.
17. 15.207(b) and (c). The intention of this coverage is unclear. It appears to be inconsistent to allow the submission of late proposals and prohibit late modifications to these proposals unless the modification is requested by the contracting officer. We suggest the definition of "modification" be changed to permit the submission of modifications at any time up until contract award or another time specified by the contracting officer. Also, think it should be clearly stated that accepting or rejecting late proposals is strictly the contracting officer's discretion to avoid getting into "how late is late" arguments. If a proposal is 2 weeks late but may be in the best interest of the Government, does the contracting officer have to consider it? Suggest not, but that discretion should be clearly spelled out.
18. 15.208(a). correct the title of clause 52.215-1 to read "Instruction of Offerors-Negotlated Acquisition" to correspond with the title of the clause under Part 52.
19. 15.208(e). Correct the parenthetical cite to read "(see $15.202(\mathrm{~d})) . "$
20. 15.209 (c). As written, standard Forms (SF) 30 and 33 may be used only if these forms are modified. We recommend this section be modified as follows: Standard Forms 30 and 33 may be used as written or the forms may be modified as necessary (egg., substitute the MCF for the UCF table of contents). If modified, the contracting officer shall remove the form designation (e.g., SF-33).
21. 15.402. We believe that the information under this subsection is redundant with 15.1 .
22. 15.403(a). We suggest this paragraph be deleted based on our recommended definıtion of "source selection authority" cited under FAR 15.001, Definition.
23. 15.403(c)(2). Correct the FAR cite to read "15.407."
24. 15.404. We are concerned that the proposed language will encourage a multitude of evaluation criteria. We suggest changang this coverage to state the evaluation criteria should be tailored to the characteristics of a particular requirement, and that the criteria be limited to ONLY the key discriminators in the ultimate selection decision. The criteria should avoid, whenever possible, the inclusion of detailed subcriteria or subcriteria, in general.
25. $15.404(\mathrm{e})$ and $15.405(\mathrm{a})$. In these paragraphs, please make the distinction between the "rating method" and the "evaluation method."
26. 15.405(a). In the third sentence, please clarify the word "their". Does this mean to compare "offerors" or "evaluation criteria"?
27. 15.405(a)(4). We suggest language be included to encourage changes in the current practices of some contracting offices (i.e, releasing cost information to the evaluation team after completion of the technical evaluations). The technical evaluation team SHOULD be allowed to receive cost information "at any point" in the process.
28. 15.406(a). This paragraph makes a statement concerning the establishment of a competıtive range and paragraph 15.409(c) is referenced; however, 15.409(c) does not appear to relate to $15.406(\mathrm{a})$. We belleve $15.409(\mathrm{c})$ should read 15.401.
29. 15.407(b). This paragraph states that information obtained through communications with offerors may be used in evaluating the proposals. If this concept is retalned, we recommend offerors be required to confirm their communications in writing to the contracting officer prior to commencement of the evaluation for use by the evaluation teams.
30. 15.407(b)(1). Correct 15.409(c) to read 15.401.
31. $15.407(\mathrm{c})$. In the second sentence, correct 15.410 to read 15.408. Also, in the last sentence, we believe 15.411 should read 15.409 .
32. 15.408. It would seem prudent in most solicitations to include language that would allow the Government to award without discussions if ultimately deemed appropriate; therefore, we suggest that clause FAR 52.215-1 (f) (4) read: The Government intends to evaluate proposals and award a contract with or without discussions at the discretion of the contracting officer. Therefore, each offer should contain the best terms from a cost or price and technical standpoint. If the contracting officer determines that the number of proposals.....". Alternate I to 52.215-1 will not longer be necessary if this change is adopted.

In addition, we do not see the need for contracting officers to document the file to state the reason why discussions will be held with offerors even though discussions had not been originally anticipated.
33. $15.409(\mathrm{~b})$. We believe this paragraph is redundant with 15.406(d) because it states that those offeror excluded from the competitive range are not authorized to revise their proposals since they will no longer be considered for award. Recommend it be deleted or that 15.406 (d) be crossreferenced.
34. 15.410. Please explain "integrated comparative assessment." We also suggest the word "shall" be deleted wherever it appears in this paragraph. There also appears to be a potential protest area due to the need to reflect the rationale for tradeoffs and the requirement for perceived benefits to be received for any total additional cost. We suggest adding a statement that "all selections should be based upon evaluation criteria established and have a documented rational basis".
35. 15.801. We believe this definition should be more specific and should clearly define "legal holiday" since some State observed holidays are considered legal holidays. We suggest the definition read: "Day, as used in this subpart means calendar day, excluding Saturdays, Sundays, and Federal holidays".
36. 15.806(a). We recommend deleting the second sentence. This information appears to be covered in $15.406(d) \&(e)$ and 15.805 (a).
37. $15.806(\mathrm{a})$. We do not recommend that debriefings be predicated on offerors submitting requests to the contracting officer within 3 days after receipt of the award notification. We feel it would be prudent of any contracting officer to debrief an offeror within a reasonable time after award. If the 3 -day requirement is retained, would this mean that the Government must send
all notices of award to unsuccessful offerors by certified mail in order to determine when the notice was received? our comments impact $15.805(\mathrm{a})$ also.
38. 52.215-1 (c) (1) (ii). Change to read: "showing the date and time (including a.m. or p.m.) specified for receipt, the solicitation number, and the name and address of the offeror."
39. 52.215-1 (c) (2) (v). After the word "offer", add: "and any resultant contract". This will enable one document to reflect two actions (i.e., authority for signing the offer and contract).
40. 52.215-1 (c) (3). Modify the words "Source Selection Authority's" to read "contracting officer's". The authority for considering "late" corresponding offers should rest with the contracting officer. This coverage $1 s$ also confusing in light of $15.207(b)$ and (c). If it $1 s$ deemed necessary to repeat portions of the clause under 15.207 , please ensure conflicts do not exist.
41. 52.215-1 (f) (9). We urge you to reconsider the statement made here. The effective date of contract award should be as specified in the contract. For example, the effective date could be as specified in block 3 of standard Form 26; the date signed by the contracting officer; or as otherwise specifled in the contract. The term "effective upon transmittal" will be difficult to determine and unknown to the contractor until receipt of the contract.

November 26, 1996

Ms Beverly Fayson
General Services Admınıstration
FAR Secretariat (VRS)
Room 4037
18th \& F Streets N W
Washington, D C 10405
By hand
By fax 202-501-3341
By web http/www ARNET gov
Re FAR Case 95-029
FAR 15 Rewnte-phase 1
Dear Ms Fayson
The Computing Technology Industry Association (CompTIA) is pleased to submit the comments which follow on the proposed rule published jointly in the September 12, 1996 Federal Register by the Department of Defense, the General Services Admimstration, and NASA concerning the phase 1 rewrite of FAR 15

CompTIA is a national nonprofit trade association of more than 6,000 microcomputer resellers, software publishers, distributors, integrators, service compantes, and manufacturers of computers, peripheral equipment, and semiconductors CompTIA's mission is to foster high levels of professional competence and business ethics among its members and the computer industry Combined North Amenca sales of CompTIA members reached $\$ 505$ billion in 1993 Total mıcrocomputer sales in North America that same year were estimated to be $\$ 817$ billion

Please feel to contact me if you have any comments or questions
Cordially


Bruce N Hahn, CAE

# Comments of the Computing Technology Industry Association 

on the proposed Rewnte of

# Part 15 of the <br> Federal Acquisition <br> Regulation 

November 26, 1996

David M Nadler, Counsel
Dicksteın Shapıro Morın \& Oshınsky, L L P

The Computing Technology Industry Association (Com pTIA) is pleased to submit these comments on the proposed FAR Part 15 Rewrite CompTIA is a national nonprofit trade association of more than 6,000 microcomputer resellers, software publishers, distributors, integrators, service companies, and manufacturers of computers, penpheral equipment, and semiconductors CompTIA's mission is to forter high levels of professional competence and business ethics among its members and the computer industry Combined North America sales of CompTIA members reached $\$ 505$ billion in 1993 Total microcomputer sales in North America that same year were estimated to be $\$ 817$ billion
CompT1A is encouraged by the new procedures outlined in the proposed regulations that establish commonsense procurement methods that are, in many ways, similar to those used by a vast majority of our commercial constituents The proposed regulations should simplify the process of negotiated procurements and eliminate regulations that impose unnecessary burdens on both industry and the governmont, thereby enticing more private companies to compete to fulfill the government's needs As a result, the government will be able to receive the best products and services, at the best prices, in an environment of robust competition
Based on the tremendous efforts to reonent government toward a more commercial procurement model, it is no discredit to the drafters of the Rewnte when we say that there are a few rough edges that need to be smoothed out Refining these edges will benefit everyone This said, CompTIA submits the following comments and suggestions for consideration by the Rewrite Committee to help the Committee amplement its goal of moving to a commercial procurement model

## FAR 15 407, "Communications with Offerors"

CompTIA is encouraged by the proposed FAR 15 407(b), which gives the government latitude to communicate with offerors openly about their proposals and the government's needs prior to competitive range determinations Although this type of communication between buyer and seller is common in the commercial world, it is generally not permitted under current regulations that require that formal discussons be conducted with all offerors in the competitive range By enabling contractors and the contracting officers to establish a free flow of information about perceived strengths and shortcomings of offers, as well as government needs, the proposed rule should save both industry and the government considerable time, money, and effort
CompTIA also endorses the Rewrite Committee's efforts to prohibit technical transfusion and improper technical leveling under FAR 15 407(d), which prohibits the government from revealing an offeror's technical solution to another offeror or engaging in coaching, prompting, suggesting or recommending ways in which an offeror must change its proposal to bring it up to the level of other proposals CompTIA is encouraged by the Rewrite Committee's recognition that increased communications between industry and government, particularly in the context of one-to-one meetings between the government and a contractor, can lead to improper technical transfusion and technical leveling
CompTIA recommends that FAR 15 407(c) be strengthened The proposed rule, as it is now written, requires discussion of only "evaluated deficiencies" and "any other issues which, in the judgment of the contracting officer, should be brought to the offeror's attention "While the proposed rule mandates discussion of evaluated deficiencies, all other discussion items are left to the judgment of the contracting officer CompTIA recommends that the proposed rule require discussions with offerors regarding all perceived deficiencies, all significant weaknesses, and all negative past performance reports (ie, not neutral or favorable)
CompTIA also suggests that the proposed FAR 15407 (c) permit offerors an opportunity to respond to any negative past performance reports, especially given the government's increasing usage of past performance history as a significant evaluation factor Likewise, CompTIA recommends that the Rewnte Committee reconsider and remove the prohibition against government revelations of the names of indusviduals providing reference information about an offeror's past performance under FAR 15 407(d)(4) In order for an offeror to effectively respond to negative past performance reports, the offeror must often know the source of the report
Also with respect to FAR 15407 (d), CompTIA recommends that the current prohibition against auction
techniques be included Currently, FAR 15610 ("written or oral discussions") prohibits auction technıques, such as "[a]devising an offeror of its price standing relative to another offeror " CompTIA believes that retention of this prohibition is critical to the fair treatment of offerors

## FAR 15 201, "Presolictiation Exchanges with Industry"

Another heartening development is the proposed FAR 15 201, which permits presolicitation exchanges of information between the government and industry Whereas the proposed rule would open the lines of communication between government and industry, the existing bureaucratic structure often chills all but the most generic information exchanges The proposed rule, which closely emulates standard industry practice, should improve contractors' understanding of government requirements, which in turn increases efficiency and effectiveness in proposal preparation It should also enhance the government's ability to obtain quality products and services at the best possible prices
The proposed FAR 15 201(f) permits disclosure of "specific information about a proposed acquisition" so long as the information is public In order to munmmze any unjustified competitive advantage to an offeror receiving the information, CompTIA recommends that the provision expressly prohibit discosures of any source selection information Such a disclosure could provide a significant and unjustified competitive advantage to the recipient of the information

## FAR 15 406, "Competitive Range"

CompTIA strongly endorses the concept of efficiency in negotiated procurements under FAR 15406 CompTIA has some concerns, however, regarding the language used to implement the government's intent In particular, CompTIA is concerned with the language of the proposed FAR 15 406, which allows contracting officers to "determine the number of proposals that would otherwise be included in the competitive range [that] exceed the number at which an efficient competition can be conducted," and limits the competitive range to only those proposals that have the greatest likelihood of receiving award CompTIA recognizes that the contracting officer's discretion to limit the competitive range to a manageable and realistic number (ie , those with the greatest likelihood of award) should result in potential offerors making more informed choices regarding whether and how to bid, thereby decreasing bid and proposal costs CompTIA also applauds the Rewrite Committee's effort to bring competitive realism to government procurement Offerors will not artificially be kept in a competition if they are unlikely to receive award so that they will not waste time and money pursuing contracts they will not win Although these goals are commendable, Comp TIA believes that the Rewrite Committee should provide additional guidance to government procurement officials regarding how to determine which proposals have the "greatest likelihood of award " For example, the standard could be the top scoring "x\%" of proposals, and all offers falling within the range would be consider to have the "greatest likelihood of award "
As the proposed rule currently stands, government procurement officials will likely decide how many offer to include in the "greatest likelihood" test based on efficiency CompTIA strongly believes that the government should not sacrifice competition solely for the sake of administrative efficiency Historic data from breakout efforts after the implementation of the Competition in Contracting Act demonstrated savings of $30 \%$ when previously sole source procurements were switched to open competition There is therefore a considerable advantage to the government and to taxpayers in assuring that competitive procurements are used under all but the most extenuating circumstances To maize the potential for abuse of this discretion, CompTIA recommends that contracting officers provide substantial additional, written justification in instances when they propose to go forward with fewer than three offers In addition, without such a safety mechanism, potential new entrants into the federal marketplace may be died opportunities to participate, which is clearly contrary to the intent of the Rewrite In addition, CompTIA recommends that the competitive range not be limited more than is strictly necessary to achieve an "efficient competition " If, for example, an efficient competition can occur with between 5 and 10 offers, the competitive range should include no fewer than 10 offers CompTIA also recommends that the proposed rule be amended to require contracting officers to consider the relative distribution of proposal ratings submitted in determining the competitive range and include in the competitive range all proposals
with scores close to the lowest score otherwise included in the range
CompTIA also believes that the government, before reviewing proposals, should not limit the number of proposals to be included in the competitive range under FAR 15 406(b) solely for the sake of conducting an "efficient procurement " The intent behind the Federal Acquisition Reform Act and the Competition in Contracting Act is that competitive range determinations be made after initial evaluation of proposals To limit the number of proposals before receipt and review of intial proposals unnecessarly restricts compettion and the number of quality proposals from which the government may chose

## FAR 15 102, "Tradeoff Process"

CompTIA generally supports the government's approach under FAR 15102 for tradeoff acquisition processes Although CompTIA recognizes that flexible standards and discretion are necessary to obtain the best value for the government, the proposed rule should provide more guidance to government procurement officials on how best to make cost/technical tradeoffs This additional guidance is needed because best value procurements, in practice, are often complex and involve costly acquisitions History has shown that the government has made some improper best value determinations on significant procurements CompTIA makes the following suggestions, recognizing that there exists no predetermined process for conducting a tradeoff analysis First, the rule should require government procurement officials to quantify the cost/technical tradeoff analyses performed If such a tradeoff cannot be practicably quantified in absolute terms, the rule should require a qualitative assessment Second, all tradeoff analyses ade by the government must be based on the evaluation criteria set forth in the solicitation

## FAR 15 103, "Multtphase Acquisitıon Techntque"

CompTIA generally endorses the proposed "multiphase acquisition technıque" outlined in the proposed FAR 15 103, which allows government procurement officials to conduct multiple-phase downselects based on limited information, such as past performance and capabilities, without consideration of the substantive merits of an offer While this approach gives government procurement officials added flexibility to acquire goods and services when "submission of full proposals at the beginning of a source selection would be burdensome for the government," the multiphase acquisition technique also bestows enormous discretion beyond what is available in non-multiphase procurements
As a result of the vast discretion afforded, the government has the unrestricted ability to down-select beyond the competitive range -- those offers with the greatest likelihood of award or, even the greatest number of offers that would permit an efficient competition, as set forth in the proposed FAR 15406 For example, the proposed FAR 15103 allows the government to down-select to as few as two offers based on limited information, such as statement of qualifications and past performance information, without consideration of the substantive ments of the offers By contrast, if the government used non-multıphase procurement under similar circumstances, it might be required to include more than two offers in the competitive range
To minimize the potentral for abuse of the multiphase acquisition technique, CompTIA recommends the following First, the government should justify each instance when it seeks to use the multiphase acquisition technique instead of the traditional non-multiphase procurements For instance, the multiphase acquisition technique may be apropos for procurement of a complex product or service that requires particular, defined criteria that few offerors are expected to be able to meet, and the cost of preparing and evaluatıng full proposals is high Multiphase acquisition procedures may be appropriate for procurement of a complex, propretary data security network On the other hand, the multiphase acquisition technique might not be appropriate for the acquisition of 250 standard desktop personal computers (or other commercial items) Second, to maximize competition to the extent practicable, the government should provide additional justification when the down-selection process results in fewer than three offes Finally, the government should consider some technical and price factors even during the initial phase of the multiphase project and not down-select solely on information such
as a contractor's past performance history or statement of qualifications The government should make every reasonable effort to ensure that new market entrants and quallfied small businesses have a fair opportunity to be considered for government business The government should also assure and make clear that this process does not adversely impact the Small Business Administration's Certification of Competency program

## FAR I5 104, "Oral Presentatıons"

CompTIA heartily endorses the concept of oral presentations outlined in the proposed FAR 15104 The proposed rule, which allows oral presentations to substitute for written information, represents a major shift from the current rule, which does not allow for oral presentations in heu of written proposals Although CompTIA believes that the proposed rule will enhance efficiency in procurement by increasing the free flow of information between offerors and the government, CompTIA has residual concerns regarding the nature of oral representations Oral representations may easily be misconstrued or misinterpreted by the government, especially where contractors present oral proposals instead of written proposals As a result, contract adminstration disputes (regarding these oral representations) may increase because there may be no "meeting of the minds" before contract award and execution For these reasons, CompTIA recommends that (1) the government provide notice of the binding nature, if any, of any oal presentation, which should be transcribed or recorded, or (11) oral presentations be used only to supplement and enhance written proposals

## FAR 15 404, 15 405, Evaluation Factors \& Proposal Evaluation

CompTIA has concerns about the proposed FAR 15404 and 15405 , which require the government to evaluate offerors' past performance in every source selection except in cases where the government documents the reason past performance is not an appropriate evaluation factor for the acquisition CompTIA recognizes the importance of past performance evaluations that allow the government to assess the performance nsk of offerors However, in light of the government's increasing use of past performance evaluation as a key consideration for award, we are concerned that offerors lacking relevant past federal performance history may be excluded categoncally from competitions, even though their past performance in the commercial sector may be outstanding This is because the absence of relevant performance history will clearly have an impact on the award decision Under the proposed regulation, it is unclear what a "neutral" past performance evaluation would be For example, it is unclear whether a "neutral" evauation would be (1) the offer is deemed automatically to have met the standard in the absence of a record of poor past performance, or (il) the offer is not rated or evaluated in the area of past performance CompTIA suggests that the Rewnte Committee create a mechanism to evaluate the past performance of new entrants to the government market through their commercial expenence It should allow comparison to experienced federal contractors in a way that gives equal treatment to similar quality levels of past performance regardless of whether that experience be in the federal or commercial markets Such a mechanism is consistent with the government's goal of moving to a commercial model At a minimum the Rewrite Committee should clarify how neutral past performance evaluations should be used by contracting officers so as not to disadvantage new federal market entrants CompTIA also recommends that the Rewnte Committee strengthen the proposed FAR 15 404, to be consistent with the proposed FAR 15 102(b)(1), with respect to defining the relative weights of varous factors and subfactors for evaluation in solicitations For example, if the "delivery date" is ten times more important than any other factor, contractors should be informed of this in the solicitation so that they can better focus therr proposals to meet the government's needs

FAR 15 205, "Amending the Solicitation"
CompTIA believes there are three possible scenarios that can arise under the FAR 15 205(f) that should be clarified First, CompTIA is concerned that the proposed FAR 15 205(f) imples that the government can award a contract to an offeror whose proposal "involves a departure from the stated requirements" if a revised procurement based on the departure would reveal "the solution proposed in the onginal departure or any other information that is entitled to protection " As drafted, the proposed
rule does not state whether the "departure" refers to a farlure to meet some minımum mandatory requirement of the solicitation Award should never be made to an offeror whose proposal falls to meet the minimum mandatory requirements of a solicitation CompTIA recommends that the proposed rule be clarified to require the contracting officer to examine the "departure" and determine whether the "departure from the stated requrements" is tantamount to a fallure to meet a mandatory requirement of the solicitation
Second, the proposed rule does not state whether the government's desire to award to an offeror whose proposal contains such a "departure" means that the government plans to make an award based on some unstated, matenal evaluation factors that are not reasonably implied with the solicitation To be consistent with the proposed FAR 15404 and 15405 , the government should not evaluate offerors and make an award based on unstated, material evaluation criteria that are not reasonably implied in the solicitation During the course of a procurement, if the government discovers that it farled to state its requirements adequately, the government should revise the solicitation and permit all offerors to bid for the government's revised needs If it is not possible "without revealing to the other offerors the solution proposed in the onginal departure or any other information that is entitled to protection, "CompTIA recommends that the government evaluate all offers solely with respect to the established evalution criteria without regard to the "departure" Under no circumstances should the government make an award based on unstated, material evaluation criteria that are not reasonably implied in the solicitation A final scenario is possible under the proposed FAR 15 205(f) where the "departure from the stated requirements" actually represents some evaluation item reasonably impled in the solicitation or some tangential, unevaluated item Absent some change in the government's needs, the government already has the winner of the procurement -- notwithstanding the "departure," the offer is considered to be most advantageous to the government determined according to established evaluation criteria Under this scenanio, CompTIA sees no justification for the government's revision of the solicitation to permit other offerors to propose the same "departure "

## FAR 15 409, "Proposal Revistons"

The proposed FAR 15 409, which elıminates the requirement for a common deadline for best and final offers (BAFOs), should differentiate between technical and cost proposals CompTIA recommends that the proposed rule establish a common cut-off date for revised cost proposals While CompTIA readily endorses the flexibility of deadines for BAFO submissions with respect to technical proposals, CompTIA has some concerns about differing cut-off dates for price proposal revisions Offerors should be granted equal time to prepare and submit price proposals due to the potential volatility of market prices, a defining characteristic of the high-technology industry With respect to technical proposals, we are pleased that contractors and the government may establish mutually agreeable times for submission of revised technical proposals as a result of the dynamic and interactive communications procedures envisioned under the Rewrite The proposed method closely mirrors the practice of commercial contractors and avids the bureaucratic and nigid nature of the existing process

FAR 15 207, Modificatıon of Proposals \& Late Proposals
CompTIA believes that offerors should have the option to submit a revised proposal The opportunity to submit a revised proposal is critical to an offeror's ability to make the best offer possible to the government Accordingly, Comp TIA strongly believes that offerors should have the discretion to submit revised proposals based on new information, such as changing market conditions, new ideas, or information received from the government during the course of negotiations On the other hand, Comp TIA recognizes that the government does not want to be mundated with unsohcited proposal revisions Thus, CompTIA recommends that revision due dates be established by the contracting officer in advance so that offerors can reasonably combine all intended revisions into a single proposal CompTIA also urges the Rewnte Committee to reconsider permitting the government to accept late proposals regardless of the reason for the tardiness under FAR 15 207(b) As a matter of fairness and adminstrative efficiency, allowing the government to accept late proposals (where tardiness is attributable to the offer) will likely result in discord among offerors and disputes that can be prevented by
establishing a submission deadline CompTIA believes that these drawbacks will outweigh the benefits to the government in being able to evaluate a few late proposals that it would otherwise be required to reject CompTIA recommends that FAR 15 207(b) be amended so that the contracting officer will not accept late proposals unless it is established that the tardiness is the result of government mishandling or fault It is Comp TIA's understanding that this provision governs only late initial proposals, as $F A R$ 15409 authorizes the contracting officer to accept proposal revisions at any time

## FAR 15 805, "Preaward debriefing of offerors"

CompTIA generally endorses the proposed FAR 15 805, which requires that the government debrief offerors excluded from the competitive range "as soon as practicable," but no later than the time postaward debriefings are provided under the proposed FAR 15806 CompTIA recommends, however, that unless urgent and compelling circumstances exist that make a preaward debriefing not in the government's best interests, the government should provide a preaward debriefing to an offeror when one is requested This is necessary to preserve an aggrieved offeror's remedy if it is later determined that the government acted improperly in excluding the offeror from the procurement This is especially important with the demise of protest jurisdiction at the General Services Administration Board of Contract Appeals, which granted post-award suspensions of performance during the resolution of contract award controversies to preserve an aggrieved offeror's rights Currently, a stay is available at the US Court of Federal Claims only for preaward protests Thus, without a preaward debriefing to alert the excluded offeror of any improper government actions, an aggrieved offeror may have no meaningful remedy even if its protest based on a postaward debriefing is sustained ultimately

## FAR 1 102(c)(3), "Performance Standards" \& Fairness

CompTIA applauds the Rewrite Committee's recognition of fairness as an important consideration in the entire procurement process and endorses the fairness language in the guiding principles at FAR Part 1 CompTIA has two concerns and makes the following suggestions First, the Committee should expressly require that government procurement officials act in accordance with applicable statutes and regulations in addition to the proposed language that forbids them to act in "an arbitrary or capncious mannee when dealing with offerors and contractors " Although this should be obvious, CompTIA makes this recommendation out of an abundance of caution Second, while fairness does not necessarily require all offerors and contractors be treated identically, the government should not engage in disparate treatment unless the individual characteristics of the offeror and contractors reasonably justify such diffaring treatment

## Government/Industry Educational \& Training Initiatives

Finally, Comp TIA recognizes that the FAR Part 15 Rewrite represents a fundamental shift in governmont procurement culture As such, CompTIA believes that government procurement officials would benefit greatly from training on how the private marketplace functions CompTIA understands that few government procurement officials have background in the private sector Because the intent of the proposed regulations is to emulate the commercial marketplace by empowenng the government, procurement officials can learn a great deal from their private sector counterparts As a corollary, CompTIA also recommends that government procurement officials be treated like their private sector counterparts Procurement officials must be held accountable for their actions Good performance should be reconnized and rewarded, and poor performance should be addressed and corrected In these areas, joint educational efforts between CompTIA and the government could be mutually beneficial
Comp TIA appreciates the opportunity to submit these comments and would be pleased to provide addtonal information that you may find useful CompTIA looks forward to working with government representatives to finalize and implement this cornerstone of the administration's procurement reform initiotıves

FROM SAF/AQC<br>1060 Air Force Pentagon<br>Washington, DC 20330-1060

SUBJECT Comments on Proposed Rule Part 15 Rewrite
(FAR Cases 95-029 \& 96-303)
The Air Force has been an active participant in the Rewrite team's development of the proposed coverage in the subject cases As part of the public comment process, we requested Air Force field mut and used it to form this consolidated Air Force response The comments we offer consist of significant policy issues (Atch 1) and numerous issues identified by the field as areas for clarification or administrative correction (Atch 2) Some of the inputs of our field activities demonstrate the uncertainty that will exist when long-standing policies and processes are so significantly revised

One of the lessons learned as we have implemented acquisition reforms of the same magnitude as the rewrite of FAR Part 15 is that it requires a change in the mind-set of both industry and government acquisition personnel Proposed changes, such as the concepts of increased openness and the sharing of information between government acquirers and industry suppliers closely mirror commercial practices which are substantially different from traditional government contracting methods On the other hand, the increased reliance on the business judgments of government contracting officers, working in an environment less structured by regulation, is one that may concern some members of industry comfortable with the status quo Extensive training will be required and there needs to be a carefully planned implementation Lessons learned will begin to form the new framework for "Contracting by Negotiations" after the publication of this final rule and its subsequent use.

Lt Col Greg Weber, SAF/AQCP, (703) 695-3859, will continue to be our representative on the Rewrite team as these comments and other issues are resolved.

Attachments

1. Significant Issues
2. Clarification Requests


Air Force Input<br>Significant issues

1. We are concerned that the proposed policy allowing substantial amendments to the solicitation right up to award (FAR 15 205) could result in offeror that have been eliminated from the competitive range (no longer eligible for award) being unable to reenter the competition even though requirements may have changed in such a way that they would now be a viable competitor.

The proposed language at 15205 (e) "If a change is so substantial that it warrants a complete revision. Contracting officer shall cancel the original solicitation and issue a new one" may be too restrictive to allow previously excluded offerors from having an opportunity to re-enter a competition when the requirement is changed but not changed enough (in the determination of the Contracting Officer) to merit cancellation.

Recommendation Add at the beginning of 15205 (e) a new sentence "Consideration should be given to providing an eliminated offeror an opportunity to reenter if a solicitation is changed significantly after an offeror(s) has been eliminated from the competitive range
2. (Case 96-303) Reference proposed language at 15.407(d)(4)(ini), 15 609(b) and $52.215-16(\mathrm{c})$ (ALT III). We received numerous comments strongly disagreeing with establishing in the solicitation the number of proposals which will be retained in the competitive range. It is not realistic to predict this number before receipt of proposals If a number is inserted in the Contract Award provision, it may be too high or low, depending on the actual proposals that are received There is no benefit to be derived from establishing, in advance, the number of proposals in the competitive range Recommend consideration be given to deleting this language Allow the contracting officer to decide who and how many are retained in the competitive range, after proposal evaluation

We understand that this is permissive and agencies could choose to not predetermine the competitive range, however, we believe that in a vast majority of the cases it is inappropriate anyway.

Additionally, 15406 subparagraph (b) and (c) regarding efficient competition do not provide a definition of "efficient," nor does the provision $52215-1$ provide any additional information to prospective offeror as to what "efficient" means We have a concern that without additional guidance on what is meant by "efficient" or a clearer definition of the term "efficient competition," the tendency on the part of the government will still be a preference towards leaving otherwise acceptable proposals in the competitive range rather than elimmating proposals for the purpose of "efficiency" If "efficient competitions" are to become practice, more guidance on how to determine efficiency is required

Recommendation: Remove pre-determination of competitive range size provisions based on efficiency or provide much more information for government and industry as to the determination of efficient competition.

3 The Aur Force supports moving to the MCF but believes it must be carefully planned with a phased implementation that recognizes the substantial upfront expenses that will be required. We note that several of our MAJCOMs expressed substantial concerns about the change from the Unıform Contract Format to the Model Contract Format. Specifically they were concerned that the cost and disruption of converting automated solicitation and contract preparation systems will be considerable, including educating the workforce and industry, and that these costs must be carefully compared to the benefits identified.
4. We believe that a "fully responsive" proposal is necessary to establish discipline in the proposal process and to ensure that offerors are treated fairly. Based on this belief, we have concerns related to the proposed language on the submission and evaluation of Alternate proposals At 15 202(a)(2)(1), "Contracting officers may allow offerors to propose alternative terms and conditions. that is different from the model in the solicitation." If an offeror proposes alternate terms and conditions or an alternate CLIN structure, what happens if the government doesn't find it acceptable? In any other situation they would be considered non-responsive The proposed language is silent on the requirement for responsive proposals to be submitted along with any alternatives Recommend that a requirement be included for an offeror to submit a responsive proposal

Also, related to alternate proposals is the proposed coverage at 15205 (f) This proposed FAR section apparently allows what used to be called alternate proposals minus the requirement for an initial proposal which meets all the stated requirements However, it states "If the proposal considered to be most advantageous to the Government (determined according to the established evaluation criteria) involves a departure from the stated requirements "How can you determine a proposal is most advantageous to the Government according to the established evaluation criteria which are based on stated requirements if the proposal is changing the requirements? Is it not true that a departure from the requirements may result in a change to the evaluation criteria? This wording needs reconsideration. However, if departures from the stated requirements are to be acceptable as alternate proposals, recommend development of a standard solicitation provision which describes this process to potential offerors and which informs potential offerors that any proposed deviations from the stated requirements may be incorporated into a solicitation amendment. A solicitation provision like this would allow an offeror to make an informed decision on whether they want to submit revised requirements and would preclude a protest based on a Government falure to inform offerors that their proposals may result in RFP amendments Suggested language for proposed provision:
"Offerors may submit proposals which depart from the stated requirements Such proposals shall clearly identify why the acceptance of the proposal would be
advantageous to the Government Any deviations from the terms and conditions of the proposed contract, as well as the comparative advantages to the Government, shall be clearly identified and explicitly defined The Government reserves the right to modify the solicitation to allow all offeror an opportunity to submit revised proposals based on the revised requirements"

Arr Force Input<br>Requests for clarification \& administrative correction*

## FAR 1.102.

Performance standards Subparagraph (c)(3) The last sentence is not specific enough regarding what constitutes "fairness" Recommend the last sentence be changed as shown. "Fairness means that offerors and contractors of differing capabilities, past performance, or other relevant factors, must be treated according to those relevant differences, rather than in all aspects receiving the same treatment."

Subpart 150
Subparagraph 15000 Scope of part. This paragraph should state applicability first, then describe exclusions Recommend change to read "This part prescribes policies and procedures for negotiated competitive and non-competitive acquisitions It does not apply to actions using sealed bidding or actions not exceeding the simplified acquisition threshold "

Subparagraph 15001 Definitions Why is it necessary to differentiate between proposal modification and proposal revision" Whether before closing date, or requested by the contracting officer, in both cases it is a change to the proposal Not clear what value is added by making a distinction. Please clarify or further define the distinction

Subparagraph 15002 Negotiated acquisition Not clear what is meant by "consistent with an efficient process" in subparagraph (a) Recommend deletion of the phrase. Also recommend deletion of the term "evaluation criteria" in the parenthetical example, since sole source acquisitions do not ever have evaluation criteria

## Subpart 15.1

15.101 Lowest price technically acceptable process. While this subpart describes what the lowest price technically acceptable process 1 s , it does not specify any criteria which must be met to utilize the technique, or provide guidance regarding the types of acquisitions for which it is appropriate

Also, this subparagraph should address how past performance is evaluated using this technique. For example, acceptable proposals are determined first, then past performance is evaluated, then award is made to low offeror if past performance risk is acceptable. Otherwise, the contracting officer has the flexibility to choose the next low offeror if that offeror's past performance risk is acceptable, and the low
offeror's is not Recommend adding language which specifies the types of acquisition for which this technique is suitable, or, conversely, emphasizing that if the acquisition requires evaluating against criteria which can measure differences in the offerors proposals beyond "acceptable - non-acceptable," then the technique not be used

15102 Tradeoff process
Subparagraph (a)(1) Delete the word "signıficant" after "and" and before "subfactors" (This comment also apphes to 15.404(a) and 15 404(d))

### 15.104 Oral presentations

No differentiation is made between submitting proposals orally, and permitting the offerors to do oral presentations that reiterate, or summarize, what they submit in writing Additionally, it must be made clear whether oral presentations or proposals will constitute "discussions" or only "communications" as defined in subpart 15407 For these reasons, we think it is necessary to differentiate between oral proposals and oral presentations. Also, guidance regarding protests in the oral presentations/oral proposals environment is needed

Subpart 15 2. Solicatation and Receipt of Proposals
$15200(\mathrm{a})$ : The changes to this part delete all references and definition of Request for Quotation (RFQ). Part 13, Simplified Acquisition Procedures, however, still uses the term as a method of solicitation for actions above the micro-purchase threshold Part 13 needs to cover and define the RFQ

15202 Subparagraph (d) Recommend definition of "facsımıle" be expanded to include digital methods of receiving and transmitting proposals such as computer fax/modems, emall, or bulletin boards or homepages on the World Wide Web Subparagraph (e): The requirements cited here for a "letter RFP" are the same as those that are required for a full-blown RFP Suggest that the requirements for a letter RFP be more flexıble to allow a procedure now being used on sole source acquisitions, whereby the contractor and government IPT write the contract together

15 202(d)(1)(in) This paragraph discusses electronic commerce but it falls under paragraph (d) which only covers facsimıle proposals Was the intent for this to cover both facsimıle proposals as well as electronic proposals? If so, it should be moved

15 203-4 Section IV, Contract Clauses is not clear on where special clauses should be placed in the new Model Contract Format This paragraph states that Section IV only includes clauses not tailored to the acquisition
15.207 Submission, modification, revision, and withdrawal of proposals

Subparagraph (b) If late proposals may be considered "if doing so is in the government's best interest," does this not potentially put the late offeror at a
competitive advantage over other offerors? Depending upon how "late" the submission is, the late offeror would effectively have had more time to prepare the proposal Moreover, if the late proposal is evaluated and the late offeror is subsequently determined to be the successful offeror and awarded a contract, does the government open itself to claims of unfair treatment by the unsuccessful offerors who submitted on time? Does the team beheve that the benefits of considering "late" proposals outweighs the increased risks associated with charges of unfair practice if the successful offeror's proposal was submitted past the designated proposal recenpt date?
15.208(a) This paragraph references clause 52 215-1, Instructions to Offerors Competitive Acquisition, but the clause in part 52 is titled Instructions to Offerors Negotiated acquisition. These need to be consistent

## Subpart 154

## 15401 Definitions

Need better definition of "deficiency" Rewrite defines as "A single material falure to meet a Government requirement or a single flaw that appreciably increases the risk of unsuccessful contract performance " Increased over what? Recommend changing the definition to read: "A deficiency as used in this subpart is a single material failure to meet a Government requirement or an element of risk which may adversely impact the successful contract performance "

Suggest addıng at the end of the "discussions" definition the words "which may result in revisions to the proposal"

Suggest a definition of "clarıfication" be added, as follows" "Clarification, as used in this subpart, means communication both before and after establishment of the competitive range between the contracting officer and the offeror which do not require a proposal revision to obtain information to facilitate the Government's decision either to award without discussions or to determine the competitive range, to obtain information to explain or resolve ambiguities, or to correct proposal mistakes "

FAR 15.402-Source selection objective
If the lowest price technically acceptable process is used, will contracting officers be able to use past performance as an evaluation criteria on a pass/fall basıs? Recommend a statement which clarifies.

15403 Responsibilities
Subparagraph (b)(1) Delete "an" after "includes," and delete "mix of" after "appropriate."

15404 Evaluation factors and subfactors

Subparagraph (b)(1) Delete "to be considered"

## 15405 Proposal evaluation

Subparagraph (a) This paragraph makes the statement that the agency "should compare ..[the] relative qualities [of the proposals]" Is this statement referring to the integrated assessment that must be done by the SSA? If so, it should state this directly

Subparagraph (a)(3) Technical evaluation. This subparagraph states "If a technical evaluation is necessary beyond ensuring that the proposal meets the minimum requirements in the solicitation .", and goes on to state what records must be included Does this mean if proposals are being evaluated only to determine of they meet minimum requirements, such as in the LPTA technique, that there is no requirement to document the evaluation?

Paragraph (a)(1) prohibits the performance of cost analysis on source selections for fixed price or fixed price with economic price adjustment type contracts unless the price of the otherwise successful offeror is determined to be unreasonable We believe the contracting officer must have the ability to request other than cost or pricing data in order to perform a cost realism analysis on those contracts that warrant it. Price analysis alone may be inadequate to determine whether the proposed cost/price realistically reflects the effort required on the contract Cost realism analysis is used for several reasons: to determine whether the price bid reflects the level of manning outlined in the technical proposal, to ensure the labor rates are in compliance with the requirements of Davis-Bacon or the Service Contract Act, and to protect the government from the risk associated with unrealistically low prices Sometimes it is necessary to have cost information available to assess the impact on and to facilitate future modifications to the contract Unrealistically low prices cannot always be determined based on price analysis alone A price that is unrealistic for contractor A may be realistic for contractor B due to efficiencies or structure of the company which affect G\&A.

NOTE: In researching this comment we've discovered that a conflict exists between Phase I's proposed language and Phase II's coverage Phase 2 explicitly allows the contracting officer, in exceptional cases, to perform a cost realism analysis for any Fixed Price type contract Phase I appears to allow cost realism only for cost type contracts or Fixed Price type contracts other than FFP and FFP EPA contracts Suggest that the FAR 15.405 (a) (1) and Phase II's 15.504-1 language covering cost realism analysis be clarified between the Phases to eliminate confusion and that the FAR does not prohibit us from obtaining information required to perform the cost realism analysis when needed

15.405 (a)(2)-Past performance evaluation. When a small business offeror's past performance is unsatisfactory, will the contracting officer be required to request a certificate of competency from the SBA as required by FAR Part 19 ?
$15405(a)(2)(1)$ states that past performance evaluation is separate from the responsibility determination in Subpart 9.1. Yet it fails to explain how this evaluation is any different from a responsibility determination done in a pure price competition or low price technically acceptable competition.

15407 Communications with offerors•
Subparagraph (c) States "If a competitıve range is established, the contracting officer shall conduct discussions at least once with all offerors in the competitive range (but see 15410 )" Reference is incorrect, and should be changed to " 15408 , Award without discussions."

Also, why must the Government have discussions with all offerors in the competitive range "at least once"? If an offeror has an acceptable proposal with no deficiencies or clarifications needed, what would the Government discuss?

Same paragraph states "All evaluated deficiencles in an offeror's proposal, except those relating to past performance on which the offeror has already had an opportunity to comment" Why this exception for past performance? An issue could still be raised as to relevance of the past performance record to the instant acquisition This should be reconsidered

Additionally any deficiencies which have already been addressed by the offeror should not require additional discussions, unless the offeror response was not sufficient to correct the deficiency

15 407(d)(4)(ni) This paragraph is somewhat misleading because of award is being made without discussions, there would be no need for a competitive range since the concept of competitive range is to decide with whom to have discussions. Suggest deletion of the words "within the competitive range"

### 15.409 Proposal revisions

There is no longer a requirement to issue requests for Best and Final Offers (BAFOs), or apparently to formally close discussions Was this intended? If contracting officers wish to issue a request for BAFOs, may they still? Would this formally close discussions" Is the last sentence of subparagraph (a), which states "The contracting officer may establish a common cut off date for recerpt of proposal revisions." really intended to be a form of BAFO?

15410 Source selection

There is no discussion in this subparagraph about the evaluation team comparing the offeror proposals against the evaluation criteria specified in the solicitation It appears that we are "leaping" into the comparative assessment of proposals. Was this intended? Is this not the place to state that the proposals must first be evaluated against the stated criteria by the evaluation team? Recommend new first sentence be inserted in the first paragraph which states "The source selection evaluation team must evaluate proposals received against the evaluation criteria stated in the solicitation" The sentence which follows would then need to be modified by inserting "then" between "shall" and "be "

Subpart 15803 Notification of unsuccessful offeror
$15803(2)(\mathrm{b})$ Delete the word "for"
Subpart 15806 Postaward debriefing of offeror
Subparagraph (a) May an offeror who was notified of exclusion from the competition prior to award and who received a preaward debriefing also request and receive a postaward debriefing? Such offeror may very well request a postaward debriefing for the purposes of obtaining information not available to them preaward. We should provide limited debriefings at the time competitors are excluded from the competitive range and complete debriefings once the source selection decision is announced

## Provisions ${ }^{*}$

### 52.215-1 Instructions to Offeror

Negotiated Acquisition (a)(4) and (a)(5) This language reflects an inconsistency in definition of discussions Subparagraph (a)(4) states that "Discussion means communication." and subparagraph (a)(5) states the opposite "Communication means interchanges. which are not discussions." Correct by substituting the word "interchanges" for "communications" in subparagraph (a)(4) Also, use of the term "minor clarifications" in subparagraph (a)(5) is not consistent with the description of communications at 15 407. Recommend that the definition include the same language at 15407 (b)(2) and (3)
52.215-1(a)(5) which defines communication as "interchanges with offeror which are not discussions " the subparagraph just above defines discussions (consistent with 15.401) as "communications after establishment of the competitive range between the CO and an offeror in the competitive range" To eliminate any confusion with the definition of communication in subpara (a) (5), suggest the definition be slightly revised as follows "Communication means interchanges with offeror which are not discussions They may be conducted to obtain information which explains or resolves ambiguities or for minor clarifications prior to the establishment of any competitive range

Subparagraph (b) Recommend deletion of second sentence Does not add value.

Subparagraph (c)(v)(3). Last sentence concludes with "at the Source Selection Authority's discretion" Reference our earher comments in paragraph 4 d above relative to 15207.

Subparagraph (e)(6) Recommend deletion. This statement is confusing and does not add value

This provision does not address how the offeror is expected to acknowledge solicitation amendments Recommend that this provision either address the means by which the offeror is to acknowledge receipt of the solicitation amendment, or at least reference the fact that the offeror must acknowledge receipt as instructed by the contracting officer, or as stated on the applicable solicitation amendment form

It is also not clear what the difference between "modifications" and "revisions" is, or if a difference is intended

Reference 52.215-1(c)(4) This paragraph states that the offeror may propose any item or combination of items unless otherwise specified. We are not comfortable with this as the "default" language in the clause This should be the exception rather than the rule For many acquisitions it is not practical to split the requirements and not award the entire effort

52 215-5 Facsimile proposals
Recommend that either this provision be amended, or a new provision established, to permit submission of electronic proposals, and address virus checks to ensure proposals submitted electronically are "virus-free" Legislative COUNCIL

December 2, 1996

Ms Beverly Fayson<br>General Services Administration<br>FAR Secretarıat (VRS)<br>$18^{\text {th }} \&$ F Streets, N W, Room 4037<br>Washington, DC 10405

## Re FAR Case 95-029 <br> FAR 15 Rewrite-phase 1

## Dear Ms Fayson

The Small Business Legislative Councl (SBLC) is pleased to submit these comments on the proposed rule published jointly in the September 12, 1996 Federal Register by the Department of Defense, the General Services Administration, and NASA concerning the Phase 1 rewrite of FAR 15

The SBLC is a permanent, independent coalition of nearly one hundred trade and professional associations that share a common commitment to the future of small business Our members represent the interests of small businesses in such diverse economic sectors as manufacturing, retailing, distribution, professional and technical services, construction, transportation, tourism, and agriculture For your information, a list of our members is enclosed

Federal procurement policy is very important to the members of SBLC SBLC played an active role in the enactment of the Compution in Contracting Act and in other intiatives affecting the ability of small businesses to present proposals and assure that those proposals receive farr and equitable consideration

A substantral share of total government purchases are impacted by the provisions of Section 15 of the FAR SBLC believes that a substantial portion of those procurements are, or could be, provided by small businesses The SBLC membership is diverse, and federal market penetration as well as commercial business practices vary from one industry to another. For that reason SBLC urges that the gudance of each business sector with respect to procurement methods be given careful and separate consideration Commercial procurement methods in the construction industry may be quite different from those in the computer industry, yet the very different customs and procedures may work well and make sense for their respective industries

While that diversity precludes unanimity on many issues regarding federal procurement, there is a broad consensus among SBLC members on many aspects of federal procurement policy In general, most SBLC members believe that the less regulation, the better, and the more that government procurement practices emulate commercial practices in each industry, the better.

In both of those regards there are substantial improvements proposed in the FAR 15 rewrite For example, the proposed regulations give the government latitude to communicate with offerors openly about their proposals and the government's needs prior to competitive range determinations Under the proposed regulations, procurement officials have the discretion to obtain information from selected offerors about their proposals and make award without discussions based on the information received The communications can be informal and need not be held with all offerors While these types of communications between buyer and seller are common in the commercial world, they are generally not permitted under current regulations, which require that formal discussions can be conducted with all offerors in the competitive range By enabling contracting officers to communicate freely with offerors about perceived strengths and short comings, as well as government needs, the proposed rules can potentially save the government and contractors considerable time, money, and effort.

However, most SBLC members believe that the ideal federal procurement method is by formally advertised sealed bid. They believe that such procedures mınımıze the potential for favoritism, maximize the opportunities for small businesses, and minimize the cost of the product or service. At the same time SBLC recognizes that negotiated procurements are appropriate in many circumstances and that discretion, when used wisely, can benefit all parties Because of the heightened discretion afforded to procurement officials, however, many small and mid-sized businesses remain concerned about the potential for disparate treatment towards favored contractors

One of the most controversial proposed rules authorizes government procurement officials to limit the size of the competitive range to the greatest number that will permit "an efficient competition" The competitive range would consist only of proposals have the "greatest likelihood of award." There is no provision, however, for a minimum number of offers that must be included in the competitive range. Thus, a contracting officer could establish a competitive range of as few as two offers Procurement officials can also specify in the REP the maximum number of offers that will be included in the competitive range without regard to the merits of the offers received Currently, the FAR requires that when there is doubt as to whether a proposal should be included in the competitive range, it must be included.

By enabling contracting officers to narrow the list of prospective contractors, the proposed rule is expected to enhance the government's ability to procure goods and services quickly and efficiently This draft provision could allow the government to subjectively determine the number of proposals having a realistic chance of receiving an award based on a pre-established numenc quota Because the proposed rule all but equates "efficient competition" with administrative convenience, many SBLC members are concerned that contracting officers may sacrifice the requirement for full and open competition solely for the sake of efficiency Indeed the many horror stories of overpriced spare parts that preceded the enactment of the

Competition in Contracting Act were examples of what can happen when the most efficient procurement method from an administrative standpoint ( 1 e ., sole source procurement) is allowed to gain prionty over cost effectiveness. The cost effectiveness of competitive procurements were demonstrated by post CICA breakouts, where cost savings on 30 percent and more were achieved by switching from sole source to competitive procurement methods Breakout efforts also resulted in more sales for small companies In order to discourage the restored contracting officer discretion from becoming abused, SBLC recommends that substantial justification be required should a contracting officer propose that less than three contractors remain in any stage of a down select process.

This proposed provision, in conjunction with other controversial propositions that give contracting officers broad discretion to consider past performance, may stifle competition. While past performance is only one indicator of an offeror ability to perform a contract successfully, it has been a cornerstone of reform initiatives that allow the government to consider a variety of factors in determining which offer represents the "best value" to the government

The government's mereased latitude under the proposed rules, including the ability to communicate with selected offerors, limit the competitive range, and evaluate past performance, must be exercised evenhandedly and with sound judgment Just as not enough discretion can inhibit the government's ability to purchase efficiently, too much discretion can lead to an environment of favoritism the chills competition. As the government moves to emulate the commercial marketplace, these concerns become more evident, especially to small and mid-size businesses.

SBLC recommends that other clarifications to the regulation be considered. These include the need to preserve full and open competition and the SBA Certificate of Competency Program, protection of the rights of small businesses in the "downselect" process, a prohibition of bundling for administrative convenience, a better definition and disclosure of selection criteria, and more timely post selection debriefings

Please feel free to contact us if you have any comments or questions


Bruce N Hahn, CAE
Chairman, SBLC Procurement
Committee

SMALL BUEINESS
LEGISLATIVE
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# Members of the Small Business Legislative Council 

Air Conditioning Contractors of America
Alliance for American Innovation
Allance of Independent Store Owners and Professionals
Amerıcan Anımal Hospital Association
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American Consulting Engıneers Council
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Associated Equipment Distributors
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Automotive Service Association
Automotive Recyclers Association
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Natıonal Association of RV Parks and Campgrounds
National Association of Small Business Investment
Companies
National Associatıon of Surety Bond Producers
Natıonal Association of the Remodeling Industry
National Chimney Sweep Guild
National Electrical Contractors Association
National Electrical Manufacturers Representatives
Assoctation
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Natıonal Moving and Storage Association
National Ornamental \& Miscellaneous Metals Association
National Paperbox Associatıon
Natıonal Shoe Retailers Associatıon
National Society of Public Accountants
Natıonal Tire Dealers \& Retreaders Association
National Toolıng and Machınıng Associatıon
Natıonal Tour Association
Natıonal Wood Flooring Association
NATSO, Inc.
Opticians Association of America
Organization for the Protection and Advancement of Small
Telephone Companies
Petroleum Marketers Association of America
Power Transmission Representatives Association
Printing industres of America, inc.
Professional Lawn Care Association of America
Promotional Products Association International
The Retailer's Bakery Association
Small Business Council of Amerıca, Inc.
Small Business Exporters Association
SMC Business Councils
Society of American Florists
Turfgrass Producers International


November 26, 1996

RICHARD W CURRY Chairman Orange, California
-
HAN HERDERS
Vice Chairman
Carlsbad, California

JEFFREY J BELL Executive Committee Member at Large Orange Park, Florida

GEORGE A POUCH Executive Committee Member at Large Bellevue, Washington

GEORGE W PASHA, IV Member at Large Conte Madera, California
-
HEINO PREISSLER
Executive Committee Mernber at Large
Bellevue, Washington
-
DONALD L COLLINS
Associate Members'
Representative
St Thomas, US Virgin Islands

TERRY R HEAD
Associate Members'
Representative at Large
Alexandria, Virginia

ALAN F WOHLSTETTER General Counsel
Washington, DC

General Services Administration
FAR Secretariat (MVRS)
18th \& F Streets, N.W.
Room 4037
Washington, D.C. 20405
Re: FAR Case 95-029 -
Federal Acquisition Regulation
Part 15 Rewrite - Phase 1

The Household Goods Forwarders Association of America, Inc. (HHGFAA) submits these comments in response to the notice of the proposed revision of Part 15 of the Federal Acquisition Regulation (FAR) in FAR Case 95-029, 61 Fed. Reg. 48380, et seq., September 12, 1996.

The HHGFAA is an association consisting of, inter glia, household goods freight forwarders, all of whom are engaged in contracting directly with the Department of Defense (DOD) in the forwarding of household goods and personal effects of military service members and their dependents, as participants in the DOD's domestic and international personal property programs administered by the Military Traffic Managemont Command (MTMC).

Presently, approximately 150 household goods freight forwarders participate as prime contractors in the DOD international program. Upwards of 400 companoes participate as prime contractors in the DOD domestic program. In addition, there are hundreds of small moving and storage companies which participate in both these programs as subcontractors and which provide many of the required physical facilities, viz., trucks and warehouses. Many of these companies are small business concerns. Further, many of these small business concerns have been developed to meet the needs of the DOD and their continued existence is dependent upon their ability to continue participation in $D O D$ 's personal property programs.

The HHGFAA has a genuine interest in the proposed revision of Part 15 of the FAR because of the impact on its household goods freight forwarder members, which are predominantty small business concerns.

The HHGFAA previously filed comments on September 17 and September 25, 1996, in opposition to the proposed Competitive Range Determination Rule (FAR Case 96-303), to show that adoption of that proposed rule inevitably will result in the exclusion of many household goods freight forwarders, primarily small business concerns, from competing for contracts in the DOD programs, which DOD has announced will be placed under the FAR, effective January 1, 1997.

The HHGFAA reasserts its opposition to the Competitive Range Determination Rule, which is included in the Part 15 rewrite as proposed Rule 15.406 . We attach hereto and incorprorate herein by reference the HHGFAA comments in FAR Case 96303, which set forth the HHGFAA's opposition to the proposed Competitive Range Determination Rule. (Attachments 1 and 2). As stated in its Comments in FAR Case 96-303, the HHGFAA joins the U.S. Small Business Admınıstratıon (SBA), Office of Advocacy, in opposing the proposed Competitive Range Determination Rule.

The HHGFAA supports the position advanced by the SBA's Office of Advocacy to the proposed FAR Part 15 revisions, as set forth in the Statement of Jim O'Connor, Procurement Policy Advocate, SBA Office of Advocacy, November 8, 1995, and submits that the part 15 revision should:

1. Define what is meant by an "efficient competition" in the rules. (Proposed FAR 15.406). Unless "efficient competition' is defined, contracting officers will have unlimited discretion to exclude offerors on this ground with a disproportionate adverse impact on the ability of small business concerns to compete for government contracts. (See HHGFAA Comments, September 17, 1996 at p. 4).
2. Require that the factors employed by the contracting agency to limit the competitive range on the basis of "historical data from previous acquisitions for similar supplies and services" be disclosed and be made readily available. (Proposed FAR 15.406(b)).
3. Eliminate the factor that would allow a contracting agency to restrict the number of offeror in the competitive range by alleging that it does not have "resources available" to consider all qualified offers. (Proposed FAR 15.406(b)).
4. Establish FAR guidelanes for determining the minimum number of offerors in a competitive range. From the standpoint of small business, such guidelines are necessary to prevent contracting officers from arbitrarıly and unduly lımiting the number of proposals to be included in the competitive range where there are a significant number of small businesses in the pool of potential offerors, such as in the DOD Personal Property Program. Unless contracting officers are restricted by regulation, the authority to limit the competitive range could be used by contracting officers as a means of discouraging small businesses from submıtting offers by signıficantly reducing the likelihood that a small business concern's offer would be considered for award even if it would otherwise qualify for the competitive range. This is a much greater risk for a small business than for a large business with greater resources.
5. Require that the competitive range established for multıple award procurements, such as the Department of Defense (DOD) Personal Property Procurements, in which HHGFAA members compete, reflect the extent of participation of small business concerns in past procurements. For example, if 3 of 15 contracts in a procurement historically had been awarded to small business concerns, the competituve range established should include a minimum of 20 percent small business offerors. If less than the specified percentage of small business offerors meet the criteria for competative range, those small business offerors that meet the criteria should be included in the competituve range. This will go a long way to eliminate the concern of small business that the discretion embedded in the proposed regulations will not be exercised in a manner which disadvantages small business.
6. Reaffirm in Part 15 of the FAR the government's commitment to utılizing small firms in federal procurement.
7. Require written tracking of all contracting officer communications with offerors prıor to and after establishment of the competitive range. (FAR 15.407).

Lastly, the HHGFAA reasserts its support of the SBA's Office of Advocacy's position that the competitive range determination rule and the rewrite of FAR Part 15 should be considered as major rules subject to Office of Management and Budget (OMB) review under Executive Order 12866. (HHGFAA Comments, September 17, 1996 at pp. 3-4). As the Office of Advocacy states, competed federal contracts in fiscal year 1995 represented about $\$ 130$ billion or 64 percent of all federal contracts, which sum is well in excess of the $\$ 100 \mathrm{mlll}$ ion threshold of Executive Order 12866 .

Moreover, as the Office of Advocacy recognizes, these proposed FAR revisions will significantly alter the government contracting principle of "full and open competition" and, as a result, adversely affect many small business concerns.

For the above reasons, we request that the competitive range determination rule and the rewrite of Part 15 of the FAR not be adopted as proposed, that the amendments and alternatives discussed herein be implemented and that the proposed FAR nevisons be submitted to $O M B$ for review in accordance with Executive Order No. 12866.

## DELIVERED BY HAND

Attachments (2)

2320 MILL ROAD
TELEPHONE (703) 684-3780

SUITE 102
TELEX $710-8221108$

ALEXANORIA, VIRGINIA 22314-4679
FAX (703) 684-3784

September 17, 1996

DONALD H MENSCH Fresicent Alexancria, VIrginta -

FICHAPD W CURRY Charman
Orança Callfornia -
HAN HELDEAS
Vica Chairman
Calspad, Caltforma
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Execulve Committoe Memest at large Orança Park, Fiorida

GEOF̈GE A FOUCH Executive Committee Mencer at large Eellavue, Wasnington

HEINO PREISSLER
Eracuivg Commites Memegr at Large Bellyvu: Washirgton -

SANORA L ROWE Executive Commitee Mamber at large Toriance, Califorma

DONALD L COLLINS Associate Members' Gaprasentative
S. Themas, US Virgin isiands -

TEARY R HEAD Associata Memcers' Represantative at large Alexandra Virginia

ALAN F WOHLSTEITER Ganeral Counsel Washingtan 00

General Services Administration
FAR Secretariat (MVRS)
18th \& F Streets, $N$ W.
Room 4037
washington, D.C 20405
Re: FAR Case 96-303-
Eederal Acquisition Regulation
Competitive Range Determinations

The Household Goods Forwarcers Association of
America, Inc. (HHGEAA) submics these comments in opposition to the proposed amendments to the Federal AcquiSition Regulation (EAR) that will grant contracting officers unrestricted authority to exclude offerors from the competitive range. (61 Fed Reg s0118-40117, July 31, 1996).

The hagrad is an association consisting of, inter alia, household goods freight forwarders, all of whom are engaged in contracting directly with the Department of Defense (DOD) in the forwarding of household goods and personal effects of military service members and their dependents, as participants in the DOD's domestic and international personal property programs administered by the Milicary Traffic Management Command (MTMC).

The HHGEAA opooses the proposed FAR IUle because, if adopted, it inevitably wil result in the exclusion of many household goods freight forwarders, which are predominantly small business concerns, from competing for contracts in the DOD programs, which DOD has announced wII be placed under the EAR, effective January 1, 1997.

Presently, approximately 150 household goods freight forwarders participate as prime contractors in the DOD international program. Upwards of 400 compa-
nies participate as prime contractors in the DOD domestic program. In addition, there are hundreds of small moving and storage companies which participate in both these programs as subcontractors and which provide many of the required physical facilities, viz., trucks and warehouses. Many of these companies are small business concerns. Further, many of these small business concerns have developed to meet the needs of the DOD and their continued existence is dependent upon their ability to continue participation in DOD's personal property programs.

MTMC advised Congress that, in placing its billion dollar plus household goods programs under the FAR, it did not intend to "adversely impact the small businessperson" stating:
"We are committed to structuring an approach that offers, to the maximum extent possible, small forwarders the opportunity to fairly compete for our business.... It is not our intention to force the small businessperson out of our program. On the contrary, it is the small business that provides the resources and capacity needed for this industry. We understand the important role they play. Consequently, we have structoured an approach that provides business opportunities for all segments of this industry, especially small business, to compete fairly....'

Further, in Its Small Business Impact Report to DOD, dated January 29, 1996, MTMC further emphasized the importance of small business concerns to the DOD Personal Property Programs, stating:
"...As part of its design of a proposed new program, MTMC reviewed the existing program and concluded that small businesses were an essential element of any present or future program. The bulk of approved carrıers and almost all agents fall into the small business category. Even large national or international carriers rely on networks of agents, who are small businesses, to provide the actual transportation services. Accordingly, MTMC concluded that continued participaton by small businesses was vital to the government and public interest. This conclusion was made a design

1. Statement of Robert H . Moore, Deputy Chief of Staff for Operations, MTMC. Before the House Committee on Small Business on the Reengineering of DOD's Personal Property Program, October 11. 1995.
"consideration as MTMC developed its proposal, and has resulted in MTMC's change from proposed regional or installation global contract to proposed smaller, channel oriented contracts." (Report, p. 5).

Under the present FAR 15.609(a), small business forwarders would be able to compete for DOD personal property contracts because all offers in the competitive range must be evaluated and an offeror cannot be excluded so long as its proposal has a reasonable chance of receiving a contract award. Adoption of this proposed rule will adversely impact household goods forwarders by allowing contracting officers to eliminate offeror from the competitive range to achieve "effective competuition". Adoption of this proposal will likely have a disproportionate adverse impact on small business forwarders who would be within the competitive range under the present $F A R$, as recognized in the Initial Regulatory Flexibility Analysis Summary, which states "some offerors may be eliminated from a competition earlier than they would be eliminated under existing procedures." ( 61 Fed. Reg. at 40116).

The FAR Council attempts to Justify this exclusion of bidders by stating that "bid and proposal costs are expected to decrease because few offerors will remain in competition." (61 Fed. Reg. at 40116). This is not an acceptable justification The HHGFAA members want to continue to contract with DOD; their purpose and desire is not to save on bid and proposal costs. If the purpose of the rule is to help our members, we respectfully say "Thanks - but no thanks."

Further, the objectional provisions of the proposed rule are not required by the Federal Acquisition Reform Act of 1996 (FARA) pursuant to which the proposed rule is issued. As recognized in the Initial Regulatory Flexibility Analysis, alternatives were considered, including "retaining the current FAR language that requires offeror with a reasonable chance of award to be retained within the competitive range." We submit that this alternative and others should be considered.

The HHGFAA further opposes the proposed rule for the following reasons:

1. We support the position of the US. Small Business Administration, Office of Advocacy, set forth in its August 27, 1996 letter to the FAR Secretariat (attached), that the proposed competitive range determination rule is a major rule subject to Office of Management and Budget (OMB) review under Executive Order 12866, because its annual economic impact will exceed
$\$ 100,000,000$ and it will have significant adverse impact on competition. Executive Order 12866 requires a cost benefit assessment of a significant regulatory action of this magnitude before publication of the proposed rule for public comment. We urge that the FAR Secretariat comply with the requirements of this Executive Order and then republish the rule for comment.
2. We also object to the proposed rule on the ground that it is too indefinite because there is no definition of "effective competition", which is the sole basis provided in the rule authorizing a contracting officer to limit the number of offerors in the competitive range. As a result, the proposed rule grants contracting officers unlimited discretion. The exercise of this authority in absence of Imitations specified in the rule is likely to have a disproportionate adverse impact on the ability of small business concerns to compete for government contracts. The household goods forwarder industry, represented by the HHGEAA, is particularly vulnerable under the proposed rule, which would give MTMC's contracting officers unfettered discretion to eliminate small business forwarders from the competitive range under the excuse that such exclusion is necessary for effective competition.
3. The HHGEAA also objects to the provision in the proposed rule (proposed FAR 52.216-16 (Alternate VI)) that allows contracting officers to specify, in the solicitation, the limited number of offers to be considered in the competitive range. We object to this provision because it could be used by contracting officers to discourage small business concerns from submitting offers.

## CONCLUSION

For the above reasons, we request that the competitive range determination rule, as proposed, not be adopted and that any further proposed rule be submitted for OMB review in accordance with Executive Order No. 12866.

Respectfully submitted:
HOUSEHOLD GOODS FORWARDERS ASSOCIATION OF AMERICA, INC.


AnaT: whistotter
General Counsel

Attachment

September 25, 1996

| DONALOH MENSCH Presicent Alexandia Virgina |
| :---: |
| RICHARD W CURRY <br> Chamman Orangg Calitorma |
| HAN HELDERS <br> Vice Charman Carlsbac Calfomia |
| JEFFREY J BELL <br> Executive Committee <br> Mertor at Larga <br> Orangs Park, Forica <br> - |
| geORge a Fouch Executive Commttae Siember at Larça Bellevue, Was'ington - |
| HEINO PQE:SSLER Executive Comrntrae simmear at Large Eetievue, Washinģon |
| SANDRA L ROWE Exesuhes Commitae Memcer al Largs Torrance, Caltoma |
| DONALO $£$ COLLINS <br> Associate kumbars' <br> Reprosantative <br> Si Thorres U 3 Virgin islands |
| TERAY R HEAD <br> Assocrate Members' Representative at Large Alexandra Virgin:a |
| ALAN F WOHLSTETTER General Counsel Washington OC |

General Services Admanıstration
FAR Secretariat (MVRS)
18th \& F Streets, N.W
Room 4037
Washington, D.C. 20405

Re: FAR Case 96-303 -
Eederal Acquisition Regulation
Competitive Range Determanations

The Fousehold Goocs Forwarders Association of
America, Inc. ( $\because \mathrm{HGFAA}) \mathrm{submits}$ this adcendum to its Comments, dated September 17, 1996, in opposition to the proposed amendments to the Federal Acquisition Regulation (EAR) which, $I f$ adoptec, will grant contracting officers unresericted autrority to exclude offerors from the competitive range ( 61 Fed. Reg. 40116-40117, July 31, 1995).

By this addencum, the HFGEA Joins the Office of Advocacy of the Small Business Acministration in opposing the proposed rule on the further ground that the Inıtial Regulatory Flexibilıty Analysis (IREA) does not satisfy all of the requirements of the Regulatory Elexibilıty Act, 5 U.S C. §601, ez sea The HFGEAA. specifically concurs in the position set forth in the Office of Advocacy's letter of August 27, 1996 to the FAR Secretarlat (attached to the FHGFAA's Comments) that the IRFA "coesn't even begin to quantify the rule's impact or small business', and is deficient because, mnter alıa:

1. The summary of the IRFA in the Federal Register does not measure or discuss the impact on small business or alternatives considered and "[a]s a result, small businesses do not have a sufficient basis upon which to comment meaningfully on the rule."
2. The IRFA does not provide an "estimated measure or quantification of small business impact or number and dollar volume of federal contracts likely affected."
3. The IRFA does not discuss the available alternafives to the proposed rule except to suggest and reject the alternative of retaining the existing $F A R$ language to "...require offerors with a reasonable chance of award to be retained within the competitive range." (See HHGFAA Comments, p. 3).

For these reasons and those stated in its Comments, dated September 17,1996 , the HHGFAA opposes the proposed competitive range determination rule.


## NORTHROP GRUMMAN



Northrop Gipumanan Corporation

November 26, 1996

Ms Melissa Rider
General Services Administration
FAR Secretariat (MVRS)
18th \& F Street NW
Washington, DC 02405

Subject FAR Case 95-029, FAR 15 Re-Write<br>FAR Case 96-303, Competitive Range Determination

## Dear Ms Rider.

Northrop Grumman strongly supports Government efforts to streamline the acquisition process and appreciates the opportunity to comment on the subject proposed rules. The Company has analyzed changes included in the proposed rules and participated in Industry and Government discussions on this important subject matter. To avoid reiteration of what others have articulated so well, Northrop Grumman hereby endorses comments prepared and submitted to GSA by the Aerospace Industries Association (AlA)

The processes to be employed under the proposed rule pronde wide latitude to the PCO At the same time, the consolidation within DoD and reductions-in-force have reduced the number of experienced procurement personnel Accordingly, we believe that an aggressive trainung program and continued oversight is imperative to ensure the new rule is effectively and fairly implemented


General Services Admınıstration
FAR Secretariat (MVRS)
18th and F Streets, N W
Room 4037
Washington, D C 20405

## Re Proposed FAR Part 15 Rewrite - Phase 1 <br> FAR Case No 95-029 (61 Fed Reg 48380)

Hughes Electronics (HE) Corporation is pleased to offer its comments to the changes proposed in Federal Acquisition Regulation (FAR) Case 95-029 (hereafter Part 15 Rewrite or Rewrite effort) HE is a global company, with over 84,000 employees worldwide It is a leading provider of vehicle electronics, satellite communications and manufacturing, and a leading designer and manufacturer of electronics systems for the United States Military, its allies and for the global civil aviation market

HE is generally in favor of the scope and objectives of the FAR Part 15 Rewrite effort and strongly encourages the Government's efforts at streamlining the acquisition process based on a strategy that is warfighter-driven and product focused The balance struck in this rewnte effort between efficiency and risk is very good and is aligned with the goals of acquisition reform as described in the FASA, FARA, ITMRA and other acquisition streamlining initiatives We believe this rewrite effort, if prudently implemented, will facilitate the necessary culture change and lead to an environment where contracting officers will have greater flexibility and use of business judgment and discretion The rewrite effort should empower contracting officers to employ procurement practices that will reduce cycle time, which directly, benefits both Government and industry

However, we must not lose sıght of the fact that the changes proposed to Far Part 15 are sıgnificant We must be vigilant to ensure they are carefully crafted to avoid allegations of arbitrary decisions The proposed modifications contaned in this Rewrite will alter substantially the negotated procurement process the defense industry and Government has known for the past generation

Together with the changes bemg considered in this Rewrite, it is essential the Government implement a comprehensive training program for Government contracting personnel Coupled with
such training, oversight by senior management of the "new processes" resulting from the Rewrite imitative needs to be emphasized This oversight will ensure contracting personnel exercise their discretionary authority under the revised regulations in a fair and equitable manner

Further, there is concern that each agency will create unique implementing regulations in their FAR Supplements which could provide conflicting or inconsistent guidance to industry Therefore, all implementing guidance by the agencies should be approved by the FAR council to preclude any such inconsistencies in the application of this revised FAR rule Note also, there currently may be cross references to FAR Part 15 in other Government regulations (e g, agency FAR supplements) Any such cross references in these other regulations should also be updated when the final rule on FAR Part 15 is published

On a positive side, we find the following as most beneficial in the proposed changes in the FAR Part 15 Rewrite

- This rewrite provides more realism in competitive range determinations which will benefit companies in the long run by preventing needless expenditure of bid and proposal funds The earlier a potential offeror becomes aware it cannot meet the Government's requirements, the less time and money will be spent pursuing and evaluating a fruitless proposal
- Narrower definition of "discussion" limited to communications after the establishment of the competitive range
- A shift in competitive range policy to encourage retaining only offeror with the greatest likelihood of award and allowing the contracting officer to further limit the competitive range in the interest of efficiency
- Defining "Lowest Price Technically Acceptable" vs "Tradeoff" and "Multiphase Acquisitions"
- Encouragement of communication with industry throughout the solicitation process to ensure competitive range determinations are informed decisions
- Revision of the rules governing late proposals for negotiated acquisitions to make the offeror responsible for timely delivery of its offer, and to allow late offers to be considered if doing so is in the best interests of the Government, is consistent with commercial practices

Specific comments and recommended changes to the proposed changes to FAR Part 15 are identified in Attachment A

Please note that individual HE attorneys have contributed to the comments submitted by the American Bar Association and other professional organizations We have not attempted to duplicate the detailed analysis prepared by those organizations

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In summary, Hughes Electronics applauds all of the Government agencies and the Office of Federal Procurement Policy for embarking on much needed acquisition streamlining and reform We look forward to working the Government to make this Rewnte effort a successful reality

Please feel free to contact me at 703-284-4397 should you have any questions regarding the comments contained in this correspondence


## SPECIFIC COMMENTS:

## Part 2, Definitions of Words and Terms

2.101--Best Value. A definition of "best value" has been added to the FAR "Best Value" means an offer or quote which is most advantageous to the Government, cost or price or other factors considered (FAR 2-101) There are also various sections on source selection that have been rewritten to make it clear that the objective of the source selection process is to select the offer which represents the best value to the Government and to require that the source selection authority independently determine which proposal represents the best value (FAR 15100,15402 and 15410 )* We recommend that the definition of best value be modified as follows "Best value contracting means to determine which proposal offers the best tradeoff between price and performance, where quality is considered an integral performance factor."

## Part 14--Sealed Bidding

### 14.404-1 Cancellation of Invitations after opening

We support the elimination of the requirement to make award to the lowest price technically acceptable offeror and the requirement that the awardee's price not exceed the lowest bid price This is consistent with the shift from award to the lowest price technically acceptable offeror to use the best value to determine which offer is most advantageous to the Government

## Subpart 15.1--Source Selection Processes and Techniques

### 15.101 Lowest Price Technically Acceptable Process.

15 101(b) "Lowest Cost Technically Acceptable Process" Reference should be made to 15407 "Communications with Offerors" to clarify whether the contracting officer may contact a contractor who is determined to be unacceptable technically to support his becoming "acceptable" Whether or not such a process is desired, and there are arguments both ways, 15407 requires a clarification

### 15.102 Tradeoff Process.

Industry supports using two acquisition processes described herein to select the offer which provides the best value to the Government However, all factors and significant subfactors and their relative importance must be clearly stated in the solicitation, along with whether all evaluation factors other than cost or price when combined are sigmficantly more important, approximately equal, or significantly less important than cost or price The emphasis in determining when it's best to use these strategies, individually or in combination, should be on which technique is suitable to the complexity of a particular acquisition and will result in selection of the offer which will provide
the best value to the Government The amount of resources available to the Government to conduct source selections should be a secondary factor in making the determination of the most appropriate process Otherwise, Government and contractor resources could be wasted and the Government may not award a contract with the best value

Under $15102(b)(1)$ it is recommended that the term "significant" as used in this section be eliminated All factors should be subject to disclosure

### 15.103. Multiphase Acquisition Technique.

In general, the rewrite is an improvement, specific concerns are as follows

15 103(a) This paragraph allows that agencies "may seek limited information mitially, make one or more down-selects, and request full proposals from a limited number of offeror " We are concerned that repeated down-selects as described in this paragraph may have the unintended effect of generating protests from unsuccessful offeror throughout the acquisition cycle, thereby delaying contract awards and resulting in additional cost for both the Government and contractors We recommend that restrictions be included that limit the use of this process unless absolutely necessary and that the Government minimize the number of down-selects insofar as possible
$15103(\mathrm{~b})(3)$ Change the words "revised proposal" to "proposal revision or resubmittal" to allow contractors to modify an existing offer without complete resubmittal after discussions occur

15103 (d) Add the following sentence, "In the event of a down-select to a single offeror, the procurement shall continue as a sole-source negotiated procurement from the successful offeror "
$15103(\mathrm{~d})(1)$ This paragraph should be revised from "The government may make a mandatory down-select if it identified the criteria that will be used to evaluate offers in all phases "to "The government may make a mandatory down-select if the notice or solicitation identified the criteria...."
$15103(\mathrm{~d})(2)(11)$ This paragraph indicates that those offerer not selected are given supporting rationale as to why they are unlikely to receive an award These offers can, at their option, submit a proposal for the second phase which the Government must evaluate This could provide an unfair advantage to improve their bid, providing technical leveling to some degree and perhaps increasing the potential for a protest

### 15.104 Oral Presentations.

General An official record of the oral presentation should be included as requirement of this section An official record of discussions should be created because such discussions may be used as a basis for RFP changes or other information that may be incorporated into the resultant contract (ref $15104(\mathrm{~b})(11)$ ), or would be necessary to establish the facts in a protest proceeding Therefore,

15104 should be revised to require the agency to generate this record via any reasonably efficient means (e g, court reporter transcripts, audio tape, video recording, etc )

15 104(a) The last sentence which reads "Generally, oral presentations are most beneficial when they substitute for, rather than augment, written information" This sentence should be deleted This is little empirical evidence to support this assertion as a policy statement Many major systems acquisitions require a written proposal due to their complexity In these cases, it can be argued based on anecdotal examples that oral presentations are most beneficial precisely because they actually serve to better explain complex designs required to meet state-of-the art requirements

15 104(c) The second sentence which reads "Accordingly, the solicitation may describe--should be changed to "shall". This position is based on the fact that items (1) through (7) listed in this paragraph do, in fact, reflect the minimum amount of information that should be provided to offeror when the Government requires oral presentations

15 104(c)(2) States that the government may describe the personnel required to provide the oral presentations This should be modified to "describe the personnel (title or function) to provide " This modification will preclude the identification of specific individuals by name for oral presentations

## Subpart 15.2--Solicitation and Receipt of Proposals and Information

### 15.201 Presolicitation Exchanges with Industry.

We agree that exchanges with industry will benefit both the Government and industry due to the improved communication such exchanges will generate We also agree that the presolicitation exchange of information will enable the government to better tailor its acquisitions to obtain quality products and services at the best value to the Government

15 201(b) We recommend that the second sentence of this section be revised to add that the disclosure of information take place no later than two to five calendar days following the release of information

### 15.202 Requests for Proposals.

15 202(d)(1)(iv) This citation requires the agency to assure that facsimile procedures are adequate A requirement should be added that the agency publish detailed procedures in the solicitation that deal with contingencies that may preclude an offeror from submitting its proposal on time (e $g$, multiple phone numbers for fax receipt versus one phone number, Acts of God, etc )

### 15.203 Model Contract Format.

The proposed format should be revised to contain a separate section for acceptance criteria Acceptance criteria must continue to be concisely stated in a single location and its importance
warrants a separate section This may require a change in existing automated systems, with attendant costs

### 15.203-3--Section III, Financial and Administrative Information.

General The proposed format should be revised to contain a separate section for acceptance criteria Acceptance criteria must continue to be concisely stated in a single location and its importance warrants a separate section With respect to this section we recommend the following (1) Add a table of contents The current division into six sections does not provide the needed overview of the contract's contents, (2) Add the ability to use electronic mail or fax for notice in 15205 "amending the solicitation" which provides at (d) that oral notices may be used when time is of the essence but the contracting officer is to document the contract file and formalize the notice with an amendment

### 15.203-4 Section IV, Contract Clauses.

Delete the third sentence which reads as follows "If the contracting officer elects to include a clause in full text, the clause shall be treated as if it were tailored (eg, placed in the financial and admınıstratıve section)"

This procedure will cause unnecessary fragmentation of contract terms and conditions throughout the contract There is no reason to move a FAR clause from Section IV to Section III simply because the clause is stated in full text

### 15.205 Amending the Solicitation.

$15,205(\mathrm{~b})$ This paragraph is unclear as to whether all original recipients of a solicitation in the event of a multiphase acquisition shall receive amendments to the proposal The contracting officer may not be aware of all parties intending to bid after a "mandatory" down-select The suggested correction is to revise this sentence to "parties receiving the basic solicitation..."
$15205(\mathrm{f})$ This paragraph directs revision of the solicitation if an offeror submits an advantageous departure from the solicited requirement The language also precludes the inclusion of proprietary information in the change to the solicitation It is unclear as to the procedure to follow if the advantageous element of the offer is proprietary Can an award be made without further discussion based on overall best value? If not, what is the avenue by which advantageous, yet proprietary solutions may be proposed and accepted?

### 15.206 Receipt of Proposals and Requests for Information.

15 206(c) This paragraph discusses retransmission of electronic proposals which are unreadable Recommend clanfication of whether this opportunity exists after the closing time and date for receipt of proposals as electronic proposals will likely be submitted on the due date

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### 15.207 Submission, Modification, Revision, and Withdrawal of Proposals.

15 207(b) The provisions of the first sentence of this paragraph are of concern These concerns are as follows (1) opens the door to possible abuse by some contractors who could spend more time preparing their proposals and thereby turn in a better product, at the expense of others who got their proposals in on time and had less time to prepare them, (2) may lead to contractors routinely making late revisions to their proposals, which could frustrate the Government's attempts to evaluate proposals efficiently, (3) the practice may be prejudicial to other offerors who are disciplined enough to submit their proposals on time, (4) a late proposal could be viewed as a negative indicator of eventual contract performance ( 1 e , poor planning) (5) opens the door to possible fraud or other abuse on the part of offerors, and (6) "the best interests of the Government" is vague enough to be a cause for protests from offerors who were on time We recommend that with respect to point (6), that nonexclusive examples of what is meant by " in the best interests of the Government" be included Further, we recommend that (1) a requirement to document the basis of the determination that consideration of the late proposal is in the best interests of the Government and (2) require one level above the involved contracting officer who receives the late proposal

## Subpart 15.4--Source Section

### 15.401 Definitions.

The definition of "discussions" covers ALL communication after establishment of the competitive range But the old FAR 156 (BAFO) section which added meaning to the term as a precursor to BAFO now is gone If this is the intent, and we agree with the objective, why is there still a mention of "minor clarifications"? If the intent was to define the extent of change allowed to an offer prior to acceptance, this is already covered in the proposed 15 207(b) under handling of late or modified proposals The rewrite versions of FAR 15408 and 52-215-1(5) both refer to minor clarifications a term which is no longer necessary

## §15.403 Responsibilities.

General Under the new FAR requirements past performance is most significant because it impacts the source selection process and the eventual contract award recipient Procedures and rules should be expanded in FAR Part 15 covering the role of the contracting officer Their role must be clearly spelled out in both FAR and in the solicitation, is the person responsible for ensuring that the process is open and accessible, secondly, that all parties are playing by the rules Both subjective and objective judgment, concerning related programs and the contractors actual performance rating should be subject to the contracting officer's final decision A single source of past performance or unfavorable customer comment/input should not be enough to defeat a contractor who is deemed capable, affordable and responsible The contracting officer should be vested the authority, as the past performance evaluation control point for ensuring objectivity and fairness in the process by

1 ensuring the contractor has a reasonable opportunity for comments and to respond to facts and negative inputs This must be done timely, prior to entering final selection phase of the procurement process
2 eliminating selective use of past performance information to support a certain preconceived notion about a contractor, or avoiding altering selection criteria after proposal submission ensuring an open process with identification and resolution of disputes in a timely manner, so as not to adversely affect source selection
4 ensuing past performance data is relevant and recent (related to the instant contract and not more than 5 years old)

Add to $15403(\mathrm{~b})(5)$ or between (b)(4) and (b)(5) that if upon evaluation of all factors and subfactors, past performance becomes the determining factor for award, the SSA shall appoint an independent advisory panel to review the past performance information to ensure that the past performance assessment is unbiased, rational, and complies with the source selection instruction Members of this panel shall not otherwise participate in the source selection or evaluation and shall not have directly participated in the programs whose history is to be assessed

### 15.404 Evaluation Factors and Subfactors.

15 404(d)(3)(1) This paragraph should be revised to allow the Contracting Officer to determine whether past performance information is relevant as an evaluation consideration for each particular procurement This is consistent with direction from OFPP which already suggests that the $\$ 1 \mathrm{M}$ threshold is administratively burdensome The recommended rewrite language allows an exception to be taken rather than openly recognizing the PCO's responsibility to use past performance selectively and prudently

### 15.405 Proposal Evaluation.

15 405(a)(2) General This paragraph should be expanded to
(1) Require that the Contracting Officer, who elects to consider past performance as an evaluation factor also consider the complexity, environment, Government culpability and other situations surrounding each contractor's past performance Weight given to relevant past performance information should be retained throughout the evaluation so that past performance which is significantly less relevant is not over emphasized during the evaluation process This should include comparisons to industry norms if offeror with histories from differing industries or technology types are being compared
(11) Establish past performance information as a consideration in comparing the volume and level of contractor experience, not just as a prediction tool for cost and schedule variance
(iii) If experience (past performance) is deemed important to successful performance, than a neutral performance factor of a contractor without relevant expenence can be no more advantageous then the worst performance of all contractors with relevant performance experience
(iv) When determining relevant past performance, the definition of an offeror shall include all elements of a company or corporation that perform work which would otherwise be deemed

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relevant Such action precludes formation of shell companies or virtual corporations to avoid adverse ramification of past performance Furthermore, the requirement might be expanded to include the entire contractor team--subcontractors, partners, et al

15 405(a)(2)(i11) Firms lacking relevant past performance history receive a neutral evaluation This does not assist the Government in finding the best source as these firms could be technically incapable of performing As a minimum, a technical capability assessment should be performed by the agency

Further, we believe this proposed policy is problematic both philosophically and practically It could be argued that if an offeror has had no relevant past experience, they should be downgraded in relation to a contractor who has had relevant past experience, even if its performance was not optimal, as the contractor with no relevant past experience probably poses greater performance risk and at best must undergo a learning curve Another alternative would be to base the evaluation on the most relevant experience the offeror or Government can identify, this at least would afford an opportunity to judge something the offeror has done This criterion presents a host of potential issues What about a poor past performer who was recently taken over by another company who turned them around or an offeror whose early performance on a program was not up to par, but who eventually came up with a technical solution and now performs well? The offeror's overall performance might be considered poor but it could still be the best choice in a follow-on competition, having solved their technical problems The policy also leaves open the question of what segment of the company will be evaluated for past performance, 1 e , the division, the entire corporation etc The regulation should state that the past performance of the units) that will actually perform the proposed work is the performance that will be evaluated

Another concern is the practical implementation of this proposed policy If, for example, "Past Performance" is weighted $30 \%$, and the offeror is deemed to have no relevant past performance, the contracting officer could deal with this in several different ways $H e$ could eliminate the points designated for this factor from the offeror's score, evaluating the offer solely on the other $70 \%$ and rationing the score up to $100 \%$ However, this would distort the way the offer was evaluated in relation to other offers by effectively giving more weight to the other evaluation factors in evaluating that offer versus the other offers, essentially removing past performance as a criterion for one offeror while leaving it in for others Alternatively, the contracting officer could give the contractor with no experience a mid-point score of $15 \%$, which seems neutral But is it fair to vie an offeror with no relevant past performance a rating of $15 \%$ ? By most assessments, this would be considered a low score, one that would be given to a poor performer The offeror who had no past performance might legitimately object to this On the other hand, one could also argue that an offeror with no relevant past performance should get a zero in this category and start out with a score of $70 \%$ The point is that the policy is at best muddled and at worst not rational, and, thus, is subject to varying interpretations by contracting officers who are inevitably going to apply mechanical scoring techniques that will be inconsistent and possible illogical, subjective and susceptible to protest Attempts by contracting officers to give a score that is "neutral" will, in all likelihood, result in a score that is not at all neutral in many cases Recent increased emphasis on past performance in

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source selection may make this policy all the more controversial should it be implemented as proposed

We recommend the elimination to the reference to neutral scoring, evaluate all offeror on their most relevant past performance, and specify that the past performance of the unit that will perform the work is that which will be evaluated
$15405(a)(4)$ This section provides that "Cost information may be provided to members of the technical evaluation team if the source selection authority concurs"

We have a concern with this policy for the reason that knowledge of the competitors' prices may well influence the technical evaluators' judgment Furthermore, there is generally no good reason to inform the technical evaluators of the costs Cost information should only be provided to members of the technical evaluation team after the technical evaluations have been completed

### 15.406 Competitive Range.

15406 General This section allows for early elimination of contractors from competition The basis for elimination is the contracting officer's determination that their proposal no longer has a chance for award, based on factors/subfactors in the solicitation To reduce the risk of protest and increase the appearance of fairness, the contracting officer's authority in this area should be limited Companies eliminated, for competitive range reasons during the early phase of the procurement, should be allowed back into the competition if there is a change to requirements or evaluation factors/subfactors This section should be re-written to establish the requirement for the contracting officer to offer an opportunity for a company previously eliminated to reenter the competition This should only be permitted if the solicitation is changed after the company was excluded under the rules of competitive range determination

15 406(b)(c) These sections provide that "In planning an acquisition, the contracting officer may determine that the number of proposals that would otherwise be included in the competitive range is expected to exceed the number at which an efficient competition can be conducted After evaluating offers, the contracting officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition"

This acquisition approach departs from the previous philosophy wherein all contractors who had a reasonable chance of being selected were to be included in the competitive range While we agree that the acquisition officials should be afforded flexibility in judgment on competitive range determinations, the proposed legislation could be subject to abuse The amount of savings from a competitive acquisition can easily exceed the cost to the Government of evaluating another proposal or two In an extreme case, the contracting officer could state the Government only had resources to evaluate one proposal (based on convenience) and award it to the apparent best offeror without discussions with anyone It is often the case that contractors' proposals can improve dramatically
in negotiations following discussions with the Government To deny contractors the option to be included in the competitive range solely due to limited Government resources may prove pennywise and pound foolish

When analyses during acquisition planning indicate the competitive range may be overcrowded, the agency could re-evaluate how its needs have been described, and devise an evaluation method that can more efficiently select an awardee--without arbitrarily limiting the number of proposals to be considered

15406 (b) This paragraph establishes that the contracting officer is allowed to decide which proposals are "within the competitive range" by considering "historical data from previous acquisitions for similar supplies and services" This provision is not acceptable unless the historical data and its source is known and quantifiable The collection and archiving of performance data must be accomplished within strict guidelines which must be part of the FAR, such as the proposed addition of DFAR 242 15--Contract Performance Information The new proposed guidelines for the collection of past performance information are clear and would act as a firm basis for knowable "historical data from previous" acquisitions" Without a solid set of criteria, the new Competitive Range guidelines are weak and subjective

### 15.407 Communications with Offerors.

We strongly endorse the proposed changes to this section Such changes will facilitate communications between the Government and contractors We believe that freer discussions between Government and industry will enhance the procurement process, enabling contractors to better understand the Government's requirements and at the same time helping the Government better understand offeror's proposals, without being constrained by the previous formal, rigid negotiation process This is a more straightforward, commercial-style way of doing business

15 407(b)(2) This paragraph allows offeror to correct "mistakes" (but not allowing changes) after communications and prior to the establishment of the competitive range and prior to discussions There is no definition of what constitutes a "mistake" As a result, this is likely to cause contention and additional protest over whether an action is a "correction of a mistake" versus a proposal change Therefore, ether the term " mistake" should be defined or "correction of mistakes" after initial communications should not be permitted

15 407(d) General The caveats in this section setting forth topics that are improper in discussions and communications are helpful and acknowledge the Government's recognition of potential issues in this area We are concerned however, that despite the provisions of this section, actual communications may be verbal, undocumented, and with many subjective elements, therefore, making it difficult to control and assure that there are no violations We recommend, therefore, that communications should be formal and on the record

### 15.408 Award Without Discussions.

### 15.409 Proposal Revisions.

15 409(a) Modify the third sentence of this section to read "The contracting officer shall establish a common cut off date for receipt of proposal revisions"

15.8--Preaward, Award, and Postaward Notifications, Protests, and Mistakes

### 15.803 Notifications to Unsuccessful Offerors.

$15803(\mathrm{~b})(1)(\mathrm{v})$ This paragraph states that the winning offeror's "profit" shall not be disclosed during a debriefing However, a cost type contract has separate amounts for cost and fee, and these elements are normally available through the FOIA We recommend, therefore, that this reference be modified to exclude this prohibition in the case of cost-type awards

### 15.805 Preaward Debriefing of Offerors.

15 805(a) This paragraph states that offeror are entitled to only one debriefing, and that offeror must request a preaward debriefing within three days after being notified of exclusion from the competitive range However, it is not clear that an offeror, once excluded from the competitive range prior to award, may request a "postaward" debriefing in leu of a pre-award debriefing We recommend, therefore, that this paragraph be clarified to allow an offeror to request either a preaward debriefing or a postaward debriefing In keeping with recommendation, the last sentence in this paragraph should be modified to read "Normally, offerors are entitled to no more than on debnefing, unless special circumstances warrant more than one debriefing for each propesat(e.g., if an offeror, after the preaward debriefing, is subsequently placed back into the competitive range and is not the successful offeror)." Note, consistent with the thrust of the FAR Part 15 rewrite to allow contracting officers more flexibility, the contracting officer should also have the flexibility in this area to conduct more than one debriefing, especially if necessary in the interest of fairness and common sense

15 805(b) This paragraph states "If providing a preaward debriefing is not in the best interest of the Government at the time it is requested, the contracting officer may delay the debriefing, but shall provide the debriefing no later than the time postaward debriefings are provided under 15806 In that event, the contracting officer shall include the information at 15806 (d) in the debriefing" We believe that these two provisions would permit the contracting officer to unduly and arbitrarily delay the debriefing to the detriment of an offeror who may have an immediate need for the information We recommend, therefore, that these two sentences be deleted If not deleted, then the proposed regulation should provide that a preaward briefing may be delayed because it is in the Government's best interest ONLY if there are compelling circumstances to support that decision The contracting officer should be required to document the file with appropriate rationale supporting that decision

15 805(f) This paragraph should be revised to require that the contracting officer disclose the number of offers still in the competitive range and the ranking of the debriefed offeror With this knowledge, we believe that a disappointed offeror probably would be less likely to protest because they could more readily see that they were out of the running

### 15.806 Postaward Debriefing of Offerors.

General We behove that greater accountability and assurance of an equitable evaluation can be obtained by requiring that the key points of all evaluations in debriefings be made in writing and be provided to all competitors who submitted proposals To allow debnefing to be solely oral, as provided in subparagraph (b) is not sufficiently on the record to assure fairness All evaluation criteria addressed in FAR 15 405, Proposal Evaluation, should be addressed in debriefings, and it should be demonstrated in writing how the original evaluation criteria set forth in the solicitation has been applied to each proposal submitted, and how it quantitatively results in the selected winner

15 806(b) Recommend that this paragraph be modified to preclude oral debriefings

15 806(e)(3) See comments to $15803(\mathrm{~b})(1)(\mathrm{v})$

### 15.807 Protests Against Award.

15807 (b) This paragraph identifies information "available to prospective offeror or ongmal offeror still within the competitive range" Absent limiting the information to onginal offeror in the competitive range, all offerors arguably qualify as "prospective offerors" The intent of this phrase is unclear

15807 (b)(2) This paragraph states that debriefing information provided to the protested awardee becomes available to all prospective offeror in the recompetition, limited only by what is proprietary Original offerors will have had their own debrief and should not be entitled to additional information regarding the government's evaluation of the original awardee Absent this, the original awardee has his own debriefing information, but not that of other offeror and is at a disadvantage going into the recompetition Only the public content of the award should be disclosed to offeror in a recompetition

[^11]General Services Administration
FAR Secretariat (VRS)
Attn: Beverly Fayson
Room 4037
18th \& F Streets, N W
Washington, DC. 10405

## Re: FAR CASE 95-029 <br> FAR 15 REWRITE--PHASE I

The undersigned organizations and businesses are pleased to submit these comments on the proposed rule published jointly by the Department of Defense, the General Services Administration and NASA concerning the phase I rewrite of FAR 15. This proposed rule was initially published in the Federal Register on September 12, 1996 ( 61 F.R 48380). By notice of November 7, 1996, the FAR Council extended the deadline for comments until today.

## 1. SUMMARY

Only a very small portion of the September 12 proposed rule is designed to implement provisions of the Federal Acquisition Reform Act, hereafter "FARA" (Public Law 104-106) That same, more narrow coverage, was published as a separate rule on July 31, 1996 and comments were requested by September 30, 1996 The FAR Council subsequently asked for comments on the July 31 rule to be submitted by taking into account the expanded coverage in FAR Part 15 included in this Phase I rewrite. While we have done so in these comments, our view of, and opposition to, the July 31 rulemaking, even in the broader context of the September 12 proposed rule, has not changed While narrow changes to implement the FARA changes on "competition" and on "competitive range determinations" should be made to the FAR, we do not believe that those statutory changes have been properly implemented in ether the September 12 rule or the July 31 rule.

The balance of the September 12 proposed rule comprises Executive Branch initiatives to rewrite this critical chapter of the federal acquisition process Several of these initiatives make beneficial changes to the federal acquisition process, and, as we note below, we do support them. However, these limited number of beneficial changes are completely overridden by the ill-conceived, ill-defined, or harmful provisions in this rule such that, on balance, we do not support this rule and recommend that the rule not be adopted in its present form. In our view, the rule is inconsistent with FARA, will fundamentally alter the principles that are the foundation of the federal procurement system, and will have significant adverse consequences for all

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businesses, but particularly small businesses, that seek an opportunity to do business under the Federal Acquisition Regulations with federal agencies

Notwithstanding the assertions of the FAR Council in the Federal Register notice, we also strongly believe that the September 12 rule is a "major rule" under the definitions of the Congressional Accountability Act (5 U.S.C. 804) and a "significant regulatory action" pursuant to Executive Order 12866. We urge the FAR Council to reconsider this important aspect of the rule-making process. We applaud the determination made by the FAR Council that the rule is a "major rule" under the Regulatory Flexibility Act.

## 2. PRIOR RULEMAKING AND COMMENTS

As noted above, the September 12 proposed rule incorporates the same changes to the FAR in the proposed rule entitled "Competitive Range Determinations" published in the Federal Register on July 31, 1996 (61 F. R. 40116) On September 30, eight trade and professional associations, including many who have signed these comments, submitted extensive comments in opposition to that proposal We have attached a copy of those September 30 comments for incorporation in the public record on this rule, as well Since the subject matter and the proposed coverage of the two rules overlap, we reassert our earlier position as applied to this rule.

## 3. PORTIONS OF THE SEPTEMBER 12 PROPOSED RULE ARE NOT CONSISTENT WITH FAR

As we indicated in our comments regarding the July 31 rule, the coverage under that rule falls to properly implement the two key provisions of FARA affecting competition and the competitive range determination Likewise, the expanded coverage of the September 12 proposed rule falls to properly implement the statute

## Competitive Range

(1) The rule still allows contracting officers to arbitrarily establish an "estimate" or set the number of proposals that will be considered in the competitive range FARA provides that the contracting officer can limit "the number of proposals in the competitive range, in accordance with criteria specified in the solicitation, to the greatest number that will permit an efficient competition among offeror rated most highly in accordance with such criteria " It is obvious, except in this rule, that until proposals are received, it is impossible for the government to make a determination as to the greatest number of offerors that are most highly rated!
(2) This proposed rule, furthermore, eliminates the statutory requirement to include in the competitive range the "greatest number" of proposals, instead providing only that the "competitive range shall include proposals having the greatest likelihood of award " These are more than semantically different, and go to the very heart of the federal acquisition system when the competitive range is used Indeed, the top two proposals would have the "greatest likelihood" of award but would certainly not constitute the "greatest number" of proposals with such a likelihood. The rule does not give the contracting officer any guidance on how to establish a competitive range determination, unlike the "natural break" or "bright line" test which has emerged under the current regulations.
(3) Finally, we are very troubled by the flexibility of the contracting agency to have "evolving solicitation requirements" which are shared only with those who are left in the competitive range or who have survived the repetitive down-selection procedures now created under the regulations

## Competition

Furthermore, the rule fails to implement the provision on "competition" as required by FARA. Section 4101 of FARA provides that the "Federal Acquisition Regulation shall ensure that the requirement to obtain full and open competition is implemented in a manner that is consistent with the need to efficiently fulfill the government's requirements" (emphasis added) The statement of managers language accompanying the conference report explains clearly that "This provision [in section 4101] makes no change to the requirement for full and open competition or to the definition of full and open competition." However, the proposed rule states that the contracting officer, not the FAR, may determine the greatest number of proposals that will be included in the competitive range for conducting an "efficient competition " Thus, the FAR will no longer preserve the bedrock procurement provision to obtain full and open competition (unless a statutory exemption can be properly applied).

## 4. GOVERNMENT RESOURCES SHOULD NOT BE A BASIS FOR LIMITING COMPETITION

We recognize that the federal workforce is being reduced, and acknowledge that the downsizing of the workforce will also impact on the number of acquisition personnel available. In hight of these reductions, we have previously supported legislation and regulations that will simplify the acquisition process, reduce unnecessary work on both the government's and contractors' part, and joined with efforts to streamline the acquisition process. Many of these actions have already been put into place. However, this proposed rule allows contracting officers to arbitrarily limit the number of proposals in the competitive range based solely on the resources available to conduct the procurement Here, again, the proposed rule relegates the statutory foundation of
full and open competition to a lesser priority, and competition becomes dependent on the manpower available (or merely assigned) to conduct a specific procurement Likewise, selecting proposals for the competitive range based on factors such as market research, previous acquisition histories, or past performance under similar government contracts is inconsistent with FARA's requirement that the contracting officer limit the number of proposals in the competitive range in accordance with criteria specified in the solicitation

## 5. SECTION 15.103: MULTI-PHASE ACQUISITION TECHNIQUES

This section provides authorization for multi-phase acquisition techniques. Generally, we have supported efforts to minimize the time and cost of proposals This section of the rule provides two such techniques -- an advisory downselect process and a mandatory down-select process

We prefer the use of the advisory down-select process It puts the decision on whether to proceed with competition for the award squarely in the hands of the business which is in the best position to determine its capabilities to compete for that business. When the government takes the steps to provide a clear statement of its need (which is not an essential element of this rule or of the existing FAR), and the key evaluation criteria that it will use in making its award decisions, we behave that interested offeror will make the most of that information by competing only where they believe they have a reasonable chance of success, or where they are willing to invest their own resources

Although paragraph (d)(2)(111) of the proposed rule properly acknowledges that "advisory" down select are not entitled to a debriefing pursuant to 15.805 and 15806 , we strongly recommend that language be included in this section of the proposed rule which encourages contracting officers to provide such debriefings in a timely manner wherever possible Both the government and the private sector benefit from meaningful and timely debriefings, even under circumstances such as here where the business person has made his or her own decision not to go forward in the competition.

Paragraph (e) provides limited guidance about subsequent phases of a multi-phase acquisition We are concerned about the language in this paragraph regarding the disclosure of the evaluation criteria, possibly for the first time, to offerors who proceed to the second or possibly subsequent rounds. In our view, while it may be appropriate to withhold disclosing the more detailed evaluation criteria until subsequent rounds, we strongly urge that the regulations provide for a minimal disclosure of the key evaluation factors at the initial stage of the notice required by FAR 5.205 (or when other means of soliciting interest are used) In this way, the government will maximize the information disclosed to the public and increase the

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likelihood that a business will make a good decision on whether to proceed with competition for an award.

Furthermore, to ensure that multi-phase acquisitions are not viewed as an independent means of conducting a procurement, it is essential that any use of a multi-phase acquisition be tied to evaluation criteria (by a reference to 15404 ), competition requirements, and other source selection provision in FAR 15.

## 6. USE OF ORAL PRESENTATIONS

We recognize the value that oral presentations have in the acquisition system today They provide a means for increasing meaningful communications between offeror and government evaluators, help to reduce the reliance on artful proposal writing, may reduce cost, and can increase the government's understanding of offers submitted so as to enhance the government's source selection process.

While we support the use of oral presentations, this section is really coverage for "oral proposals," and we have significant concerns about such use. Fundamental to our concern is the basis upon which the content of the bilateral contract between the government and the offeror will be fixed when oral proposals are made For example, 15.104(b)(i1) addresses the issue of the consideration of the "oral mformation" that would have to be incorporated into the resulting contract. We do not believe that either the government or the industry is yet sophisticated enough to make broad use of oral proposals.

Therefore, we recommend that this section be carefully redrafted to distinguish between the approval for the appropriate use of oral presentations to explain or elaborate on written proposals, and the difficulty in relying on oral proposals as the basis for source selection.

## 7. 15.201 PRESOLICITATION EXCHANGES WITH INDUSTRY

This section of the proposed rule rests on the premise that a more open and earnest exchange of information between government and industry at the pre-solicitation phase should be encouraged We strongly support that premise. Over the past several years, the increased use of draft REPs, (provided that the results of the input which the agencies receive from the draft are shared in a timely manner with industry), RFIs, bidders conferences, and other mechanisms have been used successfully to assist the government in its "market research" and to assist industry in understanding government requirements.

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We appreciate the caution to government personnel included in paragraph (f) about the inappropriate disclosure of specified information about a proposed acquisition. We believe the rule, and the FAR system, would benefit from a specific cross reference to the final protections of coverage of procurement integrity protections in FAR Part 9 Since the revised Procurement Integrity coverage now protects information, irrespective of when the "conduct of the procurement begins," it would be an added precaution for both government and industry to also have those cautions kept in the forefront when reviewing this chapter of the FAR.

## 8. 15.405 PROPOSAL EVALUATION

While this section of the rule generally restates the current proposal evaluation section of the FAR, it adds new coverage to permit the evaluation of proposals to include a comparison of the "relative qualities" of one proposal against another in the technical evaluation, prior to "source selection" Today, many federal agencies are of the view that only the source selection authority may compare offers, and that the technical evaluators may only compare offers against the evaluation criteria in the acquisition strategy and source selection plan We would prefer that, absent a compelling reason, technical evaluators be limited to conducting thorough and complete "objective" evaluations against the source selection criteria and that "comparisons" among offeror be left to the source selection authority

## 9. 15.406 COMPETITIVE RANGE

We have commented above opposing many of the provisions in this section

## 10. 15.407 COMMUNICATIONS WITH OFFERORS.

Prior to establishing the competitive range, the proposed rule provides that "communications" with offeror are not considered to be "discussions" within the traditional meaning of that term under the current FAR. Information received during this phase may be used in proposal evaluation, however, offerors may not change their proposal as a result of these communications except to correct mistakes. Furthermore, contracting officers need not conduct communications with all offerors, but instead may choose to communicate with only some offerors While the rule seeks to paint an obvious example by referring to "those whose proposals initially appear to be neither clearly in nor clearly out of the competitive range," in fact it is unrealistic to make these critical determinations without even some minimal evaluation of all offerors. The rule further provides that once the competitive range has been established, communications with offerors are considered "discussions" and may by written or oral.

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While we recognize the value to both the government and the industry of an exchange of information, even after the release of the solicitation, we are concerned about the effort to create virtually meaningless distinctions between "discussions" and "communications" which may jeopardize ensuring that all offeror have the same information so as to compete on a "level playing field" For example, the use of this distinction would have a significant impact when coupled with the government's ability to make "an award without discussions" (See 15.408) The effort to craft these proposed distinctions may also violate provisions of law that were not changed by FASA or FARA, and would do little to achieve the goals sought In our view, minor changes with the current system could be made to facilitate meaningful "communications" without increasing greater risks or creating the appearance that any single offeror is given an unfair competitive advantage

## 11. 15.407(d) IMPROPER DISCUSSIONS AND COMMUNICATIONS

We appreciate the efforts to include in this subsection five examples of activities/ information that should not be disclosed during a procurement. However, we have concerns both with what has been included in this section and with what has not been included

For example, the proposed rule does not retain the current FAR 15 610(e)(2) prohibition on "auction techniques" We do not believe that the government should be engaged in an "auction" when conducting source selections, however, we believe this exclusion was done intentionally (particularly in light of the affirmative approval of such "auction techniques" in dealing with the September 6 FARA proposed rule on simplified acquisition procedures).

Paragraph (1) seeks to address "technical leveling," but creates more confusion than it solves. We see little justification for changing from the current rule

Paragraph (3) would sanction a contracting officer's disclosure of the relative standing of an offeror's price, and the results of the analysis supporting such conclusion While this information would be extremely valuable to the specific offeror, it creates the potential for an imbalance in the competition when such relative information is disclosed. Our concerns are heightened when the potential problems of this section are coupled with other flexibility in the rule (such as no common cut-off dates, "evolving standards," and other changes).

Paragraph (4) creates an unneeded restriction Given the importance of past performance in the source selection process, and the ability under the FAR rules and the OFPP Policy Letter for a contractor to be provided with the ability to include a statement in a past performance file providing an explanation of any adverse rating, we believe it unnecessary and inappropriate for the government to automatically
restrict access to this information. Under certain circumstances, we acknowledge that this past performance information may be "source selection" information appropriately protected under other provisions of the current proposal or other rules

## 12. 15.409 PROPOSAL REVISIONS

This section would eliminate "best and final offers" since the contracting officer may request proposal revisions as often as needed during discussions We have several concerns with this section, including the absence of a common cut-off date which helps bring an end to the competition and the need to minimize the opportunities for technical leveling and auctioning This section is particularly troubling when read in conjunction with the coverage of "late proposals" in 15.207 (b) which allows the contracting officer to accept late proposals, and with expanded authority for evolving standards

## 13. TRADE-OFF/BEST VALUE

While we support best value procurements by the federal government where it can specify the trade-off that it is willing to make between low price and other non-price factors, we are concerned that the rule does not require the contracting officer to identify in advance the trade-off the government is willing to make, and there is no requirement that the trade-off be documented.

## CONCLUSION

There are many innovations in this rule which have been sought by industry and which we support. However, there are a greater number of harmful changes that will add confusion to the acquisition system, create distrust among critical participants, and potentially increase protests and litigation as bidders and other interested parties, particularly small businesses, seek information about their exclusion from the federal marketplace.

The rule vests enormous discretion in contracting officers, before they are trained in the new critical elements of the acquisition system and without a demonstrated need that such flexibility is required for every type of acquisition Such a system could diminish the incentives on the contracting officer to seek the best value for the government by elevating "speed" over quality and capability In many respects, the rule works against the commercial market forces at play by elevating elements of government efficiency over full and open competition on a level playing field against a common set of government requirements.

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For these reasons, this rule (and the July 30 "competitive range determination" rule) must be either withdrawn or substantially revised to conform to the minimal FARA changes that were enacted, minimize diversion from the current FAR unless there is justification for dong so, and republish the results of the government's review of these and other comments as another proposed rule We also recommend that the FAR Council categorize this September 12 rule as a major rule under 5 U.S C. 804 and as a "significant regulatory action" under Executive Order 12866

Thank you for your consideration of these views.
Sincerely,
American Gear Manufacturers Association
American Movers Conference
American Small Businesses Association
American Subcontractors Association, Inc
Associated Builders and Contractors, Inc
Computer and Communications Industry
Association
Household Goods Forwarders Association of America
ISTI Group, Inc
Minority Enterprise Legal Defense Fund
U.S Chamber of Commerce

# Cromwell \& Moring lip <br> 1001 PENNSYLVANIA AVENUE, NW WASHINGTON DC 20004-2595 <br> (202) 624-2500 <br> FACsimile (202) 628-5116 

W Stanfield Johnson
(202) 624-2520
wsjohnson@cromorcom
November 26, 1996

SUITE 1200
ZOIO MAIN STREET IRVINE CALIFORNIA 92614 (714)2638400 FACSIMILE (714) 263 B414
$18 O$ FLEET STREET LONDON ECUA 2HD 441714130011

FAR Secretariat (VRS)
Attention Beverly Fayson
General Services Administration
18th and F Streets, NW , Room 4037
Washington, DC 20405
Re FAR Case 95-029
Dear Ms Fayson
Attached are comments submitted in connection with the referenced notice
of proposed rulemaking


Attachment

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1001 PENNSYLVANIA AVENUE, NW WASHINGTON, D C 20004-2595 (202) 624-2500

FACSIMILE (202) 628-5116

November 26, 1996

# Written Comments on Proposed FAR Part 15 Rewrite (FAR Case 95-029) 

Crowell \& Coring LLP herewith submits to the Secretariat its comments on the Notice of Proposed Rulemaking as published in the Federal Register on September 12, 1996 This Notice relates to Phase I of the Part 15 Federal Acquisition Regulation ("FAR") rewrite

## Introduction

Crowell \& Morning has a long-standing reputation as a preeminent firm in the specialized practice of government contracts Members of our Firm regularly are asked to lecture in a number of academic and industry settings, and are recognized as experts in the field of acquisition, including, in particular, competitive negotiations and source selection Crowell \& Morning lawyers have observed and participated in federal acquisitions, both for the Government and its contractors, for over 30 years. As such, we believe we have the qualifications and perspective to comment constructively on the issues which are addressed in the proposed FAR Part 15 rewrite It is not our usual practice to comment on proposed rules (and we do not now do so on behalf of any of our clients), but the thrust of the proposed revisions is to remove from existing regulations important standards and procedures which are necessary to the integrity of competitive procurement, government predictability, public accountability, and fairness

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## Fundamentals

The proposed rewrite would radically revamp the conduct of negotiated procurements to a degree that would limit competition and allow government officials "flexible" contracting discretion at odds with statutorily based rules designed to preserve the integrity of the public procurement system By dropping important safeguards and introducing confusion, we fear the proposal would damage public procurement and the competition which Congress has made its fundamental policy

The changes are apparently proposed in the supposed interests of administrative efficiency Based on our experience, we believe the added steps, definitions, and processes will foster confusion and some chaos -- not efficiency Moreover, efficiency can best be achieved by training and encouraging acquisition officials to make realistic competitive range decisions under the existing rules At least, that lesser step should be tried before rewriting well-understood rules carefully developed to preserve and promote competition -- and to maintain the competitors' and the public's confidence in the government's processes

The standards and rules which the rewrite would reject or revise -- eg, mınımum needs, "discussıons," common cutoff, BAFOs -- should not casually be dismissed on the notion that the Government should do business like the private sector The Government is not the private sector Equity of access to government markets, farr treatment of competitors, predictability and consistency -- in reality and appearance -- add value to government acquisition They add value not only in terms of special governmental objectives and obligations, not shared by private sector buyers, but also to the long-run bottom line

In an era of declining procurement budgets, it is imprudent to discourage competition by trashing its safeguards and rules, replacing them with the "flexıble" discretion that approaches a private-sector-type regime of arbitrary treatment of vendors

Congress long ago decided that the integrity of the Federal Government's procurement system, and the public's perception of the fairness of that system, must come first and be foremost The admınıstrative convenience of a contracting officer, while not an unimportant consideration, must take a back seat to the public's right to a procurement system which is structured on a foundation of competition No empirical evidence has been proffered to support the proposition that administrative efficiency is -- at the monetary bottom line -- more important than competition Such a tradeoff, in our experience, would be penny-wise and
pound-foolish A regulation such as the proposed rewrite would compromise competition and in the long run do far more harm than good

## General FAR Provisions

Several general provisions of the current FAR support the view that the existing system, while by no means perfect, has the perspective of placing this public good first Thus, the procurement system should be "maintaining the public's trust and fulfilling public policy objectives" FAR 1 102(a) Those who conduct the business of the Federal Government are required to "conduct business with integrity, fairness, and openness" FAR $1102(\mathrm{~b})(3)$ This must be done in a way that will "[e]nsure that contractors receive impartial, fair, and equitable treatment " FAR $1602-2(\mathrm{~b})$ In fact, "[t]ransactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct " FAR 3 101-1

The radical nature of the proposed Part 15 overhaul is illustrated by comparing the current FAR 15603 , which sets out the purpose of source selection procedures, to the replacement text in proposed Section 15402 The current FAR 15603 says that among the factors which source selection procedures are designed to achieve are
(a) Maximize competition,
(b) Minimize the complexity of the solicitation, evaluation, and the selection decision;
(c) Ensure impartial and comprehensive evaluation of offeror' proposals, and
(d) Ensure selection of the source whose proposal has the highest degree of realism and whose performance is expected to best meet stated government requirements

The first three of these most fundamental of procurement principles are eliminated from the rewrite in proposed Section 15402 They are replaced with little more than a restatement of the fourth principle, and the confusing (given prior definitions and usage) insistence on "best value " The proposals elevate the best value decision to be virtually the sole objective The current system, on the other hand, permits the Government to award to the "best value" proposal when

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consistent with its minimum needs, but also demands that the procurement be conducted in a competitive, comprehensible, and impartial manner


## Specific Objections

- Proposed Section 15406 The change to the composition of the competitive range, from those who have a reasonable chance of being selected for award to a standard which would include a finite number of offeror which the contracting officer behoves will permit an efficient competition among the most highly rated proposals, is unnecessary and troubling If contracting officers have difficulty interpreting what it means to have a reasonable chance of winning, perhaps regulatory guidance could be developed to better define what that term means The contracting officer is already accorded considerable discretion in drawing the competitive range The arbitrariness allowed and encouraged by this aspect of the proposal is bad public policy We agree with AIA that the "resources available" should not be an open excuse for avoiding the Congress' competition policy Overhauling the composition of the competitive range in the arbitrary manner proposed, particularly to the extent of allowing a preconceived number in the interest of efficient competition, even before proposals are received, is unwarranted and is inconsistent with existing statutory authority
- Proposed Section 15201 Allowing presolicitation meetings "one on one" with vendors where the government officials not only seek to learn what capabilities are in the private sector but are then also permitted to disclose "general information about agency mission needs and future requirements," will likely impair the public's confidence in the system Proposed Sections 15 201(c)(4), 15.201(f) Communication is important, but it is not a satisfactory answer to say that such information would subsequently be made available to the public when the "next release of information" occurs The advantage to one company having such procurement-sensitive information in advance of its competitors may well be insurmountable Further, the requirement for subsequent disclosures extends only to information "necessary for proposal preparation," but does not afford potential competitors a right to helpful information This proposed revision would set in motion a renewal of the unseemly marketing competition and favoritism that troubled acquisition reformers in the '80s


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Proposed Section 15104 Allowing oral presentations to substitute for written proposals places a premium on charm and delivery at the expense of substance Slick proposal writers will be replaced by smooth talkers (We note that competitors are hiring dramatic coaches.) In the last analysis, effective acquisition requires a sound written contract Otherwise, we will have to deal with sloppiness and the "toils of ambiguity" It is human nature that writings do a better job of communicating commitments than talk A written proposal is a record of what is proposed and if a question arises, the proposal is there in black and white We have no quarrel with using oral presentations to augment a written proposal in a particular situation where, for example, the agency wants to interview key people and pose questions of that persons's understanding of the job, but no regulatory change is required for this purpose We agree with AIA's view that there should always be a record of oral sessions

- Proposed Section 15202 Allowing offerer to submit proposals which propose noncompliant terms and conditions, without all offerors being given an opportunity to submit a revised proposal addressing those terms and conditions, is a chaotic approach The proposed rewrite would allow this information to remain secret if it would reveal the specifics of the proposed deviation, which we suspect would generally be the case of the Government allowed an offeror the opportunity to alter mandatory requirements of the solicitation Existing law, without this change, allows consideration of a "breakthrough" concept proposed by a competing offeror
- Proposed Section 15207 Allowing the Government to consider late proposals when in the best interest of the Government is not a way to instill a sense of confidence that the procurement system is fair Groundrules should be apphed fairly and consistently Competitors have a right to expect predictability with regard to procedural matters such as the deadline for submission of proposals The late proposal rule has served well to preserve fairness It should not be abandoned At a minimum, we agree with the AIA criticism of and recommendations about this proposal
- Proposed Section 15 407(b) A major fairness issue involves the content of discussions after proposals are received To allow communications with selected offerer before the competitive range is established for anything other than a minor clarification invites a claim of unequal treatment of offeror Proposed Section 15 407(b) To allow a contracting officer such discretion undermines the


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mandatory requirement in 41 US C § $253 \mathrm{~b}(\mathrm{~d})(1)$ that "[afn executive agency shall evaluate competitive proposals after discussions with the offerors, provided that written or oral discussions have been conducted with all responsible offeror who submit proposals within the competitive range " (emphasis supplied)

The statute is clear and has been consistently interpreted Award cannot be made to one offeror, "without discussions" with other competitive proposers, after having discussions with only that offeror The core concept of the statute is that there will be an even-handed process of negotiations with all competitive offerors, not just a favored one This statutory requirement cannot be avoided simply by a play on words, saying that these "discussions" are only "communications." See Proposed Section 15 407(b)(1)

It is also very clear that the rewrite intends that communications before the establishment of the competitive range embrace matters which are typically at the heart of discussions, $\imath e$, perceived deficiencies See Proposed Section 15 407(b)(3) (showing that discussions may seek a "willingness to correct" deficiencies). Proof that this is the intent of the rewrite is the statement in the November 7, 1996 Federal Register Notice extending the comment period, which explains that " $[t]$ he rule allows disclosure of perceived deficiencies before establishment of the competitive range to resolve ambiguities and other concerns These communications are not 'discussions '" 61 Fed Reg 57,622. The explanation that the proposal is "refining" the term discussions is a faulty "spin." The proposal would redefine a statutory term as it has been interpreted (in courts, GAO, and the FAR) since the "discussions" statute was passed in 1962. This redefinition violates the statute and is palpably regulatory dazzledazzle to avoid a statutory requirement

We agree with AIA's critical recommendation "it should be emphasized in the proposed rule that when discussions are held, the contracting officer is required to disclose to the offeror all known weaknesses and deficiencies in the offeror's proposal and provide an opportunity for the offeror to respond to those weaknesses and deficiencies " This is the competitive process required by statute

- Proposed Section 15 407(c) The proposed rewrite also provides that after the competitive range is established, discussions may be held not only to disclose deficiencies but also to discuss "any other issues" which the contracting officer wants to bring up Again, this


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discretion, even presuming the good fath of all parties, leads to an appearance that one offeror may be deriving opportunities and advantages in the conduct of the procurement that have not been afforded to others This serious concern also arises from the proposal's grant of permission to hold successive rounds of discussions with a favored offeror This proposition is directly at odds with the requirements of the statute as it has long been interpreted and implemented It improperly allows the unevenhanded conduct of negotiations

We agree with AIA's critical mandate the regulation should "ensure that there is not a disparity in the number of revisions requested or the cutoff dates that creates an unfair advantage for one offeror over the other offeror All offerors must be provided an equitable opportunity to compete on essentially the same basis" We believe AIA's statement represents a statutory requirement and good public policy

Proposed Section 15409 This fairness problem is underscored by the proposed rewrite's elimination of the common cutoff point for the conclusion of discussions with the subsequent submission of a Best and Final Offer ("BAFO") A common cutoff with a later BAFO ensures equal opportunity for all in the competitive range and does not represent an unacceptable burden for government evaluators who have done a good job in the discussions process

- Proposed Section 15103 If one of the goals of the proposed rewrite is to simplify the system, the proposed rewrite falls short of the mark. For example, new concepts such as "multiphase acquisition technique," which add such terms and processes as "first phase notice," "first phase responses," "mandatory down-selects,"and "advisory down-selects," without these terms being defined, result in complicating rather than streamlining a system

The meaning and inter-relationship of the many new terms and processes introduced by this proposed section are very unclear. It has been asked by leading procurement academics whether the existing two-step procedures or effective, tough-minded competitive range decisions under existing regulations wouldn't be sufficient to achieve any worthwhile objectives

We are troubled by the "advisory down-select" in Proposed Section 15 103(d)(2), it would seem a pre-judgment jeopardizing the

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objectivity of contmumg evaluation or a device to avoid debriefings and review (and accountability) for this determination See Proposed Section $15103(\mathrm{~d})(2)(111)$ This kind of smoke-and-mirrors decisionmaking would reduce confidence and competition We, at a minimum, agree with AIA's criticisms that debriefings should be held for "advisory down-selects" -- a proposition that probably would deny this concept any reason for berg But the concept ought to be dropped because it presents competitors with a Hobson's choice. Contrary to the philosophy which apparently underlies this and other proposed sections, the Government needs the continuing confidence and interest of competitors for its busies

Proposed Sections 2 101, 15 101, and 15410 Another confusing matter is the apparent application of the "best value" concept to all acquisitions The definition itself in Proposed Section 2101 ignores the common understanding that a best value approach is only appropriate where the "minimum needs" issue has been resolved with the conclusion that the Government might pay more for better, instead of paying less for what is deemed sufficient or good enough Under the proposed Section 15 101, a low price/technically acceptable procurement is not subject to a tradeoff process, yet under proposed Section 15100 it is categorized as "best value" and under Section $15002(b)$, award is required to be made to the "best value" proposal under any competitive acquisition While the authors attempt to clarify this apparent inconsistency in proposed section $15.402(b)$, applying the concept of best value to a procurement where tradeoff is not permitted will be confusing at best to the procurement community Not every procurement should be "best value" ( $e$ e , premium price for better product), frequently, good is sufficient, and low price should win Proposed Section 15410 confounds this established practice and usage The proposed discussion of best value also neglects to take into account the principle that agencies should not be acquiring goods or services which are beyond their minimum needs Either these are very troublesome changes, or these terms are thoroughly confused in the rewrite

- Proposed Section 15405 We believe that a judicious use of past performance is a proper indicator of an offeror's capability where that is consistent with the agency's minimum needs No new rule is required for this purpose Furthermore, we agree with these critical points made by AIA (a) in the interest of fairness, agencies should be required to notify an offeror of negative or even neutral past performance evaluations at a sufficiently early stage in the


#### Abstract

procurement cycle that the offeror would have a meaningful opportunity to rebut such an assessment, (b) where there is a pending dispute or litigation, the performance criticism should not be considered, and (c) the source of the negative performance allegations should be identified, anonymity of accusers is an investigator's concept, not a judge's, no one seeking the truth or to resolve an issue should rely on anonymous comments


These are the most problematic provisions of the proposed rewrite, but are by no means the only difficulties There are many other changes which do not rise to the same level as the items listed above (for example, eliminating in proposed Section 15206 the cross reference to FAR 14 401, entitled "Receipt and Safeguarding of Bids" which is currently referenced in FAR 15 411) Other changes are simply unnecessary (for example, the change to the Model Contract format from an alphabetical listing where offerors are familiar with what to look for in the various sections of an RFP to a Roman numeral system where, for example, the former Section M's evaluation factors is not listed as a discrete RFP section) It is a confusing, complicated proposal that will require extensive debugging and undoubtedly revision

## Administrative Discretion

Under the existing FAR Part 15 regulations, there are significant and appropriate areas for the exercise of discretion Examples of such discretionary judgments are the decision about what the government's minimum needs are, what to buy, what evaluation factors to use, who is in the competitive range, how to evaluate proposals, and which competitor to select Some discretion, related to the evaluation of offerors, is already allowed in shaping the substance and extent of discussions That these judgments are not always well made, or that discretion when it exists is not exercised, does not mean that additional areas of discretion are needed .- and particularly it does not mean that discretion should replace standards and rules needed to maintain the Congress' competition policy

Effective competition requires standards and rules They provide a level, consistent, predictable, and fair playing field Without the standards and rules that the proposed rewrite would drop or disfigure, competition will wither An unpredictable, arbitrary, governmental customer would be the greatest barrier to entry in this marketplace

The proposed rewrite not only expands areas of discretion, it stretches that discretion beyond prudent recognition by speaking of the "greatest amount of

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flexibility in exercising discretion " This language mites, and even tries to codify, arbitrariness.

## Statutory Constraints

The proposed rewrite makes major changes to regulations promulgated under statutory requirements The existing FAR Part 15 implementation is the long-standing interpretation of those statutory requirements, reflecting contemporaneous administrative expertise, congressional oversight, and judicial and GAO decisions interpreting the statute These requirements may not be changed by reinterpretation or "refining" of the statute to suit latter-day purposes The court's statement in Atchison, Topeka and Santa Fe Ry Co v Pena, 44 F.3d 437, 442 (Fth Cir 1994) is instructive here

The current interpretation is inconsistent with twentythree years of agency enforcement, notwithstanding its present plaintiff cries that it has always considered this a close question, the FRA has always enforced the Act in a manner opposite that of its current position In addition, this is an interpretation not contemporaneously made with the legislation or its relevant amendments, but twenty-three years later

Congress has not legislated or authorized the radical and extensive changes now being proposed in the competitive process by regulation, and the Supreme Court has declared the governing law in this circumstance

Congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress

NLRB v Bell Aerospace Co, 416 US 267, 275 (1974) The proposed rewrite violates this principle of statutory interpretation and administrative law Worse, this kind of revisionism reduces respect for law by agency officials and trust in it by potential competitors

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## Conclusion

We urge that the FAR Part 15 rewrite authors reconsider them approach and recognize that the proposed changes will foster confusion and litigation, that change which is intended to radicalize a procurement system founded on the premise of predictability and fairness is something which in the long run is anticompetitive and not in the taxpayers' best interest, and that change to longestablished statutory requirements is not justified or authorized by revisionism or "refining" terms

On behalf of Crowell \& Morning, we appreciate the opportunity to comment on this very important matter

Respectfully submitted,


W Stántıeld Johnson
Paul Shmitzer
Lloyd M Weinerman
an association of engineering and science
firms practicing in hazardous waste management

1015 Fifteenth Street NW, Washington DC 20005 202-347-7474 FAX 202-898-0076

November 26, 1996

Ms Beverly Fayson
General Services Administration
FAR Secretariat (VRS)
$18^{\text {th }}$ and F Street, NW , Room 4037
Washington, DC 20405

Re Proposed Federal Acquisition Regulation ("FAR") Provisions Regarding the Rewrite of Part 15-Phase I, 61 Fed Reg 48380 (September 12, 1996), FAR Case 95-029

Dear Ms Fayson

The Hazardous Waste Action Coalition ("HWAC") appreciates this opportunity to provide comments to the FAR Secretariat regarding the Phase I proposed rewrite of Part 15 of the Federal Acquisition Regulation (FAR 15) HWAC member firms regularly do business with the Government HWAC is the premier trade group representing approximately 100 of the leading engineering and science firms practicing in the environmental management and remediation industry Employing more than 75,000 individuals in over 600 offices nationwide, HWAC members comprise small, medium and large size firms that perform more than $75 \%$ of the United States' hazardous waste cleanup activities It is HWAC's mission to serve and promote the interests of engineering and science firms practicing in multi-media environmental management and remediation HWAC operates as a coalition of the American Consulting Engineers Council ("ACEC") which represents over 5,500 engineering firms

HWAC firms generally favor the direction of the proposed rewrite and applaud your efforts to streamline the federal procurement process Your efforts to enhance efficiency and eliminate unnecessary effort by both the Government and industry are welcome steps towards a better way of doing business with the Government However, HWAC firms have expressed concern about specific provisions of the proposed rewrite of FAR 15 HWAC believes there are several areas of the proposed rewrite that would benefit from clearer explanation and better language Our specific comments are set forth below HWAC looks forward to working with GSA by helping to develop positive changes to the regulations Should you have any questions, please do not hesitate to contact me or my staff at (202) 347-7474


# COMMENTS OF THE HAZARDOUS WASTE ACTION COALITION 

## FAR COUNCIL REWRITE OF PART 15

-- CONTRACTING BY NEGOTIATION --
[FAR CASE 95-029]
-- 61 FEDERAL REGISTER 48380, SEPTEMBER 12, 1996 --

I HWAC supports the direction taken by the FAR Council in rewriting the Contracting By Negotiation regulation

- Streamlining the Federal procurement process is long over due and should result in efficiencies and cost savings for both the Government and contractors
- More open communications will allow contractors to focus their response to the Government's acquisition needs (FAR 15 201) ${ }^{*}$
- Recognition of the "best value" evaluation allows the Government to weigh the importance of technical and cost factors so that there is less inclination to award on cost alone (FAR 15102 and 15 404)
- Explicitly allowing proposals to be evaluated against each other recognizes a common practice, but also permits a more informed source selection (FAR 15.405(a)) This change should be accompanied by appropriate safeguards, as noted in the discussion below, regarding needed training and guidance for procurement officials
- No longer requiring BAFOs should save contractor bid and proposal ("B\&P") funds This particularly benefits small businesses by reducing costs which do not increase opportunity for award (FAR 15 409) As discussed below, the opportunity to timely submit revisions should be clarified
*) All FAR references are to Part 15 as proposed unless otherwise noted
- Determining the competitive range early in the process will permit the non-winning offerors to deploy their $\mathrm{B} \& \mathrm{P}$ funds to more promising opportunities This, too, is believed to benefit small businesses which do not have large B\&P budgets (FAR 15 406(d))
- Recognizing and rewarding good contractor performance should improve performance overall and increase benefits to the Government (FAR 15.405(2) and 15 404(d)(3))
- Oral presentations offer opportunities for freer information exchange, promotion of more interaction, gaining insight into the Government's need, and better understanding a contractor's qualifications and approaches (FAR 15 202(f))
- The Model Contract Format improves on the current solicitation/contract format with logical groupings of contract contents (FAR 15 203)
- It is appropriate for the Government to consider "late" proposals, modifications and revisions if doing so is in the best interest of the Government and does not give an unfair advantage to the "late" offeror (FAR 15 207(b))

II The Part 15 rewrite can be strengthened through appropriate changes to the proposal
A Source Selection Processes and Techniques (FAR Subpart 15 1)

- The "Best Value" tradeoff process should require that solicitations, when appropriate, quantify the ratios between cost/price and noncost factors/subfactors (FAR 15 102(b)) At a minimum, the solicitation should specify the relative importance of cost and noncost factors For example, this could be accomplished by stating that cost is a key factor in the selection decision, yet the Government considers the specified technical/non-cost factors as more important
- When oral presentations are chosen, the Government should expressly prescribe the boundaries for presentation materials, media and written matter to limit B\&P costs, avoid lavish presentations, and maintain a level playing field (FAR 15 104(c))

B Solicitation and Receipt of Proposals and Quotations (FAR Subpart 15 2)

- The Government should assure that information made available in presolicitation exchanges with industry is broadly and openly available to all potential offerors (FAR 15 201)
- The Government should "partner" with broad-membership industry associations as a vehicle to promote early exchange of information (FAR 15 201(c)) For Government contracts involving investigation, design or management of hazardous waste remediation, the Hazardous Waste Action Coalition offers itself to assist in the information exchange, as HWAC is the leading association of engineering and science firms practicing in hazardous waste management
- While there are advantages to including in the competitive range only firms with the greatest chance of winning, it is unclear what the benefits are to artificially limiting the competitive range to a specific number of firms before proposals are received (FAR 15 208(a) and Clause 52215-1(f)(4) (Alternate II) The Government's interests are better served by determining this after receipt and review of proposals.
- The solicitation should include criteria to be used by the contracting officer to limit the competitive range For instance, the criteria might refer to "natural break" in the evaluation rankings or a "natural break" that include not more than $[3,4,5$ ] offers (FAR 15 208(a) and Clause 52 215-1(f)(4))
- FAR $15.205(f)$ provides that when the Government determines that the most advantageous offer involves a departure from the stated requirements, the contracting officer shall provide other offeror an opportunity to submit new or amended proposals relative to the additional requirement of the most advantageous offer FAR 15 407(d)(2) prohibits communications that reveal an offeror's technical solution to another offeror FAR 15 205(f) cannot be implemented without disclosing such information and it should be deleted
- FAR 15 207(c) and Clause 52215-1(c)(6) would prohibit proposal revisions unless requested by the contracting officer. Presumably, this is proposed as an offset to a contracting officer's new authority to conduct "communications" with offeror as a matter of the


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contracting officer's judgment (see also FAR 15 407(a)) The ability to timely revise proposals has long been considered a right of offerors to improve their proposals, ether in cost or technical areas, as new developments are identified as a part of discussions Not allowing revisions could result in the Government losing opportunities to take advantage of advances after the solicitation began Moreover, once an offeror has had a "communication" with the contracting officer, it is all the more important that the offeror have an opportunity to timely revise his proposal to respond to the communications which had been conducted with hum

## C $\quad$ Source Selection (FAR Subpart 15.4)

- Further guidance should be given to contracting officers to ensure that all competitors with a greater likelihood of award will be given an opportunity to proceed with written or oral discussion The down select process should not eliminate offerors simply due to a decision to limit the competitive range to accommodate perceived limitations on the evaluators' resources Break points in the competitive range should not be biased by the number of additional offers the evaluators have to consider, but should be based on likelihood of award (FAR 15 406(c))
- Procurements can benefit from increased "communication" prior to competitive range establishment and increased "discussions" afterwards However, discussions must not be allowed to take on the characteristics of technical leveling or auctioning (FAR 15 407(d)) HWAC is particularly concerned that the contracting officer's "communications" authority may result in auctioning of proposals. There is substantial precedence and guidance contained in Comptroller General decisions on this subject that should constitute tramming and guidance for contracting officers to avoid auctioning Also, discussions should not lapse into seemingly endless iterations of information requests or proposal revisions under FAR $15.409-$ this would defeat the efficiencies promised by the rewrite The contracting officer's authority to request proposal revisions "as often as needed" must be tempered with concern for the expense to the offeror, as well as for the appearance of engaging in auctioning or technical leveling
- While the proposal addresses "improper discussions," the regulation or other guidance should further alert procurement officials to the dangers of disclosing an offeror's confidential business information in the iterative discussion process. (FAR $15407(d)(2)$ and (3))
- Evaluation factors and subfactors discussions should expressly recognize that price or cost is not a factor in the initial selection of contractors under the Brooks A-E Act procedures which Part 36 exclusively controls (FAR 15.404(d)(1))


## D Past Peformance (FAR 15 405(a)(2))

- While past performance should be considered in source selection, the Government does not yet have an adequate infrastructure to capture, maintain and utilize performance data. An example of madequacy is the inability to properly translate successful performance for non-Federal clients or the ability to match performance ratings with merged, acquired or divested companies or firms that merely change their names (FAR $15405(\mathrm{a})(2)$ )
- The Government must discipline its procurement personnel to insure timely and accurate performance information input to a common data base. Should a contracting officer leave a contract, a performance rating should be filed before transferring that contract to a new contracting officer who is unfamiliar with prior performance Moreover, the Government should consider more frequent rating periods to develop a picture of performance throughout the contract life (FAR 15 405(a)(2))
- Reliance on past performance is a significant hurdle for new entrants to the Government procurement arena. Allowance must be made for consideration of related experience in other contracting areas or for non-Federal Government clients Assigning a "neutral" rating is unfair to the offeror and may deprive the Government of learning of superior performance being available to the Government (FAR $15405(\mathrm{a})(2)$ )
- Assigning a "neutral" rating to the offeror without prior performance may also pose an unfair situation to other offeror with prior experience who may have experienced startup difficulties, received a lower performance rating, overcome the prior difficulties, and later received higher performance ratings
(FAR $15405(\mathrm{a})(2)(\mathrm{nii})$ ). In these circumstances, the poor past history on that item, while corrected to the Government's satisfaction and benefit, could be negatively compared to another offeror's "neutral" rating which assigns nether credit nor decrement It is incumbent on the Government to substantially expand the discussion and guidance to contracting officers in applying the "neutral" rating such that new entrants will have an opportunity to compete without giving them an unfair advantage over other offeror with prior experience, some of which may reflect lower but corrected performance
- Rehance on past performance poses problems also for merged or acquired companies These companies need not only the ability to clam attribution for past performance ratings of predecessor entities, they must have the opportunity to include predecessor firm resumes and experience in their proposals (FAR $15405(a)(2))$
- Past performance of subcontractors presents a troublesome problem First, the current system does not adequately capture subcontracted performance Second, asking prime contractors to rate their subcontractors may entail conflicts of interest, for in the environmental engineering, science and management field, contractors and their subcontractors often compete for other contracts. (FAR 15 405(a)(2))
- Guidance should be provided to insure that past performance ratings relate to relevant work performed on prior contracts and that the contracts are not so old as to provide only stale information. Without this guidance, there is considerable concern that the information will be too voluminous to handle efficiently, add unnecessary expense to the Government and the contractor, and not be current enough to be useful (FAR $15405(\mathrm{a})(2)(1)$ )
- The current performance data system also suffers because contractors are often unaware of negative ratings in the Government data base and, thus, are not afforded an opportunity to respond to the ratings Moreover, there are no assurances that a contractor's response is as prominently available to proposal evaluators as the initial negative rating The regulation should require that offeror have an opportunity to respond to negative ratings and introduce corrective action material prior to discussion if the rating could be used to deny an award or selection to the competitive range. (FAR 15.405(a)(2)(11))


E Pre-Award, Award and Post-Award Notifications, Protests, and Mistakes (FAR Subpart 15.8)

- In post-award debriefings, providing the ranking of the offeror being debriefed would provide insight into the relative strength of the offeror's proposal and assist in saving B\&P funds on future proposals, but individual rankings of other unsuccessful offeror should not be disclosed to competitors (FAR 15 806(c)(3))
- The choice of whether debriefings are conducted by phone or face-to-face should be left to the offeror. This provides the offeror the opportunity to seek as much depth and detail about the offer as the contractor wants (FAR 15 806(b))
- While granting more discretion to contracting officers is a positive move, substantially more training and guidance must be provided to all procurement officials Inconsistencies occur in the current, less flexible process While these may not all be eliminated, this change in Contracting By Negotiation should be seized upon to assure consistent, predictable and fair determinations by all procurement officials
- HWAC suggests that procurement officials received guidance and training in the following areas
-- Principles of fair and open competition
-- Principles for evaluating the "likelihood of success" and "capabilities" of offerors
-- How to determine when "communications" result in the transfer of information that should be given to all offeror
-- Do's and Don'ts of both "communications" and "discussions"
-- The circumstances under which excessive, exclusive communications or discussions become favoritism
-- The circumstances under which Government requests for clarification become technical leveling


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-- Guidance in evaluating proposals against each other to insure that the standard for selection continues to be the scope of work and evaulation factors and subfactors
-- How to evaluate performance ratings including positive, negative and corrected information
-- Guidance requinng contracting officer's timely input to performance data bases.
-- Assigning performance ratings to new entrants using private sector or other related experience
-- How "neutral" ratings for new entrants should be used in comparison to offerors with prior experience ratings
-- Limits on communications to prevent auctioning
-- How to work with trade groups to facilitate broad dissemination of information to all potential offeror

- HWAC concurs in the comments submitted by the American Consulting Engineers Council ("ACEC") regarding the Two-Phase Design Build Procedure (FAR Case No 96-305) HWAC agrees that it would be inconsistent with Congressional intent for the Government to use Part 15 for conducting designbuild procurements authorized by 10 US C $\S 2305(a)$ and 41 U SC $\S 303(\mathrm{~m})$ Thus, HWAC supports the language changes proposed by ACEC


# DEFENSE LOGISTICS AGENCY 

 HEADQUARTERSMs Sharon Kisser
General Services Administration
FAR Secretariat (MVRS)
18th and F Streets, NW
Room 4037
Washington, DC 20405

## Dear Ms Kiser

On behalf of the Defense Logistics Agency, I want to convey our appreciation for and support of the FAR Part 15 rewrite (FAR Case No 95-029) It was a monumental undertaking by the rewrite committee and I applaud its efforts to streamline the solicitation and source selection process and promote best value The advantages to be gained from the proposed revised coverage are evident in the favorable comments received from industry at the public meeting In particular, we support the concepts of a more open dialog between the Government and offeror in all phases of the solicitation and evaluation process so that both parties can make better informed business decisions while at the same time minimizing investment of time and money in the solicitation and evaluation process It is incumbent upon us to ensure, in executing the proposed revised process through our highly trained acquisition professionals, that integrity and fairness to all offerors is maintained. It is in this vein that we submit the enclosed comments (Enclosure 1) and those of our field activities (Enclosure 2) We look forward to continuing to support the rewrite effort in the resolution of public comments phase

 (Poly \& Oversight)
Enclosures

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cc AQAA
    AQ
    GC
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DLA Comments on Part 15 Rewrite

1 Recommend that the Subpart 15.1 -Source Selection Processes and Techniques be deleted as unnecessary and risking the constraints of regulation This new proposed section has no value added in regulation and would be better left to a best practices handbook Section 15.101, for example, is problematic in that statute and regulation mandate the evaluation of offerors' past performance Past performance cannot be evaluated on a "go-no go" basis, thus the low priced technically acceptable approach to source selection cannot be used when past performance is being evaluated By meluding recognition of this technique in FAR, even though on a permissive basis, it begs the issue of beng an endorsed technique (note that it is the first technique mentioned-first place can be construed to convey "preferred" technique), when, in fact, the mandate is that it could only be used in those rare few instances when the contracting officer documents the reasons past performance is not an appropriate evaluation factor (proposed 15 404(d)(3)(11)) We have particular concern with the inclusion of regulatory prescriptions, rather than just a description of the processes, as well The DLA has developed a "multi-phase" process based on an approach it used for one acquisition We were not constrained in the development of that approach by any higher level regulatory coverage and we want to continue to be free of any such constraints in our ability to tailor and develop source selection processes that work best in a particular situation The proposed multi-phase description in 15103 is more restrictive and more complicated than the multi-phase approach we used Inclusion in the FAR of a description of a process that so closely resembles a process we now have the ability to tailor or revise without a deviation is not prudent it is best to leave flexibility with the agencies, where flexibility can be provided, rather than create unnecessary regulatory restrictions A best practices guide, as a result, is the best repository for information on techniques and processes

2 In addition to our comment in 1 above, it is not clear how, under the proposed 15 104(a) coverage on oral presentations, offers can be evaluated on the basis of an oral presentation provided after a competitive range is established if the oral presentation is the only offer received (this coverage provides that no written offer is required) If the coverage were going to be retained, we recommend that the coverage provide that to ensure a meeting of the minds that oral proposals be reduced to writing and that written proposals be used as the basis for competitive range determinations

3 It is unclear how proposals can be safeguarded (proposed 15 206(b)) and make offeror responsible for the timely submission of their proposals (proposed 15 207(a)) while at the same time making the contracting officer responsible for immediately notifying offerors to retransmit unreadable electronically submitted proposals We recommend that proposed 15.206(c) be deleted so that offerors are held responsible for the submission of offers and to avoid the implication that contracting officers should be reading (or even seeing) offers before the closing time to determine their acceptability (Note that the provision at 52 215-1 does not contain the coverage at 15206 (c) which makes it more unclear what the effect of the 15206 (c) coverage would be )


4 The concept in 15 207(b) that late offers may be considered " 1 f doing so is in the best interests of the Government" needs to be added to 52215-1(c)(3) As it stands, the provision and the coverage do not say the same thing The provision says late offers "shall be considered at the Source Selection Authority's discretion" We need to do 2 things (1) remove the mandatory "shall" from $52215-1(\mathrm{c})(3)$, and (2) change the $52215-1$ (c)(3) statement to "if doing so is in the best interests of the Government."

5 To ensure that the process of "communication" (under the revised definition prior to the establishment of the competitive range) is fair to all offerors, we recommend that proposed 15407 provide that the contracting officer notify all offeror that it proposes to have communications with certain offerors and that, if the contracting officer does not communicate with an offeror, it means that the contracting officer needs no clanfication of the offeror's proposal Such notice would address the fundamental fairness issue while at the same time not burdening the contracting officer with a requirement to talk to all offerors when there is only a need to talk to particular offeror(s) at this stage of the process.

6 Proposed 15 409(a) makes the establishment of a common cut-off date for receipt of proposals permissive For clarity and fairness to all offerors in the competitive range, we recommend that a common cut-off date be required to be established

7 Proposed 15401 does not contain a definition of "communication" Such a definition only appears in proposed 52215-1(a)(5) Recommend the definition of "communication" be included in 15401 The definition should be clarified to contain information at proposed 15407 (b)(3) Specifically, the definition should say that "Communications are interchanges between the contracting officer and an offeror for the purpose of obtaining information that explains or resolves ambiguities or other concerns (eg perceived errors, perceived omissions, or perceived deficiencies) in the offeror's proposal " The definition proposed in 52 215-1(a)(5) is misleading as it implies (by reference to "minor clarifications") that deficiencies will not and cannot be discussed in this phase Replacing "minor clarifications" with "or other concerns" and adding the examples, will assure the objectives of the broader use of the term are achieved There is also a conflict between the wording at 15407 (b)(2), which allows changes to correct mistakes only, and that at 15408 which allows proposal modifications (as a result of communications) to "resolve ambiguities" as well as to correct apparent mistakes The wording needs to be consistent

MEMORANDUM FOR MMPPP
SUBJECT FAR Part 15 Rewrite- Phase 1, FAR Case 95-029

Enclosed are comments from the Defense Fuel Supply Center regarding the proposed coverage under the FAR Part 15 rewrite The DFSC point of contact on this matter is Ms Kerry Pula, who can be reached by telephone at $767-8609$ or by e-man at kpılz@dfsc da mil.


NORMAN B HODGES III
Colonel, USA
Director
Busies Integration Center

Attachment

The following comments are submitted by the Defense Fuel Supply Center (DFSC) regarding the first phase of the FAR Part 15 Rewrite

1. FAR 15.202(a)(2)(1), Request for Proposals.

This section allows offeror to propose different CLIN structures Proposing an alternate CLIN structure can have a wide-ranging effect on a procurement, so why address it in FAR coverage and thereby raise it as an issue offeror may want to pursue? Unless the committee sees some benefit from giving high visibility to potential revision of the CLIN structure, this provision would seem to serve no useful purpose It could, in fact, be harmful We recommend that it be dropped

2 FAR 15.203-4, Section IV, Contract Clauses
This section prescribes that any clauses provided in full text shall be treated as tailored and placed in Section III, Financial and Administrative Information. DFSC incorporates all its terms and conditions in the form of clauses Therefore, we have acquisition description clauses, performance clauses, evaluation clauses, etc , that are more suitable for the other sections, rather than placed in Section III It appears the drafters of this section are not aware that some activities use a clause format for describing all of the Government's terms and conditions

3 FAR 15 205, (f) Amending the solicitation
The language in $(f)$ is too general " without revealing to the other offeror the solution proposed in the onginal departure "does not adequately limit the description to a proprietary technical solution Contractors could argue that just in changing the requirements their solution would now be apparent to their competitors Better wording would be
" provided, that this can be done without revealing the technical details of an offeror's solution proposed in the original departure or any other information that is entitled to protection "

4 FAR 15 401, Definitions
The sentence about discussions needs to be clarified It currently leaves the impression that offerors have some decision making ability in establishing the competitive range A clearer sentence would be
" Discussion, as used in this subpart, means communication between the contracting officer and an offeror in the competitive range that takes place after the Government establishes the competitive range "

5 FAR 15 403(a), Responsibilities

This section states that the SSA shall be the contracting officer unless the agency head appoints another individual We suggest that greater flexibility be built into the process by changing this to read, "the agency head or designee"

6 FAR 15405 , Proposal evaluation
Price analysis is included not only to determine a price fair and reasonable, but also to establish negotiation objectives, and to obtain, through negotiations, a lower price than the initial low offer A statement should be added to this coverage directing the reader's attention to subpart 156 , Price Negotiation, and stating that price analysis is an appropriate tool for use in preparing for price ne $e_{\text {b }}$ otiations

7 FAR 15 407, Communication with offeror and 15 409, Proposal Revisions GAO recently sustained a protest (GAO B-2781693, 8/2/96) in which an agency after submission of BAFOs allowed an offeror to revise its unacceptable proposal to make it comply with a subcontracting clause GAO said that the agency should have reopened discussions when it discussed the deficiency, rather than having called it a "clarification" and only communicating with the eventual awardee GAO decided the protester was prejudiced by the agency's improper post-BAFO discussions with the offeror GAO suggested that the agency should have ether, (1) rejected the awardee's proposal or (2) conducted another round of discussions

Under the new FAR 15-Phase 1 and the elimination of the successive BAFO concept would this case likely have been decided in the Government's favor?
' 8 FAR 15 804(b), Award to successful offeror
This section says that both the offeror and contracting officer will sign a contract award document if it includes information that is different from the latest signed offer This should be changed to

- different than the latest signed offer, as amended by written correspondence signed by the offeror "

Many, if not most of DFSC's negotiated contract awards incorporate correspondence from the offeror received after the "latest signed offer" The coverage as written would seriously hamper our award process

9 FAR 52 215-1(f)(9), Instructions to Offerors- Negotiated Acquisitions This section states that award of a contract is effective upon transmittal of the contract signed by the Government This should be changed to " upon transmittal of the contract or a Notice of Acceptance signed by the Government "

If you have any questions about these comments, please contact DFSC-IPR at 703-767-8609

# MEMORANDUM FOR DIRECTOR, DEFENSE LOGISTICS AGENCY ATTN MMPPP (Linda Davis) 

SUBJECT FAR Part 15 Rewrite - Phase I, FAR Case 95-029

In response to your request for comments to the Phase I rewrite of Federal Acquisition Regulation Part 15, Contracting by Negotiation, this office offers the following comments
a FAR part 15 104, Oral Presentations, causes some concern because a company could have excellent marketing skills and give a great presentation, only for the Government to find out the product supplied is not exactly as presented The Government personnel involved in this process should approach this with caution and clearly understand what is required to make a good business decision
b FAR part 15 201(f), Presolicitation Exchanges with Industry, allows "government personnel" to disclose general information about a proposed acquisition There is a potential conflict with FAR part 3 and the release of source selection information It would have to be determined if the information is source selection information and if it is an authorized release In addition, which "government personnel" are authorized to release information and do they have to obtain authorization from the Contracting Officer before releasing such information?
c FAR part 15 202(c), Request for Proposals, should clearly state whether the Contracting Officer has the option to require the use of electronic commerce and prohibit non-electronic responses
d FAR part 15 203-3 Section III, Financial and Administrative Information, should be revised Currently, this section includes packaging, packing, preservation and marking requirements which are not financial or administrative matters. These items should be located in Section V. Performance Requirements because they are unique to the item being purchased
e FAR part 15 403(a), Responsibilities, should clearly state if agency head's authority to appoint the source selection authonty can be delegated
f FAR part 15 405, Proposal Evaluation, appears to imply that the agency will not conduct a cost realism analysis when there is competition and is contracting on a firm fixed price or fixed price with economic price adjustment basis The Contracting Officer should have the option to perform a cost realism analysis when determined necessary
g FAR part 15 406(b), Compettive Range, states Alternate II of 52 215-1, Information to Offerors--Competitive Acquisition, may be used to indicate the Government's estimate of the greatest number of proposals that will be included in the competitive range However, the clause itself states "the competitive range will be limited to no more than $\qquad$ ", with a space provided for the contracting Officer to state a number it is not clear if this number is an estimate that may be exceeded while excluding other offerors to arrive at an efficient compettion or, once the Contracting Officer decides to eliminate some offers to make for an efficient compettion, is the Contracting Officer limited to no more than the specified number?
h FAR part 15 407(c), Communications with Offers, refers to FAR part 15411 but there appears to be no 15411 in the new coverage

I FAR part 15 804, Award to Successful Offeror, the introductory statement states the Contracting Officer shall award a contract by "furnishing the contract or other notice of the award to that offeror" The word "furnishing" indicates actual delivery as opposed to initating delivery Clause 52 215-16, Contract Award, incorporates the "mallbox rule", and provides that the award is effective upon mailing The language in the introductory statement appears to conflict with the new language in paragraph (f)(9) of clause 52 215-1, Instructions to Offerors--Negotiated Acquisitions, that award is effective "upon transmittal of the contract signed by the Government" The language in paragraph $(f)(9)$ would incorporate the mallbox rule and extend the "transmission rule" to other methods of communicating the notice of award, ie facsimiles Under this language, the award would be effective upon transmission and would not require actual delivery to the offeror The mallbox rule only applies to mailed notices of award, not facsimiles There should be consistency between the introductory statement in 15804 , paragraph (f)(9) of clause 52 215-1 and the language in clause 52 215-16

If you have any questions, please contact Tanya Hill, DSCR-CEC, DSN 695-3250


## Scott Sandra S

From：Scott Sandra 5
Bent Wednesday，November 20， 1996151 PM
To：＇linda davie＠hq．dia．mil＇
Cb：
Subject：
Scott，Sandra S，Van Schalk，julie
FAR Part Rewrite－Phase I，FAR Case 95－029

Linda Davis，

DLA－MMPPP Memorandum，Sep 19，1998，subject as above，requested comments on the proposed rewrite．
The proposal has been reviewed by a variety of DSCC personnel，including DSCC－P and DSCC－B The attachinent reflects a draft of the comments received．This memorandum is currently in the review cycle and the final comfimatoon will be sent to you after signatures have been obtained．

Sorry tor the delay，but I do thank you for your patience．
Sandra S．Scott
Procurement Analyst
DSCC－EDA，DSN 850－4993

PART I－ 15 REWRITE．doc

# MEMORANDUM FOR DLA-MMPPP <br> All TN: Ms. Norma Builey-Muller 

SUBJECT: FAR Part 15 Rewrite - Phase 1, FAR Case 95-029

MMPPP Memorandum, September 19, 1996, subject same as above, advised that the proposed rule had been published in the Federal Register on September 12, 1996. Since the information could significantly change the Government's negotiation and source selection process, the memorandum further requested that the proposed coverage be widely disseminated to the acquisition community to elicit further comments during this public comment pernod.

The following recommendations were received on subject document:

## a. 14.404-1 Cancellation of invitations after opening

(f) This section permits negotiation providing that each "responsible" bidder in the sealed bid acquisition has been given an opportunity to participate in negotiations. Although an offeror may be responsible, it may not have submitted a responsive offer that is capable of being made acceptable (1.e., the offer may be technically deficient, such as, offering unacceptable material). In these type situations, the contracting officer should be able to proceed with negotiations without giving non-rcsponsive offeror an opportunity to submit an offer for negotiations
b 15201 Presolicitation exchanges with industry
It is agreed that pre-solicitation exchanges with contractors may help define the requirements. However, there is a serious concern that such exchanges may result in an offeror's ability to influence the resulting technical requirements/specifications and afford the offeror an unfair competitive advantage io future negotiations.
c. 15.203 Model Contract Format

The proposal states that the Model Contract Format (MCF) should bc used to the maximum extent possible and there are circumstances listed which exempt its use. The format is different than that currently used at DSCC and appears to conflict with the current DPACS format. This may not be a problem if the changes can easily be made in DPACS. Need to know if the MCF will require extensive changes to DPACSS and whether they will be cost effective.
d. 15.207 Submission, modification, revision and withdrawal of proposals
(c) It is stated that "Offerors may not revise proposals unless requested by the contracting officer." The successful offeror should be allowed to make voluntary improvements to its proposal anytime prior to award.
e. 15.407 Communications with offerors

There still exists a fine line which distinguishes "duscussions" from ncgotations." FASA encourages discussions be beld dunng the acquisition process. There will be a tendency for unsuccessful offerors to questron and possibly protest that the contracting officer crossed the discussions line and actually pegotiated.

## f 15804 Award to successfil offeror

If a modificalion is made as a rcsult of discussions, etc., will need to obtain the ofteror's signature a second tume Currently, in such situations, if the contractor's signature was obtaned on the basse RFP, telegraphic modifications of offers are acceptable Qucston why there is a need to obtain the contractor's signature a second lime. It is recognuzed that fax capability may eliminate a part of the problem, but it still does not seem to be effective.

If therc are questions, concerns, or other comments on this response, the point of contact is Mrs Sandra S. Scott, DSCC-BDA, Phone - DSN 850-4993/Commercial (614) 692-4993

Fax - 13SN 850-5061/Commercial (614) 692-5061

KEVIN W. BLANCHARD
Li Col, USAF
Director of Procurement

PAUL D. VICARS
Director
Directorate of Corporate Information

FAR PART 15-RAURIE
DPSC-PPC COMmENTS (NINA MAGAZU)

1) UNDER SUBPAT /S.8 (THBLE OFCONBNTSS) PARA, 6
$\qquad$
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REVISED AND SUBSECTIONS 15.001 AND 15.002 WHICH ARE - REVISe, AND SUBSECTONS 15.001 AND 15.002 , WHICH ARE

2) UNDER 15,001 DEFINITIONS: $\qquad$
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3) UNDER 1Si002 NEGOTATOD ACQuisition - (a) Sole Source
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DEERE - $3 R D$ SENTENCE - WHY - RELATES TO TRADEOFF FOES WHICH WOULD NOT BE USE IN SOLE SORE TOBEGN WITH. BEGIN LAST SENTENCE WITH I HE MODEL CONTRACT.... PRACTNABLE.
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REVISE - (a) THIS PROCESS REQUIRES FENOR RESOURCES THTN A TRADEOFF PROCESS. THE CONTRACTNG OFITCER HAS LITTLE DISCRETTON.
NOTE: I TOOK GUT "PERMIS COMmuNICATIONS." (APABARS TOAARVY) UNCESS YOUANPUTI IT IN ALL-15,101-15.104.
7) 15.101 (b) (1) REVISE-. The minimum Requirements For TECHUCAL ACCERTBBIUTV...... SOLICITATTN.
......- HAWGE THE LAST WORD IN SECWD SENTRNGE $\qquad$ FROM THRESHOLD(S) TO MINMUM RERUREOMENS.
8) $1 \leq 101(b)(2)$ $\qquad$
REYISE and SENTONCE - The Contractivs orricer. IDDNOTIES THE ACCEPABLE OFFERS AND MAKES THE AUHRD TOTME LOWE RTICE OFIER:
9) $15.101(b)(3)$

REVISE- IF DISCYSSIONS ARE NEZESSARY, TITE GOVGRNMENT'S CONCOENS SHAM BE DISCUSSED WITH AM OFFERORS DURKMNND TO BE IN THE COMPETTTUERANE ANDA A 1.. 15,409(c)
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11) $15,102(b)(3)$
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 OF RRICES, CERDFICATONS, BLPRESENTHIONS \& FILLINS, AND

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13) 15.104 (c)(4)- HOW WILL WEDESCRIBE THIS IMPACT IN THE SOLLCLTATION WHEN WE DON'T. FNOW WHO IS GOING TO SUBMIT AN - QFFER? 15 THLSA BLANKET STHTRORENT HUAT COUKD GO/NTO THE SOWCITATIOW? PLEASE CLARIFY THE ANTENT OF THIS STATEMONT,
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## OFFICE OF THE UNDER SECRETARY OF DEFENSE

## 3000 DEFENSE PENTAGON <br> WASHINGTON DC 20301-3000

November 26, 1996

DP (DAR)

Ms. Sharon Kaiser
General Services Administration
FAR Secretariat (MVRS)
18th and F Streets, NW, Room 4037
Washington, DC 20405
Dear Ms. Kiser:
I have reviewed the proposed rule for FAR Case 95-029, FAR Part 15 Rewrite, Phase I throughout its development, and I continue to have concerns that some of the proposed changes will result in unfair treatment of offerors. Should the practices advocated in the proposed rule result in sustained protests, the negative impact on DoD would be considerable because of the hundreds of ongoing source selections in this department.

The major portions of the rule that are troubling are:

- The proposed 15.407 (b) encourages communications with offerors after receipt of proposals but before establishment of the competitive range or award (if award is made without discussions). These communications need not be conducted with all offerors and may include explanations of proposal deficiencies. However, they "do not permit changes in an offeror's proposal other than correction of mistakes." Open communication with one or a number, but not all, of the offeror can easily result in a situation where one or some of the offerors have information key to the competition that others do not. Such communications can result in one offeror, or selected offerors, being permitted to explain a deficiency in a way that might influence the source selection without providing the same opportunity to others. GAO has sustained protests when the record demonstrated that the Government excluded an offeror's proposal unfairly or provided important information about the procurement to some, but not all offeror.
- The proposed 15.207, that allows the contracting officer to evaluate late proposals, modifications, and revisions if it is in the best interests of the Government, is unfair to offeror whose proposals are received timely because they have had less time to develop their proposals. Also, this provision encourages offerors to submit revisions if they believe they have left something out or failed to explain something

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adequately on the chance that the Government will consider the revision. When the provision is coupled with the proposed provision on open communications at 15.407, an offeror could submit a revised proposal based on communications with the Government, with none of the other offerors having a similar opportunity. I believe the proposal has great potential for unfairness if some late proposals are considered but not others.

- The competitive range coverage at 15.406 should be modified to remove the option of setting a maximum number of proposals to be included in the competituve range prior to an initial evaluation of all proposals. Furthermore, adoption of a "greatest likelihood" standard for determination of the initial competitive range seems to obviate the need for the changes in Section 4103 of the Clinger-Cohen Act. The Act contemplated a narrowing of the competitive range for purposes of efficiency as a two-stage process. First, one would determine which proposals were eligible for inclusion in the competitive range, based upon an initial evaluation in accordance with the evaluation criteria contained in the solicitation and the "reasonable chance of award" criterion of the current FAR 15.609. Then the contracting officer could further limit the range to the greatest number of proposals that will permit an efficient competition amongst the most highly rated proposals. Substituting "reasonable likelıhood" for "greatest likelihood" would both narrow the current "reasonable chance" criterion and provide for subsequent limitations on the size of the competitive range for purposes of efficiency.
- The proposed explanation of "fair treatment of offerors" to be added to 1.102 is subject to abuse. The statement that "fairness does not mean that offerors and contractors of differing capabilities, past performance, or other relevant factors, must be treated the same" is inappropriate. Offers may be evaluated differently but offerors should recelve identical treatment within the competitive framework.
- The proposed 15.409 permits the contracting officer to request proposal revisions as often as needed during discussions. If an offeror has extra tıme to make changes to its proposal or an extra opportunıty to submit a revised proposal and then receives an award, there would likely be allegations of unfairness. Also, with revised proposals being received throughout the source selection period, evaluators are assessing a moving target. This will add complexity to the evaluation process rather than simplifying it, which is the intent expressed in 15.002 (b).
- The suggestion at $15.002(a)$ that sole source awards should follow the procedures for competitive source selection unnecessarily imposes a formal process in sole source negotiations.

Other general concerns I have with the rule include:

- The statement at $15.102(\mathrm{~b})(3)$ that best value tradeoffs need not be quantified in any manner is misleading since a tradeoff decision does require justification.
- At the November 8, 1996 public meeting, one of the industry presenters stated that when one compares proposals against other proposals rather than against a set standard, it will be impossible to provide preaward debriefings without divulging information about other offers that is not supposed to be released before award. We need to consider whether or not the language at $15.405(\mathrm{a})$ (comparison of relative qualities) presents that problem.
- I do not believe RFPs for A-76 studies need special coverage at 15.202 (b).
- The terms communications and discussions are not used consistently. In 15.401 and $15.407(\mathrm{~d})$, discussions are defined as communications after establıshment of the competıtive range. At 52.215-1, "communlcatıons" are defined as interchanges that are not discussions.
- There should be a cost-benefit analysis performed to see whether the perceived benefits of changing contract format outweigh the costs (in terms of training, reprogramming of existing automated systems, etc.). An alternative would be to make the new contract format optional for use when it is cost effective.
- I do not believe that the phrase "at least once" should be included in the description of when discussions should be conducted at $15.407(c)$. By saying that discussions will be held with all offerors in the competitive range, we do not dictate the frequency or duration of interchanges between the Government and offerors during the course of those discussions. Neither do we dictate the content of discussions. Hence, the phrase "at least once" is meaningless and potentially confusing to contracting officers.


Eleanor R. Spector
Director, Defense Procurement

Computer 2 Communications Industry Association

666 Eleventh Street, NW, Sixth Floor

General Services Administration FAR Secretariat (MVRS)
18th \& F Streets, N W --Room 4037
Washington, DC. 20403
Re: FAR Case 95-029
Dear Sir or Madam*
The Computer \& Communications Industry Association is pleased to submit these comments on the FAR 15 Rewrite-Phase I. Except as otherwise noted in these comments, all FAR references are to the FAR numbers in the proposed FAR 15 Rewrite--Part I.

## FAR 15.101--Lowest Price Technically Acceptable Process

Subpart (b) (3) states that if discussions are necessary, a revised proposal "may be requested " This is a significant change Under current law, offeror in the competitive range are always allowed the opportunity to submit a revised proposal when discussions are concluded. This practice enhances competition. It also ensures that all points raised during discussions are memorialized in a written proposal. CCIA believes that every offeror in the competitive range should be able to revise its proposal after discussions The proposed regulation would make this process entirely discretionary, and also permit some offeror to revise their proposals but not others There is no reason to permit such disparities

## FAR 15 102--Tradeoff Process

Subpart (b) (3) provides no guidance regarding the need for justifying best value procurement decisions. CCIA recognizes that rigid, quantification requirements cannot be imposed on every best value procurement decision However, to insure that source selection officials make disciplined, well-justified decisions, the regulation should require quantification of trade-offs to the maximum extent practicable Experience has shown that source selection officials sometimes make improvident decisions by selecting significantly more

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expensive solutions that do not provide sufficient added value to justify the higher cost. When these mistakes are made in best value procurements for indefinite delivery/indefinte quantity contracts, the result is a failed program that is rejected by customers. Since it is quantification itself that makes specific comparisons possible, encouraging quantification where practicable will help reduce these mistakes.

The source selection official should be required to prepare a detaled statement that explains his or her award decision. Too often, the source selection rationale for even a major procurement is compressed into two or three pages that barely explain the logic behind the agency's choice. Requiring detailed justifications and explanations of trade-offs will impose more disciplined decision-making on source selection officials. It would also be appropriate to remind source selection officials in this section that all trade-off decisions must be based on the solicitation's evaluation criteria

## FAR 15 103--Multiphase Acquisition Technique

CCIA is highly skeptical that the benefits of the proposed multi-phase acquisition technique will outwergh the risks. As we understand 1 it , the proposal will allow mandatory down-selects based on proposals that provide only a subset of the information that would normally be considered in a final award decision The multiphase technique makes no sense if the initial proposals are as complex or voluminous as the initial proposals in a procurement that does not use the multiphase technuque If there is no difference in the time required to prepare or evaluate intial proposals, the Government should simply conduct the procurement in the normal manner by establishung a compettive range

The language in proposed FAR 15103 (d) (1) effectively punts on this issue, and thereby opens the door to considerable litigation against any contracting official who ventures to use mandatory downselects. The proposed language states:

The Government may make a "mandatory" down-select if it identified the criteria or process that will be used to evaluate offers in all phases and requested sufficient information (including cost

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information) for there to be binding offers. A mandatory downselect allows the Government to prohibit offeror from participating in subsequent phases based on the evaluation criteria set forth in the notice or solicitation.

First of all, what is meant by the terms "criteria or process"? The process for evaluating proposals (eg., receiving proposals, conducting discussions, evaluating revised submissions) says nothing about the criteria that will be used to make the award decision. Without knowing the award decision criteria, the offeror has no way of knowing how to construct a proposal because he does not know, for example, whether to give the Government a high quality, high cost solution or a lower quality, lower cost solution.

Thus, under one reading of these rules, an offeror can be excluded from further participation in a procurement even if he was never informed of the evaluation criteria that will apply to all phases of the procurement. But assume for the moment that the evaluation criteria for all phases are included in the initial solicitation. How many of the evaluation factors must be addressed in the initial submission to support a mandatory down-select? If all of the factors are addressed in the initial proposal, then the multiphase approach serves no purpose. But if only a small subset are discussed in the offeror's initial submission, the Government will be making decisions based on a highly incomplete picture of the offeror's capabilities

These and other problems convince us that the mandatory down-select procedures are probably illegal, at least when they are used in procurements that are not conducted under special, test program authority. For example, the technique violates provisions of 41 U.SC § 253a requiring the statement of all significant evaluation factors and subfactors in the solicitation, as well as their relative importance It also violates the provisions of 41 U.S.C. § 253 b requiring discussions (if award is not made on the basis of initial proposals) and the establishment of the competitive range. The conclusion that mandatory downselects are illegal is also re-enforced by FARA The multi-phase acquisition technique described in the FAR 15 Rewrite is highly similar to the design-build procedures in $\S 4105$ of FARA, which limits this technique to contracts for the design and construction public facility Even in this limited area, FARA imposes

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more constraints than the nebulous language of the FAR 15 Rewrite. For example, FARA requires contracting officers to consider such factors as the extent to which requirements have been adequately defined, the project's time constraints, and the capability and experience of potential contractors, before design-build procedures are authorized. The FAR 15 Rewrite lacks these necessary constraints Also, the proposed regulation is highly similar to legislative proposals that were expressly rejected by Congress

None of these concerns are ameliorated by the FAR 15 Rewrite's vague requirement that to support a mandatory down-select, the solicitation must request "sufficient information (including cost information) for there to be binding offers." It will take many years of litigation to determine what this means About the only point that is clear is that the minimal information necessary to support a binding offer falls far short of a proposal that responds to the agency's evaluation criteria. A contract can arise so long as all essential terms (such as price, quantity and delivery terms) are specified And even if some essential terms are missing, the law may supply them in order to save the purported contract.

For all of these reasons, CCIA recommends the elimination of "mandatory down-selects" from the FAR 15 Rewrite proposal. On the other hand, the "advisory down-select" is an excellent idea that should be broadened We recommend that this approach be used in all procurements when award is made after discussions Supplying vendors with prompt feedback regarding their likelihood of success will allow businesses to make informed decisions as to whether it makes sense to continue their involvement in the procurement This makes sense for both business and Government. Business can save precious B\&P dollars for procurements they are likely to win. Agencies can avoid prolonged evaluations of marginal proposals The advisory down-select is a "win-win" for both industry and Government It is also a straight-forward concept that does not require a special acquisition process for its foundation

## FAR 15 104--Oral Presentations

CCIA supports increased communication between Government and industry, and the use of oral presentations to explain an offeror's solution CCIA

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would also encourage interactive oral presentations, in which Government personnel vigorously question vendors so that possibilities for misunderstanding are reduced, and weaknesses in a vendor's solution fully aired.

However, the fact remains that the outcome of oral presentations is still the award of a contract to the selected vendor or vendors. Therefore, critical parts of proposals cannot be made verbally. They must be memorialized so that the Government knows what it is buying. Furthermore, it is difficult to compare vendor solutions based on oral presentations alone. There must be a record which Government personnel can review and evaluate in a thoughtful manner. If most of the points that a vendor receives are based on undocumented, oral presentations, fair evaluation becomes impossible and the rationale for the Government's award decision is likely to be tenuous at best

For these reasons, CCIA believes that the phrase, "the SSA may require offeror to submit all or part of their proposals through oral presentations" should be eliminated or clarified Oral presentations should supplement proposal submissions, not replace them If the FAR 15 Rewrite is adopted intact, contract administrators are likely to suffer acute disappointments. For example, proposed FAR 15104 (b) (2) suggests the oral presentation of information regarding staffing resources. If oral presentations are the exclusive means of conveying this information, the Government may have little recourse when an offeror attempts to perform the contract with significantly fewer or less qualified resources than he verbally promised The requirement to put it in writing is not only a predicate to enforcement of promises, it is also good business sense Moreover, proposed FAR 15407 (c) requires the Government to confirm all agreements reached during discussions "by proposal revisions) before contract award " It would be useful to cross-reference this requirement in some of the Rewrite's more expansive encouragement of oral presentations

## FAR 15.201--Presolicitation Exchanges With Industry

CCIA supports this section, and believes that thorough and meaningful communication with industry early in the acquisition cycle will significantly improve federal procurements Our only concern is in subpart ( $f$ ) which states,

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"If Government personnel disclose specific information about a proposed acquisition which is necessary for the preparation of proposals, that information shall be made available to the public as soon as possible .." (emphasis added). This criterion is both too limited and too vague. Defining what is truly necessary for proposal preparation is an impossible task. It can be argued that very little information is truly necessary for the preparation of a proposal, but there is a broad range of information that is very useful to the proposal writer. CCIA believes that FAR 15.201 should retain the current provisions of FAR 15410 (c) which requires prompt disclosure of both necessary information, and information whose nondisclosure "would be prejudicial to a prospective offeror or quoter." Stated differently, the FAR should clearly require disclosure to all offeror of any information that provides a competitive advantage.

We question the wisdom of eliminating current provisions regarding preproposal conferences that are contained in current FAR 15.409. This section provides both useful guidance and limitations on oral guidance to vendors. CCIA believes that these provisions should be retained.

FAR 15.202--Requests for Proposals
This section omits a current FAR 15402 (h), which requires contracting officers to solicit offers using competitive procedures if responses to a proposed sole source show that competition is available. This requirement is important to promote the use of full and open competition, and should be retained.

## FAR 15.205--Amending the Solicitation

The FAR 15 Rewrite makes changes to current regulations that are not desirable. First, the requirement in current FAR 15.606 (a) that contracting officers issue written amendments has been eliminated in proposed 15.205 (a). The current language should be retained. Also, current FAR 15.410 (b) contains a prohibition against making awards if amendments have not been issued in sufficient time to be considered by prospective offerors. The removal from the FAR 15 Rewrite of any requirement to give offeror sufficient time to respond to amendments opens a door to unfairness that the current system prevents. There

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is no reason to sanction unreasonable deadlines on vendors that will undercut the Government's ability to obtain full and open competition.

FAR 15.207--Submussion, Modification, Revision, and Withdrawal of Proposals
Proposed FAR 15207 (b) greatly expands the circumstances in which the Government can consider late proposals. CCIA believes that this expansion is unwise. A fundamental tenet of federal procurement is that all offeror are treated equally. There is no reason to give some offeror more time to prepare their proposals than others. The "best interests" test in this section is so amorphous that it leaves the possible consideration of late proposals almost wide open. Under this proposal, an offeror could show up one week after the closing date for submission of proposals and still be considered This is patently unfair to the offeror who submitted their proposals on time. It also raises serious questions of favoritism that will likely lead to legal challenges. CCIA is aware of no report or study indicating that vendors have undue difficulties in submitting their proposals on time. The current requirements should be retained

CCIA also questions the wisdom of proposed FAR 15.207 (c) that prohibits proposal revisions "unless requested by the contracting officer." There are many reasons why a vendor may need to amend a proposal For example, a proposed product may go out of production or decline in price. In these circumstances, the vendor may well decide that a proposal revision is either necessary or desirable. It is an unnecessary burden on both contracting officers and vendors to require specific approval before any proposal revision occurs Any administrative issues that are raised by the frequency of revisions can be resolved by establishing a common cut-off so that the final evaluation of proposals can take place on a defined set of documents

## FAR 15.401--Definitions

CCIA suggests expanding the definition of discussion so that it is not limited to communications between the contracting officer and offerors This broadening reflects the reality that discussions may be initiated by a contracting officer's representative, and may sometimes involve members of the evaluation team. Although the contracting officer should control all discussions, they may

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be initiated by other members of the Government's acquisition team. Current FAR 15.610 (d) acknowledges the involvement of other Government personnel in the discussions process Similar language should be included in the FAR 15 Rewrite.

A more substantive concern is that the FAR 15 Rewrite obliterates the distinction established by case law between discussions and clarifications This distinction is no longer required by the scheme that the Rewrite establishes, which will allow discussions to occur throughout the process, and will eliminate the requirement for best and final offers. CCIA believes that this change is unwise. There should be a point in the procurement at which discussions cease, and the offeror integrates all changes and understandings into a final proposal. If this concept is returned to the FAR, a definition of clarifications will also be required so that communications that are intended purely for resolving minor ambiguities can continue after BAFOs

## FAR 15402--Source Selection Objective

We find it significant that the drafters of the FAR 15 Rewrite have omitted the statement of purpose in current FAR 15.603, which includes maximizing competition as an objective of source selection procedures. This objective should be retained Indeed, the Government will not be able to obtain best value unless it is attracts the best proposals. To do this, the Government must seek to maximize competition as part of the source selection process.

## FAR 15.405--Proposal Evaluation

Subpart (a) instructs agencies to compare the relative qualities of proposals when evaluating them against the evaluation factors specified in the solicitation This instruction complicates the evaluation that normally occurs in a negotiated procurement It is customary first to evaluate proposals against the factors stated in the solicitation that meaningful rankings can be achieved against common criteria After this process occurs, proposals are compared, and their relative strengths and weaknesses assessed. By evaluating in this manner, the Government minimizes the possibility of constructing evaluations based on proposal elements that are unrelated to the evaluation criteria. The

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Government is also able to compare proposals in a more meaningful manner once ratings against the RFP's baseline are performed. The instruction in 15.405 (a) jumbles this process and encourages evaluations that will depart from the criteria specified in the RFP.

## FAR 15 406--Competituve Range

As a threshold matter, there are a number of reasons to avoid restrictive definitions of the competitive range The competitive range is established relatively early in the procurement process. Experience has shown that the range may be set when the Government has incorrectly evaluated the offeror's proposal, or the offeror has not fully understood the Government's requirements. Moreover, the proposal evaluation process invariably provides additional information to both Government and industry that is used to refine the vendor's proposal. Finally, it is not uncommon to see procurements change significantly through the RFP amendment process. These concerns do not engender significant problems so long as doubts are resolved in favor of including proposals in the competitive range, and offeror are permitted to compete if they have a "reasonable chance for award " If the ground rules shift so that drastic cuts in the number of competitors occur when the possibility of error is high on both sides, the resulting diminution of competition will be inconsistent with both the requirements of full and open competition, and good business sense

CCIA acknowledges that the acquisition statutes now permit the contracting officer to limit the number of proposals in the competitive range, " 1 f the contracting officer determines that the number of offerors that would otherwise be included in the competitive range. . .exceeds the number at which an efficient competition can be conducted ..." However, thus language is not carte blanche authority for arbitrary exclusions First, FARA specifically subordinates efficiency to "the requirement for full and open competition. . ." See eg., FARA, §4101 Second, FARA does not permit contracting officers to limit the competitive range on the basis of efficiency in every procurement The limitation is only appropriate if the contracting officer makes a specific determination that the number of offeror exceeds the number of proposals that permit an efficient competition among the most highly selected offeror

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The proposed regulation is inconsistent with the statutory structure that it is supposed to implement First, and most important, the competitive range test in FAR 15.406 (a) omits key words that appear in the statute. The regulation says that "the competitive range shall include proposals having the greatest likelihood of award. . ." The statute says that in limited circumstances, the contracting officer can 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 offeror rated most highly in accordance with such criteria." Under the general criteria for the competitive range in proposed FAR 15.406 (a), the Government is authorized to limit the number of proposals to those with the greatest likelihood of receiving the award This language could reduce the competitive range to the top two proposals based on the agency's initial evaluation There is no requirement to make any effort to include the "greatest number" of proposals. The new test also restricts participation in federal procurements considerably more than the current rule in FAR 15609 (a), which requires inclusion of "all proposals that have a reasonable chance of being selected for award."

The proposed competitive range test in FAR 15406 (a) makes the rest of this section provisions concerning "efficient competition" redundant. If there is no requirement to include the "greatest number" of proposals in the customary test for the competitive range, why should the Government use the provisions in FAR 15.406 (b) - (c)? The test of FAR 15.406 (a) is far more restrictive than any of the efficiency-based tests that appear in (b) and (c)

FAR 15.406 (a) is also inappropriate because it adopts a competitive range test for all procurements that is only supposed to apply when the CO is permitted by statute to limit the competitive range based on efficiency. Under proposed FAR 15406 (a), the Government is always permitted to limit the competitive range to those proposals "having the greatest likelihood of award based on the factors and subfactors in the solicitation." This is virtually the same test prescribed by FARA for use when the number of offeror "exceeds the number at which an efficient competition can be conducted." By limiting the use of this standard to a defined set of procurements, Congress implicitly barred the FAR drafters from importing the standard into all competitive range determinations This conclusion is further reinforced by the language of the statutory predicate

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for "efficient" competitive range determinations: "If the contracting officer determines that the number of offeror that would otherwise be included in the competitive range. . " (emphasis added) FARA, § 4101 This reference assumes that there is another criterion for determining the competitive range that would govern if efficiency considerations did not apply. The FAR 15 Rewrite obliterates this distinction, and imposes a single standard, regardless of whether efficiency considerations are warranted or not

The statutory language strongly suggests that the determination to limit the competitive range based on efficiency must occur after receipt of proposals. The Contracting Officer cannot make a rational determination that the number of proposals that "would otherwise be included in the competitive range" is "inefficient" unless the CO knows the number of proposals received Proposed FAR 15.406 (b) encourages the CO to guess the number of proposals that the procurement will attract, and then apply limitations to the competitive range before the first offer is received. This is inconsistent with the statutory scheme.

Alternate II which implements proposed FAR 15.406 (b), permits a contracting officer to arbitrarily limit the number of proposals that will be included in the competitive range before the first proposal is received This is contrary to the intent of the legislation. Under the draft, the Contracting Officer could determine on Day One that he or she will only allow two proposals to receive consideration throughout the procurement Although FAR 15406 (b) characterizes such a number as an "estimate," Alternate II describes the so-called estimate as a rigid limit on the number of proposals that will be considered. The description of this Alternate as a limitation of the competitive range to a specific number is also contained in FAR 15208 (a) (2). This determination would be made before the CO knew the number or quality of the proposals

Alternate II's invitation to arbitrary rejections must be removed At a minimum, this Alternate must be rewritten to remove the limitation language that is inconsistent with the "estimate" language in FAR 1515406 (b) However, we believe that the notion of even an a prior l estimate is flawed Until the Government reviews the proposals received, how can it determine what number that is consistent with efficient competition? Proposals may be large or small, complex or simple The FAR should ban the use of any pre-conceived, a

## FAR Secretariat

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prior i limitation on the number of proposals that will be considered in the competitive range.

Before restricting the competitive range based on efficiency, the Government should take all practicable steps to achieve efficiency and maximize competition. This could include setting limits on the number of pages and volumes included in proposals; reducing the number of topics to be addressed; and automating the proposal creation and evaluation processes as much as possible

A graver problem in the FAR 15 Rewrite is the complete absence of any definition of "efficient competition." CCIA has serious concerns regarding the chore of factors that are supposed to underlie the calculation of efficiency. The inclusion of the factor "resources available to conduct the source selection" is an open invitation to elevate bureaucratic convenience over statutory requirements for full and open competition. Moreover, inclusion of the criterion will remove incentives for agencies to develop innovative methods of proposal evaluation and preparation. CCIA believes that this criterion should be removed.

The proposed regulation is also deficient because it fails to balance the proven, fiscal benefits of competition against the proposal's undefined notion of "efficiency" Under the FAR 15 Rewrite's proposed policy, a Contracting Officer could bypass a $\$ 50,000,000$ reduction in proposed costs of the procured goods or services to save $\$ 50,000$ on the grounds of "administrative efficiency." The proposed policy does not even consider savings achieved through vigorous competition as a factor in determining the size of the competitive range.

CCIA supports the idea that vendors should know as soon as possible where they stand in each procurement Much of the disagreement between industry and Government over the FAR 15 Rewrite proposal arises because it reduces the number of proposals that can compete, and gives the Government sole, and sometimes arbitrary, control over the number of players. CCIA suggests that the objectives of both Government (to discourage marginal vendors from continuing in the procurement) and industry (to reduce bid and proposal expenditures on marginal bid opportunities) can be achieved through an optional down-select procedure Before supporting a draconian tightening of the

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competitive range, the Government should at least experiment with an optional down-select that would silence industry's concerns by giving the offeror, not the Government, the ability to exclude proposals that do not have the "greatest likelihood of award based on the factors and subfactors in the solicitation."

Under this proposal, the Government would first determine the competitive range using current, regulatory criteria. The Government could then advise the remaining offeror regarding the results of their initial evaluations, and their relative standing in the procurement. Based on this information, the offeror could make a reasoned business judgment whether it made sense to continue in the procurement. To the extent there is a problem with receipt of too many proposals (a point that CCIA seriously doubts), providing offeror with an informed basis to evaluate their likelihood of success will reduce the number of vendors that continue through the entire process And since the decision to continue or not continue rests with the vendor, the Government will also reduce the likelihood of protests when it determines the competitive range. This will achieve a benefit sought by some within the Government policy community, namely reducing the tendency to keep vendors in the competitive range to avoid pre-award protests CCIA also notes that a variant of this proposal has been included in proposed FAR 15.103, and urges that the Government use the "advisory down-select" approach as a substitute for restrictive definitions of the competitive range.

## FAR 15 407--Communications With Offeror

It is difficult to determine precisely what is intended in the section permitting communications with offeror prior to setting the competitive range As presented in the FAR 15 Rewrite, this communication cannot result in changes in proposals, but may result in the transmission of information that is used in proposal evaluation for such purposes as understanding the offeror's intent These communications may also involve perceived deficiencies, which are normally resolved through proposal modifications. The language used in this section is sufficiently murky so that it is not clear whether the intent is to permit contracting officers to go beyond the currently permissible category of perecompetitive range communications (ie., clarifications) or whether the rewrite is simply attempting to define (and slightly broaden) the scope of permissible

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clarifications We believe that the intent of this section should be more clearly defined to avoid litıgation regarding the type of communications that may occur

Since communications prior to establishment of the competitive range cannot result in proposal modification, it is appropriate to permit the contracting officer the discretion to conduct such communcations with some offerors but not all. This is not unlike current law in which the CO may seek clarifications as needed from offerors The example in the proposed FAR 15 Rewrite that precompetitive range communications need not occur with companues that are clearly in or clearly out is an appropriate use of selective communucations. We would encourage the FAR to define this point more broadly by stating that such communications need not occur with any offeror when they could not reasonably be expected to bring that offeror within the competitive range or to make that offeror likely to receive an award, when award is made without discussıons

CCIA belleves that the FAR's current treatment of past performance is superior to that of the FAR 15 Rewrite. Current FAR 15.610 (c) (6) requires the contracting officer to "Provide the offeror an opportunity to discuss past performance information obtained from references on which the offeror had not had a previous opportunity to comment." Proposed FAR 15.407 (c) requires discussion of "All evaluated deficiencies in an offeror's proposal, except those relating to past performance on which the offeror has already had the opportunity to comment . ." A past performance deficiency (as defined by the FAR 15 Rewrite) is a small subset of the erroneous past performance information that the Government may receive in the course of a procurement. Since past performance is assuming an increased role in award decisions, simple fairness requires the Government to give the contractor the opportunty to rebut derogatory information that may or may not be true prior to any use of the data.

## FAR 15.409--Proposal Revisions

The totally unstructured approach to discussions and proposal revisions in this section is likely to lead to unfairness and vendor protests. We see no need to change current practice, which gives every offeror equal opportunities to revise their proposals If one offeror is permitted to change its proposal, all other

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offerors should receive the same opportunity. The Government is simply not unable to determine when an opportunty to revise proposals would be beneficial. Similarly, it makes no sense to dispense with the requirement for common cut-offs for discussion and proposal revision. These are basic components of fair treatment that should not be abandoned, especially by the federal government when dealing with its citızens

We appreciate the opportunity to provide these comments, and would be pleased to discuss these matters further at your convenience

Sincerely.


Edward J Black
President
$95-029-6 \%$

November 26, 1996
General Services Administration
FAR Secretariat (VRS): Attention Beverly Fayson
$18^{\text {th }}$ and F Streets, NW, Room 4037
Washington, DC 20405
RE. FAR Case 95-029
FAR Case 96-303

Dear Ms Fayson
Enclosed please find a copy of the comments to be filed in the above reference cases on behalf of the American Movers Conference Thank you for your attention to this matter

Sincerely


Ann Wilson

## COMMENTS OF <br> AMERICAN MOVERS CONFERENCE ON <br> PROPOSED CHANGES TO FEDERAL ACQUISITION REGULATION <br> FAR CASE 96-303 <br> FAR CASE 95-029

AMERICAN MOVERS CONFERENCE 1611 Duke Street
Alexandria, VA 22314
(703) 683-7410

Joseph M. Harrison
President
L. Ann Wilson

Vice President, Governmental Affairs


November 26, 1996

The American Movers Conference is the principal national trade association representing household goods moving companies AMC's 3,000 members include every aspect of the industry national van lines with affiliated agents, agents affiliated with van lines, and independent national and regional carriers without an agency network The vast majority of these companies are small businesses

The household goods moving industry has long provided relocation services to the federal government These services include international, interstate, intrastate and local moves These relocation services have been available through the individual federal agencies, the General Services Administration and the Department of Defense Approximately 170,000 household goods shipments are transported on behalf of the federal government every year

The services associated with moving an individual household are unique and differ greatly from other services contracted by the government A successful move depends in large part on highly individualized services in at least two locations origin and destination. The packing, loading, storage and unloading of household goods are as unique as the actual transportation of household shipments The moving industry depends upon individual companies located throughout the world which provide these services For the most part, these companies are small businesses

Furthermore, over $50 \%$ of the moves in the US take place between May and September of each year During much of the summer every available tractor-traller,
truck and driver is still not sufficient to meet the relocation demands of its customers This demand includes the relocating of federal employees

In the past, the federal government has not used FAR based contracts for household goods transportation. However, DOD is now proposing to test a FAR based procurement system AMC believes a more efficient, simplified method of procurement is to include only those FAR clauses which are specifically needed by the government The concern is that the inadvertent inclusion of standard FAR clauses that are inappropriate to a contract for the packing and transportation of household goods will unduly complicate DOD's relationship with its service providers and create needless administrative burden on both parties

DOD also contends that because other types of contractors do business with the government under FAR-based contracts, there is no reason household movers cannot do likewise This conclusion ignores the fact that the domestic household moving industry is unique it is a three tier system consisting of van lines and their agents, carriers that are authorized in their own right to transport traffic or as agents of van lines and independent owner-operators (drivers) Each component of the industry must meet established standards, either regulatory or contractual, before they qualify to transport DOD shipments. The interdependence of each segment requires a high degree of industry acceptance of the contractual relationships carriers enter into with their customers, whether they are military or commercial If any component of the industry is unduly burdened by a regulatory morass such as FAR that hampers its ability to operate, the entire system will not
function effectively This is no doubt an important reason why contracts for household goods moving have always been exempted under FAR 847200 (d) (3)

As disturbing as inclusion in the FAR is for the household goods moving industry, the changes proposed in both FAR Case 95-029 and FAR Case 96-303 are even more so Specifically, AMC offers comment herein on the effect limitations to the competitive range will have on the moving industry

## General Comments

The proposed changes to the competitive range expedites bureaucratic functions while dismissing the needs of small business By allowing a contracting officer to limit the competitive range, the federal bid process will become a proposal writing contest Small businesses do not have extensive marketing, legal and other resources available to effectively compete in such an environment The individual writing the bid is often the same individual signing payroll, answering phones and completing the business at hand the owner Instead of focusing on ease of administration, the regulations should focus on awarding contracts to any business which can satisfactorily complete the requirements

With regard to the moving industry and its responsibility for relocating federal employees, the proposed regulations will have a detrimental effect on the federal government The ability to move shipments within a limited window of time takes multiple participants Not even the most seasoned relocation expert can always completely predict when these resources may be necessary A major corporate relocation may divert necessary drivers and equipment from military and government
shipments. Likewise, a shift in military personnel may cause capacity and similar problems in other areas of the country

Moving companies have attempted to tackle the problem of predicting capacity needs However, these predictions are not always accurate and even when they are, bottlenecks occur It is impractical to hire drivers and purchase trucks for a seasonal business that always contracts in the winter Therefore, any prudent traffic manager will need access to multiple moving companies which may or may not be called in to perform services

DOD has long wrestled with this problem During the peak season (May through September) DOD has periodically experienced a lack of equipment and personnel to meet its needs The answer to this problem is not to exclude the very companies which own trucks and warehouses - small business movers The answer is to encourage small business movers participation in the DOD program and continued viability as successful service providers Limiting the competitive opportunities of these companies will discourage their very existence

DOD's solution to the capacity problem is to begin the use of third-party brokers which in turn contract with moving companies for services The industry seriously questions the ability of these companies to meet all of the needs of the DOD In addition, this practice flies in the face of encouraging and developing small businesses throughout this country Third party relocation brokers are national and international corporations If these companies are allowed to become prime contractors then movers will only exist as subcontracting entities This decreases
small business profits and allows the prime contractor to set operational and other standards More importantly it still does not address the primary concern of the federal government to ensure adequate and quality service to relocating personnel. Until that becomes the primary focus of the contracting system both small movers and federal personnel will suffer

## FAR Case 96-303

In the proposed Section 12301 (e) (4) a contracting officer could limit the number of proposals in the competitive range without guidance or standards The section goes on to modestly require that this limitation would include "the greatest number that will permit an efficient competition among the most highly rated proposals " However, there are no standards attached to this limitation and no explanation of how a contracting officer could reach a determination of what number, if any, produces efficient competition

Furthermore, this standard seemingly allows a contracting officer to establish a limitation prior to reviewing the contracts A contracting officer could arbitrarily determine a number which meets their time limitations or other needs Finally, AMC believes that any blanket standards may never fit the needs of the household goods moving industry Although reviewing a set number of proposals may give a contracting officer sufficient grounds for awarding some services that number may not ensure sufficient equipment and drivers to meet the government's needs during a busy moving season. Any attempt to meet these needs with a finite group of bidders will lead to contract awards to a very few national corporations relegating many quality small movers to subcontractor status

## FAR CASE 95-029

Although the proposed regulations in FAR Case 95-029 are more complete, they still place the needs of the contracting officer before the ability of small companies to compete The proposal in 95-029 is preferable to the one in 96-303 because it does state that factors and sub-factors must be stated in the solicitation However, 95029 still allows a contracting officer to preset the competitive range which will limit the number of businesses competing for a contract

By proposing these regulations, the federal government has determined that "efficient" competition is the most important element in determining the breadth of acceptable bidders. Although $95-029$ provides that "the contracting officer may consider such factors as the results of market research, historical data from previous acquisitions for similar supplies and services, and the resources available to conduct the source selection" nothing requires the contracting officer to do so This type of information has routinely proved inadequate to track capacity requirements for the household goods industry

Finally, 95-029 presents cold comfort to the small businesses of this country by providing an opportunity for notice To tell competitors in advance that their proposal will most likely be disregarded stifles competition and growth Such a system will not serve either the industry or the government well

Conclusion
Ultimately, these proposals will lead to participation by only large companies in the government procurement of household goods moving services. Contracting officers will believe that their needs can be met by contracting with only a few large corporations only to subsequently discover that even their capacity might not be sufficient Small movers will either be relegated to subcontractor status, forced to seek non-governmental business or close their business altogether. This will not be in the best interest of ether the relocating federal employee or the federal government

As indicated, larger movers cannot provide all the capacity needed during a summer moving season Furthermore, in the moving industry, it is the small, local moving companies that own most of the transportation equipment, hire drivers and own warehouses To relegate those entities with assets, payroll and risks to subcontractor status disregards the importance of these companies to our nation's economy and national defense Therefore, AMC urges these rules to be retracted Efforts should be made to meet the needs of the contracting officer while encouraging the continued existence of small business
uinthor , Tim o'Hara at Asu300 Dact: $11 / 21 / 96$ 3:46 PM Priority: Normal TO: Dorochy Sirk at Asul00 Subject: Re: HOT stuff
$\qquad$
Dorothy,


Just to close the loop, we in -340 have onl had one corpetitive since the advent of the AMS, and oddly enough 3 new (f.e., they have never had a prime contract to my knowledgel swall businesses hade the competitive range:

```
O CGH Technologies, Inc. (prefmous
                    subcontyactor)
0 Infotech Enterprises (neu)
O GIS/Trans Ltd. (either new or a previous sub)
```

I obulously can't elaborate further, but on of them will be getting a sazable (> \$5 M) award.

Tim

Subject: HOT stufff
Author: Dorothy Sirk at ASUIOO
Date: $11 / 19 / 964: 33 \mathrm{PM}$

Have you noticed that some of those chatractors that would not do business whth the FAA in the past are pow proposing and in some cases getting contracts? Are there those edntractors that in the past were only subs but are now prime contractops? What about those conczactors that in the past were not competituve but are nou competitive? We belleve that some of those contractors that traditionally wern not FAA contractors are proposing, competing, and getting contracts since the new process was issued on April 1 . While some of these contractors may be large businesses, many of them are probably small businesses.

Many of you can probably name these contractors right off the top of Your head. And that's all I'm asking. If you would provide the contractor's name, brief desciption of the project, extent of competrtion, and awarg amount each coitractor recerved since April 1 it would be greacly appreciated.

This information will be used as part substantlate the fact that contractor because of the new process.

Please send the your comail by COB, Th for your accention. ds

Reply Separator $\qquad$
of rulemaking documentarion to are doing business with the FAA

Dear Sir.
We went out to all of our regions/centers and headq中akters for information conceming new contractors doing business with the Federal Aviation
Administration since the Acquisition Ma, hagement System was implemented and found out the following. While most of gur regions and centers did not notice a difference, there were a couple that did indicate thatithere were some new contractors. They are enclosed.

Sincerely,


Davia Lankiora
Manager, Procurement Management Branch

Enclosures

ANM
11/25/96

Contractor's that may be seeking and obtaliung contracts since reforme
Choices NW Inc., Auburn, WA, Specializing in refurbished Herman Miller systerns, refurbished chairs, cabinets, etc.

PCL. Construction Services, Inc., Bellevule, WA. They were excited we left FAR and proposed on the Porthand Tower and recewred contract award. They are a very large construction firm.

On the TRACON in Salt Lake City all offerdr: (3) are netw construction firms for our Region. (I can't give out the narmes we ant in evaluatuo) They are now willints to work with the FAA since discoverngg our releas, from FAR. Ikey like to discuss scope, design, and value enguneenng. They like the relationship and thrae they have to get subcontractors quotes. Instead, of on the phone two minme before bid opening to firm bids up.
$\begin{array}{ll}\text { Computer City } & \text { computer equpment } \\ \text { Newark Electronics electrical equpment }\end{array}$
$\begin{array}{ll}\text { Computer City } & \text { computer equipment } \\ \text { Newark Electronics electrical equpment }\end{array}$
Gray Electric electrical equipment
All three vendors are latge businesses whp received aukards compettively. Under FAR, these vendors would have never been sollited due to spt-asides and GSA FSS. Cost stivings in award were rcalized.

Prior construction subs now as primes, a 1 are small bolsimess:
Tolin Mechanucal, Denver CO, HVAC and cooling systerm work.
Webber Electric, Auburn, WA, electrical work
Intermountain Electrical, Denver, CO, electrical work.
$\qquad$
,

14500 Avion Parkway
Suite 125
Chantilly, VA 20151-1108
Tel (703) 378-1483
Fax (703) 378-1036
JLH-46094
November 25, 1996

Via Facsimile (202)501-4067
General Services Administration
FAR Secretariat (MVRS)
18th \& F Streets, NW, Room 4037
Washington DC 20405
Subj FAR, Part 15 Rewrite, Phase I
Ref FAR case 95-029
Dear Sirs
It is strongly suggested that a provision be added to the proposed FAR 15104 - Oral Presentations addressing the proper use of videotapes Specifically, that (8) "Oral presentations must be done in person. Submission of videotapes or other form of media are not authorized and will be rejected."

Attached are our company's specific comments on this issue Recently, a US Army (CECOM) solicitation, No DAAB07-97-R-H001, was released with a requirement to submit a $31 / 2$ hour videotaped oral presentation Please pass these comments to the US Army Representative on the Revision Team

Sincerely


## $95-029-6$

## COMPUTER SYSTEMS DEVELOPMENT CORP. <br> COMMENTS - NOVEMBER 25, 1996 <br> PROPOSED FAR 15104 - ORAL PRESENTATIONS

We have a number of comments regarding this area We have used a reference document entitled "Guidelines for the Use of Oral Presentations", prepared by an interagency team, under the auspices of the Procurement Executives Association, in partnership with the Office of Federal Procurement Policy, as the basis for these comments and questions The document is available at http //www pr doc gov
a) The videotape does not provide a good medium for offeror to describe then capabilities, work plans or approaches, staffing resources, or, in the case of some REPs, sample task responses As proposed in the Phase 1 rewrite of Federal Acquisition Regulation Part 15, Section 15104 Oral Presentations, the information pertaining to the areas mentioned is more suitable for oral presentations Other agencies have used videotape only as a "media to record the oral presentation", not as a substitute for one
b) The cost of producing a video is significant We have estimates of $\$ 700$ to $\$ 1500$ per mute for a quality presentation video The video requirement will more adversely impact small and 8(a) businesses who do not have a video production capability This costly requirement is in direct conflict with FAR 52215-7, which discourages "Unnecessarily Elaborate Proposals or Quotations" Some agencies would argue that "travel costs" are greater than video production costs However, this is hardly true considering the average cost of $\$ 1,10000$ per minute and oral presentations beng $11 / 2$ to $31 / 2$ hours long The other argument is that a "camcorder" approach is good enough since they are only looking for content - yet they require that graphics and other means of illustrating a technical approach or capability be included in the presentation This again, is quite difficult to produce without extensive video production resources (people and equipment)
c) With the video tape oral presentation beng a highly important evaluation factor, it would be difficult for evaluators to do their job, for example, multiple video copies and playback equipment would be necessary The length of the videos would be cumbersome as well Regardless of the Proposal Topic (technical, management, sample tasks), the evaluators, in applying the evaluation criteria, will have to determine from the video, 1) how well qualified the offerer's staff is to perform all aspects of the work, 2) how well the offerer understands the requirements, and 3) precisely how the offerer will approach accomphshment of the required tasks This will require significant searching, fast forwarding and rewinding, etc, resulting in lost time or a lengthy evaluation process
d) A video has the potential for perceived discriminatory procedures (eg an mdividual presenter's race, sex, physical appearance, etc ) and is more subject to protests (Selecting the best looking video)

DEPARTMENT OF THE NAVY NAVAL AIR SYSTEMS COMMAND NAVAL AIR SYSTEMS COMMAND HEADQUARTERS

1421 JEFFERSON DAVIS HWY

From. Commander, Naval Air Systems Command
To- General Services Administration, FAR Secretariat (VRS)
18th and F Streets, NW (Room 4037)
Washington, DC 20405 ATTN. Beverly Fayson
Subj: FAR PART 15 REWRITE--PHASE I, FAR CASE 95-029
Ref. (a) OASN (RDA) ABM memo of 30 Sep 96
(b) NAVAIR Itr Ser AIR-2 1 1/96-151 of 8 Nov 96; same subject

Encl- (I) Additional NAVAIR Comments on FAR Part 15 Rewrite - Phase I
1 In response to reference (a), the Naval Aur Systems Command reviewed the subject rewrite and submitted comments via reference (b) We would like to add additional comments to that submission Specific additional comments are contaned in enclosure (1).

2 If there are any questions, please contact Judy Richardson, AIR-2 11, at (703) 604-2005, X6119


# NAVAIR ADDITIONAL COMMENTS ON FAR PART 15 REWRITE, PHASE I 

1 FAR 15001 , Definitions
The defintion should be revised to read "Proposal modification is a change made to a proposal, which has already been submitted to the government, before the closing date and time for submission of proposals specified in the solicitation. "This clarifies two areas. (1) the modification would be to a proposal already submitted to the government, and (2) the intent of the closing date statement.

2 FAR 15 206, Recerpt of proposals and requests for mformation
Recommend that the title be changed to "Receipt of proposals and information" to make it and the first sentence consistent

3 FAR 15 207(c), Submission, modification, revision, and withdrawal of proposals
This section states that offerors may not revise proposals unless requested by the contracting officer. It is unclear why this is included Contractors can always revise their proposals prior to the solicitation close date This sentence should be deleted or clarified

4 FAR 15 401, Defintions

The defintion of deficiency appears to combine the current defimion of deficiency with that of a weakness (a flaw that appreciably increases the risk of unsuccessful contract performance) It is believed that this could create confusion since award cannot be made with proposal deficiencies but can be made with certam weaknesses The defmition should be revised to clearly separate the two

The definition of discussion imphes that discussions do not occur if communication is conducted between government personnel, other than the contracting officer, and the contractor. Clearly, no discussions should take place without the contracting officer present, but the proposed defmition could imply that if an engmeer spoke to the contractor, discussions did not occur The defimion should be revised to read, "Discussion, as used in this subpart, means communication after establishment of the competitive range between any government personnel and an offeror in the competitive range However, no communtcaton shall take place without the contracting officer present "

5 FAR 15 402(b), Source selection objective
The first sentence contains some redundancy It should be revised as follows "A lowest price technically acceptable process is used where is has been determined that the Government's interests are best served by selection of the lowest price offer that is evaluated (on a pass/fans basis) as techncally acceptable and award is made to the lowest cost (price) technically
acceptable offeror" The last sentence in this section states, "Proposals need not be ranked under this process nor are communcations precluded " It is unclear why this sentence is included Since these areas are not addressed in the preceding section for tradeoff process, it creates confusion to address it here.

## 6 FAR 15 404(a), Evaluation factors and subfactors

The first sentence should be rewritten to read, "The basis upon which the award decision is made includes general considerations and specific evaluation factors and subfactors" A second sentence should be added "General considerations can melude compliance with solicitation terms and conditions, availability of data rights, the offeror's financial condition, results of preaward surveys and other surveys or reviews" This allows the Source Selection Authority to consider issues which are legitımate business considerations but not amenable to ratings to be used in the award decision

7 FAR 15.806(d)(1), Postaward debriefing of offerors
This section states that the debriefing shall include information on the government's evaluation of significant "weaknesses" or "deficiencies." As noted in number 2 above, the current definition of "deficiency" seems to encompass "weakness" There is no definition for weakness It should be separated out

## 8 FAR 52 215-1, Instructions to Offerors - Negotiated Acquisition

Paragraph (a)(4) - In the definition of "Discussions" the word "communication" should be replaced with "interchanges with offerors" This would eliminate the apparent contradiction with the current wording that states discussions are communications but that communications are not discussions

Paragraph (a)(5) - Consistent with number 4 above, recommend that the first sentence in the defintion of "Communication" be changed to, "Communication means interchanges with offerors before the establishment of the competitive range" The second sentence would remain

Paragraph (c)(3) - The last sentence refers to the Source Selection Authority's discretion regarding the acceptance of "late" offers This is inconsistent with FAR 15207 (b) which implies that the contracting officer is the individual making the decision Recommend changing "Source Selection Authority's" to "contracting officer's"

Paragraph (f)(6) -"Communications with offerors after receipt of an offer do not necessarily constitute a rejection or counteroffer by the Government" The intent of this sentence is not clear The term "not necessarily" makes the sentence even more unclear
e) We recognize that the effective use of "streambed" procedures has the potential to significantly reduce the time and cost associated with the source selection process However, the videotape approach, by itself, does not allow for greater "face-to-face" spontaneous interaction between the Government evaluators and the offeror during the selection process This process provides a unique insight into how offerors would respond to actual taskings after contract award, - an insight which is lost in the rehearsed, artificial world of the videotape In fact, the "Guidelines for the Use of Oral Presentations", referenced earher, stresses that presentations by the offerors should be made in person This allows the evaluators to meet/nterview offerors' key technical personnel and proposed Program Manager Accordingly, the document suggests that submission of videotapes or other forms of media should not be authorized, and "should be rejected" We strongly support this approach
f) The use of videotaped oral presentations does not represent a proper procurement practice or sound business judgment and does not promote more efficient use of taxpayer dollars.

## 



Federal Bar Association

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\text { Sept went to } 95-029-17
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November 26, 1996

## BY MESSENGER

General Services Administration
FAR Secretariat (MVRS)
Attn • Beverly Fayson
18th and F Streets, NW
Room 4037
Washington, DC 20405

## Re: Supplemental Comments Concerning Proposed Rewrite of FAR Part 15 FAR Case 95-029

Dear Ms Fayson.
On behalf of the Government Contracts Section of The Federal Bar Association ("FDA") ${ }^{1 /}$ and its FAR Part 15 Task Force, we respectfully submit these supplemental comments concerning the proposed rewrite of FAR Part 15, as published in the Federal Register on September 12, 1996 The Task Force previously submitted detailed comments on the proposed rewrite of FAR Part 15, which comments (dated October 31) are incorporated herein by reference These supplemental comments are intended to address those specific issues raised at the November 8 public meeting, at which the FBA's FAR Part 15 Task Force presented a summary of its October 31 comments, as well as some additional thoughts of the Task Force on the proposed rewnte.

[^12]General Services Admınistration
November 26, 1996
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## A. The Desirable Scope of Discussions

During the puble hearing, the Task Force expressed its concern that the proposed regulation "renders the scope of discussions overly narrow, and that matters which heretofore have been addressed in discussions -- such as weaknesses and excesses -- will no longer be addressed " See Task Force Comments dated October 31, 1996 at page 4 At the hearing, Dr Kelman inquured whether the Task Force had proposed, or could propose, suitable language describing the proper scope of discussions. The Task Force proposes that revised FAR 15 407(c) indicate that the scope of discussions "should address all ıssues which appear to the contracting officer likely to affect the evaluation or scoring of proposals or resultant award decision " For several different reasons, the Task Force believes this broader language is preferable to the proposed language in FAR 15.407(c) that discussions address "[a]ll evaluated deficiencies in an offeror's proposals" and "any other issues which, in the judgment of the contracting officer, should be brought to the offeror's attention " First, the language proposed by the Task Force will help ensure that weaknesses and excesses are addressed during discussions, as the Task Force believes should be the case. In this regard, the Task Force reiterates its view that the Government is the primary beneficiary of a policy that favors broad -- not narrow -- discussions, largely because the Government recerves better final proposals as a result. ${ }^{24}$ Second, while the Task Force's language clearly encourages broad discussions, it also does not rob the contracting officer of discretion in such matters. The use of the word "should" instead of "shall" renders the language advisory, not mandatory The language also exphcitly requres the judgment of the contractıng officer in determining those issues which appear "likely to affect the evaluatıon or sconng of proposals or resultant award decision."

In summary, the Task Force submits that its proposed language better reflects the interests of both the Government and the offerors in having broad discussions, while at the same time reasonable contracting officer discretion is preserved

## B. The New Proposed Rule Regarding Late Proposals

In its October 31 comments and at the public meeting held on November 8, the Task Force expressed its opposition to the proposal to revise FAR 15.207 to allow contractung officers to consider late proposals "if domg so is in the best interests of the Government " One of the grounds for opposition is the Task Force's concern that the proposed revision may

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violate CICA, a position based in part of the decision of the Court of Federal Claims in Aerolease Long Beach $\mathbf{x}$. Unted States, 31 Fed. Cl 342 (1994)

At the public heaning, GSA's Ms Ida Ustad expressed the view that the Aerolease case had been overruled In point of fact, the Task Force's research reflects that the decision of the Court of Federal Claims in Aerolease was affirmed without opinion by the U S Court of Appeals for the Federal Circuit. See Aerolease Long Beach v, United States, 39 F 3 d 1198 (Fed Cir. 1994) Even apart from the legalities of the proposed revision, the Task Force contınues to be concerned that the proposed revision permits results that could appear quite unfarr to offerors which work hard and diligently to submit timely proposals and expect their competitors -- absent extraordinary circumstances -- to do the same.

## C. The Comparison of Proposals and Release of the Government Estimate

Although not mentioned in its October 31 comments or at the November 8 public meetıng, the Task Force supports the proposed revisions to FAR Part 15 that would explicitly permit the comparison of proposals (proposed FAR 15405 and 15410 ) and the release to all offerors of the Government cost estimate (proposed FAR 15.407(d)(3)). The Task Force observes that these techniques have worked well in the commercial sector, and their adoption for Government procurement appears likely to enhance the source selection process.

## D. Final Comment

As described above and in its previous oral and written submissions, the FBA's FAR Part 15 Task Force favors many provisions of the proposed rewrite of FAR Part 15. In particular, the Task Force supports (1) limiting the competitive range during the evaluation phase of a procurement, (2) the new concept of pre-competituve range communications, (3) the expanded use of oral presentations and (4) the comparison of proposals and release of the government estimate. The areas of Task Force concern include (1) a definition of "best value" that appears inconsistent with current case law and practices, (2) the revised procedures for the conduct of discussions, particularly the elimination of the right of all offerors in the competitive range to submit a revised, final proposal, and (3) the need for oral solicitations and proposals to be reduced to writing and incorporated in any resultant contract. Finally, the Task Force is opposed to (1) specifying in advance a specific limitation on the number of offers to be included in the competitive range, (2) the narrowed scope of discussions, and (3) the proposed new rule governing late proposals

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The FBA's FAR Part 15 Task Force appreciates the opportunity to submit these comments and looks forward to working with the FAR Council and the FAR Part 15 Rewrite Committee as the proposed rewrite of FAR Part 15 moves forward.

If you have any questions concerning the enclosed comments, please contact the undersigned at (703) 790-7940.

Respectfully submitted,


Alex D. Tomaszczuk// //
Chair, FBA Part 15 Task Force

## FEDERAL BAR ASSOCIATION

Government Contracts Section
FAR Part 15 Task Force

Linda A Donaghy, Esq.<br>Department of Justice<br>Deputy General Counsel<br>Justice Management Division<br>Richard S. Ewing, Esq.<br>Arnold \& Porter<br>Robert J Kenney, Jr., Esq<br>Hogan \& Hartson<br>Jeffrey I. Kessler, Esq.<br>Office of Command Counsel<br>Army Materiel Command<br>US. Department of the Army<br>Tim E Nickerson, Esq<br>Eckert, Seamans, Cherin \& Mellott<br>Roger Sabin, Esq<br>Deputy General Counsel<br>Defense Information Systems Agency<br>John Toile, Esq.<br>Barton, Mountain \& ToIle<br>Alex D. Tomaszczuk, Esq.<br>Shaw Pittman Potts \& Trowbridge<br>Donna Lee Yesner, Esq<br>Piper \& Marbury

U.S. Small Business Administration

Washington, DC 20416

## NOV 261996

General Services Administration
FAR Secretariat (MVRS)
18th \& F Streets, N.W.
Room 4037
Washington, DC 20405
Subject: Federal Acquisition Regulations; Competitive Range Determinations [FAR Case 96-303] and Part 15 Rewrite Phase I [FAR Case 96-029]

Dear FAR Secretariat:
This concerns the proposed rules Competitive Range Determinations and FAR Part 15 Rewrite - Phase I, published in the Federal Register on July 31, 1996 and september 12, 1996, respectively.

The Office of Advocacy has previously expressed its views on the subject proposals in letters to the FAR secretariat, the Honorable Steve Kelman, the Honorable Sally Katzen and at public meetings this month in Washington, DC and in Kansas City. This discussion will serve as a follow-up to our previous comments

These are controversial rules that will alter the process of "full and open competition" in government contracting. Many small business groups feel the proposals will adversely affect the ability of small firms to win federal contracts. The FAR Council, on the other hand, believes the proposals will benefit all businesses.

The polarization on this issue has been caused by several factors. The initial regulatory flexibility analyses on both rules suggest the proposals will benefit small firms, yet provide no supporting information or quantitative data measuring impact. Why historical data on contracting with small businesses was not analyzed and included in the analysis is a mystery, if indeed the Council based its conclusions on factual data indicating a problem will be solved. As a result, Advocacy and numerous small business groups believe the requirements of the Regulatory Flexibility Act have been skirted, with insufficient analyses provided to support speculative conclusions.

We also know the Small Business Administration (SBA) was excluded from participating on the FAR Part 15 drafting team, even though SBA's Administrator urged the Agency's inclusion (see enclosed letter from Phil Leader). Many small businesses feel they have
been forced to "react" to proposals they should have helped to develop.

Advocacy supports the streamlining both rules suggest, but is very concerned that the proposals will limit competition by giving the contracting officer significant authority to eliminate offerors prematurely -- for reasons of "convenience." In theory, limiting the competitive range to promote government and offeror efficiency sounds great. But, in the real world -. where contracting officers have concurrent buying actions ongoing and are under significant pressure to do more with less -we believe the rules will give government contracting officials license and incentive to focus on the fewest number of offerors that are the best known or who represent the most recognized brand name.

We are concerned that new government vendors, emerging firms and other small businesses, less polished in marketing or proposal writing skills, will be quickly eliminated from a competition.

Advocacy belleves competition will be limited because provisions in the proposed rules:

- Do not define what is meant by "efficient competition," giving the contracting officer significant latitude to interpret "efficiency" as "convenience;"
- Allow a contracting officer to determine the number of offerors to be considered in a competitive range before the submission of offers;
- Do not require a minimum number of offerors to be considered in the competitive range;
- Leave open to the judgement of the contracting officer the method or reasons for eliminating a potential offeror from the competitive range; and,
- Provide no protections for small firms in mandatory or advisory "down-selects."

The need for open competition in federal procurement markets is significant. Advocacy contends that some recent acquisition reforms, including those articulated in the proposed rules, will have the immediate effect of reducing procurement opportunities for small firms. In the long term, these changes may alter the number of firms available, willing and able to participate in federal procurement markets.

Advocacy believes all branches of the federal government have an obligation to be consistent in advancing the Nation's policy of preserving competition. This means directing public contracting
monies in such a way that competition is vigorously encouraged. As such, certain allowances for small firms should exist to level the playing field so that open competition is preserved and that all sectors of the economy, including women and minority business owners, have an equal opportunity to participate in federal markets.

It would be myopic to sacrifice competition at the expense of creating false efficiencies and short-term savings. Only marketbased competition can prevent monopoly practices and the concentration of federal dollars in the hands of a few large industry giants. It is easy -- and arguably more efficient in the short term -- for the government to contract with a cadre of mostly large firms. In the process, however, the fate of many small firms, the entrepreneurial base of the economy and the future of competition are jeopardized.

Advocacy urges the FAR Council to consider the following alternatives:

1. Define what is meant by "efficient competition" in the rules;
2. Require contracting officers to disclose the market research and/or historical data used for limiting a competitive range. The factor, "resources available," should be eliminated from the proposals;
3. Establish FAR guidelines for determining the minimum number of offerors in a competitive range,
4. Require that at least one small firm (highest ranked), with at least a "reasonable chance" of winning a particular contract, be included in the competitive range; and,
5. Re-affirm in Part 15 of the FAR the government's commitment to utilizing small firms in federal procurement.

Further, Advocacy believes the competitive range rule and the rewrite of FAR Part 15 should be considered as major/significant rules, subject to Office of Management and Budget (OMB) review and analysis under Executive Order 12866.

The Office of Advocacy is committed to regulatory reform and
stands ready to work with the FAR Council and the promulgating agencies in that endeavor.

Sincerely


Jere W. Glover
Chief Counsel
Office of Advocacy

Fámes M. O'\&onnor
Prbcurement Policy Advocate Office of Advocacy
cc: The Honorable Sally Katzen, OMB, OIRA
enclosure:

# Aerospace Industries Association 

## Comments

FAR Part 15 Rewrite - Phase I

(FAR Case 95-029)

Section 2.101 Definitions. The proposed rule places an emphasis on selection of the offer which represents the best value to the Government This is evidenced by addition of a definition of best value in Section 2101 and in the clear direction provided in Part 15 to select the offer which represents the best value to the Government.

AIA strongly supports the use of best value in source selection Use of best value recognizes that selection of the lowest price technically acceptable offer does not necessarily result in the most advantageous contract for the Government It also allows the contracting officer to select the offer which best fits the Government's needs. However, AIA feels that the definition of best value provided in the proposed rule is too broad Therefore, we suggest that the definition be rewritten as follows to avoid confusion during the evaluation and source selection process
"Best value" means an offer or quote which is most advantageous to the Government, based on trade-offs among cost or price, quality, past performance, technical and management capabilities, and other appropriate factors "

Section 15.002 Negotiated Acquisition. The introductory text to this section, which describes the types of acquisitions covered by the negotiated acquisition processes in Part 15, should be clarified to read as follows
"This part apples to negotiated acquisition processes for (a) competitive acquisitions, and (b) to the maximum extent practicable, sole source acquisitions"

The entire Section 15002 (as rewritten) should be included under Section 15000 Scope of Part
Subpart 15.1 Source Selection Processes and Techniques. This subsection describes four acquisition processes or techniques which may be used individually or in combination to design appropriate acquisition strategies Two of these are the lowest price technically acceptable process and the tradeoff process

AIA supports the use of these two acquisition processes to select the offer which provides the best value to the Government. However, we are concerned about the emphasis on "the amount of Government resources available" as a factor in determining acquisition strategies The amount of resources available to the Government to conduct source selection should not be a factor in
determining the most appropriate acquisition process Otherwise, the Government and contractors could expend resources in an acquisition process that would not produce the best value for the Government

Section 15.102 Tradeoff Process. The tradeoff process is extremely important because it probably will be the most frequently used source selection technique The process, as currently fashioned in $15.102(b)(3)$, does not require that specific tradeoffs be described in terms of cost or price impacts, nor is there a requirement that tradeoffs be quantified in any other manner

While AIA supports the use of the tradeoff process, we feel that this language will not and offerors in preparing the most responsive offer possible The mere fact that tradeoffs will be considered will not be helpful in structuring proposals Potential offeror need to know what kinds of tradeoffs will be considered and the relative importance of key parameters, $l e$, while providing a precise mathematical formula for tradeoffs is nether necessary nor practical, it would be useful to know that for a particular solicitation tradeoffs will be made, for example, between cost and past performance Therefore, we recommend that the final sentence of 15.102(b)(3) be revised to read as follows
"Specific tradeoffs in terms of cost or price impacts and noncost factors/subfactors should be identified in the solicitation whenever possible Quantification of the tradeoffs may be identified in the solicitation, if feasible."

Section 15.103 Multiphase Acquisition Technique. Another acquisition technique described in the proposed rule is the multiphase acquisition technique, formerly known as "two-phase" acquisition This technique enables the Government initially to seek limited information, make one or more "down-selects," and then require full proposals from a limited number of offeror During the first phase of multiphase acquisition, the Government evaluates all offerors' submissions and makes either a mandatory or an advisory down-select. In the case of an advisory down-select, offeror not selected will be provided with "supporting rationale" for the decision Such offeror still may submit a proposal for the second phase which the Government must evaluate

AIA supports the concept of multiphase acquisition. Because of the down-select process, multiphase acquisition has the potential to save a contractor significant amounts of bid and proposal money which could be better spent bidding on other projects where the contractor is competitive

However, AIA is concerned that an offeror informed as the result of an advisory down-select that it is "unlikely to receive an award" will be faced with a dilemma The offeror must decide whether to expend additional resources to prepare a proposal for the next phase of the competition, knowing that the chance of award is slight, or not submit a proposal and withdraw from the competition, all on the basis of "supporting rationale" provided by the Government

Therefore, AIA recommends that $15103(\mathrm{~d})(2)(11)$ be amended to provide that the "supporting rationale" provided such offerors contain sufficient information that an offeror is able to make an informed decision whether or not to participate in the next phase of the acquisition

Section 15.104 Oral Presentations. The fourth "new" acquisition technqque described in the proposed rule is the use of oral presentations for submission of all or part of a proposal AIA supports use of oral presentations when it is beneficial to both the offeror and the Government Oral presentations can be an excellent substitute for paper intensive, time consuming written submissions under appropriate crrcumstances. However, the proposed rule should be amended to include a requirement for a permanent record of the oral presentation ( $e g$, a videotape or tape recording). A permanent record is necessary to establish accountability and to ensure that Government evaluators hear and/or see the same presentation

Section 15.201 Presolicitation Exchanges with Industry. AIA supports presolicitation exchange of information between the Government and industry as advantageous to both industry and Government. Presolicitation communications will enable the Government to better tailor its acquisitions in order to obtain quality products and services at reasonable prices and will increase the efficiency of the acquisition process In addition, it will help identify and resolve issues regarding acquisition strategy, while facilitating resolution of other concerns or questions that industry or the Government might have It also will allow industry to be more responsive to the Government's needs and make the most efficient use of industry resources in responding to Government requirements.

The draft Request for Proposal (RFP) (one of the techniques identified in 15 201(c) as a means to promote early exchange of information) is an especially effective means of promoting industry involvement early in the acquisition process. Draft RFP's allow the Government to obtain feedback in such critical areas as evaluation factors, terms and conditions, and requirements definition When used effectively, draft RFP's reduce the need for time consuming modifications to RFP's and subsequent costly contract amendments. Draft RFP's allow industry to better understand the Government's requirements and help Government understand what industry is able to provide

Section 15.202 Requests for Proposals. Under 15 202(a)(2)(I) the contracting officer may allow offerors to propose alternative terms and conditions, including a new contract line item number (CLIN) structure

AIA supports providing offerors the opportunity to propose alternate terms and conditions and CLIN structures in response to a solicitation, especially in proposals for commercial items This will allow the contractor to propose the terms and conditions best suited to the acquisition and will result in the best value for the Government. However, in addition to the caveat already expressed in $15202(\mathrm{a})(2)(\mathrm{ii}), 15.202(\mathrm{a})(2)$ should include guidance to the contracting officer explaming that where the solicitation allows differing CLIN structures, the cost evaluation model
also must be able to accommodate the differing CLIN structures and result in comparable calculations and equitable evaluations for all offers

Therefore, 15 202(a)(2)(11) should be renumbered as 15 202(a)(2)(111) and a new 15 202(a)(2)(11) should be inserted as follows
"Before soliciting or accepting proposals with alternate CLIN structures, the contracting officer must ensure that the Government's cost model for both proposal and evaluation purposes can accommodate different CLIN structures"

AIA also notes that 15 202(e) introduces the undefined term "letter RFPs" This term should be defined

Section 15.207 Submission, Modification, Revision, and Withdrawal of Proposals. The rule governing late proposals has been revised in this section to emphasize that an offeror is responsible for timely delivery of its offer However, the rule also allows late offers to be considered if doing so is in the best interests of the Government (Government mishandling or fault no longer need be established to accept a late offer )

AIA believes that the proposed standard for consideration of late proposals is too open-ended. The rule should be revised to provide that, as a general rule, the contracting officer may accept late proposals only if the contractor has an "excusable delay" which prevented timely delivery of the offer, such as inclement weather or other circumstances which are beyond the contractor's control A reasonable time limit for acceptance of late offers (e.g., 48 hours) should be established, also In addition, determination of whether a late proposal is "timely" should be made before the proposal price or its contents are revealed In any event, the rule should ensure that consideration of late offers does not create a material competitive advantage for late offeror over offeror that submitted their proposals on time These changes would avoid excessive delay in contract award and eliminate unnecessary protests

## Section 15.405 Proposal Evaluation.

Preaward testing/product demonstration. Under $15405(a)$ use of preaward testing or product demonstration is authorized without a formal test plan, provided that all offerors are evaluated against the same criteria The evaluation method need not be disclosed in the solicitation.

AIA supports preaward testing and product demonstration without a formal test plan as long as the evaluation criteria are provided in the solicitation This would comport with the requirements in 15404 (e) and 15405 (a) that all evaluation factors that will affect contract award be stated clearly in the solicitation and that proposals be evaluated solely on the factors specified in the solicitation

Cost or price evaluation. Cost analysis is specifically prohibited under 15 405(a)(1) when there is adequate price competition if contracting on a firm fixed price or firm fixed price with economic price adjustment basis, unless the price of the otherwise successful offer is determined to be unreasonable AIA applauds this clear statement of policy

Past performance. Sections 15 404(d)(3) and 15 405(a)(2) discuss a significant factor in evaluation of a contractor's proposal - evaluation of the contractor's past performance This is required in every source selection, unless the contracting officer documents the reason past performance is not an appropriate evaluation factor.

AIA strongly supports use of past performance information in source selection as a good (although not infallible) indicator of a contractor's ability to perform future contracts. However, it is important to ensure that past performance information is used fairly, accurately and consistently when making determinations of nonresponsibility or evaluating offeror in order to award without discussions or make competitive range determinations Agencies should be required to notify an offeror of any negative past performance information that will be used in the source selection process and provide an opportunity for the offeror to comment on that information prior to its use. The source of the negative past performance information also should be identified to the offeror Past performance information related to a contract which is the subject of a dispute or litigation should not be relied upon in evaluating a contractor's past performance Such information is inherently suspect

Section 15 405(a)(2) should be modified to reflect these changes In addition 15 407(b) should be amended to require that all offeror be provided an opportunity to rebut negative past performance information prior to its use in the source selection process $15.407(\mathrm{~d})(4)$ and $15806(e)(4)$ should be rewritten to allow the contracting officer to disclose the source of negative past performance information

Section 15.406 Competitive Range. The regulation establishes a new standard for inclusion in the competitive range - only those offerors which have the greatest likelihood of award based on the factors and subfactors in the solicitation will be included in the competitive range

The contracting officer is allowed to further limit the competitive range in the interest of efficiency In planning an acquisition, the contracting officer may determine that the number of proposals that otherwise would be included in the competitive range is expected to exceed the number at which an efficient competition can be conducted An "estimate" of the greatest number of proposals that will be included in the competitive range for purposes of conducting an efficient competition among the most highly rated proposals may be indicated in the solicitation If the solicitation contains proper notification, the contracting officer may determine after evaluation of offers to limit the competitive range for the sake of efficiency.

AIA supports the concept of more realistic competitive range determinations, which will benefit both Government and contractors More realistic competitive range determinations mean that offeror will not be kept in a competitive range artificially of they are not likely to receive award Although this might cause a contractor to expend more in bid and proposal funds up front to ensure that its initial proposal has the greatest likelihood of being included in the competitive range, it also will avoid unnecessary expenditure of time and resources trying to remain in a competition when there is little likelihood of securing the contract Concomitantly, the Government will not expend time and resources unnecessarily on those same proposals Properly implemented, this policy will enable contractors to make intelligent decisions regarding appropriate use of scarce bid and proposal funds and will enable the Government to allocate its scarce resources appropriately, also.

AIA believes, however, that additional guidance should be provided in 15.406(b) regarding the factors to be considered in determining the size of the estimated competitive range at which an efficient competition can be conducted Recognizing that such a range is but an estimate and not a final predetermination of the competitive range, factors such as market research and historical data from previous similar acquisitions provide objective standards against which to measure the contracting officer's determination of the estimated range, but lack of resources does not

The amount of resources available to the Government to conduct the source selection should not be a factor in determining the most efficient size for the competitive range If it is used as a factor, both the Government and the contractor may expend resources unnecessarily on a source selection process which could exclude the very proposal that would result in the best value for the Government, simply because there were insufficient Government resources to evaluate that proposal.

AIA also recommends that Alternate II of 52 215-1 Instructions to Offeror - Negotiated Acquisition be amended to conform to the language of 15.406 (b) which states that Alternate II may be use to indicate the Government's estimate of the greatest number of proposals that will be included in the competitive range for purposes of conducting an efficient competition among the most highly rated proposals As currently written, Alternate II gives an absolute number of proposals that will be included in the competitive range

Section 15.407 Communications with Offerors. One of the major policy changes in the proposed rule is the shift to a narrower definition of "discussions" Communications with offerors prior to establishment of the competitive range are not considered discussions, and the contracting officer is not required to communicate with all offeror Once the competitive range has been established, communications with offerors are considered discussions. The contracting officer is required to conduct discussions at least once with all offerors in the competitive range, but is not required to hold discussions an equal number of times with each offeror Discussions remain open until contract award

AIA strongly supports increased communication between the Government and offeror to allow the contracting officer to better understand an offeror's intent and make an informed decision whether to determine a competitive range or award without discussions However, there is some concern that the ability to communicate with individual competing offeror prior to determination of the competitive range, coupled with the fact that communications need not be conducted with all offeror and the ability to conduct discussions more than once with individual members of the competitive range and request successive proposal revisions, could raise issues of fairness or the appearance of favoring one offeror over another.

As a practical matter, we believe that there are steps the Government can take to alleviate these concerns One is to ensure that contracting officers have the professional credentials and training necessary to exercise good business judgment. Another is to establish sufficient supervisory oversight to ensure that discretion is not abused. In addition, it should be emphasized in the Section 15407 (c) of the proposed rule that when discussions are held, the contracting officer is required to disclose to the offeror all known weaknesses and deficiencies in the offeror's proposal and provide an opportunity for the offeror to respond to those weaknesses and deficiencies

Section 15.409 Proposal Revisions. Elimination of the requirement for Best and Final Offers (BAFO's) and the requirement for a common cutoff date for proposal revisions is another major change in the way the Government proposes to conduct source selection

AIA supports these changes, which would streamline the current burdensome, expensive and time consuming acquisition process for both industry and the Government by allowing the Government to conduct discussions and request proposals as needed. However, it is important to ensure that no dispanty exists in the number of revisions requested or the cutoff dates that creates an unfair advantage for one offeror over the other offeror All offerors must be provided an equitable opportunity to compete on essentially the same basis

Section 15.410 Source Selection. In Section 15.410(b) it is stated that the basis for the source selection decision shall be documented and shall reflect the rationale for any tradeoffs among factors, subfactors and business judgments However, specific tradeoffs need not be described in terms of cost/price impacts, nor do tradeoffs need to be quantified in any other manner

While quantification of cost/other factor tradeoffs is not necessary in the solicitation (see comment to Section 15.102), AIA feels that it is appropriate to require more specificity in documenting the reasons for the source selection decision Therefore, we recommend that 15410 (b) be revised accordingly

Section 15.805 Preaward Debriefing of Offerors. AIA also has several concerns relative to preaward debriefings One of those concerns relates to delay of preaward debnefings under 15 805(b).

The proposed regulations require that the contracting officer promptly notify an offeror when its proposal is excluded from the competitive range or otherwise is excluded from competition. The regulations require further that the contracting officer provide a preaward debriefing to the offeror as soon as practicable However, the contracting officer is allowed to delay the preaward debriefing if providing a debriefing is not in the best interest of the Government at the time it is requested

AIA recommends that the proposed regulation be revised to state that preaward debriefings may be delayed only of there are compelling circumstances for the delay The contracting officer should be required to document the file with the supporting rationale for the delay Otherwise, there is potential risk that preaward debriefings could be delayed merely because it is not convenient to provide a debriefing at the time. This would essentially deprive the unsuccessful offeror of its right to a preaward debriefing

Under Section 15805 (c), the preaward debriefing should contain as much information as possible in order to make the debriefing "meaningful" [cf $15806(\mathrm{~d})$ ] This type of meaningful communication during the evaluation process should reduce the chance of protest, because the unsuccessful offeror should better understand the reasons for elimination from the competition and be more likely to feel that it has received fart treatment in the source selection process

AIA also proposes that 15805 and 15.806 be amended to allow an offeror which has received a preaward debriefing to request a postaward debriefing, as well The information provided in a postaward debriefing is more extensive than the information provided in a preaward debriefing and would be more useful to the unsuccessful offeror

## Part 52 Solicitation Provisions and Contract Clauses.

52.215-5 Facsimile proposals. 52 $215-5$ (d) states that the Government is not responsible for any failure attributable to the transmission or receipt of a facsimile proposal if the offeror chooses to transmit a facsimile proposal

AIA supports the use of facsimile proposals Facsimile proposals and electronic proposals will drastically reduce proposal turn-around time However, AIA also recommends that a facsimile proposal be treated the same as an electronic proposal is treated under $15206(\mathrm{c})$, which allows retransmission of unreadable proposals or (at the contracting officer's discretion) resubmittal of the proposal in another format
52.215-7 Annual representations and certifications - negotiation. Maintaining a system of required representations on an annual basis is an excellent idea. However, it should not be necessary for the offeror to certify to their existence The certification requirement in the proposed clause should be deleted, consistent with FAR Case 96-312 which modifies existing clause 52.215-35 to delete the certification requirement

## Chairman

Edward H Bersoff, Ph D
President \& CEO BTG, Inc

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C G Appleby, Esq
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President \& CEO
Varro Corporation

Charles L Nichols
Consultant
Science Applications
International Corporation

## Treasurer

Thomas G King, CPA
Partner
Deloitte \& Touche LLP

## Legal Counsel

James S Hosteler, Esq Kirkland \& Ellis

November 26, 1996

General Services Administration
FAR Secretariat (MVRS)
18th \& F Streets, NW, Room 4037
Washington, D.C. 20405
Reference: FAR Case 95-029
Federal Acquisition Regulations; Part 15 Rewrite--Phase I

## Dear FAR Secretariat:

The Professional Services Council (PSC) enthusiastically supports the ongoing effort to rewrite the Federal Acquisition Regulations (FAR) Part 15. We believe the proposed rule represents a significant step forward in dramatically reducing procurement cycle times and increasing system performance by eliminating non-value-added regulatory burden. We especially want to commend the government rulemakers for the highly constructive, open dialogue practiced during the redesign phase.

We believe that the changes in the FAR Part 15 Rewrite, taken collectively, will produce major improvements in the acquisition process and the quality/value of the goods and services being acquired by the government. Specific areas of improvement to the existing FAR include-

1) a clear embrace of best value principles;
2) support for oral presentations;
3) provision for a multiphase acquisition technique;
4) a coherent definition of evaluation factors and their application,
Charles H Cantus
Heather B Rosenker


FAR Part 15 Rewrite

## PSC Final Comments

## Best Value Definition [Proposed Parts 2.101]

PSC believes the definition is wholly inadequate, lacking a meaningful description of what best value truly is. The definition should be supplemented with a clear description of the range of contract requirements subject to the application of best value procedures. PSC strongly believes that the regulation must be further supported by a full description of best value, in order to educate and assist contracting officers and contracting officer's technical representatives (COTRs) in successfully using the technique.

Recommended Language: Definition-- "Best value is a process for determining whether an offer or quote is most advantageous to the government [delete remaining part of the sentence] based on a tradeoff among factors such as quality, past performance, cost/price and others as appropriate. Best value procedures are applicable to the full spectrum of contract requirements from off-the-shelf hardware and software to, at the other extreme, developmental, high risk requirements." (Additions are noted in bold)

Lowest Price Technically Acceptable [Proposed Parts 15.101, 15.402]
PSC has serious concern with any use of the phrase "lowest price technically acceptable" as having a perjorative meaning and otherwise driving buyers to conduct source selection on a low quality, cost auction basis. We believe the correct concept the government is trying to define is a conscious tradeoff among quality and cost/price factors. We strongly urge you to retitle the entire section "Best Value," and outline a range of appropriate factors used in a best value process with guidance on how relative weights can be assigned to evaluation factors.

Recommended Language: Delete Part 15.101 "lowest price technically acceptable", and defer to an expanded description of the "tradeoff process" as described in Part 15.102. See the next section for the proposed restructuring of 15.102 .

## Tradeoff Process [Proposed Parts 15.102, 15.402]

The proposed rule confuses existing best value practices by putting into regulations non meaningful guidance. Since the best value process is an issue of degrees, a process description is needed which outlines a range of alternatives that include lowest price selections through highest quality not lowest price selections.

After elımimating Part 15.101, restructure 15.102 to set forth a top down description of best value contracting, the essence of which is tradeoffs among quality and cost/price factors.

Recommended Language: Rename section 15.102 -- Best Value, then add the following description: Best value contracting involves a determination as to which proposal offers the

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best tradeoff between quality and cost/price. Under a best value source selection, the selection officials) determines the relative importance or weight assigned to selection criteria. Quality includes such factors as past performance, technical approach, and management capability. In general, the determination of relative importance or weights for selection criteria should be based on the good or service's uniqueness (routine, specialized, or developmental) and, for services, the level of the service (low, medium, or high technology). The relative importance or weight of quality versus cost/price factors will vary depending on where a given contract requirement is positioned along a spectrum-that is, the more unique and high level the contract, the higher the quality factors will be weighted, and the more routine the contract, the more cost/price may be weighted. After comparing proposals, officials judge which proposal represents the overall best value to the government and select it for contract award.

Recommended Language: Section 15.402, sentence 2, reword as follows -- "A best value decision in these acquisitions reflects the government's delete the remaining part of the sentence] desire to balance cost/price with quality factors such as past performance, technical approach, and management capability." (Additions are noted in bold)

## Multiphase Acquisition Techniques [Proposed Part 15.103]

PSC recommends revising this section to eliminate the government's ability to have a mandatory downselect before submitting a full proposal. Interested companies should be given an advisory notice about their apparent inability to be a serious contender for final award. This approach gives companies an early indication of their award prospects, allowimg them to make a business decision as to whether to spend scarce bid \& proposal funds to continue in a competition. Yet, companies who feel they can upgrade their positions by submitting a full proposal, may still be able to proceed in subsequent phases.

Recommended Language: 15.103(d) "The Government shall evaluate all offerors'.....and make [delete: either a mandatory or] an advisory downselect decision. Delete section 15.103(d)(1), which allows the government to make a mandatory downselect." (Additions are noted in bold)

Cost Realism [Proposed Part 15.405(1)]
Cost realism as an important evaluation factor is alluded to in a casual way in this section. PSC urges that language be included which provides a definition of cost realism as an analytical, multi-factor, and sophisticated process, especially where complex, high-risk developmental contract requirements are being procured.

Recommended Language: Part 15.405(1) Cost Realism is an analytical process which focuses substantially on the relationship between the work to be performed and the cost or price of manpower and other resources required to accomplish the work. The scope of cost realism analysis factors includes manpower, other direct costs (ODCs),
subcontractors, indirector costs, and contract unique aspects such as leasing, make-orbuy, risk sharing, and contractor furnished facilities (testing laboratory). Cost realism analysis must also consider the offerors past cost realism performance on prior comparable contracts. (Additions are noted in bold)

Past Performance [Proposed Parts 15.405(2), 15.407(b), 15.407(c), and 15.407(d)(4)] PSC has concern about the proposed regulations in several sections, where contracting officers are given discretion as to whether to allow a contractor to respond to negative past performance ratings obtained by the contracting officer. This guidance conflicts directly with the Federal Acquisition Streamlining Act (FASA) which establishes the precept that offeror should have the opportunity to respond to negative past performance information and document the file.

Recommended Language: At 15.405(a)(2)(ii), as a new sentence 3, insert the following: The contracting officer shall provide offerors an opportunity to respond to any negative past performance information, not previously responded to, coming from a variety of sources including 1) "report cards" contained in government data repositories; 2) reference checks in response to identified past contracts submitted by offerors; and 3) external sources such as market research data. (Additions are noted in bold)

Recommended Language: Section 15.407(b) Communications with Offeror Prior to Establishment of a Competitive Range -- insert the following statement: Communications relative to negative past performance, which have not been reclamed by offeror shall occur before determining the competitive range. (Additions are noted in bold)

Recommended Language: Section 15.407(c) Communications with Offeror After Establishment of a Competitive Range -- Revise sentence 2 to read as follows: "If a competitive range is established, the Contracting Officer shall conduct discussions at least once with all offerors in the competitive range to discuss all evaluated deficiencies in an offerors proposal including unresolved past performance issues. All past performance issues shall be brought to the offeror attention and disclosed during the conduct of discussions." (Additions are noted in bold)

Recommended Language: Section 15.408 Award Without Discussions -- amend the last sentence as follows: "The Contracting Officer may permit minor clarifications to allow proposal modifications that resolve ambiguities, or correct apparent mistakes and shall discuss any unresolved negative past performance issues." (Additions are noted in bold)

Downselect [Proposed Part 15.406]
With the proposed changes in the downselect process, it is essential that all offeror who do not make the downselect be informed of the downselect decision immediately and be provided a debrief.

Recommended Language: Section 15.406(d) -- amend sentence 2 to read as follows: "Written notice of this decision shall be provided to unsuccesful offerors [delete: at the earliest possible convenience] within three days and those offerors will be otherwise entitled to a debriefing in accordance with FAR Part 15.805." (Additions are noted in bold)

Technical Leveling [Proposed Part 15.407(d)(1)\&(2)]
This section changes the current FAR language to discourage technical leveling of multiple offeror technical approaches. PSC applauds these changes as needed improvements. A company's competitive advantage frequently is based on a unique technical approach, particularly niche small businesses. Attempts by Contracting Officers to dilute a technical approach is both unfair to the company and costly, in the form of alternative proposals.

Recommendation: Fully support the language as proposed.

## Communications [Proposed Part 15.407]

Communications is the key element to acquiring goods and services effectively. The proposed rule is a positive step forward in improving the buyer/seller communications. In order to give more positive guidance in this area, several specific changes are suggested.

Recommended language: 15.407 (b) Communications with offerors prior to the establishment of the competitive range. "Communication with offerors after receipt of proposals, but prior to establishment of the competitive range (or award, if award is to be made without discussions), is encouraged to be as extensive as possible to obtain information to facilitate the Government's decision either to award without discussions or determine the competitive range. Any negative past performance information should be communicated and clarifications should be allowed. Information received during this phase of communications is likely to provide context to the proposal in that it allows the Government to better understand both the offeror and the offeror's intent. Consequently, it should be used in proposal evaluation. Communications conducted pursuant to this paragraph-
(3) Are conducted to obtain information that enables the Government and the offerors to better understand both the Government's requirement and the proposer's offer. Resolution of ambiguities and other concerns (e.g., perceived errors, perceived omissions, negative past performance reports or perceived deficiencies) is encouraged." (Additions are noted in bold)

Recommended Language: 15.407(c) Communication with offerors after establishment of the competitive range. "Communication with offeror determined to be in the competitive range is accomplished through written and/or oral discussions (see 15.401). Whenever possible, oral discussions are encouraged as the better means to communicate with offerors. If a competitive range is established, the Contracting Officer shall conduct discussions at least once with all offerors in the competitive range to discuss all evaluated deficiencies in an
offerors proposal including unresolved past performance issues. All past performance issues shall be brought to the offerors attention and disclosed during the conduct of discussions. Discussions are encouraged to be as open and frank as possible. These discussions should include sufficient inquiry to determine which offer presents the best value to the Government. While the Government may rely upon agreements made during discussions for the purposes of proposal evaluations, such agreements shall be confirmed by proposal revisions) before contract award (see 15.411)." (Additions are noted in bold)

Recommended Language: 15407.(d) Improper discussions and communications. "The contracting officer and other Government personnel involved in the procurement shall not engage in-
(1) Favoring one offeror over another [delete remaining part of the sentence]; (2)\&(3) remain unchanged; (4) [Delete: Revealing names of individuals providing reference information about an offeror's past performance]."

## Proposal Revisions [Proposed Part 15.409(a)]

Too much latitude is given in the new guidance related to proposal revisions. The result likely will be a requirement for multiple submissions which increase costs for the contractor and the government making the investment in proposing greater. Large investments in competitions without award success has been a contributing factor in the increases in bid protests. Guidance which discourages multiple proposal revisions is recommended.

Recommended Language: 15.409(a) Amend sentence 1 to read as follows: "The contracting officer may request specific portions of an offeror's proposal be revised during discussions, [delete: as often as needed] but these should be kept to a minimum and should maintain adherence to original performance standards set forth in the solicitation. An efficient approach should be taken to eliminate excessive or extensive resubmissions) of proposal information that may not be necessary for evaluation. The portions) of the proposal that is/are not changed or effected by the offeror's proposal revision need not be resubmitted. Complete proposal resubmittals should not be required. If the revision effects the estimated cost or price of the offeror, the offeror may submit only that portion of the cost proposal effected by the proposal revision." (Additions are noted in bold)
15.409(b) Add the following new second sentence: Notification shall be made to these offerors in accordance with 15.406 (d). (Additions are noted in bold)

# COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS 

1250 Eye Street N.W., Suite 1200
Washington, D.C. 20005
(202) 371-8414

General Services Administration
FAR Secretariat (MVRS)
Novernber 26, 1996
18th \& F Streets, N.W
Washington, D.C 20405

Subject: FAR Case No. 95-029 15.406 -Competitive Range
FAR Case No, 96-303; Competure Range Determinations

Dear DAR Council and CAA. Council
The undersigned members of the Council of Defense and Space Industry Associations (CODSIA) appreciate the opportunity to comment on the proposed rules which were published in the Federal Register on July 31, 1966 and September 12, 1996 (FAR Case No 96-303, 61 Fed. Reg 40116 and FAR Case No. 95-029; 61 Fed Reg. 48380 respectively). Under this submission we are submitting our comments on FAR Case No. 96-303, "Compeutive Range Determinations." With the agreement of the FAR Part 15 Rewnte Committee Chair, CODSIA is limiting these comments to the proposed "15.406 - Competitive Range" and those parts of proposed " $52.215-1$ Instructions to Offeror -Negotiated Acquisitions" that relate specifically to competitive range determinations. We will forward the remainder of our comments on the FAR Part 15 Rewrite in the near future

Formed in 1964 by industry assocrations with common interests in the defense and space fields, CODSIA is currently composed of ten associations representing over 4,000 member companies across the nation Participation in CODSIA projects is voluntary. Therefore, a decision by any member association to abstain from participating in a particular activity is not necessanly an indication of dissent

CODSLA members agree that it is appropriate to raise the standard for determination of the competitive range to a standard higher than "reasonable chance of being selected for award." However, we strongly recommend language that modifies the standard from "greatest likelihood of award" because the communications that will ensue from the FAR Part 15 Rewrite Committee's proposed 15.407 should permit the Government to establish the competitive range on a more realistic basis. We believe that under our revised
15.406(a) protests previously based on the present FAR's "reasonable" and "doubt" standard can be eliminated. See FAR 15.609.

CODSIA members further agree that "efficiency" is a proper goal of all procurement actions. A more efficient acquisition benefits the industry as well as the Government. Nevertheless, we are concerned that the proposed 15406 elevates "efficiency" as the sole focus of an acquisition Rather, we beheve "efficiency" while important, is but one of several factors, all of which are driven primarily by the complexity and criticality of the requirement. We realize that the FAR Rewrite Committee does not intend this result, but the proposed language may be interpreted to substitute "efficiency" for evaluation. Consequently, CODSIA strongly recommends deleting all of 15.406 (b) and much of the proposed language for 15.406 (c).

We are especially pleased to see proposed language establishing a connection between elimination from the competitive range and debriefings. In the past, many protests have been filed and then subsequently withdrawn when the offeror received an expensive and tume-consuming debriefing in the form of a contracting officer's bid protest report. In order to eliminate as many protests as possible, we not only agree that an offeror excluded from the competitive range should receive an informative and timely debriefing as soon as possible, we are adamant that the debnefing must occur before award To do otherwise (1.e., delay a debriefing until after award), is a disservice to any offeror who made a legitimate and expensive effort to obtain a government contract. With this in mind, we have recommended language for 15 406(e) that essentially makes a debriefing required within five days following the offeror's whiten request. Given the Government's ability to communicate as set forth in the Rewrite Committee's proposed 15.407, and the ongoing training of government acquisition professionals, we believe that an informative and tamely debriefing at the competitive range phase of an acquisition will result in significant efficiencies to the acquisition process, far fewer protests, and continuing respect for the integrity and professionalism of government acquisition personnel.

We appreciate the opportunity to comment on the Rewrite Committee's proposal on the competitive range. It is a difficult area of procurement, but nevertheless one of the most fundamental areas. It is somewhat difficult to comment only on Phase I when we have not had the opportunity to review and evaluate how the proposed changes in Phase I will interact with the Phase II pricing-related issues Nevertheless, the FAR Part 5 Rewnte Committee is to be congratulated on its efforts and we encourage further efforts by the Councils to simplify the acquisition process for industry and Government alike.

If you have any questions about CODSIA's comments, we will be pleased to make available representatives from CODSIA's Operating Committee who are evaluating the proposed FAR Part 15 Rewrite.

## Sincerely,

See CODSIA Signatories Next Page
cc- Adminstrator, Office of Federal Procurement Policy
Deputy Under Secretary of Defense for Acquisition Reform
Director of Defense Procurement

# FAR Part 15 Rewrite Committer's Proposed 15.406. Competitive Range 

(a) The contracting officer shall establish a competitive range for the purpose of conducing written or oral discussion (see $15409(c)$ ) The competitive range shall include proposals having the greatest likelihood of award based on the factors and subfactors in the solicitation
(b) In planning an acquisition, the contracting officer may determine that the number of proposals that would otherwise be included in the competitive range is expected to exceed the number at which an efficient competition can be conducted In reaching such a conclusion, the contracting officer may consider such factors as the results of market research, historical data from previous acquisitions for similar supplies and services, and the resources available to conduct the source selection. Alternate II of 52.215-1, Information to Offerors-Competitive Acquisition, may be used to indicate the Government's estimate of the greatest number or proposals that will be included in the competitive range for purposes of conducting an efficient competition among the most highly rated proposals
(c) After evaluating offers, the contracting officer may determine that the number of proposals that would otherwise be included in the competitive range exceeds the number at which an efficient competition can be conducted Provided the solicitation notifies offeror that the competitive range can be limited for purposes of efficiency, the contracting officer may limit the number or proposals in the compentive range to the greatest number that will permit an efficient competition among the most highly rated proposals The solicitation provision at $\$ 2 \mathbf{2 1 5 - 1}$, Instruction to Offerors-Competitive Acquisition, reserves the contracting officer's night to limit the competitive range for purposes of efficiency
(d) If the contracting officer determines that an offeror's proposal is no longer in the competitive range the proposal shall no longer be considered for award. Written notice of this decision shall be provided to unsuccessful offeror at the earliest practicable tune (see $15.803(\mathrm{a})(1)$ )
(e) Offeror excluded from the comperave range may request a debriefing. When a debriefing is requested, see 15805

ISSUE
Section 15.406(a), establishment of the competitive range

## DISCUSSION

Subparagraph (a) changes the standard currently in effect for determining the competitive range ("all proposals that have a reasonable chance of being selected for award-" see FAR 15,609(a)) The standard has been raised to "greatest likelihood of award" in 15.406 (a) and "most highly rated proposals" in 15.406(c). CODSIA agrees that, assuming proper communications between offerors and the Government (as envisioned elsewhere in the proposed regulation, 1 e 15.407), it is appropriate to raise the standard.

However, CODSIA members believe that the standard has been raised too high. The standard has been raised too high because, even assurning that communications are useful in determining the efficacy of some proposals and the futility of others, there will still be a range of proposals where the "greatest likelihood of award" or "most highly rated proposal" standard will eliminate them prior to discussions with no opportunity to revise their proposal. Consistent with the Competition in Contracting Act, these proposals should receive continuing attention by the evaluators At the moment, having two different phrases to describe the proposals left in the competitive range is confusing and would lead to unnecessary protests. Moreover, using similar language contained in the present FAR will only facilitate the necessary training programs that are the foundation of the proposed rewrite.

## RECOMMENDATION

We strongly recommend raising the standard for inclusion in the competitive range to those proposals having "more than a reasonable chance of being selected for award "

ISSUE
15.406(b) acquisition planning and efficient competitions

## DISCUSSION

Subparagraph (b) of this section appears to restrict the concepts of full and open competition and competitive range determinations based on an evaluation Neither of these restrictions are required by FARA, § 4101, which amended 10 U.S.C. 2305(j) and 41 U.S C. $253(\mathrm{~h})$ to "ensure that the requirement to obtain full and open competition is implemented in a manner that is consistent with the need to efficiently fulfill the Government's requirements." Under FARA, §4103, a contracting officer is permitted, but not required, to limit proposals in the competitive range "to the greatest number that will permit an efficient competition among the offerors rated most highly " In subparagraph (b) as proposed, however, that determination can be made during acquisition planning. In other words, because FARA makes no reference to eliminating offerors from the competitive range as part of an "efficient" acquisition plan, the proposed language in 15.406 (b) does not appear to be an accurate reflection of the statute. We strongly oppose a regulation where "efficiency" is used as the basis for limiting competition in advance of an evaluation of the proposals (which the FAR Rewnte Comrnittee may not intend). As drafted, 15.406 (b) appears to be unsupported by FARA and contrary to 10 U.S.C. $\S 2305(\mathrm{~b})(4)(\mathrm{A})$ For example, if a solicitation receives 30 proposals, the contracting officer may (but is not required to) limit the number in the competitive range "to the greatest number that will permit an efficient competition," but all 30 proposals must be evaluated before "the greatest number" can be identified.

Clearly, there is nothing in this provision that instructs the Government to limit or "pieevaluate" the competitive range based on speculation during "acquisition planning" that such a large number of offers will be received so as to preclude an "efficient" competition The law assumes an evaluation as a condition precedent to the establishment of the competitive range

Based on the above, we strongly recommend that all of subparagraph (b) be deleted. CODSIA endorses the proposal that the government's marketing research and past procurement history be a factor in acquisition planning. We recommend that the Government place that information in the solicitation for potential offeror to review and evaluate.

## RECOMMENDATION

We strongly recommend that all of $15406(\mathrm{~b})$ be deleted

ISSUE
$15.406(\mathrm{~b})$, Alternate II of $52.215-1$, Information to Offeror - Competitive Acquisition.

## DISCUSSION

The proposed language encourages the use of Alternate II when government acquisition personnel know, or think they know, prior to release of the solicitation, the greatest number of proposals that will be included in the competitive range. As outlined above, this appears to require a decision to be made in the absence of information on the actual number of solicitations that will be received, their content, and how they will be evaluated

CODSIA members believe that the correct reading of FARA § 4103, "Efficient Competitive Range Determinations," authorizes the contracting officer to limit the number of offeror included in the competitive range only after proposals have been received and initial evaluations have been conducted in accordance with criteria specified in the solicitation As noted previously, there is no statutory basis for setting such a limitation poor to release of proposals Further, it is not efficient, appropriate or legal to authorize a curoff--at any point dung proposal evaluation-based on any factors (egg., "the resources available to conduct the source selection," "market research") other than those evaluation factors or subfactors set forth in the solicitation. Any predisposed cutoff of the competitive range should be based, not on an arbitrary number perhaps prematurely identified by the contracting officer, but rather on a minimum evaluation score This approach retains the concept of efficient competition while paining it with the other essential component, fair competition. This latter type of competitive range limitation is consonant with our recommended procedure set forth in 15 406(a), which enables the
contracting officer to limit the number of proposals in the competitive range after evaluating offers. Moreover, and when appropriate, our recommended procedure has the additional advantage of allowing a contracting officer to identify material breakpoints in the evaluation process.

In summary, we support the approach contained in § 4101 of FARA that promotes "efficient" competitions, but believe that the FAR Rewrite Committee has gone well beyond the statutory language.

## RECOMMENDATION

We recommend that 15.406 (b), $52.215-1$, Alternate II, be eliminated. Further, we recommend that such factors as "the resources available to conduct the source selection" should not be utilized as a primary criterion un source selection.

ISSUE
15.406(c) - competitive range determinations based on "efficiency"

## DISCUSSION

CODSIA members stress that Government "efficiency" is not an evaluation criterion and under virtually all circumstances should not constitute a basis to eliminate a proposal from further consideration. This is particularly so if the communications now permitted by the proposed regulation in 15.407 are properly used. During those communications, the contracting officer can make an informed decision on whether a particular proposal has (as we suggest) a "more than a reasonable chance of being selected for award"). The focus of the government's effort should be on a fair evaluation of the proposal, not the efficiency of the acquisition process or the availability of contracting personnel. The language we recommend maintains the rights of the contracting officer, assumes that proper and continuous training will be provided to acquisition personnel, and permits the communications during the evaluation process to maintain the "efficient" acquisition process that both the Government and industry desire.

CODSIA members recognize, however, that circumstances may occur where the acquisition process may benefit by reducing the number of offerors in the competitive range solely for the sake of "efficiency." In those rare cases, we agree that a contracting officer may limit the competitive range solely in the name of efficiency, but may in no case reduce the number to less than three.

## RECOMMENDATION

We recommend that most of the language proposed in 15.406 (c) be deleted and that the standard of establishing the competitive range be proposals having "more than a reasonable chance of being selected for award" and that the phrase "most highly rated proposals" be deleted.

ISSUE
$15.406(\mathrm{e})$, optional preaward debriefing.

## DISCUSSION

We agree with the Rewnte Committee's proposal that offerors be informed as soon as they are eliminated from the competitive range. Consistent with the time frames in FASA for post-award debriefings, we have recommended that an offeror eliminated from the competitive range must request a debriefing in writing within three days of receiving notice of its elimination

However, 15.406 (e) as proposed allows contracting officers to delay a debriefing until after the contract is awarded despite the limited amount of information that may be disclosed in a preaward debriefing pursuant to proposed 15.805 Further, 15.604 (e) does not mention FARA's admonition that "contracting officers shall make every effort to debnef the unsuccessful offeror as soon as practicable." FARA, $\$ 4104$. Since there may be a substantial time lag between notice of exclusion from the competitive range and eventual award, we believe that it is absolutely essential that offerors be provided a debriefing at the time they are eliminated from the compentive range, not after award. Immediate and informative debriefings will have the effect of preventing, rather than increasing, protests because most unsuccessful offerors are more interested in receiving information that will allow them to make future proposals more effective.

It appears that failure to provide an immediate and quality debriefing will only continue protests as offerors attempt to learn from the protest process (as distilled from attorneys under a protective order) what they could not learn from a timely and "efficient" ( 1 e, useful and informative) debriefing. In thus regard, we note the expenence of the Department of the Treasury's IRS has been that timely and informative debnefings virtually climate protests, demonstrate professionalism on the part of the source selection team and promote integrity and confidence in the IRS procurement system. We have every reason to believe that the IRS expenence would be repeated throughout the federal agencies. The Government's ability to reduce protests will be contingent on the quality and timing of the Government's debriefing to excluded offerors, not the standard for establishing the competitive range The Government's emphasis should be on eliminating frivolous or malformed protests, not meritorious protests.

## $95.029-75$

## RECOMMENDATION

Proposed section $15.406(e)$ must be revised to require that a preaward debriefing be conducted upon the written request of the disappointed offeror and be conducted withun five days of receipt of that request unless both the offeror and the Government agree to another date．

In order to assist the FAR Part 15 Rewnte Committee in understanding the precise changes we recommend to the proposed regulation，we have provided Attachments 1 and 2 These attachments conveniently juxtapose the Rewrite Committee＇s proposed regulations（which may or may not be line out）next to our proposed revisions which appear in bold face type

### 15.406 Competitive range.

(a) The contracting officer shall establish a competitive range for the purpose of conducting written or oral discussions (see $154097(\mathrm{c})$ ) The competitive range shall include proposals having the greatest likelihood of ward more than a reasonable chance of being selected for award based on the factors and subfactors in the solicitation. After evaluating offers, the contracting officer may limit the number of proposals in the competitive range to those with more than a reasonable chance of being selected for award. Solely for reasons of efficiency in the source selection process, the contracting officer may at times limit the proposals in the competitive range to the offerors with more than a reasonable chance of being selected for award, but in no event to fewer than three.
(b) In planning an requisition, the-contreatng officer may determine that the number of propesals that wouldotheanse be melded in the eempetutwe ruses expected to exceed the fumber-atwhich en efficient competition can beendueted. In reaching such erenclucion, the centrantug officer may-consider-such factors the results of marketreseareh, historical data from previews acquisitions for similar supplies and server, and the resources ailablete
 Anequinition, may be used to indicate the Governments estimate of the greatest mumbrior
 ermpettion among the fest highly rated proposals.
(e) After evaluating offers, the eentrectug officer may determine that the number- $\theta$ f proposals that would otherwise be included in the competitor range eveeeds the number at Which an offeiont competition cat be-cenduted. Provided the solioitetron notifies efferent that the competitur range ban be limited for purposes of effievey, the enduring officer may limit

 Offerers-Cornpetitive-Acquisition, reserves the contracting officer's might to limit the competitive range fer purposes of efficiency.
(d) If the contracting officer determines that an offeror's proposal is no longer in the competitive range the proposal shall no longer be considered for award Written notice of thus decision shall be provided to unsuccessful offerors at the earliest practicable time (see 15.803(a)(1))
(e) Offeror excluded from the competitive range may request a debriefing. When a debnefing is requested see- 15805 the request must be in writing and made within three days following receipt of the notice. The contracting officer shall make every effort to debrief the unsuccessful offeror as soon as practicable in accordance with $\mathbf{1 5 . 8 0 5}$ but no later than within five days of the request unless the contracting officer and the offeror mutually agree to a later date

Attachment 2
52.215-1 Instructions to Offerors-Negotiated Acquisition.

As prescribed in 15.208(a), insert the following provision:
Instructions to Offerors-Negothated Acquisition (Date)
(a) Definitions
(1) Time, if stated as a number of days, will include Saturdays, Sundays, and Federal holidays.
(2) In writing or written means any worded or numbered expression which can be read, reproduced, and later communicated, and includes electronically transmitted and stored information.
(3) Revision means a revision of an offer requested by the contracting officer during discussions.
(4) Discussion means communication after establishment of the competitive range between the contracting officer and an offeror in the competitive range.
(5) Communication means interchanges with offeror which are not discussions They may be conducted to obtain information which explains or resolves ambiguities or for minor clarifications.
(b) Amendments to solicitations. If this solicitation is amended, all terms and conditions which are not modified remain unchanged. Offerors shall acknowledge receipt of any amendment to this solicitation by the date and time specified in the amendments).
(c) Submission, revision and withdrawal of offers. (1) Unless other methods (e.g electronic commerce, facsumile, etc.) are permitted in the solicitation, offers and modifications to offers shall be submitted in paper media in sealed envelopes or packages (i) addressed to the office specified in the solicitation, and (ii) showing the tome specified for receipt, the solicitation number, and the name and address of the offeror
(2) The first page of the offer must show--
(1) The solicitation number;
(ii) The name, address, and telephone number of the offeror;
(iii) A statement specifying the extent of agreement with all terms, conditions, and provisions included in the solicitation and agreement to furnish any or all items upon which prices are offered at the price set opposite each item,
(iv) Names, titles, and telephone numbers of persons authonzed to negotiate on its behalf with the Government in connection with this solicitation, and
(v) Name, title, and signature of person authorized to sign the offer. Offers signed by an agent shall be accompanied by evidence of that agent's authority, unless that evidence has been previously furnished to the issuing office.
(3) Offerors are responsible for submitting offers, and any requested revisions to them, to the Government office designated in the solicitation on time Unless the solicitation states a specific time, the time for receipt is 430 p m., local time, at the designated Government office on the date that offers or requested revisions are due. Offers, and requested revisions to therm, that
are received in the designated Government office after the time for receipt are "late" and shall be considered at the Source Selection Authority's discretion.
4) Unless otherwise specified in the solicitation, the offeror may propose any item or combination of items.
(5) Offers submitted in response to this solicitation shall be in the English language and shall be in terms of U.S. dollars, unless otherwise permitted in the solicitation.
(6) Offeror may not revise offers unless requested by the Contracting Officer
(7) Offers may be withdrawn at any time prior to award. Withdrawals are effective upon receipt by the Contracting Officer-
(d) Period for acceptance of offers, Offers in response to thus solicitation will be valid for the number of days specified on the solicitation cover sheet (unless a different period is proposed by the offeror.
(e) Restriction on disclosure and use of data Offerors who include in their proposals data that they do not want disclosed to the public for any purpose or used by the Government except for evaluation purposes, shall--
(1) Mark the tulle page with the following legend

This proposal includes data that shall not be disclosed outside the Government and shall not be duplicated, used, or disclosed--in whole or in part-for any purpose other than to evaluate this proposal. If, however, a contract is awarded to this offeror as a result of--or in connection with-the submission of this data, the Govemment shall have the right to duplicate, use, or disclose the data to the extent provided in the resulting contract This restriction does not limit the Government's right to use information contained in this data if it is obtained from another source without restriction. The data subject to this restriction are contained in sheets [insert numbers or other identification of sheets]; and
(2) Mark each sheet of data it wishes to restrict with the following legend:

Use or disclosure of data contained on this sheet is subject to the restriction on the title page of this proposal
(f) Contract award (1) The Government intends to award a contract or contracts resulting from this solicitation to the responsible offeror(s) whose offers) conforming to the solicitation represents the best value.
(2) The Government may reject any or all offers af such action is in the Government's interest
(3) The Government may waive informalities and minor irregularities in offers received.
(4) The Government intends to evaluate proposals and award a contract without discussions with offerors (except communications). Therefore, each individual offer should contain the offeror's best terms from a cost or price and technical standpoint. The Government reserves the right to conduct discussions if the Contracting Officer later determines them to be necessary if the Contracting Officer detentes that the number of proposals that would otherwise be in the competitive rangoeweeds the number wheh-an efficient compertioncan
beenducted, the Gentrocting Officer may limn the number of proposals in the competitive range to the greatest number that will perm inefficient competition among the mech highly rated proposals.
(5) The Government reserves the right to make an award on any item for a quantity less than the quantity offered, at the unit cost or prices offered, unless the offeror specifies otherwise in the offer.
(6) Communications with offeror after receipt of an offer do not necessarily constitute a rejection or counteroffer by the Government
(7) The Government may determine that an offer is unacceptable if the prices proposed are materially unbalanced between line items or subline items. An offer is materially unbalanced when it is based on prices significantly less thancost for some work and prices which are significantly overstated in relation to cost for other work, and if there is a reasonable doubt that the offer will result in the lowest overall cost to the Government, even though it may be the low evaluated offer, or it is so unbalanced as to be tantamount to allowing an advance payment.
(8) The Government reserves the night to make multiple awards if, after considering the additional administrative costs, it is in the Government's best interest to do so.
(9) Award of a contract is effective upon transmittal of the contract signed by the Government.
(10) The Government may disclose the following information in postaward debriefings to other offerors. (i) the overall evaluated cost or price and technical rating of the successful offeror; (ii) the overall ranking of all offerors, when any ranking was developed by the agency during source selection, (iii) a summary of the rationale for award; and (iv) for acquisitions of commercial end terns, the make and model of the tern to be delivered by the successful offeror.

## (End of provision)

Alternate I (Date). As prescribed in 15-208(a)(1), substitute the following paragraph (f)(4) for paragraph (f)(4) of the basic provision.
(4) The Government intends to evaluate proposals and award a contract after conducting discussions with responsible offeror s whose proposals have been determined to be within the competitive range If the Contenting Officer determines that the number of proposals that-weuld
 beenducted, the Gentrecting Officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient cempettion ament the most highly fated proposals, Therefore, An offeror's initial offer should contain the offeror's best terms from a price and technical standpoint.

Alternate II (Date). As prescribed in 15 208(a)(2), add the following to paragraph (f)(4). (4) If the Gentractry Officer-owerises the Government's right to limit the number of proposals in the comped range, the compettwe rang wall be limited to ne ne re than
$\qquad$ (insert number).

1 Recommend changing 15000 , for clarification purposes, to state the following "This part prescribes . acquisitions that do not use simplified acquisition procedures (see FAR Part 13), sealed biddıng (see FAR Part 14), or construction and architect-engineerıng contracts (see FAR Part 36). This section applies to both competitive and noncompetitive acquisitions"

2 Recommend deleting the word "sıgnificantly" from 15001 , because it means more than may be sought by the contracting officer It restricts the consideration of cost or price to three broad categories rather than keeping it in the context of a tradeoff 15 404(f)(1) also includes the word "significantly "Recommend deleting this word, because you must then quantify what "significant" means This may be even more subjective than stating,"price is less important than technical quality .or price is more important than technical quality "

3 In 15001 , recommend including the defintions of the terms "discussions," "communications," "negotiation," and "cost realism."

4 The language in 15.102(a)(3) which reads, "Specific tradeoffs need not be described in terms of cost or price impacts nor do the tradeoffs need to be quantified in any other manner" appears to contradict case law and 15410 (b) which requires documentation of the trade-offs made in the award decision See also 15 410(b)
5. The proposed language in 15.103 (d)(1) requires that there be sufficient offeror information, including cost information, so as to constitute a binding offer before the Government may make a mandatory down-select. In practice, this exceeds the present requirement for eliminatung an offer from the competitive range (offers that no longer stand a reasonable chance of award before elumination from the competition). Such elimination can now occur without there being sufficient information for a binding contract Although we believe that offers should not be elıminated by mandatory downselect on the basis of responses to vague and nebulous "requirements," the proposed regulation is overtly strict and inflexible and could well lead to significant protest litigation.

6 Recommend that $15103(\mathrm{~d})(2)(111)$ be clanfied to state that an offeror can be debriefed after it has acceded to an advisory down-select determınation. In addition, 15103 (d)(2)(iii) is out of sequence and should be renumbered as 15.103(d)(3)

7 Recommend that 15 201(b) be amended to address one of the most critical purposes of exchanging information This purpose is for the Government to be able to survey the marketplace capability to meet its requirement and to be able to shape its needs through information exchange. The draft is now silent on this purpose

8 Recommend revising the language in $15.202(a)$ to read, "Formal proposals including technical capabilitres and cost/pricing information should only be sought when there is a definite intention to award a contract " The proposed language now advises that RFPs are only to be used when there is a definite intention to award a contract; however, 15.201 (c)(6) encourages use of draft RFPs.
9. Recommend the present contract section labeling be retained. At the very least, delete the use of the model contract format outlined in 15.203 until a cost/benefit analysis has been performed. The purpose of the analysis would be to ascertan the benefits of changing the present contract format versus the costs of changing and reprogramming automated systems throughout the Federal government. Further, the proposed model contract format does not appear to make any provision for the inclusion of CLIN pricing
10. If the model contract format in $15203-4$ is adopted, please provide rationale for varying where a clause is located depending on if $1 t$ is incorporated by reference or if it is printed in full text. One benefit of the present structure, supported by the matrix which specifies location, is that someone can quickly find a clause or determine if it has been omitted. As proposed, clause location will be more difficult to pinpoint. In addition, it appears that any clauses incorporated in full text are not included in Section IV but are treated as though "tallored" and included in Section III. Does this now mean that all FAR clauses will be eligible to be incorporated by reference?
11. Recommend modifying 15 205(b) and (c)(2)to clarify that RFP amendments may ordinarily be issued in a manner other than which the RFP itself was issued if the solicitation or appended documents so provide.

12 As presently written, 15.205 (f) would require the Government, if possible, to resolicit all initial offerors if the successful offer involves a deviation from the solicitation requirements, no matter how minor the deviation. This unnecessanly curbs the Government's discretion Resolicitation of any offerors should only be required where the departure is substantial. In addition, resolicitation of offerors already eliminated from the competition should only be required in unusual cases where the departure is so substantial that the change it makes to the requirements would normally mandate cancellation and resolicitation
13. In 15.209 (c) and 15.809 (b), it is unclear why Standard Forms would be maintaned which would have to be "appropriately modified". If the model contract format is adopted, the forms should be changed. Why would we need standard and optional forms for the same purpose(s)?
14. It is unclear what $15.402(b)$ is attempting to say.
15. 15.403 (b)(6) limits the role of the SSA to selecting the "best value" offer. Since 15.101 offers an alternative method, recommend substituting the following language, "Select the offeror most suitable for award based on the established selection method
16. While factors and subfactors should not be used to evaluate areas of insignificance, 15 404(b)(1) goes overly far in mandating that use of factors and subfactors be limited to "key areas" If 15 404(b)(1) is to be retained at all, the word "key" should be deleted.

17 Recommend the first sentence in 15 405(a)(2)(ii) be rewntten to read, "The solictation ...(including those for Federal, State, and local Governments and for the private sector).."

18 Recommend in 15.405 (a)(4) that a time frame be provided as to when this information can be provided Initial technical evaluations should be completed before providing any cost information for a technical evaluation of costs The proposed language makes it appear that SSAs, if they desire, give this information at any time which could potentally lead to prejudice in evaluation.

19 Recommend the second sentence of 15406 (a) be changed to read as follows' "Except as provided in subsection (b) below, the compettive range shall. ." This change would accommodate limiting the compettive range as discussed in 15 406(b). In order to best preserve the Government's flexibihty in determinung the compettive range and to maintain consistency with 15406 (a), 15.406 (b) and (c) (and also $15609(\mathrm{~b})$ and (c)) should be modified to delete the phrase "the most highly-rated proposals" and replace it with the phrase "those proposals having the greatest likelihood of award" Highly-rated proposals which do not stand a realistic chance of award should not be retained in the competitive range, while proposals, which though initially lower-rated, offer innovative solutions which might gain award through the discussion process should be retained in the competition.

20 In 15.406, there are other reasons besides efficiency for limiting the competitive range, e.g., too high a pnce for the low technical merits offered. Contracting officers should be provided the discretion to eliminate offers on other than an efficiency basis. Recommend language be included to allow this flexibility. In 15.406(a), the contracting officer determines the competitive range, yet 15403 provides that the Agency Head may appoint another indıvidual for a particular procurement. Recommend modifying the language in 15.406(a) to state "..or alternative individual as designated by the Agency Head in accordance with 15.403 "

21 The guidance for treatment of defictencies in 15.407 is unclear Errors and omissions within a proposal may be obvious from the proposal, but, unless these can be treated as a mistake, they will not be corrected Likewise, it does not appear that the contracting officer will allow deficiencies to be corrected unless negotiations are commenced with the offeror after competitive range is established However, if clarification communications are conducted, a volunteered revision could be accepted under the proposed late offer procedure if the SSA so choses Recommend reviewing this policy to determine if this practice is fair and will provide the intended outcome
22. In 15410 , please provide a definition of what is meant by "integrated comparatıve assessment." In addrtion, recommend that the word "shall" be deleted or changed to "should" or "may."
23. In 52 215-1 (c)(3), recommend changing the phrase "Source Selection's Authonty's" to "contracting officer's," because the decision for considering "late" offers should rest with the contracting officer as specified in 15 207(b) and (c)

Attached to these comments is a graph showing the distribution of the contractor's costs and staffing along the procurement timeline (The chart was originally prepared by the information Technology Association of America for a Trail Boss presentation.) While actual procurements will vary, this chart is representative of a great many negotiated procurements As the chart shows, high level costs typically begin shortly before the RFP, continue through proposal, and then resume at an even higher level through the period leading to BAFO In a procurement that follows this cost distribution model, a downselect, even after initial proposals have been submitted, will avoid large procurement period costs And if a downselect occurs before full proposals are required e.g, in a multiphase source selection on the basis of a limited submission - the major portion of the offeror's costs can be avoided

Several objections have been raised to early downselects One is the concern that the Government will not have effective competition But nothing requires the Government to exclude offerors to a point where meaningful competition is lost The Rewrite says otherwise As long as the Government retains a sufficient number of offerors, it will continue to reap the price and quailty benefits that competition brings Over time, in fact, competitive pressure will increase rather than decrease, because if companies can concentrate their resources on high probability procurements they will waste less bid and proposal money on longshots

Another concern raised is that on occasion a company that might ultimately win will not make the cut While this may happen in some procurements, we do not think it will happen often It is true that sometimes an excluded company might have been able to catch up. But most of the time it will be a better investment to place the team where the playing field is still competitive if companies don't tilt at as many windmills, windmilh-titing budgets can decline

While EDS supports the concept of early downselects, we believe that the rewrite would benefit from some guidance to contracting officers on how to make them

First, sometimes a solicitation's approach or selection criteria change during a solicitation The contracting officer should be careful not to exclude an offeror on the basis of selection criteria that may become obsolete Nothing will undermine the credibility of a procurement faster than a discovery that the winner's solution carried the same feature that resulted in another offeror's earlier exclusion from the competitive range.

Comments on FAR PART 15 Proposed Rewrite - Phase I

## ELECTRONIC DATA SYSTEMS

November 26, 1996

EDS provides Information Technology products and integration services throughout the world The Government Services Group of EDS does close to a billion dollars of business annually with the federal government, most of which comes from negotiated procurements Accordingly, EDS has a great deal of interest in the ground rules that will be in place and, respectfully, submits these comments on Phase 1 of the re-write of FAR Part 15

Overall, EDS strongly supports the proposed revisions embodied in Phase 1 of the rewrite. EDS endorses the basic principles that underlie the proposed changes - limiting the competitive range more expeditiously and more efficiently, increasing communications between Government and industry, and retooling the process to take on more of the aspects of commercial business This will benefit Government and it will benefit industry Although the proposed changes will involve risk, EDS believes that the risk involved will be manageable and that, on balance, all will gain by the changes

Although EDS supports the rewrite as a whole, EDS submits the following suggestions for clarification or modification

## 1. The advantages of efficiently and fairly narrowing the competitive range

 A controversial aspect of the Part 15 rewrite is the discretion given to contracting officers to narrow the competitive range and retain only offerors with the greatest likelihood of award The rewrite refers to this action as a "downselect"EDS strongly supports this increase in the contracting officer's discretion It will enable all parties to marshal their resources and use them most effectively From the Government's perspective, procurement personnel can concentrate their review and negotiation time on fewer but stronger potential offers And from a potential offeror's perspective, early downselects will help a company focus its bid and proposal resources in places where they are most likely to bear fruit Bid and proposal efforts in the information technology industry are expensive, sometimes involving millions of dollars and the long-term, full-time dedication of our most experienced people We want to make those investments where they are most likely to succeed If our proposal is not going to be strong enough to win the contract, then we want the Government to tell us, so we can concentrate our efforts elsewhere

Second, in making competitive range decisions, contracting officers should avoid locking themselves into a preselected number of offers, but should instead be guided by the distribution and natural breakpoints in the scoring For example, suppose that the contracting officer initially believes that three is the most efficient number of offers desired for review If the evaluations to this point show scores of $96,93,92,91,78$, and 65 , it would be arbitrary to limit the competitive range to only the top three scorers Of course, the result would be different if the fourth highest score was 79 rather than 91 EDS suggests adding language to the rewrite to the effect that "in making the determination of offeror to be included in the competitive range, the contracting officer shall consider the relative distribution of rankings resulting from the evaluation of the proposals submitted"

Third, contracting officers should be cautious about excluding on the basis of price factors alone, particularly in procurements that can reasonably expect a BAFO opportunity In many procurements the Government will not see the best price until BAFO, especially in industries like high-technology where the prices can drop rapidly as technology advances This impact is multiplied if the offeror's solution includes products or services from other companies Just as the Government frequently sees the lowest prices at BAFO, so does the prime contractor The Government should be cautious not to separate itself prematurely from those benefits

2 The importance of preserving effective debriefings of excluded offerors Another concern that relates to the downselect process involves debriefings By statute, offeror excluded from the competitive range may request a debriefing The issue concerns the timing and scope of the debrief

The rewrite offers a debriefing to the excluded offeror as soon as practicable But it allows the contracting officer to defer the debriefing until after contract award, if a preaward debriefing "is not in the best interest of the Government" The rewrite also makes clear that a preaward debrief will not provide much of the information that is included in a post-award debriefing

It may be difficult to make a preaward briefing as thorough as one held after award, since the procurement is still going on But it will benefit all parties to expand the scope of the debrief as much as possible, perhaps by encouraging disclosure of certain information only to limited persons (e g , counsel) under protective order or non-disclosure agreement if the offeror is being excluded because its proposal, though adequate, is not "competitive" with other proposals that have the "greatest likelihood of award," for a debrief to be meaningful it must explain why that is so

And it is important that the agency provide a debriefing at the time of exclusion, not after award A post-award debrief is much less helpful to an excluded competitor Its proposal team has been working hard When it does not make the cut the team's emotions, and its attention, are high The team wants to know why it failed, and what it can do to avoid similar deficiencies the next time By the time there is an award, which may be months or even years later, the team will have disbanded, its members moving to other programs and perhaps even other companies The lessons learned from a debriefing will pale into insignificance

Moreover, sometimes an excluded offeror will feel that its exclusion was unfair If it is considering a protest, for all practical purposes it must file at the time of its exclusion, and cannot wait until after award A timely and effective debriefing should defuse emotions and help the excluded offeror understand the reasons for its exclusion This will discourage a protest - assuming, of course, that the Government can demonstrate that its competitive range determination was based upon proper considerations Conversely, if the contracting officer delays the debrief, that may force the excluded offeror to file a protective protest, merely to preserve its rights

EDS believes that an excluded offeror should be able to request and receive an early and meaningful debriefing, at the time of its exclusion The rules should permit the Government to delay the debriefing until after award only if there is a compelling Government interest, as certified by the Head of the Contracting Agency The test should be more stringent than the contracting officer's feeling about "best interest of the Government" A debrief should not be delayed merely because it is convenient, or to prevent resources from being diverted during the solicitation period, or to avoid the risk of accidental information disclosure

EDS also believes this debriefing should be available at the option of an excluded offeror, whether the downselect is "mandatory" or "advisory" If the contracting officer believes that a voluntary withdrawal will benefit both the offeror and the Government, why dilute the incentive by denying a debriefing when the exclusion is "advisory"?

3 Communicating without technology transfusion or leveling. The Part 15 rewrite emphasizes the importance of increased exchange of information between Government and industry throughout the solicitation process EDS wholeheartedly endorses this The Government will benefit from increased understanding of the needs and abilities of industry And industry will be able to do a far better job helping Government meet its objectives if it better understands those objectives

The goal of increased communication can run into valid concerns regarding technology transfusion and leveling, however, since there is an inherent tension between the competing goals of open communication and respect for proprietary information

EDS believes that it is very important for the Government to tell industry what it really wants to get from a procurement For example, we endorse the release of the Government's estimate, which will allow a more rational analysis by industry of what the Government wants and whether the Government can realistically fulfill its needs at the stated estimate In fact, we believe the same principles should apply to the evaluation criteria EDS strongly believes that the Government should disclose its tradeoffs and its scoring methodology in situations when those tradeoffs and methodology have already been set Tradeoffs do not have to be quantified, and sometimes evaluation tradeoffs will not be prepared in advance But when they are, the Government gains nothing by keeping those tradeoffs from industry In place of openness, offerors must play guessing games about agency priorities This robs the Government of the best possible solutions and can undermine the credibility of the selection process In contrast, disclosure of the Government's tradeoffs will reduce the likelihood of a "technical leveling" issue, because there will be no need for the Government to encourage an offeror to improve its solution in a cost-effective way - the tradeoff information will already provide that information

On the other hand, the free flow of information can lead to the unintentional disclosure of truly proprietary information For example, section 15 205(f) of the rewrite provides that if the proposal considered to be most advantageous to the Government involves a departure from stated requirements, the Government should revise the requirements and allow another round of proposals But can this be done without letting the other competitors share the insight of the innovative company that submitted the advantageous but non-compliant proposal in the first place?

To be sure, section 15 205(f) includes a proviso that an opportunity to submit revised proposals should be given only if doing so will not disclose protected information And there are other beneficial provisions ( 15 207(d)) that prohibit technical leveling or the disclosure of an offeror's proprietary solution But we are concerned whether this approach is realistic If the Government revises its requirements in response to a superior but non-compliant proposal (per section 15 205(f)), wont that action inevitably let the other offeror know about special features contained in the superior solution? Even if the superior solution involves only commercial items, and the particular models are not disclosed, the Government's action may rob an innovative offeror of the advantage of its innovative approach

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There may not be a clear answer Of course, it will be best if the Government can disclose its objectives but minimize the restrictions in the stated requirements, so that innovative proposals will not have to depart from those requirements But in any case, there should be a regulatory admonition that the contracting officer should be sensitive to the risks of sharing information that, while not proprietary in itself, may signal a competitor's unique technical, management, or costing approach to a problem
4. Oral presentations EDS supports the use of oral presentations as a means of simplifying and expediting the procurement process To preserve accountability and demonstrate fairness, however, a permanent record should be made of the oral presentations and discussions - eg, by recording or transcription

5 Late proposals. Section 15 207(b) allows the Government to consider late proposals, modifications, and revisions "If doing so is in the best interests of the Government " This provision is open-ended. It does not indicate how late a proposal may be, whether there are limitations to "best interests of the Government," or even whether it applies to final submissions (whether through BAFO or otherwise) as well as initial or interim proposals When subsequent submissions are contemplated, any substantive advantage a late offer might have in a changing marketplace will only be temporary If a late BAFO (or otherwise final proposal) is permitted, however, a late offeror can gain a substantive advantage through its knowledge of subsequent changes to the marketplace (or even to the competition itself) The draft regulation does not exclude this possibility. In the worst case, the Government could open a late BAFO, conclude the offeror's late prices are better, and decide that FOR THAT REASON ALONE that the best interests of the Government mandate acceptance. [Note that the Government's short term interest may be inconsistent with its long term interest in maintaining the concept and perception of treating all offeror fairly, lest potential competitors opt out of the Government marketplace 1

EDS recommends that (a) late proposals be permitted only for excusable and limited delays (eg, no more than one or two days) where mitigating circumstances exist, (b) late proposals be permitted only where other offeror will have the opportunity to proposal modifications (at BAFO or otherwise), and (c) the contents of a late proposal may not be considered in determining whether acceptance of the proposal is in the Government's best interest, unless an alternative and timely proposal from the same offeror is otherwise the most advantageous to the Government

6 Past performance EDS strongly supports the use of past performance information in source selection, as an indicator of the likely quality of a contractor's future performance it is important, however, that the Government use past performance information fairly and accurately in the source selection process EDS believes that the evaluating agency should be required to notify an offeror of any adverse past performance information that the agency will use in the source selection process, whether or not it has previously been commented on, and provide an opportunity for the offeror to comment on that information Where necessary, the agency should identify the source of the information

EDS is also concerned that the threat of an adverse performance rating may be used unfairly to prevent a contractor from asserting legitimate contractual rights through clams or other contractual remedies Therefore, EDS believes that adverse information should not be considered when it is the subject of a dispute or litigation

7 Unreadability Section 15 206(c) places upon contractors the risk that their electronic proposals may be unreadable after two attempts What if the fault is in Government equipment or operators? This provision forces an offeror to have back up hardcopy to cover such cases, which undercuts the benefit of electronic submissions, especially if the offeror would need a long lead-time to prepare hardcopy

8 Cost analyses. EDS endorses the rewrite's direction not to perform a cost analysis when contracting on a fixed-price basis without cost incentives, unless the contracting officer has reason to believe the proposed prices are not reasonable EDS recommends that in such a case the contracting officer be required to provide a written justification to that effect

9 Independent determination Section 15410 (Source Selection) provides that after an integrated comparative assessment is performed, the source selection authority shall "independently" determine the best value proposal EDS is confused about the meaning of the word "independently " Does it mean "Independent" of the assessments made by others on the procurement team (the Source Selection Boards or Advisory Committees), or does it mean "independent" of outside political or non-political influence We believe that the language needs clarification

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10 Change to the procurement culture Finally, the FAR 15 rewrite continues the sea change made by the Federal Acquisition Streamlining Act (FASA) and the Federal Acquisition Reform Act (FARA) to the environment and culture in which the Government conducts negotiated procurements For the new paradigm to succeed, Government procurement personnel, as well as industry, must move away from a world governed by a rigid set of rules, and enforced by an intrusive set of protest fora, and into a "brave new world" where procurement personnel are permitted to make decisions that must be fair, but may be business-like This will require extensive training, retooling, empowerment, and acculturation to a new set of waters Already we are seeing some procurement activities already entering the new waters while others are still watching EDS encourages the Government to involve industry in the training processes that will be required We at EDS pledge our assistance, and we are confident our colleagues will do the same

In sum, EDS strongly supports the proposed revisions embodied in Phase 1 of the rewrite It represents continuing rapid improvement in the procurement process



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FAR Part 15 Rewnte Comments

1. 15.104. Oral presentations. We were pleased to see the addition of this section It will be very useful in encouraging contracting and program offices to use this technique Our only reservation is that paragraph (b)(2) could be read as an unintentionally exclusive list To maximize flexibility, we suggest that it be rewritten as follows
(2) Information pertaining to such areas as an offeror's capability, work plans or approaches, staffing resources, transitions plans, sample tasks or other tests may be [particularly] suitable for oral presentations- [, but any information, except that excluded in (a) may be presented orally ]
2. 15.201 Presolicitation exchanges with industry. This section is also well done, and a welcome clanfication of a difficult subject However, the second sentence of paragraph ( f ) appears to be problematic with the inclusion of the phrase "but no later than the next release of information" Being very difficult to detect or prove, this would be nearly impossible to enforce We find no advantage to putting ourselves in this kind of box, but can foresee that this could turn into a technical "trap" We recommend its deletion
3. 15.203 Model contract format. This is the only section to which we have strong objections Substituting one standard format for another creates no particular advantage Our primary concerns are practical

- Serious consideration of the cost of revising automated systems throughout the Government must be included in the decision to adopt a new format If the overall savings do not outweigh these costs, and we believe that they wouldn't, then the idea must be turned down
- There would be delays and confusion during the period of retraining government and industry workforces Again, the costs would be substantial and must be weighed against the claimed benefits
- Calling it a "model" format and only requinng "maximum practicable" use will lead to considerable variation in usage between agencies and even within agencies This undermines the concept of presenting a single face to industry and the efficiencies gained thereby

Therefore, we recommend that the section be dropped However, if the decision is made to go forward with the implementation of the model format, then the following improvements should be made

- 15 203(a)(4) contains a cross reference to 15 203(e), and the proposal contains no such paragraph It appears that 15 202(e) was intended

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FAR Part 15 Rewrite Comment

- 15.203-3 Section III, Financial and administrative information. If all tailored or modified clauses are to be placed in this section, then it is misnamed Since this appears to be the replacement for the current Section H, we suggest it be changed to "Financial, Administrative and Special Contract Requirements "
- 15.203-4 Section IV, Contract clauses. We find the idea of requiring a given FAR clause to be inserted in two different places depending on whether it is incorporated by reference or in full text to be particularly unsound It is inefficient and confusing to have to look in more than one place for a standard clause This procedure also adds an unnecessary complication to programming automated systems Finally, including an unchanged FAR clause in with the modified and tailored clauses could be construed as misleading We recommend this section be rewritten as follows

This section includes all contract clauses not tailored specifically for the acquisition that are-meorporated by reference ( 1 e , all standard clauses incorporated by reference, including those with minimal fill-ins[, and standard clauses in full text] or are not tatored but are required to be inserted in full text ) The text of clauses incorporated by reference shall be available through the Internet or from the contracting officer If the contracting officer elects to melude a clause in full text, the clause shall be treated as if it were-tatored (eg, placed int the finameral and admmistrative information section) The restrictions in 52104 on use of standard clauses still apply
4. 15.204 Issuing solicitations. Paragraph (a) conflicts with FAR 5 102(a)(1), which states that solicitations need be furnished only to small businesses after a "reasonable number" had been distributed Since there is no need to repeat guidance on this subject in Part 15, we recommend that 15 204(a) be deleted rather than reworked However, if it is retained, then the conflict should be resolved
5. 15.205 Amending the solicitation. This section implies that only "requirements" ( 1 e , the statement of work or specifications) can be revised in the indicated manner We suggest that it be made clear that terms and conditions can also be revised by adding the phrase "or solicitation terms and conditions" after "modifies its requirements"
6. 15.206 Receipt of proposals and requests for information. This section excludes mention of information received in response to a draft RFP We suggest that "or DRFP" be added after "in response to an RFI"
7. 15.207 Submission, modification, revision, and withdrawal of proposals. While we agree with the intention of relaxing requirements related to late proposals, modifications and revisions, paragraph (b) could be improved

- We recommend addition of the words "determined by the contracting officer to be" before the words "in the best interests of the Government" This could help in litigation challenging such decisions As written, the adjudicator could make an independent (de novo) determination of the best interests of the Government With the addition of a specific Government determination, they need only look at the reasonableness of the contracting officer's determination
- The coverage lacks mention of any standards that the contracting officer might use to decide whether to consider a late proposal While we are sympathetic with the need for flexibility, consistency among agencies is also necessary for this critical part of the negotiation process Practices will vary agency to agency, or even contract to contract, causing confusion for vendors dealing with different agencies If definitive standards cannot be developed, then, as a mmimum, some examples should be added

8. 15.208 Solicitation provisions and contract clauses. Paragraph (e) contains a cross reference to $15203(\mathrm{~d})$, and the proposed rule contains no such citation It appears that $15202(\mathrm{~d})$ was intended
9. 15.403 Responsibilities. Paragraph (b)(1) implies that the listed types of expertise (contracting, legal, logistics, technical) are all required for every evaluation team As a practical matter, this is not always possible Whether the list was meant to be prescriptive (in which case, we disagree) or was intended to hist examples (in which case, it is unclear), it should be rewritten as follows
(1) Establish an evaluation team, tailored for the particular procurement, that includes an appropriate mix of [expertise, such as] contracting, legal, logistics, [and] technical], and other expertise to assure a comprehensive evaluation of offers,
10. 15.405 Proposal evaluation. In paragraph (a), do the words "agencies should compare their relative qualities" mean that we are now to compare one offer to another? If so, we agree that this is a positive change However, this language needs to be reworked to make its meaning clearer In addition, an exclusively relative evaluation could result in a weak proposal receiving an inflated score if the other proposals are also weak Additional language is needed to make clear that an offer which fails to meet technical requirements will be unacceptable no matter what the level of competition is
11. 15.405 Proposal evaluation. Paragraph (a)(2)(m) remams problematic A"neutral" evaluation sounds good in theory, but it has proved to be an awkward at best Examples of proven techniques would certainly be useful Unfortunately, we know of none to contribute

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FAR Part 15 Rewnte Comments
12. 15.407 Communications with offerors. This section is excellent and, if finalized, would be a significant improvement in contracting procedures
13. 15.804 Award to successful offeror. The references in paragraph (d) need to be fixed The Government's acceptance statement is in block 15, not 15a, of the OF307 In the reference to block 14 A , the "a" is not capitalized on the form
14. Use of Facsimile. This is an area where further revisions are needed DOI recently approved a FAR deviation, which we recommend for inclusion in the FAR itself Since this issue cuts across several FAR references, they are addressed together and out of sequence

- 15.202 Requests for Proposals. Paragraph (d) allows the contracting officer to authonze submission of proposals by facsimile By itself, this is fine However, the corresponding provision at $52215-5$ defines "proposal" to include revision, modification and withdrawal, and this we find objectionable While it is rarely feasible to accept voluminous proposals by fax, it has proven to be very convenient for both buyers and vendors to handle changes that way Therefore, we have found it most practical to separate the authonzation to fax proposals from authorization to fax modifications, revisions and withdrawals to proposals
- 15.207 Submission, modification, revision, and withdrawal of proposals. Additional coverage should be added regarding facsimile receipt of modifications, revisions and withdrawals of proposals For the reasons mentioned above, we suggest addition of a paragraph (e), as follows
(e) Contracting officers may allow proposals to be modified or withdrawn via facsimile regardless of whether the solicitation authorized facsimile proposals
- 15.208 Solicitation provisions and contract clauses. A new paragraph (1) should be added to accommodate submission of proposal modifications, revisions and withdrawals by facsimile
(1) The contracting officer shall insert the provision at $52215-\mathrm{ZZ}$, Facsimile Modification, Revision or Withdrawal of Proposals, in solicitations if proposals may be modified, revised or withdrawn by facsimile (see 15 202(e))
- 52.215-5 Facsimile Proposals. The definition should be revised to de-couple authorization to submit proposals themselves by facsimile from submission of changes to proposals by facsimile
(a) Definition Facsimile proposal, as used in this solicitation, means a proposal; revisron or modification of a proposal, or withdrawal of a proposal that is
transmitted to and received by the Government via facsimile machine

Department of the Interior Page 5
FAR Part 15 Rewrite Comments

- 52.215-ZZ Facsimile Modification, Revision or Withdrawal of Proposals To complete our proposal, the following provision should be added

52 215-ZZ Facsimile Modification, Revision or Withdrawal of Proposals
As prescribed in 15 208(i), insert the following provision
Facsimile Modification, Revision or Withdrawal of Proposals (Date)
(a) Definition Facsimile modification, revision or withdrawal, as used in this solicitation, means modifications of, revisions to or withdrawal of a proposal that is transmitted to and recerved by the Government via facsimule machine
(b) Offerors may submit facsimile modifications, revisions and withdrawals via facsimile Facsımile modifications, revisions and withdrawals are subject to the same rules as paper modifications, revisions and withdrawals
(c) Telephone number of receiving facsimile equipment (insert telephone number)
(d) If the offeror chooses to transmit a facsimile modification, revision or withdrawal, the Government will not be responsible for any failure attributable to the transmission or receipt including, but not limited to, the following
(1) Receipt of garbled or incomplete modification, revision or withdrawal
(2) Avallability or condition of the receiving facsimle equipment
(3) Incompatibility between the sending and receiving equipment
(4) Delay in transmussion or recerpt of modification, revision, or withdrawal
(5) Falure of the offeror to properly identify the modification, revision or withdrawal
(6) Illegibility of modification, revision or withdrawal
(7) Security of modification, reviston or withdrawal data
(e) The Government reserves the right to make award based on the facsimule modification, revision or withdrawal However, if requested to do so by the Contracting Officer, the apparently successfiul offeror agrees to promptly submit the complete onginal signed modification, revision or withdrawal


## AMERICAN BAR ASSOCIATION

November 27, 1996

Section of Public Contract Law Writer's Address and Telephone

1100 Wilson Blvd
Suite 2000
Arlington, VA 22209-2249
(703) 284-4355
(703) 525-6598 - Fax

General Services Admınıstration
FAR Secretariat (MVRS)
18th \& F Streets, N W
Room 4037
Washington, D C 20405

## Re: Proposed FAR Part 15 Rewrite - Phase I FAR Case No. 95-029 (61 Fed. Reg. 48380)

Dear Sir or Madam
On behalf of the Section of Public Contract Law of the American Bar Association ("Section"), I am submitting comments on the above-referenced matter The Pubhic Contract Law Section consists of attorneys and associated professionals in private practice, industry and Government service The Section's governing council and substantive committees contain a balance of members representing these three segments, to ensure that all points of view are considered In this manner, the Section seeks to improve the process of public contracting for needed supplies, services and public works

The Section is authorized to submit comments on acquisition regulations under special authority granted by the Association's Board of Directors The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association

## GUIDING PRINCIPLES

The Section supports reform measures to streamline acquisitions, enhance efficiency and provide flexibility, particularly in this era of downsized staffs and reduced budgets At the same time, Congress has emphasized that in recent reform legislation (Federal Acquisition Reform Act of 1996, Pub L 104-106 ("FARA")), Congress has
made "no change to the requirement for full and open competition or to the definition of full and open competition" HR Conf Rep No 104-450, § 4010 (1996) Representative Clinger stated, concerning the enactment of several reform efforts during 1996, that Congress worked hard to "strike a balance between affordability, accountability, and accessibility Only through the most vigorous implementation will we achieve the goal of creating a more responsive system which provides more discretion to government buyers and freedom for those who sell to them while maintaining the requisite degree of control and fairness." 66 Fed Cont Rep (BNA)(1996) p 362

Striking a workable balance between the government's need for flexibility, and the equally important need for fairness, is the challenge faced by the regulators The Section believes that the FAR 15 Rewnte, which seeks to accord source selection officials greater discretion, could open up new areas for legal challenges unless the statutory requirement for full and open competition, and the need to maintain fairness, also continue to be observed The Section trusts that by calling attention to those vulnerabilities, the FAR 15 Rewrite effort will be strengthened and may be able to avoid pitfalls that could well result in unnecessary litigation and eventually, a circumscribing of the very flexibility for government officials that the Rewrite hopes to accomplish

The procedures in current FAR Part 15 have been developed and refined over many years and interpreted in a large body of decisions from the courts, the boards and the GAO Sigmficant revisions to the rules such as those proposed by the FAR 15 Rewrite could unsettle the negotiated procurement process while a similar development/refinement takes place for the new rules The Section believes the risk can be minimized through careful crafting of the revisions to avoid, wherever possible, unnecessary ambiguities and conflicts with existing statutory requirements

Many of the practices found in the proposed changes to FAR Part 15 are currently being used in some form by agencies pursuant to the current FAR Part 15 provisions Two examples are oral presentations and multiphase procurements These are progressive developments that can be readily expanded through additional management initiatives in the government, they are being used under existing rules and procedures that provide procedural safeguards for both government and industry These practices do not require changes in regulation

In areas where changes in the regulations are necessary, a guiding principle for FAR Part 15 is that the negotiation process must be open, fair, in accordance with announced criteria and supported by a reviewable rationale Since the enactment of the Administrative Procedure Act in the mid 1940s, Congress has declared that administrative actions of Government officials must be rationally based on clear and explicit standards, and supported by a written record that is available to a reviewing court Congress long ago decided that, while Government officials must have the discretion they need to discharge their responsibilities, they must also act in a manner that permits later
review for alleged abuse of that discretion This principle is in no sense an affront to any Government official, but rather is an abiding premise of an open society

Further, the basic goal of the negotiation process is to achieve fair and reasonable prices The earliest iterations of the regulations governing negotiated procurements stated the Government's policy to procure supplies and services "at fair and reasonable prices calculated to result in the lowest overall costs to the Government " Armed Services Procurement Regulation (ASPR) § 3 108-1 (1959) Auction techniques, for example, have been prohibited from the outset (ASPR § $3805-1$ ), because they are inconsistent with the Government's duty -- both as the sovereign and as the dominant contracting party -- to treat its citizens and supphers fairly and even-handedly Negotiation techniques intended to maximize efficiency and drive the lowest possible price in a particular procurement may not be in the Government's long-term interest, if they undermine confidence in the integrity of the acquisition process

With the comments that follow, the Section seeks to strengthen the ability of the government to act with flexibility, while maintaining consistency with guiding principles such as those set forth in statutory requirements, and maintaining a critical balance of fairness for those who would do busies with the United States

## SUMMARY OF COMMENTS

The following is a summary of some of the more significant features of the Section's comments

- Many of the Section's concerns relate to fairness and equal treatment of offeror The commentary accompanying the proposed regulation states " $[t]$ he greatest challenge to the committee was addressing the concerns that traditionally have been raised under the concept of fairness, while maintaining an acquisition process that promotes best value to the taxpayers" 61 Fed Reg 48381 Proposed FAR 1 102(c)(3) states "[ a]ll offerors and contractors are entitled to fair treatment " It further states, however, that "[f]arrness does not mean that offerors and contractors of differing capabilities, past performance, or other relevant factors, must be treated the same" This could be misunderstood as an invitation for unequal treatment by evaluators, which, coupled with potential problem areas discussed in further detail in these comments, could lead to rulings that the proposed regulation exceeds the bounds of the statutory requirement for full and open competition Equal treatment and fairness have been hallmarks of administrative and judicial rulings construing the statutory requirements for competition
- Proposed FAR 15406 states that it would permit the Government to estimate the size of the competitive range in advance Nevertheless, the
rewrite would permit the competitive range to be fixed in advance Neither a fixed number nor an advance estimate appears consistent with the statutory mandate that the competitive range consist of the "greatest number that will permit an efficient competition among the offerors rated most highly in accordance with such [solicitation] criteria" That objective cannot be achieved without evaluation of offerors The goal of "efficiency," which is essentially resource-driven, cannot be accomplished in advance of proposal evaluation
- Proposed FAR 15407 would authorize contracting officers to conduct communications with offerors before establishing the competitive range Those communications could address deficiencies in the proposal, need not be confirmed in writing, and could be used in evaluation These communications would not have to be conducted with all offerors, would not be considered "discussions," and would not be intended to permit changes in a proposal other than correction of mistakes This relaxation of procedures could give selected offerors an unequal advantage and allow insight into agency thought processes unavallable to other offerors
- After establishment of the competitive range, discussions would be limited to "deficiencies" Agreements would not need to be confirmed before final evaluation, only before award Discussion of "clarifications" would not be permitted The agency could contmue discussions with one offeror without discussions with other offerors The requirement for best and final offers would be abolished (proposed FAR 15 409) and there would be no common cutoff date for revisions to offers These provisions also present opportunities for unfarness and unequal treatment
- Proposed FAR 15 407(d) would only prohıbit revealing an offeror's "technical solution," in place of the present prohibition against disclosing "technical information" Also, while the rewrite would nominally prohibit auctions, the agency could (a) indicate the cost or price the offeror must meet for further consideration, (b) advise of the price standing of another offeror, without disclosing its price, or (c) furnish other information about other offerors' prices, as long as the "price" itself is not disclosed
- Offerors, under proposed FAR 15 407(c), would have no opportunity to comment on negative past performance reports on which they presumably had an earher opportunity to comment Nor, under proposed FAR $15407(\mathrm{~d})(4)$, would offerors be entitled to know the identity of individuals who provided reference information about an offeror's past performance These provisions could frustrate an offeror's right to
comment on the relevance of past performance information to the solicitation requirements in question
- "Best Value" is redefined in proposed FAR 2101 as "an offer or quote which is most advantageous to the Government, cost or price and other factors considered " Award should be made on the basis of "stated Government requirements," as set forth in present FAR 15 603(d) In addition, proposed FAR 15102 could be challenged as providing incorrect guidance on the justification needed for tradeoff decisions See also, proposed FAR 15 410(b)
- Proposed FAR 15101 would treat "lowest price technically acceptable" under the heading of best value, with a pass/fail criterion This presents a definitional problem in that "lowest price technically acceptable" does not involve the cost/technical tradeoffs found in best value procurement In addition, it is difficult to understand how the requirement of "neutral" evaluation of past performance for an offeror with no performance history would work in general, and, in particular, in the case of the lowest price technically acceptable category See proposed FAR 15 405(a)(2)(111)
- Proposed FAR 15 104(a) would allow oral presentations to substitute for written information There could even be oral proposals in response to oral RPs See proposed FAR 15 207(d) In the absence of a written record, there would likely be substantial dispute over the terms of the agreement.
- Proposed FAR 15 207(b) would unconditionally allow late proposals and late modification of proposals, without time limitation or a requirement to demonstrate excuse for failure to comply with time deadlines These provisions are likely to be viewed as invitations for abuse


## SPECIFIC COMMENTS

Specific comments and recommendations on the proposed revisions are discussed in the following sections

## Proposed Subpart 15.1 - Source Selection Processes and Techniques

Proposed Subpart 151 - Source Selection Processes and Techniques generally summaries some of the acquisition processes and techniques that can be used singularly, or in combination, depending upon the complexity of the procurement The Section behoves it is helpful to lay out the various procedures Nevertheless, several clarifications are necessary to eliminate potential problems

One general comment that applies to the entire proposed rewrite of FAR Part 15 is the inconsistent use of the terms "cost" and "price" Since FAR Part 15 apphes to both cost reimbursement and fixed-price contracts, the terms "cost" and "price" are generally apphcable to all the described contractıng procedures In some sections either "cost" or "price" is used, when both would seem applicable Accordingly, in addition to the specific changes recommended below, conforming changes are needed throughout proposed Part 15 to reflect the applicability of both types of contracting

## Proposed FAR 15.101 - The Inclusion Of The Lowest Price Technically Acceptable Process Under The Heading Of Best Valuc Creates Problems

The language of proposed FAR Subpart 151 indicates that all methods of negotiated procurement, including the lowest price technically acceptable process, are considered to be "best value" procurements Proposed FAR 15100 states that the Source Selection Authonty ("SSA") "should select the process most appropriate to the particular acquisition that is expected to result in the best value " (Emphasis added) Further, "best value" is defined in proposed FAR 2101 Definitions as "an offer or quote which is most advantageous to the Government, cost and price and other factors considered " This standard is different from the current requirement in FAR 15 603(d) for the offer that "best meets the stated Government requirements" The distinction is significant Award should be made on the basis of stated Government requrrements -- not simply on which proposal is deemed best

The inclusion of the lowest price technically acceptable process in proposed FAR 15101 under the general category of best value is inconsistent with the law that has developed at the GAO and the federal courts See, e.g. Widnall v B3H Corporation, 75 F 3d 1577 (Fed Cir 1996) Traditionally, these decisions have equated best value with the greatest value method of source selection described in the current FAR 15 605(c), where the SSA can trade off the cost or price against the non-cost factors to select the proposal that represents the greatest value to the Government However, the low cost technically acceptable approach allows for no such tradeoff

If the lowest price technically acceptable process is retained in this part of the FAR, some clarification or further definition is required It would be appropriate to clarıfy the meaning of "technically acceptable" as meetıng or exceeding all of the technical requirements set forth in the solicitation Without guidance, this method might be used with inappropriate specifications, which could lead to vastly different approaches by offerors

Also, it is not clear whether the drafters intended to use this method only in firm fixed-price procurements Proposed FAR 15101 (b)(1) indicates that award will be made on the basis of the "lowest evaluated price" The use of "evaluated" usually implies other than a firm fixed-price procurement (although transportation costs, life cycle costs and
operation and maintenance costs can be part of evaluation of a fixed-price proposal) If other types of contracts can be used, further clarifications and revisions are appropriate

## Proposed FAR 15.102 - Tradeoff Process Requires Justification

Proposed FAR 15 102(b)(3) states that best value cost/technical tradeoffs "need not be described in terms of cost or price imparts nor do the tradeoffs need to be quantified in any other manner" The Section recommends that this guidance be modified Tradeoff decisions require justification and a statement of rationale is needed to provide visibility into the process See additional discussion under proposed FAR 15 410(b)

## Proposed FAR 15.103 - Needs To Be Modified To Provide Offeror A More Meaningful Evaluation And The Government The Opportunity To Consider The Best Proposals

The Section recognizes the potential benefits from the multiphase procurement process It provides the Government with a useful tool for those situations when "the submission of full proposals at the beginning of a source selection would be burdensome for offeror to prepare and for Government personnel to evaluate " Proposed FAR 15 103(a) However, it is unclear why this multiphase process is being introduced as a separate form of negotiated procurement Multiphase procurements are being utilized by agencies under the current provisions of FAR Part 15 If this process can be generally accommodated under the current FAR, it may be questioned why the proposal procedure (particularly with the shortcomings described below) should be specifically proposed as a separate process Indeed, inclusion of specific detailed procedures may be interpreted by some agencies as removing contracting officer discretion to use other innovative multiphase procurement methods Furthermore, several aspects of this proposed language may result in unfair treatment and the Government not achieving the hoped for efficiencies

The procedures laid out in the proposed language appear similar to the provision in the Federal Acquisition Reform Act ("FARA") for the new design-build, two-phase procurement method for construction contracts See FARA § 4105(a), (b), codified at 10 USC § 2305(d) However, unlike the provisions in FARA, the proposed FAR language provides no further guidance on when this process should be used For example, this multiphase process seems unnecessary if there are only two offeror capable of meeting the Government's requirements

More fundamentally, the proposed language suffers from its failure to provide the Government's ultimate evaluation criteria and evaluation process in the first phase From the outset, the Government and the offeror should be operating from a common understanding as to how the Government will ultimately evaluate and select an awardee The Section appreciates that in a multiphase procurement the Government may not know

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precisely the scope of work or approach it will ultimately select In fact, in typical large development contracts the design of the desired item evolves over time and is not established until the production stage Nevertheless, the evaluation criteria and the evaluation process used to judge the various proposals can be established and disclosed from the beginning To make an informed decision whether to participate in the procurement and how to prepare their proposals, offeror should be apprised of the contemplated evaluation factors and process from the outset To the extent the Government lacks this fundamental information, it should further define the need for the project, obtain more information on possible approaches, or both Should the Government determine there is a need to change the evaluation criteria and method during the process, it can do so by amending the solicitation

This problem is not remedied by the proposed language in FAR 15 103(d)(1), which makes the initial down-select mandatory only if the evaluation criteria and process for the succeeding phases are disclosed in the first phase and sufficient information is required to constitute binding offers If both are not present, proposed FAR 15 103(d)(1) indicates that the down-select is only advisory Even though the down-select might only be advisory, it seems unlikely that any offeror that is informed it should not participate in the following phases would ever stand a reasonable chance of being selected for award Moreover, in the absence of any disclosure of evaluation criteria and process, offerors can only guess at the Government's initial preferences

Another problem with the proposed language is the difficulty in using this process while only requiring a minimum amount of information in the first phase Proposed FAR 15 103(c) indicates that the information in the first phase may be limited to "a statement of qualifications and appropriate information (e g, proposed technical concept, past performance information, limited pricing information)" This information may be so limited that the agency is unable to conduct an adequate analysis of the proposal and gain an understanding of whether an offeror could meet the Government's ultimate requirement Further, smaller companies, or those that are less well known in a particular area, would likely be at a substantial disadvantage Given the limited information that can be required there is also a potential for undue emphasis on past performance Without additional guidance, over-reliance on any single item may distort the analysis of an offer and cause its premature elimination

Nor is the problem resolved by making the down-select advisory if sufficient information is not required to constitute a binding offer As noted above, an offeror that is advised it should not continue may not, as a practical matter, stand much of a chance in succeeding phases At a minimum, being told it should not continue to participate in the procurement would discourage many companies even though one might ultimately propose the best offer There is a distinct potential for even an advisory down-select on the limited information allowed by the proposed FAR language to be abused as a circumvention of the statutory requirement for full and open competition Without
additional guidance and the requirement for offeror to provide, and the Government to consider, more complete initial information, this process could effectively become a prequalification step that does not meet the statutory requirements for prequalification See 10 US C § 319,41 US C $\S 253$ (c)

Based on the foregoing, the Section recommends that proposed FAR 15103 be modified to require that the Government disclose the evaluation criteria and process, as it exists in the first phase Additionally, more than the information listed in proposed FAR 15103 (c) should be required from offerors in the first phase While a requirement for a full proposal might defeat the underlying purpose of this multiphase process, more than the minimal "qualification-type" information should be solicited At a minimum, the second sentence in proposed FAR 15 103(c) specifying the minimum information in a first phase response, should be modified to require more detailed information about the offeror's proposal Finally, additional guidance should be provided in the proposed language as to when the multiphase process is appropriate

## Proposed FAR 15.104 - Should Be Modified To Make Clear That Oral Presentations Cannot Be Substituted For Written Information

The Section endorses the use of oral presentations as an important tool for both the Government and contractors during the evaluation process It allows the offeror to clearly articulate and explain in a meaningful way their proposals However, an underlying concept in proposed FAR 15104 would create problems

Proposed FAR 15 104(a) allows and encourages oral presentations to "substitute for, rather than augment, written information" The only restriction on the scope of the oral presentation is the admonition that " $[\mathrm{e}]$ xcept for certification, representation, and a signed offer sheet (including any exception to the Government's terms and conditions)," offerors may be required to submit all, or part of, their proposals through oral presentation The proposed FAR provision does not require, nor even address recording the oral presentation in some fashion

Substituting oral presentations for written submissions may be appropriate in limited circumstances However, encouraging this practice as the norm raises serous questions The following questions highlight the problem of allowing oral presentations to basically represent the entire substantive portion of a company's proposal

- What happens if there is a subsequent dispute over what was said at the presentation regarding the offeror's proposal?
- What will form the basis for the contract?
- Will there be a requirement for the presentation to be reduced to writing?

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- How will evaluators who are not present for the oral presentation conduct an effective evaluation?
- Must every evaluator be present for every oral presentation?
- What record will be reviewed if award is challenged by an unsuccessful offeror?

To allow oral presentations to substitute rather than augment written proposals violates one of the fundamental precepts of contract law -- an integrated document that reflects the totality of the common understanding of the contractual obligations In the absence of such a document, there is no record of the meeting of the minds of the parties, a basic requirement of all contracts Without a written record, (a) disputes over the content of proposals could not be resolved either before or after award, (b) the Government could not rely on its contract to require the bargained-for goods and services, and (c) increased litigation would likely result This problem could be amplified when oral offers are permitted in response to oral REPs, under 15 202(g) and 15 207(d) Accordingly, the Section strongly recommends that FAR 15 104(a) be modified to read "Except under the most limited circumstances, oral presentations should augment and not substitute for written information "

## Proposed FAR 15.2 - Presolicitation Communication, Solicitations, Late Proposals, Model Contract Format

The Section wholeheartedly endorses increased communication between the Government and potential offerors at the presolicitation stage and agrees that it will "improve the understanding of Government requirements, thereby enhancing the Government's ability to obtain quality products and services at reasonable prices, and increase the efficiency in proposal preparation, proposal evaluation, negotiation and contract award" The Section encourages the contmued use of draft REPs, presolicitation conferences and other initiatives to discuss the Government's requirements with prospective offeror in advance of the solicitation closing date The earlier a potential offeror becomes aware it cannot meet the Government's requirements, the less time and money will be spent pursuing and evaluating a fruitless proposal In addition, in many cases the Government could do a better job of ensuring that its specifications are clearly and completely stated Through draft REPs and presolicitation conferences, the Government can ensure that vendors are able to identify potential problems This technique could go far toward reducing ambiguities and forestalling bid protests

The restructuring of the uniform contract format currently in FAR 15406 into the model contract format in proposed FAR 15203 is apparently proposed to reduce the time spent creating and responding to REPs but at a substantial cost Existing automatic contract preparation and admmistration systems could require substantial modification to accommodate the proposed model contract format The Section recommends further
study of the cost benefit analysis associated with conversion from the present format to the proposed model contract format before implementing this dramatic change

In large part, the proposed rule achieves the appropnate balance between open communication and full and open competition There are, however, several clarifications that the Section believes would (a) increase efficiency and cost reduction even further and (b) reduce the potential for successful legal challenges to the language in Section 152

First, in addition to emphasizing that increased communication at the presolicitation stage will "improve the understanding of Government requirements, thereby enhancing the Government's ability to obtain quality products and services at reasonable prices, and increase the efficiency in proposal preparation, proposal evaluation, negotiation and contract award," proposed Section 15 201(b) should also emphasize that such communication presents a prime opportunity for the Government to conduct market research into the products and services available in the commercial marketplace to fulfill its needs Substantial savings will also accrue to the Government when its solicitations reflect the products and services already being sold to other customers by its potential contractors

Second, the Section strongly supports the early disclosure of general information about agency needs and future requirements (proposed Section 15 201(f)) but is concerned that if such information is released to an offeror and not made public in a timely fashion, protests may result The Section believes the risk of controversy could be substantially reduced by eliminating the language "but not later than the next release of information," and substituting "but not later than the second business day following the release of the information "

Third, if a determination is made to retain the proposed model contract format, "basic agreements" and "shipbuilding (including design, construction and conversion), ship overhauls, and ship repairs," which currently appear on the hist of items exempt from the Uniform Contract Format in FAR 15 406-1, should be added to the exemption list for the model contract format appearing in proposed FAR 15 203(a)

Fourth, proposed FAR 15 206(c) provides
If a proposal received by the contracting officer in electronic format is unreadable to the degree that conformance to the essential requirements of the solicitation cannot be ascertained from the document, the contracting officer shall immediately notify the offeror and request retransmission of the proposal or, at the contracting officer's discretion, resubmittal of the proposal in another
format If the retransmitted proposal is still unreadable, it may be rejected

In the event the proposal is unreadable in any respect, the contracting officer should contact the contractor and have it retransmitted The proposal should be susceptible to rejection only if the solicitation specifies that the proposal must be submitted in an electronic format and the contractor is unable to comply with that direction Accordingly, the Section recommends proposed section 15 206(c) be rewritten to read

If a proposal received by the contracting officer in electronic format is unreadable in any respect, the contracting officer shall immediately notify the offeror and request retransmission of the proposal If the retransmitted proposal is still unreadable, and the solicitation requires submission of the proposal in the electronic format, it may be rejected, or at the contracting officer's discretion it may be resubmitted in another format

Fifth, proposed FAR 15 207(b) would provide that
proposals, modifications, and revisions received in the designated Government office after the exact time specified are 'late' but may be considered if doing so is in the best interests of the Government Government mishandling or fault need not be established in order to accept a late offer The contracting officer shall promptly notify any offeror if its proposal, modification, or revision was received late and whether or not it will be considered, unless contract award is imminent and the notice prescribed in 15803 (b) would suffice

Full and open competition would seem to demand that all offeror receive an identical amount of time in which to submit their proposals, for in many instances there will be a marked improvement in the quality of an offeror's proposal with additional time Although the GAO has upheld an agency practice of establishing a new proposal due date after receipt of a late proposal, in that instance, all offeror received the additional time, not just the offeror submitting the late proposal

Moreover, the Government will not be able to achieve maximum efficiency in the proposal evaluation process if proposals continue to trickle in after the deadline Such an open-ended process is bound at some point to call into question the integrity of the system because of the builtin opportunity for abuse Accordingly, absent any
A - Accepted C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council


| A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| M - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council |  |


| 1. COMMENT | 2. | 3. RATIONALE |
| :---: | :---: | :---: |
| GSA |  |  |
|  | A |  |
|  | A | 0501-001, 0501-002, 0501-003, and 0501-004 The TABLE OF COATETS is revised to conform to the fas Drafting Procedures. |
| Ethe M. Quinn 9996-021 <br> Subpart 15.1 Table of Contents <br> FAR Subparts $15.1,15.2$, and 15.3 were released for public comment before section 15.106 and subsections $15.106-1$ and 15.106-2 of the FAR were so released. Therefore, the Phase I Subpart 15.1 Table of Contents did not include section 15.106 and its subsections $15.106-1$ and $15.106-2$, which should be added. | $A$ | 2006-021 The TABLE OP COMTENTS is revised to add FAR section 15.106 and subsections 15.106-1 and 15.106-2. |
| GSA |  |  |
|  | A |  |
|  |  |  |
|  |  | See comment 0094-090 on page 022-48 for rationale regarding Subpart 15.3 title |
|  | A |  |
| ETHA M. QUINN <br> 9996-114 <br> Subpart 15.3 Table of Contents <br> In the Phase II joint OFPP, FARPO, GSA meeting on April 8, 1982, it was decided to delete FAR 15.308 because its subject matter is adequately covered in FAR 4.805(c) and (d). | $A$ |  |

A - Accepted $\quad$ C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Counc::


## DISPOSITION CODES

A - Accepted C - Not accepted
M - Accepted but mrified D - Major policy change -- deferred to the FAR Council

## 1. COMMENT

Under our proposed structure, in its Part directed at competitive proposals, the circumstances for the use of competitive proposals would be set out in a section entitled " [c]riteria for [u]se." Next, in a subpart entitled, "[s]olicitation of proposals and quotations," we would address the matters to be covered by OFPP's proposed Part 15.4 .

Proposed subpart 15.5, "[u]nsolicited proposals," would become a completely separate part under our structure. Unsolicited proposals to not involve the same considerations as competitive proposals. Similarly, ofPP's proposed subpart 15.6 . " $[s]$ ource selection policies" would not be covered under corpetitive solicitations, since it Involves considerations broader than competitive proposals. OFPP's proposed 15.7, "[m]ake-or-buy programs, policies and proeedures," would become a subpart of a new part in our etructure on "pricing," a more logical organization. orpp's proposed subpart 15.3, "Ip]rice negotiation policies and techniques," would also beccme a subpart of our new part on "pricing." orPP's proposed subpart 15.9, [r]enegotiation," should be deleted from the FAR unless and intil the Renegotiation Act is extended by the Congress. If the Renegotiation Act is extended, its treatment in the FAR should be in e feparate part. Renegotiation does not apply only to competitive solicitations.


## DISPOS.ITION CODES

A - Accepted
C - Not accepted
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"negotiation" be divided into four separate subparts,
presumably separate parts: "competitive proposals", "sole
source acquisitions", "emergency acquisitions" and "un-
solicited proposals". Each of these should be dealt with
separately in the FAR. We hope to have a later submission
in this regard.
(c) Recomanded Revision

Divide Part 25 into four different parts for other
groupings): "competitive proposals", "sole source
aequisitions", "emergency acquisitions" and "unsolicited
proposals".

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A - Accepted C - Not accepted
M - Accepted but fodified D - Major policy change -- deferred to the FAR Council
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## 1. COMMENT

## INTERIOR

General Comments
We believe it

We believe it would be desirable to seructure the format and organization of Subpart 15.1 to correspond vith the orgenization of Subpert 14.1 , to the extent possible. This would greatly simplify the procest the reader must go through in trying to distinguish general differences between foral advertising and negotiation. To this end, we
recomend PART 15 be be retitled to read HREGOTIATION" and thet Subert recommend PART 15 be be retitled to read MEEOTLATION" and that Subpart 15.1 be retitled to read "USE OF NEGOTIATION". A zuggested format for the contents of 15.1 is as follows:

```
15.100 Scope of subpart.
15.101 Elements of negotiation.
15.102 General
15.103-1 Policy.
15.103-1 Limitations
15.103-2 Competition
15.104 Types of contracts
15.105 Solicitations for informational or
plenning purposes.
```

15.101 - This section wuld include the definition for negotiation under the proposed 15.101 and list the following elements of negotintion:
(a) Authorixation
(b) Preparation of Request for Proposals (Kfp)
(c) Publicising the RFP
(d) Submission of Proposals
(e) Evaluation
(f) Negotiacion and Selection
(g) Contract Auard
15.102 - This section would remain as proposed in the Far.
$15.10 s$ - This section would set forth the policy already contained in proposed 15.103 . In sddition, the approvals under proposed 15.104 would be relocated under $15.103-1$ to correspond with 14.103-3. The policies respeccing compericion under proposed
15.105 would be relocated under $15.103-2$.
15.104 = This new section would be added which would reference the provision: of PART 16 - TYPES of CONTRACTS.
15.105 - This new section would reference the applicable provisions of PART 4 and/or Subpart 15.4 - Solicitation of Proposels and Quotarions.

| $\stackrel{2}{\text { DISP }}$ | 3. RATIONALE <br> 0004-077 (a) We appreciate the suggestion that the format and organization of FAR Subpart 15.1 should correspond yith those of PAR Subpart 14.1 to the extent possible. Optimum part and subpart titles and arrangements are matters about which reasonable persons can easily differ. Distinguishing the general differences between formal advertising and negotiation is more complex than the comment indicates, however. Becanse of the numerous complexities associated with contracting by negotiation that are not present in contracting br formal advertising, we believe after careful consideration that Sabpart 15.1 is titled and arranged properly and cannot more closely parallel subpart $1 \overline{4} .1$ vithout loss of clarity and usef ulness. <br> (b) Despite these complexities, which warrant additional, divergent, and more extensive coverage in part 15, much parallelism does exist between the entireties of Part 14 and Part 15 . For example: <br> (1) Part 14, Formal Advertising (the words "Contracting by" are inferred or understood)/Part 15. Contracting by Negotiation. <br> (2) Subpart 14.1, Use of Formal <br> Advertising lincludes a definition of the term; a list of melements of formal advertising," which had been identified in the DAR and PPR as "basic steps"; and policy statements, including <br> limitations)/Subpart 15.1, General <br> Reguirements for Neqotiation fincludes a definition of the term; govers the <br> contrast between formal advertising and negotiation; and includes authorization and approval, and statements regarding competition). <br> (3) Subpart 14.2, Solicitation of Pids; Subpart 14.3, Submission of Bias: and Subpart 14.4 , Opening of Bids and Āward of Contract/Subpart 15.4, Solicitation and Receipt of Proposals and Quotations; Subpart 15.5, Onsolicited Proposals; <br> Subpart 15.6, Source selection; Subpart 15.8. Price Negotiation; Subpart 15. , Profit: and subpart 15.10 (formerly Subpart 15.9). Preavard and Postavard Notifications, Protests and Mistakes. <br> (c) Regarding the recommendation to retitle part 15 and Subpart 15.1, we believe that the present part 15 title, Ilcontracting by Negotiation," is more accurate and conveys the content of the part better than yould "yegotiation," Which, in a generic sense, includes only a portion of the overall process described in Part 15. It would be inaccurate to title Subpart 15.1 mse of gegotiation because of the structure of Part 15 and and organizes the material under three headings, only one of which is "णse of Hecotiation." Subpart 15.1 omits or |
| :---: | :---: |

A - Accepted $\quad$ - Not accepted
$M$ - Accepted but mified D - Major policy change -- deferred to the FAR Counci:

DOE
$\begin{array}{ll}0114-802 & 15.1 \\ 0114-903 & \text { cin } 182\end{array}$
$0114-903$ sis stwap
O/NTH 8415,3 GEMERAK.
It 1: recognized that subchapter C, Parts 14 and 15 -of the Federal Acquisition kegulation heve been prepared under the requirements of the Arwed Services Procurenent Act and the Federal Property and Administrative Services Act. However, knowing the recommendstions of the Commission on Covernent Procurement, the widespread acceptance㘯 principle of its provisions and porential early pasaage of 51264 (Federal Acquisition Act of 1977), and that mandatory 1 mplementation of the final fir regulation will probably be April 1980, it is recomended that back-up Parts 14 and 15 reflecting the equally valid acquisition methods of comperitive sealed bids and competitive nagotiation as set forth in $\$ 1264$ be prepared.

NAT'L. MICRUSFAAFHICS ASS.
OO 68-0 N TST GENERAL
mind somewht zystiffed oy the total lack of mention of multiple ward contracting in Part 15 - Contracting by hegoriation. This aurprises us beceuse orpp has alweye been supportive of sultiple wards. Indeed, the Acquisition and Distribution of Comercial Products (ADCP) program that is currently being faplemented by OFPP is very wuch geared to using the multiple avard schedule whenever and wherever posathle.

I at aure that you are well aware of the merite of the multiple award schedule aysten of procurement. Let me briefly describe the major benefits, however, wo that they may be on the record.

1. It makes available to federal agencies thousands of commerctal off-theshelf products.
2. It opens up government contracts to many small businesses who otherwise would be unable to compete.
3. It guardis againat ereation of a product wich, because a manufacturer was forced to meet a unlque govemment spectification, can only be used by the federal government.
4. It provides fast and responsible delivery of products and services because of reliance on an existing compercial distribution network.
5. 2n many casea is allowe government offtces aroumd the country to deal with approved businesses on a local basis.
6. It guards againgt the goverment purchasing outmoded or outdated products because the procurement specification has not kept pace with technological improvenents. This is particularly tmportant in high technolagy flelds.
are by no means auggestiag that the multiple award schedule is a panacea and bould be the only wethod of procurement used by the federal government. On the contrary, for products of which the government is che princlpie user sud the purchaser by the government are isrge enough to fustify writing a specification, functional (rather than design) apecipication ia certainly warranted.

I Yeaize that many other parcs of the draft FAR are still to be released and that riticie the If the is the case, the outiple avards my be gentioned in one or sore for multiple awards be pliced in any quart other thens one ore goveraing contract by negotistion? This is the logical part other than the one goverdug wihority to be placed. I refer you to Senator parz for multiple award scheduse Acquisitions Act of 1977 (s. 1264). Section 303 (d) of TYile III, fhich desle with ecquisitions by competitive negotiation, (d) of Mitle III, which dosis writh acquisitions by competivive negotiat


## DISPOSITION CODES



| 1. COMMENT <br> Etha M. Quinn <br> 9996-003 Letter/Comment Number 0073 <br> received from the Tennessee Valley Authority does not mention FAR Subparts 15.1. 15.2, and 15.3. It is, therefore, shown in the list of respondents that either concurred with or had no comment on this FAR entity. The letter concerns the issue of applicability of the FAR to the TVA and is addressed in the rationale accompanying Segment Number Ol. Control Number 011. for FAR 1.103. <br> ADFA <br>  <br> 0103-092 sulmorrois <br> There are a number of idiosyncracies of style in the text which anem to us to hinder rather than help easy reading and use of the FAR. The first is the prolific use of cross-references which do not add to comprehension of the context where they are used. The shortcoming in such cross-references is that they cause a careful user of FAR to stop to check the referenced citation before proceeding with the balance of the text. For example, $14.103-1$ (a) (1) refers to the "circumstances permitting negotiation", followed by ("see, Subpart $15.2^{\prime \prime}$ ): Subpart 15.2118 s the "Negoriarion Authorities" provided in governing statutes. It is not necessary for a proper understanding and use of formal advertising procedures to refer to the 17 negotiation authorities in 15.2. The reference to 15.2 in 14.103-1 (a) (1) is surplusage: Another example 1s 14.202-4 (h), dealing with "unsolicited samples", which directs that a bid and refera to ("see 14.404-2"). Pardgraph 14.404-2 contains about 20 instances calling for rejection of individual bids. The bulk of the cited instances are irrelevant to the matter of unsolicited samples. But the reference to $14.404-2$ will stop a careful user of FAR and require a reading of the whole paragraph in order to determine whether it is revelant to the matter in hand. |
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either concurred with or had no comment on
ssur entity. The letter concerns the
TVA and is addressed in the rationale
accompanying Segment Number 01, Control
Number OII, for FAR 1.103.

ADFA

0103-092 sum mor $\overline{\sin 3}$
There are a number of idiosyncracies of style in the text which Eas to ug to hinder rather than help easy reading and use of the add to comprehenstion of the context where they are used. The shortcoming in such cross-references is that they cause acareful user with the balance of the text. For example, 14.103-1 (a) (1) refers
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codsta
ROMF
 certanin actions are authorized and/or himited i.e. 15-103; $15-202(\mathrm{c})$; $15-203$ (a) and (c); $15-208$ (c) etc. These dollar thresholds should be reviewed for their reasonableneas, eapecially in- 11 ght of the inflection that has taken place since they were originally esrablished. Necessary action should be taken to revise the applicable statutes as appropriate
DOD

The word" míst" is frequently used in an imperative sense; thewever, "shall" is defined as imperative in the definition portion of the FAR and would therefore be more appropriate than must."
2. DISP A
3. RATIONALE

0103-090, 0103-091, and 0103-0:2 These somments do not cite specific examples of prolific use of cross-references in PAR Subparts 15.1, 15.2, and 15.3. They do, hovever, cite cross-references contained in PAR Part 14 to PAR Subparts 15.1 , 15.2. and 15.3. Although FAR Part 14 and Subparts 15.1, 15.2 , and 15.3 were released through the Federal Register at the same time. for public comment, part 14 and the subpart 15.1, 15.2, and 15.3 material are separate entities in Phase II. Responding to comments (including those specific comments regarding crossreferences cited in Part 14) on Part 14 is a separate àssignment, and accordingly, the issue of use of cross-references in FAR Part 14 will be addressed in Segment Number 02, Control Number 021, for FAR Part 14. Regarding the general comment that the cross-references do not add to comprehension of the context where they are used. cross-references in FAR Subparts 15.1. 15.2, and 15.3 are intended to assist the usex and eliminate repeating text appearing elsewhere in the FAR. He have reviewed these subparts to ensure that each of the cited cross-references is necessary and does refer the users to other relevant FAR material that they must understand in order to apply Subparts 15.1. 15.2, and 15.3 properly.

0075-004 The concern expressed in the comment is understandable. However, the initial $\bar{F} A R$ is constrained by existing statutes and generally follows existing acquisition policies and procedures. By its own terms, acceptance of this comment would require legislation or other action outside the scope and authority of the FAR Project. The dollar thresholds will besubject to early review by the FAR Council.

0108-076 In Subparts 15.1. 15.2, and 15.3 of the FAR, as throughout the FAR, "shall" is prescriptive; it imposes a duty. obligation, or requirement or confers a right, as in "The Government sh̄all have the right to inspect these records for 3 years after the completion of contract performance.". "Must" is used to describe a duty, obligatiōn, or requirement,
prescribed elsewhere, or a condition to be met, as in "To be eligible, the offeror must be $\bar{a}$ manufacturer or regular dealer."
A - Accepted $\quad C$ - Not accepted
M - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council

A - Accepted $C$ - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council

| 1. COMMENT <br> DAVII H. SIEGEL <br> 0077003 FAR 15.103 <br> . Two-tep procurement procedure is included in 14 as a procedure that may be used in formal advertising (FAR Subpart 14.5). However, Part 15 makes no mention of one of the contract negotiation procedures; e.g. four-step procurement. Realizing that this may appear in a mbequent section, should not mention of this method of contract negotiations be contained in this part" <br> ADPA <br> The drafts of Parts 14 and 15 will permit the contracting agencies of the Goverament to continue to excercise their authority under the statues which currently govern their acquisition of upplies and services. The organization of Parts 14 and 15 describe the manmer in which the agencies will exercise their authority to place formaliy advertised and negotiated contracte. This letter and the attachments contain number of suggestions for iuproving the drafts to increase their usefulness. In the main, these suggestions are editorial in nature; but in sum they would make for a better document. $103-089 \cdot 15 \cdot 103$ <br> The araxt should be read over again very carefully to eliminate inconsistencies. We have found two examples of such inconsistencies. Example 1: 14.103-1 (a) (2) requires that bids for formal advertising "shall be solicited From all qualified sources". But 14.203-1. requires solicitation from only "a sufficient number of prospective bidders to insure adequate comperition". The latter is the correct statement and should be used throughtout. Example 2: 14.103-1 (a) (1) requires that contracts shall be awardedin accordance with formal advertising procedures "whenever feasible and practicable". But 15.103 limits the requirement to use formal advertising to "acquisitions in excess of $\$ 10,000$ whenever it is feasible and praccicable ro do so". The $\$ 10,000$ limitation should be included in 14.103. Also, the definftions of "feasible" and "practicable" in 25.103 belong in 14.103 , where they woild have operative force and efiect. <br> 15.103 <br> owfpelete definition of "feasible" and "practicable and insert in 14.103-1 (a) (1). <br> EPA <br> 010907 <br> Sec. 15.103: The language concerning focmal advertising would be more appropriately located in Part 14. <br> DOD <br> 0108834 <br> In 15.103 we recommend that it not be attempted to define feasible and practicable. We recommend adoption of the language in dar 3-101(a). As used in the DAR the words "feasible and practicable" appear settled through their use for approximately twenty years. The legislative history referenced in the proposed FAR coverage supports the conclusion that Congress was antisfied with the DAR use of "feasible and practicable." The introduction of new definitions will lead to questions and controversy about an area that has been resolved. In the absence of a specific problem, which has not been identified, ve recorumend adoption of the DAR coverage. | A 2. | 3. RATIONALE <br> 0077-003 The FAR guidance on the fourstep procedures is included in FAR Subpart 15.6. <br> 0103-089, 0103-065, and 0109-037 Comment O103-089, while requesting elimination of inconsistencies, does not cite any inconsistencies within PAR Subparts 15.1. 15.2, and 15.3. It does, however, cite examples contained in PAR Part 14. AAS stated in rationale 0103-090, 0103-091, and 0103-092 on page 022-8, those issues regarding part 14 will be add̄ressed in Segment Number 02, Control Number 021, for part 14: The comments relating to FAR Part 15 suggest that the definitions of "feasible" and "practicable" should be in FAR 14. 103, where they would have operative force and effect. These definitions were included in FAR 15.103 (as it was released for public comment) so as to give meaning to the use of those terms within PAR Subparts 15.1, 15.2, and 15.3. However, for the reasons given in rationale 0108-034, immediately below. PAR 15.103 is revised to delete these two definitions. Also see 0108-034 below concerning the issue of moving these definitions to Part 14. Formal Advertising. <br> 0108-034 (a) While no other commenters expressed the view that "feasible" and ㅍpracticable" not be defined, several comments suggested that these two definitions be moved to another part of the FAR; other comments proposed minor editorial changes; and other comments either concurred vith or vere silent on this issue. Based upon the nature of the comments received concerning this issue and the fact that these definitions were included in PAR 15.103 only to give meaning to the use of those terms within PAR Subparts $15.1,15.2$, and 15.3 , ve helieve that the usefnlness of these definitions is not supportable. Purther, inclusion does not appear to contribute to the clarity or understanding of either the section or the subpart. Therefore, PAR 15. 103 is revised to delete the two definitions. <br> (rationale cont'd an ment pq.) |
| :---: | :---: | :---: |

A - Accepted $C$ - Not accepted
$M$ - Accepted but modified D - Major policy change -- deferred to the FAR Council


## DISPOSITION CODES

A - Accepted $\quad$ C - Not accepted
$M$ - Accepted but modified D - Major policy change -- deferred to the FAR Council

| AT\&T <br> 0081014 <br> 15.104 <br> Authorization and approval. <br> Recommendation: Add Paragraph (d) as follows: <br> (d) The prospective contractor has been determined to be responsible. <br> Comment: Subpart 15.104 of FAR would delete the requirement stipulated in FPR 1-3.101 which lists requirements for entering into a contract as a result of negotiations. <br> It is to the benefit of the Government to retain the paragraph as enumerated in FPR 1.1202 ( $($ ) which states, "while it is important that purchases be made on the basis of offers which are most advantageous to the Government, price and other factors considered, this does not require an award to an offeror solely because he submits the lowest bid or offer. A prospective contractor must affirmatively demonstrate his responsibility." <br> The Government's interest would not be served, if the winning offeror defaults, is late in his deliveries, or otherwise performs unsatisfactorily, with the result that additional costs to the Government are incurred. In addition, FPR 1-1202(b) states, "Such awards are also unfair to other offerors who are capable of satisfactory performance and tend to discourage them from submitting bids on future procurements." | 2. DISP <br> $C$ | 3. RATIONALE <br> 0001-014 The recomnendation to include in FAR 15.104 the additional paragraph noted in the comment is not accepted. The FPR 1-3.101(b)(4) stipulation to which the comment refers does not apply only to contracts resulting from negotiation: it also applies to contracts resulting from formal advertising. The requirement has not been deleted from, or overlooked in, the FAR. It has been given prominent coverage in the appropriate FAR subpart (i.e.. Subpart 9.1. Responsible <br> Prospective Contractors). FAR 9.103(a) states "Purchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only." FAR $9.103(b)$ states "No purchase or award shall be made unless the contracting officer makes an affirmative determination Of responsibility." The substance of FPR I-1.1201(c) is retained in FAR 9.103(c) which states "The contracting officer shall contract on the basis of offers most advantageous to the Government, price and other factors considered, not solely on the basis of the lowest price. A prospective contractor must affirmatively demonstrate its responsibility, including, when necessary, the responsibility of its proposed subcontractors." |
| :---: | :---: | :---: |
| ABA <br> 009301 $\qquad$ <br> 1. The parts of the FAR proposed to date would not onhance the possibilities for product competition or for buying other than from detailed specifications or to take into consideration factors other than price. We think it ${ }^{-}$ would be a mistake to perpetuate the present reliance upon competition determined by detailed specifications and lowest price. | $C$ | 0083-001 He realize that this comment was prepared before the current proposed FAR structure vas formulated. De believe that FAR Part 11 (Acquisition anc̄ Distribution of Commercial products) guidance addresses the concern expressed in the comment. <br> Part 11 does incorporate OPPP policy and inplements recommendations D2 and D6 of the Commission on Gorermment procurement that commercial and commercial-type products be acguired, if they meet the Government's needs. He believe that PAR Part 15 does take into consideration factors other than price. section 15.102 of the FAR specifically mentions schedule, technical reguirements, type of contract, or other terms of a proposed contract in addition to price. Paragraph (a) of FAR section 15.1002 (formerly 15.902 ) states M日hen a contract is avarded on a basis other than price (see PAR Subpart 15.6)...." Subpart 15.6 prescribes policies and procedures applicable to competitive negotiations when selection of a source for contract award is to be based on an evaluation and comparison of price and other factors. Earagraph (c) of section 15.602 of the FAR notes that source selection procedures are designed to ensure selection of the source whose broposal has the highest dearee of realism and yhose performance is expected to best meet stated Government requirements, price and other factors considered. JSee also FAR section 15.604 for discussion of evaluation factors.) |

## DISPOSITION CODES



## DISPOSITION CODES

A - Accepted $\quad$ C - Not accepted

## NSF

## 1. COMMENT

$007180115.105(\mathrm{c})$.
The linitation in $15.105(\mathrm{c})$ that contracts shall not be negotiated on a non-competitive basis without prior review at a level above the contracting officer, needs to be clarified. The requirement for review prior to the contract being negotiated is somewhat ambiguous. I would suggest changing he wording to read concracts...sball notide awarde on a non-conpefir higher level review, wille allowing the agencies the administrative flexibi'sty to deternine the appropriate review point prior to award.

HEW
0085 g.
. 515.105 (c) states contracts in excess of
$\$ 10,000$ shall not be negotiated on a noncompetiti
basis without prior review at a level above the
contracting officer. This appears to unduly restrict
to our Departmental policy of allowing contracting
to our Departmental policy of allowing contracting
officers to approve noncompetitive procurement justi-
We recomend that the $\$ 10,000$ figure be changed to $-\$ 25.000$
DOT
0072-48 $15.105(\mathrm{c})$.
Paragraph (c): It is recommended that this be raised to at least $\$ 25,000$

Rationale: The requirement that contracts in excess of $\$ 10,000$ shall not be negotiated on a, noncompetitive basis without prior review at a level above the contracting fficer is too restrictive. The review should be required at some higher threshold, above that of small purchases (\$10,000).

HUD
0086 -Section 15.105 (c) requires contracts which are in excess of $\$ 10,000$ and are negotiated on a noncompetitive basis to be reviewed level above the Contracting officer. If the gal of this section of the regulation is to reduce the number of sole source procurements by introducing another factor in the procurement process, then, shere are three exceptions taken to the proposed methodology. The present wording is ambiguous, unclear about possible repercussions and insensitive to the effectiveness of overkill of the proposed approach. First, if prior review before award of the contract is required, how will this be shown? Should the reviewer signal his/her approval by signing the document? What would happen if the reviewer did not approve? thder the present wording there is no way for soneone checking complisnce at alater date to determine if a person of higher authority reviewed the document before the award of the contract, if this person spproved of the method of procurement or if this person dieapproved. Second, the ASPR and FrR clearly delineated the linitations of coptracting officer's authority. In cases where Contracting officers 'elearly exceeded their contracting authority, contracts awarded wete determined null and void. Does a Contracting officer exceed his/her uthority if a review is not ohtained? The regulation should clearly state if this is the case. Third, implementation of the $\$ 10,000$ timeatrold across the board would undermine the effectiveness of the proposed approach by diluting meaningiul review-rhe very check char supposed to guard agaiast the proliferation of bogus sole sources. It in suggested a better approach would be to let the individual agencies determine the threshold predicated upon their organizational mencup. This mould mean agencies could in faet have different thresholds depending upon their procurement atructure. Failure to sive moncise this flexibility will reault in less than meaningful review (vernaculariy called "rubber stamping").

0086-002 We disagree with the comment That FAR 15.105(c) is "ambiguous, unclear about possible repercussions, and insensitive...." While recognizing that in Some instances noñcompetitive negotiated acquisitions are unavoidable, the DAR and the FPR have constantly sought to promote, further, and enhance the cause of competition in negotiated acquisitions. Because negotiation is subject to the inherent possibility of restricting competition, one of the goals of the FAR, like the DAR and the FPR, is to reduce the number of unnecessary "sole source" acquisitions. Requiring that contracts not be negotiated on a noncompetitive basis without prior review at a level higher than the contracting officer is not a new concept in Govermment contracting (see DAR 3-101(d)). The mechanics of the necessary detailed internal agency operating procedures, including the manner in which the review will be shown, are matters requiring flexibility due tō differing agency needs and are not covered in the FAR. Concerning the $\$ 10,000$ Ehreshold, see rationale 0085-006 and 0072-008, above.
A - Accepted $\quad$ C - Not accepted
$M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council


## DISPOSIIION CODES

A - Accepted C - Not accepted
M - Accepted Dut modified $D$ - Mdjor policy change -- deferred to the fAR Council


A - Accepted $\quad C$ - Not accepted
$M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council

| 1. COMMENT <br> CODSIA $0432-0!$ <br> 1. $15.106(\mathrm{~b})(\mathrm{C})$ - It would be preferable to state that $\$ 10,000$ will be used as the criteria for swall purchase orders instead of referring to "small purchases uuder part 13." <br> Rationale: The examination of records clause itself (52.215-11) refers to "purchase orders not exceeding $\$ 10,000$ " as being excluded from coverage of the clause. 15.106 (b) (1) should do likewise. Commentary footnote 2 is not convincing in that if the dollar amount is changed by GAO or whoever, the approprfate FAR can then be changed to reflect the new dollar amount. | 2. DISP <br> $M$ | 3. RAJIONALE <br> 0432-001 The wor Eing of the exemption at FAR 15.106-1(b)(1) and of paragraph (c) of the clause should je parallel. However, this is accomplisied in a manner different from that suggested by the comanter. The language at $15.106-1$ (b) (1) (issued for public comment as $15.106(\mathrm{~b})(\mathrm{I})$ ) is rewritten to complenent paragraphs (a) and (c) of the clause at 52.215-1 for two reasons. First, Conptroller General letter B-182869 dated February 10, 1975 (referred to in Prase I footnote 2) states: "Accordingly, we believe that omission of our 'Examination of Records' clause for small purchases not exceeding $\$ 10,000$ is reasonable and we have no objection to the proposal." The text is revised to comply strictly with the wording of Comptroller General letter B-182869. Second, it is important to tie the exemption of the clause to the smallpurchase threshold and to identify that threshold (to avoid causing FAR users to consult the small-purchases section in order to discover what the threshold is). The reference to Part 13 is retained so that, if further information on small purchases is desired, it can be found. If the small-purchase threshold is changed, it will be necessary to revise the clause and 15.106-1(b)(1) to reflect that change. |
| :---: | :---: | :---: |
| NASA <br> $0365-01$ <br> Section 15.106 () Examination of Records Clause <br> We suggest that authority for the exception for utility contracts in paragraph 15.106 (b) (2) be derermined, since it is not provided for in 10 U.S.C. 2313. At the least, this should be explained as it is for the small purchase exception appearing in footnote 2 . | $A$ | $0365-001$ General authority for exempting public utilities contracts is at 32 Comp. Gen. 277, 279. The Comptroller General decision states that "The applicaule legislative histories clearly disclose that the provisions contained in these earlier acts were intended, among other things, to afford a means whereby the Congress could be informed of any excessive or unreasonable payments to contractors holding negotiated contracts and to serve as a deterrent to the making of contracts providing for unreasonable profits to Government contractors...It is not believed that the term 'subcontract' as used in such legislation can be given a definition which will cover every situation which might arise...However, this Office will interpose no objection if the term 'subcontract' be construed as excluding...subcontracts and purchase orders for public utility service at rates established for uniform applicability to the general public." The DAR Council applied the Comptroller General's rationale to contracts as well. At one time, this exemption was dropped from the DAR, with the tacit approval of GAO. However, the exemption was reinstated at the request of the DAR Army Policy Member. who stated in his 24 Aug 71 memorandum that "utilities are refusing to accept the clause." The FPR does not exempt public utilities contracts (see 1-7.103-3). change to FAR 15.106-1(b)(2) is required; no authority is provided in this listing for the other two exceptions (at $15.106-1(b)$ (1) and (3)). |

A - Accepted
C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Come:

## 1. COMMENT

AT\&T

## $0387-01$

Subpart 15.106(b)(2)-Page 1
Recommendatofi - मot the underlined portion as follows:
(2) Contracts for utility services at rates
set by law or regulation, and not exceeding those established to apply uniformly to the public; or those established to accommodate special applications unique to the needs of the Government, plus any applicable reasonable connection charge; or....
Comment - Services provided by common carriers are covered by law or regulation. Ceriain rates are applicable to services specifically established for private industry and/or the Government, ete. while others apply uniformiy
to all interests including the general public. to all interests including the general public.
2.

DISP

0387-001 The reasia for establishing examination of rec.ejs rights is to prevent unreascras:e prices or excessive profils on negoti=zes contracts. In most cases, the General $\therefore$ ccounting Office, under the Examinction of Records clause, has the authority $=0$ cneck contractors' books after the cc.cclusion of negotiations. Ece: utilities contraces, audits by the General Accounting office $\equiv$ re considered unnecessary and resirdant if a rate comission, accouriajle to the public, has already reviewed and evaluated the
utility's proposal before the utility can begin charging that rate. The wording of the exemption at Fir $15.106-1$ (b) (2)
(issued for public comment as $15.106(\mathrm{~b})(2)$ ) allows the utility to charge the Government a rate equal to or lower than that rate already established as reasonable by the rate commission, but it does not allow charging a rate higher than that evaluated and approved by the rate commission. The wording of the exemption allows the General Accounting Office to review utility contracts awarded at rates higher than those approved by rate commissions. If accepted, the commenter's recommendation would effectively exempt all Government contracts for utility scrvices. Such a broadening of the exemption is contrary to the intent of 32 Comp. Gen. 277, 279 (see rationale for 0365-001, page 091-3).
A - Accepted $\quad$ C - Not accepted
M - Accepted but modified D - Major policy change -- deferired to the FAR Council


A - Accepted
C - Not accepted
M - Accoptcd but modified D - Major policy change -- deferred to the FAR Council

## 1. COMMENT

Firestone
D37/- Of of the above referenced subparts have dollat amounts below which either examination or evaluation is not xequired.

While these figures may have been or were meaningful when first established, inflation at its current rate for that of the recent past) has made a mockery of all dollar amounts.

To adjust for the past five or so years we would recommend that 10 go to 15 in both instances. To hedge against future inflation it would be logical to change 10 to 20. Evaluation and approval of a contractor's purchasing systemat the $\$ 10 \mathrm{mililion}$ level; and proposing a $\$ 100,000$ system at the level for the matory fixed price subcontracts clause are two further examples where the threshold figures are too low.

## DOD

$0474-2.3$
$52.215-1$ - He recomnend that the following be aded to paragraph (a) of the clause "including small lusiness restricted
advertising" since such contracts are solicited on a formally adveztiscd basis but नwarded under negotiation authority.
DISP
$C$
0371-001 The threshold for exemption from the clause is the current statutory threshold for small purchases, not $\$ 10,000$ per se. The threshold was raised by P.L. 93-356 in 1974 from $\$ 2,500$ in recognition of the effects of inflation. Comptroller General Letter B-182869 dated 10 February 1975 applied the small-purchase threshold to the Examination of Records clause. It is beyond the scope of the FAR Project to change statutory thresholds, but the question of whether the issue should be raised with the FAR Executive Staff will be addressed when the public comments on FAR Part 13, Small Purchases, are evaluated.

0474-003 The information that the clause belongs in small business restricted advertising contracts is placed in the clause prescription and preface rather than in the clause itself. Although small business restricted advertising is recognized at $F A R 15.201$ and 15.217 as an exception to the requirement for formal advertising, the inclusion of the word "advertising" in its name has caused confusion in the past. Its specific mention in the clause prescription and preface will help contracting officers to set up their general provisions correctly.

A - Accepted | C - Not accepted |
| :--- |
| M - Accepted but modified D - Major policy change - - deferred to the FAR Council |

| Emanuel Kintisch <br> 0356-33 $\frac{52.215-1(6)}{\text { C18u50 pars. }}$ <br> 1. COMMENT <br> (b)(c)a(d) In (b) and (c) the authors changed many of his duly authorized representatives" ta these mords appeer in DAR and FPR to "any authorized ropresentetive" and in (d) rovert to "ouly Euthorized representative." I prefer that DAR/FPR words <br> CODSIA and suggest that they bo used in (b); (c), and (d). <br> $0432-04$ <br> 3. $52.215-1$ - This subsection contatns a clause which implements 10 U.S.C <br> 2313(b). That statute uses the word 'his' in two places. In one place it is used to make it clear that the examination of records authority shall extend down only to the prime and to "his" subcontractors (i.e., to first tier subs only). In another instance, the statute refers to the Comptroller General and "his" representalives. The draft far referred to "The Comptroller General of the United Statea or any duly authorized representative." Accordingly, it is recommended that the first sentences of subparagraphs (b) and (c) of that clause be revised to read as follows: "(b) The Comptroller General of the United States or any of his duly authorized representatives from the General Accounting office shall..." "(c) The Contractor agrees to inciude in all of his subcontracts under this contract a provision to the effect that the Comptroller General or any of his duly authorized representatives from the General Accounting Office shall..." (added words are underscored) <br> Rationale: The draft FAR leaves out the word "his" with respect to subcontracts. This omission could create an ambiguity and could lead one not familiar with the legislative background to become confused and contend that the intention is that prime contractors should establish provisions in first tier subs that would require those first tier subs to flow the clause down to the second cier, third tier and subordinate tiers. Such a practice would be contrary to the requirements of 10 U.s.c. 2323(b) and would be contrary to both the DAR/ASPR and the FPR presently written. The added words concerning the Comptratier fipnetal will make it rlear that the representatives of the Comptroller General with authority to examine records will be from the General Accounting office and not from executive agencies. $0438-01$ <br> Proposed Far 32.215-1 would prescribe for use in negotiated contracts an "Examination of Records by Comptroller General" clause which is a revised version of that currently required by both the Defense Acquisition Regulation and the Federal Frocurement Regulations and implementing 10 v.S.C. 2313 (b) and 41 U.S.C. 254 (c). For the most part, the changes appear to be of relatively ifttle substantive significance with a single fuportant exception. Subparagraph (b) of the far clause would, with respect to any of the cor tractor's directly pertinent books, records, etc., extend access and the right to examine to "It]he Comptroller General of the United States or any authorized representative." The comparable language used in the current clause refers to "the Conptroller Generel. or any of his duly authorized representatives" (underscoring added). <br> The owiseion of the words "of his duly" in the FAR clause uight conceivably be construed to allow'the Comptroller General to delegate his mudit authority to the Defense Contract Audit Agency or to the auditors of the government agency entering into the concract. The procurement statutes currenely grant the Comptroller General authority to audit ell fixed-price pegothated contracts (inciuding fimmfixed-pilice cont tracts), but such uuthorisy bas not been given the procurement agencies with respeci to fiximfixed-prite contrects except for the purpose of evalusting the accoracy, completeness, and currency of cost or pricing data required to be mubented by the contractor. <br> In our view, the audit authority in the FAR should not exceed that granted under the basic statutes. Therefore, the language in the proposed FAR clause should be changed to read "the Comptroller General of the United Sthtes or any duly authorized representative of the General Accounting office" or, alternatively, the present language on this point should be retained. | DISP $M$ | 3. RATIONALE <br> 0356-033; 0432-004; and 0438-001 10 U.S.C. $2313(\mathrm{~b})$ and 41 U.S.C. $254(\mathrm{c})$ provide examination authority to "the. Comptroller General and his representatives." The statutes clearly limit the authority to GAO personnel, while the present FAR clause paragraphs (b), (c), and (d) do not. However, FAR conventions prohibit the use of personal pronouns specifying gender. FAR references are rewritten as follows to linit the definition of "authorized representative" without using personal pronouns: <br> "the Comptroller General or a duly authorized representative from the General Accounting Office." <br> (See Raticale 0384-002, page 091-9) |
| :---: | :---: | :---: | States or any duly authorized representative of the General Accounting of

or, alternatively, the present language on this point should be retsined.
A - Arcepted
C - Not rocepted
M - Accepted but modified $D$ - : Iajor policy change ... defejed to the far con...

1. COMMENT

Arther I. Litte


TRW
091 0384-02
The proposed contract clause set forth in FAR $152.215-1(c)$ would require that an Examination of Records provision be inciuded in all subcontracts under the prime contract; however, the DAR and FPR clauses being supplanted, as well as the basic statutory requirements (10 U.S.C. 2131 (b) and 41 U.S.C. 254 (c), only require the prime contractor to include suc
contracts..." (emphasis supplied).

The net result of this change in the proposed FAR clause would be to require prime contractors to include the clause in all his subcontracts with a flow down requirement to all tiers, wheras the statutory requirements and the existing
only require flow down to first tier subcontractors.

This proposed $F A R$ provision, in our view, exceeds the require ments of the basic statutes and well may be regarded as an unwarranted exercise of statutory authority specifically limited in the particular involved. Further, from an industry viewpoint, this would place aded increase
by $G A 0$.

In view of thc above, we urge that the proposed far rlanse he changed to retain the DAR, FAR and statutory wording, i.e., "all changed to retain
his subcontracts".

A - Accepted $C$ - Not accopted
$M$ - Accepted but modified D - Major policy change - - deferred to the FAR Counc:-

## 1. CORMENT

GSA
$04 / 25-03$
Page 2, Earagry 2h 52.215-1(a)
Recommendation
Add "and examination" after the word "access" and before the word "fn" in the first sentence.

GSA

CODSIA
$0432-05$
4. (52.215-1(d) - The extension of time during which records will be available
in the cevent of certain contingencies such as appeals and litigation
should be a requiremem triggered into bcing only by the occurrence of the
contingency. The use of the phrase "1f necessary" in the next to last line
of $52.215-1$ (d) serves no purpose except to leave in doubt whether a contractor
need retain certain records.
Rationale: Elimination of the wores removes the doubt and makes the requirement absolute as it should be.
2. DISP
3. PaMAIE

0425-003 The ras ad addition parallels the rights in the referenced paragraphs (b) and (c) and - b (es the FAR language match that in pasteraph (d) of the DAR and FPR source clauses. Failure to state precisely the rigits involved might result in the contractor's refusal to extend all applicable rights beyond the periods set forth in paragreshs (b) and (c).

## 0425-007 and 0432-005 The phrase "if

 necessary" was r.ct in either of the source clauses. Its inclusion introduces doubt into an otherwise clear statement.DISPOSITION CODES
$\begin{array}{ll}\text { A - Accepted } & \text { C - Not accepted } \\ \text { M - Accepted but modified D - Major policy }\end{array}$
M - Accepted but modified D - Major policy change -- deferred to the FAR Council

A - Accepted
C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the EjE Gouncil

1. COMMENT
$\therefore 1 A$
1344-001-15.106-2-GENETEAL
We feel that the role of consideration.
officers is an important and valuable subjectationship to Contracting in the FAR.

PCE
1572-002 Ceneral
It is also essential that the $\operatorname{FPR}$ waiver provision regarding foretgn governments be included in the Far. Current civilian, and we belleve, DOD policy provides for waiver of cost/price data subuission certification when negotiating contracts with foreign governments. It will cause an anneceseary hindrance to such negotiations if it lo not made absolutely
clear to the contracting officer that the audit clause regarding cost/ clear to the contracting officer that the audit clause regarding cost/ pricing data is not to be focluded/applied to foreign governments in these clause in these circumstances wust be provided.

The following editorial comment has been considered and incorporated to the extent appropriate:

Commenter
Letter/Comment Number
DOD
1586-003

## DOE <br> 1522-001

We do not believe the FAR has properly adopted, as stated in subnote (1) the far has included the term "negotiated" inse applfability critcrion. The DAR explicity states "all contracts (except ...)." Inclunguage. the word negoriated clearly negates the current applicability of of Cost/Price Data audit provisions to advertised contracts. If by the the FAR has assumed in adopting this Isnguage that a modification to ance advertised contract converts such a contract to a negotiated contract and the clause will be added at that time, we cannot accept such an assumption he are not assured the civilian contracting comininity will understand the FAR ${ }^{\circ}$ s intent and include the neceosary clause in advercised contracts the when applicable, i.e., changes requiring cost/price dats certification.
The following language is suggested to implement the intent of the far to waintain DAR/FPR policy.

15.106 .2 | No change in proposed language |
| :--- |
| (No change since this section applied to |
| negotiated contracts) |

52.215 .2 Make proposed language paragraph (a)

| Add as a paragraph (b) |
| :--- |

(b) Add the provisions of paragraph (b) in the clause below to all formerly advertised contracts when amended to reflect cost or price changes baged on contractor certified
cost/pricing data.

| $2 .$ | 3. RATIONALE |
| :---: | :---: |
| A | 1344-001 The role of auditors is described at the points in the FAR where audit services are required; e.g., 15.805 and 32.5 . |
| c | 1522-002 ine can find no statutory basis for the FPR waiver provision. 41 U.S.C. 254 (b) ar. 10 U.S.C. $2313(a)$ both clearly require the right to audit by the contracting agency and do not provide any exemption for foreign governments. The FPR staff advised us that the waiver in FPR 1-3.814(b) was meant to apply only to audit of certified cost or pricing data, and that the last two sentences in FPR 1$3.814(\mathrm{c})$ require an audit clause even if the submission and audit of certified cost or pricing data are waived. |

1522-002 ne can find no statutory basis the FPR waiver provision. 41 U.S.C 254 (b) ar.i 10 U.S.C. $2313(\mathrm{a})$ both clearly right to audit by the exemptior Eo FPR staff advised us that the waiver in FPR 1-3.814(b) was meant to apply only to audit of certified cost or pricing data and that the last two sentences in FPR 1 the submission or pricing data are waived.

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A - Accepted C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the Fi? こouncil
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1. COMMENT


## ¿SA

1629-001
Subparagraph 52.215-2(b), page 2

## Comment

Line 14 of subparagraph (b) is not necessary when an audit clause
is incorporated into nogotiated contracts. The audit clause for
formally advertised contracts will cover this passage. Also, line
18-20 are considered redundant to lines 8-14.
Recommendation
1629-001 The recommendation to delete the sentence that starts in line 14 is acceptcd. However, the sentence that starts in line 18 is retained at the request of DLA to assure access to data even if it wasn't directly used in negotiations or pricing.

"documents" word "relevant" be added between the words "15.106.2(b) ocuments" in the second to last line.

As indicated in orpp's transmittal letter, the FPR links the Audit Clause requirement to the requirement for inserting defective pricing clauses (threshold of $\$ 100,000$ ). The FAR is proposed to coincide with the DAR which requires use of the Audit clause in all negotiated contracts in excess of $\$ 10,000$

We do not feel that either these approaches is proper. The first part of the Audit Clause (52.215-2(a)) relates to Examination of to examine costs claimed under cost with the Government's right time-and-materials, labor-hour, or cost-reimbursement, incentive, or any combination of these the FAR proposal that this part of of contracts. We agree with contained in all contracts part of the Audit Clause should be absence of such a clause, we would not under $\$ 100,000$. In the to examine contra contractual right claimed under small-dor costs

The second part of the clause (paragraph (b), cost or pricing exception of the last two sentences, the co 46 . With the exception of the last two sentences, the clause gives the records deemed necr or his representative the right to examine and currency of cost or to evaluate the accuracy, completeness or any modificationt or pricing data used to price the contract appropriate for inclusion porkion of the clause seems contracts over $\$ 100,000$. in contract solicitations and/or in to records related to a contract , the benefits of having access contract types noted in paragraph ward under $\$ 100,000$ (other than We would be provided with related authority for pricc adjustment access to records, with no determined that the dit can be Nevertheless, use of the used for negotiation were defective to records in evaluating the pricing of any modification access contract under $\$ 100,000$. The suggested any modification to a first three lines of the clause:

If the Contractor is required to submit cost or pricing data
in connection with pricing any modification to this $1460-0.3$
the last two sentences of the clause basically state that the Comptroller General shall have the same rights of access to modification over $\$ 100,000$ to formally advertised pricing any recommend transfer of this tianguge to thertised contracts. We relates to "Examination of records by comptrollegment which (currently covered under section 1-7.103-3 of the FPR).

D07
1488-001
Clause 52.215-2(b) requires that offerors or contractor provide additional cost or pricing infomation to Contracting officers or their representatives "unless the pricing was based on dequate price competition, established catalog or market prices of commercial items sold in sunstantial quantities to the general cost or pricing information has made it difficult to obtain additional cost or pricing information from offerors who consider themselves interpretations of mestablish linguage allows ciffering "items sold in subetantial quantities to the gereral public."

The Department has experienced cases where the offerors elaim that typed price lists (as opposed to printed lists or brochures) for roducts not (although made available) to the general public exempt them from the requirement to provide dequate price cormetition and (2) reconmend that the terms (1) pices of con cices of commercial items sold in substantial quantities to the in the FAR section on pricing the audit clause, and be incorporated

A - Accepted
C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council

A - Accepted
C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council

2.
DIS
$A$
3. RATIONALE
pod C - Not accepted
人isd but modified D - Major policy change -- deferred to the FAR Council

1. COMMENT
1 SEP. 1978

| 2. ${ }_{\text {DISP }}$ | 3. RATIONALE <br> 9998-050 The revision to DAR 3-109 <br> included in DAC *76-17 (issued after the FAE Subpart 15.1 araft vas published for comment) relates to material not included in PAR Subparts $15.1,15.2$, and 15.3. The DAC revision, while not necessitating a change to PAR Subparts 15.1. 15.2, or 15.3, is spreadsheeted as a part of this Ehase II segment to account for the material and shou that this office is aware of the DAR change. As was indicated in Column 4 aña footnote 1 . page 10, of the Phase I spreadsheets for the proposed PAR Subparts $15.1,15.2$, and 15.3 issued for comment, the subject of abstract of proposals was to be considered with $F \bar{A} R$ Subpart 15.6, Source Selection, coverage. JAs a point of interest, it is noted that the subpart 15.6 drafter has subsequently decided to leave the specification of an abstract form to the discretion of the agencies.) |
| :---: | :---: |
| c | 0094-081 Omission of the word "Statutory" From the title of FAR Subpart 15.2 does not create an inconsistency between the subpart title and the language of the FAR sections cited in the comment. Furthermore although each of the cif peaotiation authorities' subparaqraph (a)(1) gives the statutory citations in far sections 15.201 through 15.217, statutory language is paraphrased in each of the sutparagraphs (a)(2). In combining DAR añ FPR coverage of negotiātion authorities, the formerly quoted parts of the two statutes are paraphrased because there are differences in them, althouqh they are minor. |
| D | 0075-005 See rationale 0075-004 on page 022-8. <br> 0090-004 Although this comment has been assigned a Comment/Letter No.. we are Considering it as a no comment at this time. On March 2. 1981, Mr. Randy Sim, office öf General Counsel. OPM (successor to CSC) confirmed that the cases referred to in the comment letter are still pending. |

[^14]A - Accepted $\quad$ C - Not accepted
M - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council

| EPA <br> 1. COMMENT <br> We also suggest that for <br>  15.2 that either the appropriate sections in 15.2 be so noted, or if the GEUKRRL, table is reture. | $\begin{gathered} 2 \\ D I S \$ \\ C \end{gathered}$ | 3. RATIONALE <br> 0100-053 Notwithstanding the Aispesition of comments $0109-052$ and 0100-054, pages 022-51 and 52, we do not aqree with the suggestion to note in FAR Subpart 15.2 those authorities not reguiring a determination and findings (DEF). Having clearly indicated in paragraph (c). Iimitations, under the negotation authorities in subpart 15.2 those instances requiring a DEp to authorize use of that particular statutory authority for contracting by negotiation in lieu of formal advertising, ve do not consider it necessary to state those instances not requiring such a DEF. |
| :---: | :---: | :---: |
| Shortening the References to the Statutory Condition for Competitive Proposals. <br> (a) FAR as Presentiy Proposed. <br> Subpart 15.2--NEGOTLATION AUTHORITIES <br> 15.200 scope of subpart <br> (a) This subpart identifies the statutory authorities (including applieation and limitations) for using negotiation as method of contracting. These authorities are exceptions to the general requirement for formal advertising. <br> (c) Conditions for the use of negotiation authorities are listed in 15.201 through 15.217 . . . Contracting officers thall use the 0.S. Code citation applicable to their agency. Each negotiated contract shall contain a reference to the specific authority under which it was ROS4-O22 15.200 GENERAL. negotiated. <br> (b) and (c) comment and recomendations <br> We suggest that the circumstances for use of the <br> four basic methods of acquisition, competitive sealed bids, competitive proposals, sole source aequisitions and emergency acquisitions couid be better defined. We plan a later submisaion in this regard. | $C$ | 0084-022 For the reasons noted in Eationales 0084-001, 0084-004, and 0084119, page 022-3, the FAR generally follows eristing acguisition policies and procedures. Those existing policies and procedures do not include the concept of "the four basic methods of acquisition" mentioned in the comment (i.e., competitive sealed bids, competitive proposals, sole source acquisitions and emergency acquisitions). Hith this in mind, we believe that PAR Subparts 15.1 . 15.2, and 15.3 do accurately describe the circumstances for contracting by neqotiation. |
| Etha M. Quinn <br> 9996-029 It is necessary to add a sentence to FAR 15.200 (c) in response to rationale 0109-048 and 0109-055 on pages 022-45 and 022-46, respectively. | $A$ |  |


| A - Accepted M - Accepted but modified $D$ - Not accepted D Major policy change | ferred to the FAR Council |  |
| :---: | :---: | :---: |
| 1. COMMENT <br> ADFA $15.500 \text { (a) }$ <br> wojof Change "statutory authorities" to "circumstances authorized by statute" to cinfirmwith provisior of 15.104 (a). | DISP | 3. RATIONALE <br> 0103-069 See rationale 0 103-066, page 022-12. Additionally, the PAR 15.200(a) words "statutory authorities" do not appear to conflict vith, nor are they considered to be inconsistent with, the Ianguage of FAR 15. 104 (a). |
| GSA | C | 0501-009 See rationale 0501-005 and 0501006 on page 022-9. |
| ADFA $\left.\begin{array}{c}0103-093 \\ 15.2 \text { GENERAL }\end{array}\right\}$ | $C$ | 0103-070 and 0103-093 The crossreferences cited in the comment are intended to assist the user and eliminate repeating text appearing elseuhere in the FAR. He bave reviewed Subpart $15.2^{-}$to ensure that cross-references are necessary to refer the users to other relevant PAR material that they must understand in crder to apply Subparts 15.1, 15.2, and 15.3 properly. No cross-references are deleted as a result of that review. |
| FAIREHILE INU. $\begin{aligned} & 15,201(a)(2) \\ & 0110 \text {-001 } \\ & \text { no lingt of the fact that the national emergency } \\ & \text { of Part } 15 \text { exists } 201(\text { (see attached), the second sentence } \\ & \text { should be deleted. Contracting By Negotiation } \end{aligned}$ | $C$ | 0110-001 This comment, contained in a letter dated November 17, 1978, was responded to by letter on December 7, 1978 by Mr. William R. Thybony, Assistant Administrator for Regulations, Office of Federal procurement policy. For the record, we quote from the December 7, 1978 letter: "...You express the belief that the...language in 15.201(a) (2)...should be deleted...The reason offered is that the national emergency no longer exists as supported by the Fall 1078 Senator Mathias attachment regarding passage of the - National Emergencies Act' (P.L. 94-412). Önfortunately, Senator Mathias did not provide full coverage of the Act as passed. I have enclosed a copy of the complete Act for your information. It is intcresting to note that the emergencies have not themselves been terminated - only the powers and autborities qnder them. of particular merit in this instance, however, is Title $\nabla$ of the Act, particularly sec. 502 (a) (3) and (7). Specifically exempted from the provisions of the Act are 41 J.S.C. 252 and 10 U.S.C. $\overline{2} 304(\mathrm{a})(1)$, as cited in the FAR coverage. The reasoning for the exemptions is found in the legislative history accompanying the Act. Exemption was necessary because of the application of the two provisions of law to major socio-economic policies favoring labor-surplus and disaster-area, small business, and balance of payments programs. Separate leqislation would have been required to allow the agencies to continue these special proarams since no other authority is available..." |

A - Accepted
C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council
I. COMMENT
2.

FEDERAL EAR AESOCIATION
$1285-0$
1
8 K. 403 .
16.403 Fixed Price Incentive Contracts

In the fixed price incentive contract format, the relation-
ship between the incentive provisions, i.e., target cost, target profit, and the share line for adjustment must be related to the negotiated ceiling price. As proposed FAR 16.403 indicates, a fixed price incentive contract is appropriate when a firm fixed price contract is not suitable, f.e., where performance and cost risks are such that they camot be estimated with any reasonable degree of certainty. Accordingly, a celling must be negotiated which is not so low as to convert the contract into a firm fixed price contract at its inception nor so high that the contract is essentially a cost reimbursement-type contract. The establishment of a ceiling should provide sufficient flexibility between target and ceiling to account for performance and cost risks.

It is recommended that 16.403 be revised to add a new subparagraph as follows:

### 16.403(e) Negotiation of Ceiling.

A ceiling shall be negotiated which provides a sufficient spread between target cost and ceiling price to provide reasonable protection to the contractor from the impact of performance and cost risks which cannot be estiak led with any degree of accuracy. Negotiation of the cef ing should take into accoult the reasent there are the negotiated targence risks which are so great that a ceiling which provides reasonable protection to the contractor while maintaning a degree of contracting risk cannot be negot be used.

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ADPA
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5 Add "ond performonce, if included" ofter "cost." lacentive contracts provide for performonce targets as well os cost fargets when oppropriate. The description in 16.403(o) is not complete inless performonce is included.
include the requested phrase at this
point. See, however, FAR 16.403 (b) (3).
HHE 403 (b) should be changed to read "A fixed-price incentive
137.003 Para. 16.403(b) should be changed to read "A finderscoring added to indi-
1338.003 Para.
16.403 (b). contract may be approp

## DISPOSITION CODES




| A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council |  |



M - Accepted but modified D - Major policy change -- deferred to the FAR Council

| 1. COMMENT <br> HEH <br> $0015-9 / 3-15,209(6)$. <br> On page 16.515 .203 (c) indicates that the negotiation authority citation for awards under $\$ 10,000$ that were originally estimated to cost in excess of $\$ 10,000$ (and based upon another authority) not be changed to 41 U.S.C. 252(c).(3). However S 15. 202 (c), 15.205 (c) and 15.211 (c) (2) indicate that these authorities shall not be used whenever negotiation is authorized for purchases of $\$ 10,000$ or less. It is recommended that these sections be reworded to avoid the appearance of conflict with 515.203 (c). We also recommend that these sections be revised to include guidance on which authority to cite if the original estimated cost of the requirement was under $\$ 10,000$ but the negotiated amount was in excess of $\$ 10,000$. | $\underset{\subset}{2 .}$ | 3. RATIONALE <br> 0085-013 He appreciate the comment's intent. However, we believe that careful reading of the cited paragraphs discloses not even the appearance of a conflict, althongh FAR 15.203(c) indicates that, when negotiations for purchases of $\$ 10,000$ or less have been initiated under another authority. that other authority shall be cited as the authority for resulting contracts, even though they may be for $\$ 10,000$ or less. <br> (a) There should be no appearance of a conflict between PAR 15.203 (c) and <br> 15.202 (c). because, if one of the <br> 15.202(a) authorities had been used initially, the initial estimated aggregate amcunt yould have been more than $\$ 10,000$, since FAR 15.202(c) clearly indicates that the 15.202 (a) authorities shall not be used (as the initial authority) when negotiation is authorized for purchases of $\$ 10,000$ or less. Hence, for an action initiated under one of the 15.202(a) authorities. should the resulting contract (s) be for $\$ 10,000$ or less, the initial negotiation authority would be cited. Conversely, if an action initiated under one of 15.203 (a) authorities (that yould otheruise have been negotiated under one of the authorities cited in FAR 15.202 (a) had its initial estimated aggregate amount been more than $\$ 10,000$ ) produces quotations of more than $\$ 10,000$, award cannot be made until all <br> requirements of FAR 15.202 have been met. (b) similarly, there is no appearance of a conflict between PAR 15.203 (c) and 15.205 (c) because, if one of the 15.205 authorities had been used initially, the initial estimated amount would have been more than $\$ 10,000$ (except as authorized for Educational Service Agreements), since 15.205 (c) clearly indicates that the 15.205 (a) authorities shall not be used Jexcept as authorized for Educational Service Agreements) as the negotiation authority when negotiation is authorized for purchases of $\$ 10,000$ or less. Eence, as in paragraph (a) above, for an action initiated under one of the $15.2 \overline{0} 5$ (a) authorities, should the resulting contract (s) be for $\$ 10,000$ or less, the initial negotiation authority would be cited. Again as in (a) above, if an action fhat would otherwise have been neqotiated under one of the authorities cited in FAR 15.205 (a) had its initial estimated amoant been more than $\$ 10,000$ ) initiated under one of the 15.203 (a) anthorities produces quotations or more than $\$ 10,000$, award wonld be made citing one of the 15.205 (a) authorities. providing all the requirements of 15.205 had been met. <br> (c) There is no appearance of a conflict between FAR 15.203(c) and 15.211 (c) (2) for the reasons similar to those given in <br> paragraphs <br> (a) and <br> (b) above. <br> (d) In sumary, we do not believe it |
| :---: | :---: | :---: |



| A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council |  |


| 1. COMMENT <br> ADPA $15.203 \text { (b) }$ <br> 0103 -72 Change " 10,000 on less" to "not more than $\$ 10,000$ " In this paragraph and wherever the ©Thase "or less" is ured. "Not more than" is the phase) used in the statute. | $\begin{gathered} 2 . \\ \text { DISP } \\ C \end{gathered}$ | 3. RATIONALE <br> 0103-072 The commenter states no reason for believing that the statutory language should be included in paragraphs (b) and (c) of FAR 15.203. As indicated in footnote 1 . on page 13 of the FAR Subpart 15.2 draft issued for comment, statutory language is even paraphrased in each paragraph (a) of FAR sections 15.20115.215. For editorial reasons, the construction cross-reference in FAR $15.203(b)$ is deleted. Nonetheless, the phrase "contracts of $\$ 10,000$ or less may result* in FAR 15.203(c) does not appear to violate the statutory language and allows the intent to be stated in a clear manner. See also rationale 0094-081 on page 022-17. |
| :---: | :---: | :---: |
| EPA $\text { -0104 } 248$ <br> 3. Sec. 25.203 , paracraph (b): Part $35 . \mathrm{XXX}$ is cited for construction; however, Part 35 is entitled "Research and Develcquent." <br> COM. FOR BLIND \& OTHER SEV. HANDIGAPPED $\begin{aligned} & \text { FOR BLIND \& GTHER SEV (b) } \\ & \text { O } 31,001 \end{aligned}$ <br> mandetoxy progrmas are exempted an mptainl prograne from negotintion requirements and applicition for purchases under \$10.000: Tha page 16 ianguage doas not apply to the "Bce." zven a $\$ 5$ buy goes directiy to Beil. He would ilke a cavat or some form of ooverage provided under 15, 203 to cover the situmtion and ake it noticenble form wior. | A | 0631-001 The DAR and FPR coverage çorresponding to FAR 15.203 does not contain a caveat similar to that requested in the comment. We do not believe such a caveat is appropriate or necessary because detailed coverage regarding acquisition from the blind and other severely handicapped is in FÄR Subpart 8.7. |
| HEH <br> $00550>-15.2 .3 / \mathrm{c})$. <br> On page 16.1515 .203 (c) indicates that the negotiation authority citation for awards under $\$ 10,000$ that were originally estimated to cost in excess of $\$ 10,000$ (and based upon another authority) not be changed to 41 D.5.C. 252(c)(3). However $\$ 15$. 202 (c). 15.205 (c) and 15.211 (c) (2) indicate that these authorities shall not be used whenever negotiation is authorized for purchases of $\$ 10,000$ or less. It is recommended that these sections be reworded to avoid the appearance of conflict with 515.203 (c). We also recommend that these sections be revised to include guidance on which authority to cite if the original estimated cost of the requirement was under $\$ 10,000$ but the neqotiated arount was in excess of $\$ 10,000$. <br> INTERIOR <br> 009.4 .204 <br> 15.203(c) - In the recond rentence, consideration thould be given to incorporating or referencing the provitione of Section 221 of 2 .I. 95-507 which edds new subsection (i) to Section 15 of the Small Jusinets Act. Subsection ( $j$ ) requires that each acquisision of lest than $\$ 10,000$ and which if subject to mall purchase proceduret be reeterved exclusively for emall business concerns. | $C$ | -0085-007 See rationale 0085-013 on page 022-24. ```0094-084 The provisions referenced in the comment do not appear in the DAR and FPR. coverage corresponding to FAR 15.203(c). He consider that the subject matter of the guidance requested in the comment is appropriate for inclusion in FAR Parts }1 and 19, Small Purchases, and Small Disadvantaged Business Concerns respectively.``` |
| EPA <br> $0109-41$ <br> sec. 15,203 , parasremph (c). It is suggested that wording substantially . as the following be added: "Similarly, if the lowest responsive bid mutmitteed under focmal advertising is less than $\$ 10,000$, this negotiation authority shall not be used ard the contract shall be awarded in accordance with the formal advertising procediures." | $C$ | 0109-041 We consider the guidance requested in the comment to be inappropriate for inclusion in FAR 15.203 (c) because it is relevant to the subject of, and procedures for, formal advertising. |


| ted | $C$ - Not accepted |
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| ted but modified $D-M a j o r ~ p o l i c y ~ c h a n g e ~--~ d e f e r r e d ~ t o ~ t h e ~ F A R ~ C o u n c i l ~$ |  |


A - Accepted $\quad$ C - Not accepted

| 1. COMMENT | 2. | 3. RATIONALE |
| :---: | :---: | :---: |
| HUD <br> 0086804 <br> -Section 15.205 cites services of educational institutions as a condition wifch permits use of negotiation. Shouldn't state and local governmenta be added to this category? Actualiy both groups of contractors have overlapplag characteristics; e.g. they're nonprofit, receive awards for social reasons rather than economic reasona and represent the same constitutency. It should be recognized that there is a growing body of procurements going to the states and locals and in many instances there are liaisons formed between the two groups. | D | 0086-004 While the concern expressed is appreciated, acceptance of this comment Would require legislation or other action Gutside the scope and authority of the FAR Project. |
| INTEFIGR $0094.066$ <br> 15.205(b)(1)-(3) - We have experienced numerous "abuses" of ehis authority as a reault of the rather vague examples used under FPR $1-3.205(a)$. Since the FAR basically incorporates these examples verbatill, we recomend they be further clarified to restrict the circumstances under which this suthority may be uoed. | $C$ | 0094-086 While we appreciate the honesty of the comment, it is beyond the scope of the $F A R$ project to impose new restrictions regarding the circumstances under which these authörities may be used. As noted in the comment, the examples in FAR <br> 15.205(b)(1) through (3) are the same as those in the cited FPR and those in DAR 3205.2. Just as the FAR seeks to provide needed fiexibility to accomodate differing agency needs and opērating conditions while maintaining a great deal of uniformity, so too must it rely to a great extent upon the ability of the agency to monitor its own internal operating procedures. |
| HEW <br> 0085 -2it- 5.205 (e). 1 <br> On page 16, s. 15,-203(c) indicates that the negotiation authority citation for awards under $\$ 10,000$ that were originaliy estimated to cost in excess of $\$ 10,000$ (and based upon another authority) not be chanoed to 41 D.S.C. 252(c).(3). However 515. 202 (c). 15.205 (c) and 15.211 (c) (2) indicate that these authorities shall not be used whenever negotiation is authorized for purchases of $\$ 10,000$ or less. It is recommended that these sections be reworded to avoid the appearance of conflict with $\$ 15.203$ (c). We also recommend that these sections be revised to include guidance on which authority to cite if the original estimated cost of the requirement was under $\$ 10,000$ but the necotiated amount was in excess of $\$ 10,000$. <br> EPA Lconstruction and architect-ergineer contracting. | $C$ | 0085-014 See rationale 0085-013 on page 022-24. <br> 0109-039 FAR 15.205(c) is revised to delete the cross-reference citation for Educational Service Agreements since Part 37 of the FAR issued for corment through the Federal Register indicates that coverage of Educational Service Agreements is not to be included in the FAR. Because of the limited extent to which coverage of this subject is required, it should be developed by each agency according to its needs. |


| A - Accepted $\quad$ C - Not accepted M - Accepted but modified D - Major policy change | r | to the FAR Council |
| :---: | :---: | :---: |
| 1. COMMENT | ${ }_{\text {2 }}^{2} \mathrm{SP}$ | 3. RATIOINEE |
| DOD <br> 0108-037 <br> In $15.206(\mathrm{~b})$ we question the deletion of Puerto Rico, as shown in DAR 3-206.1. We do not believe Puerto Rico can be properly classified as a possession. <br> DAC. \#76-20. 17 SEP 1979 $9998-053$ <br> 3-206.2 Application. The authority of this paragraph 3-206 shall be used only for the procurement of supplies to be shipped from, delivered, and used, or services to be performed, outside of the United states, ils pussessions and Puerto Rico, irrespective of the place of negotiation or execution of the contract. When the authority of this paragraph is available for the negotiation of a contract, no other negotiating authority shall be used, nor shall formal advertising be used. | A <br> C | 0108-037 FAR 15.206(b) is revised to Include Puerto Rico. <br> 9998-053 The revision to DAR 3-206.2 included in DAC $\$ 76-20$ is editorial in nature and requires no change to FAR 15.206. |
| (abler |  |  |
| GSA <br> $05010 / 6$ <br> (e) Limatestions. <br> (i) Every contract negotiated under these authorities shall be supported by adeteraination and cindinge justifying their use and signed by the contracting officero (fet $15.3 \times \mathrm{x}$ ). These authorities shall not be used when egotistion is authorized for purchases or 510,000 or less (15.203), or for purchases outside the United States (15 208 ). | $C$ | 0501-016 See rationale 0501-005 and 0501. 006 on page 022-9. |
| NASA $006302$ <br> In the last line, change "this authority" to "these $\because$. duthorities". | A | 0063-022 FAR 15.207 (c) (2) is revised as the comment suggests. |

A - Accepted
C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Counci:


A - Accepted $\quad C$ - Not accepted
$M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council

| $\csc$ <br> 1. COMMENT <br> $0090-00615,210(b)(4)$. <br> Finally, in Section $15.210(6)$ it is specified that negotiation is perتitted when it is impracticable to secure competition by advertising, e.g. when procuring training film, motion picture production, or maniscripts. The intent of this passage 18 not clear. Does this apply only to three specific products? If so, what distinguishes these products from products such as slide/tape presentations, lectures, or audiovisual casseites? Or do the three products represent clapses of products or representative examples oniy? If co, then this passage should be rephrased to expressly present the three products as examples. | $\begin{gathered} 2 \\ \text { DISP } \\ A \end{gathered}$ | 3. RATIONAIE |
| :---: | :---: | :---: |
|  |  | $\cdots$ |
| ALIFA ```003.77. 16.210 (b) (7) Change "with respect to them" to "thercin". 003:%8 15.210 (b) (8) Insert "those calling" before "for".``` | $M$ $A$ | 0103-077 and 0103-078 Aithough the suggested wording of the comment is not adopted, FAR $15.210(\mathrm{~b})(7)$ is revised ${ }^{-1}$ to state more clearly the matter $\bar{s}$ to which the referenced instruction applies. FAR 15.210(b)(8) is revised as suggested. |

HN SOIWLE ASS.
$0189-01$
15.210 (b) (13) "When it is impossible to draft, for invitation for bids, adequate specifications or any other adequately detailed description of the required supplies or services."
Suggest changing the word "impossible" to "impracticabie" or "uneconomical." The word "Impossible" frequently requires the expenditure of an inordinate amount of public funds solely to comply with use of the term. There are very few cases where it is "impossible" to draft specifications but this requirement ranses activities to develop many speciflcalions for tormal off-the-shelf products by ne more cost effective to purchase off-the-shelf products by negotiation.

0189-001 The point made in this comment is a valid one. $\quad$ Bovever, as previcusly noted in other rationale, the FAR
generally follows existing acquisition policies and procedures. The DAR and the -FPR have long used "uben it is impossible tc draft" in coverage corresponding to FAR 15.210 (b) (13). It is clear in the legislative history that although this negotiation authority provides for negotiation where it is impracticable to secure competition and allows for the intent to be construed iiberally, it also places upon the agencies the maximum responsibility for decisions as to when it is impracticable. Because of that agency responsibility, the DAR and the PPR recognized that use of this broad neqotiation authoritp must be controlled


\begin{tabular}{|c|c|c|}
\hline A - Accepted \(\quad C\) - Not accepted
M - Accepted but modified D - Major policy change \& err \& to the FAR Council \\
\hline \begin{tabular}{l}
1. COMMENT \\
ADPA \\
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\(0103-80\)
\[
15.210 \text { (c) (1) }
\]
\[
\text { Change "(15.3xx)" to "as provided in } 15.307 \text { ". }
\]
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\end{tabular} \& \begin{tabular}{l}
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2 .
\] \\
DISP
\end{tabular} \& 3. RATIO::ALE
\[
\begin{aligned}
\& 0103-080 \text { See rationale } 0103-074 \text {, page } \\
\& 022-31 \text {. }
\end{aligned}
\] \\
\hline \begin{tabular}{l}
HIT \\
0108239 \\
In 15.210 (c) (2), we recomend that an exception, similar to that in DAR \({ }^{3-210.3 \text {, be included for foreign military sales }}\) falling within the illustration of 15.210 (b) (18). \\
EF'A
\[
0109-046
\] \\
sec . 15.210 , paragraph (c) (2): We do not understand the meaning or rationale for the exception set out in the paragraph.
\end{tabular} \& \(A\)
\(C\) \& \begin{tabular}{l}
0108-039 FAR \(15.210(\mathrm{c})(2)\) is revised as suggested in the comnent. \\
0109-046 (a) The comment indicates that in FAR 15.210(c)(2) the meaning of "except that these authorities [10 U.S.C. \(2304(\bar{a})(10)\) and 41 U.S.C. \(252(c)(10)]\) shall be used if appropriate in preference to the authorities to negotiate purchases not to be publicly disclosed (15.212)" is not understood. clearly, it means that exception (10) is to be cited in preference to exception (12) whenever both exceptions would be applicable. It is noted that no other comments were received on this point. \\
(b) The comment also indicates that the "rationale for the exception set out in the paragraph [FAR \(15.210(c)(2)]\) is not understood." We believe this comment is based upon the fact that FPR 1-3.210(b) does not include in its "Limitations" language corresponding to the DAR 3-210.3 "except that this authority shall be used in preference to 3-212...." FAK \(15.210(c)(2)\) is, of course, based upon that DAR language. The FAR wording was concurred in by GSA. OFPP agreed to the adoption in the FAR of the DAR priorities in the application of negotiation authority. The use of these priorities in applying negotiation authorities will provide a consistent basis for enhancement of government-wide standardization in this area, including related statistical reporting such as that required under the Federal Procurement Data System.
\end{tabular} \\
\hline \multicolumn{3}{|l|}{G 6 A} \\
\hline \begin{tabular}{l}
950/-019 \\
- (3) The appiteation 11 iustrated in (b) (3) arrec ( 4 ) above hall not be used when shall Business festrictex divertising" has been uned. However, zhese auterorities ass be used in the ease of partial set-asides, unlesss the contracting officer dreides that the railure to mbtain wifficient responsive bids wat caused by the exszezence of the set-asidesor(ee 15.20 y . \\
ADPA \\
\(0 \times 5 \div{ }^{2}\) \\
15.210 \\
(c) (3) \\
Change "application" to "applications".
\end{tabular} \& \(C\)

$A$ \& 0501-019 See rationale 0501-005 and 0501--006 on page 022-9. <br>
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\end{tabular}

[^15]
## DISPOSITION CODES

A - Accepted
C - Not accepted
M -

- Accepted but modified D - Major policy change -- deferred to the FAR Council

\begin{tabular}{|c|c|c|}
\hline \begin{tabular}{l}
INTERIGR \\
1. COMMENT \\
0094887 \\
15.210(c)(3) - In order to be clearer, we suggest a reference to the applicable portion of PART 19 be included to cover "Small Business Restricted Advertising" mentioned in the first sentence of this subparagraph. \\
NSF \\
\(0071-90518: 210\). \\
Hy third coment concerns the requirement in' 15.211 and 15.307 that contracts negotiated for research and development be supported by written determinations and finding, signed by the head of the agency. While this is a statutory requirement, I urge OFPP to work toward eliminsting it. Formal sdvertising 15 razely, if ever, appropriate for Red concracting for the simple reason that precise specifications cannot be written. This is specifically recognized and stated in Section IV of the Defense Acquisition Regulations and in the latest far draft version being informally circulated. If a written determination is meeded at all, it could be accommodated under the authorities in 15.210 , which do not require signature by the head of the agency. \\
I don't know of any compelling reasons that have been advanced fo support of this requirement, and continuing it results oaly in an unnecessary ذpaperwork exercise in obtaining the required bead of the agency approval.
\end{tabular} \& 2.
DISP
\(A\)

$D$ \& | 3. RATIONALE |
| :--- |
| 0071-005 Although FAR 15.210 is mentioned in this comment, the main thrust of the comment really concerns the requirement for a determination and findings in FAR 15.307. For the reasons stated in rationale 0071-003 on page 022-36, this matter is geferred to the PAR council. | <br>


\hline | DOE |
| :--- |
| $0114-\infty 7$ |
| Aiso, negotiation authority 15.211 is set at two dffferent thresholds for agencies, depending upon whether they are subject to 10 USC or 41 USC. Some agencies such as DOE and DOT have operating elements which are subject to different codes. Pending passage of a uniform acquisition act, it is recommended that OFPP introduce legislation amending 41 USC to equalize these thresholds so that all agencies and elements may operate under uniform procedures. | \& $D$ \& 0114-007 While the concern expressed is appreciated, by its own terms this comment requires legislation or pther action outside the scope and authority of the FAR Project Office. The thresholds will be subject to early review by the FAR Council. <br>


\hline | HUL $0 \begin{aligned} & g \lg +05-15.211(a)(2) \\ & -S e c t i o n ~ 15.211,15.21 \end{aligned}$ |
| :--- |
| Section $15.211,15.213,15.214$ and 15.216 require that the head of an agency must make the determination before these negotiating authorities may be used. Historically in sections 211,213 and 216 it was thought the expenditure of the large sums of money, which would be required in each of these instances, mandated review by the head of an agency to prevent arbitrary and wasteful spending of the federal budget. In recent years the fmplementation of OMB Circular A-109 and other management controls has provided for meaningful revies by the head of an agency. To incert the head of an agency into the process again by signing a determination and finding (D\&F) will only increase the amount of time needed to process a procurempnt and duplicate evaluation efforts mandated by other legislation; e.g. OMB Circular A-109. Whlle secticr 214 does not have a large amount of money assoclated. with 1t, the insertion of the head of the agency into the revieu process is fust as meaningiess. Circumstances wartanting the use of this authority would be procurement related rather-than management issues. | \& $C$ \& 0086-005 We appreciate the comment. However, the signatory authorities for äcquisitions discussed in FAR 15.211 are virtually the same as those prescribed in the DAR and FPR. The same is true for FAR 15.213 and $15.214 .^{-}$The FAR 15.216 coverage applies only to agencies already subject to U.S.C. 2304(a)(1). The FAR has not introduced the agency head into the process. <br>

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A - Accepted
C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council


| A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified D - Major policy change -- deferred to the FAR Council |  |


| 1. COMMENT <br> (b) These authorities shall be used for purchases not authorized by 15.203 (purchases of $\$ 10,000$ or less) or 15.206 (Purchases outside the United States). <br> (c) These authorities shall not be used wher negotiation is authorized by the provisions of 15.203 or 15.206 . <br> (d) These authorities shall not be used when negoriation is authorized by the provisions of 15.203 (purchases of $\$ 10,000$ or less) or 15.206 (purchases outside the United States). | 2. | 3. RATIOSALE |
| :---: | :---: | :---: |
|  |  |  |
| GSA <br> 0501.82d <br> (c) Linitations. <br> (1) Every contract negotisted under the se suthorities shali be supported by a deteraination and findingsind justifying their use and signed by the agentronead (fee $15.3 \times 2$, | $C$ | 0501-020 FAR 15.212(c) (1) conforms to the PAR Drafting Procedures. See rationale 0501-005 and 0501-006 on page 022-9. Additionally, FAR Subpart 2.1, Definitions of hords and Terms, will include the term "agency head" with a cross-reference to the definition of "head of the agency" so that it is clear that the terms are synonymous. |
| EFA $0109047$ <br> Sec. 15.212, paragraph (c) (2): We do not understand the exception which references an inapplicable limitation on services. | $C$ | 0109-047 PAR 15.212(c)(2) (as released through the federal Reqister for comment). like the corresponding DAR 3-212.3 coveraqe, included the phrase "except as otherwise provided in 15.204 (c)." He believe that the referenced exception phrase is not "an inapplicable limitation on services" (i.e., for professional services, only that authority may be used). However. FAR 15.212 (c) (2) is revised to delete the unnecessary word "otherwise." |



## DISPOSITION CODES

A - Accepted
C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council


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DISPOSITION CODES
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A - Accepted C - Not accepted
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| A - Accepted | $C$ - Not accepted |
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| $M$ - Accepted but modified $D$ - Major policy change -- deferred to the PAR Council |  |

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\hline \begin{tabular}{l}
1. COMMENT \\
NASA
\[
\begin{aligned}
\& 0063-005 \\
\& 15.214(\mathrm{c})(1)
\end{aligned}
\] \\
In the fourth and fifth lines, change" (see charts in \(15.3 \times x \times)^{n}\) to (see Table I in 15.307)". \\
\(G E A\) \\
\(000 / 125\) \\
(c) Lieltazions. \\
(1) Every eontract nesotisted under these suthorities shall be zupported by adeterwination and rindingz juztifylag their use and sigaed by the aitency hesd or where \\
 15. \(3 \times \times x\) 둘
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DISP
A

$C$ \& | 3. RATIONALE |
| :--- |
| 0501-025 and 0501-026 FAR 15.214 (c) (1) and 15.214 (c) (2) (iii) conform to the FAR Drafting Procedures. See rationale 0501005 and $0501-006$ on paqe 022-9 and 0501020 on page 022-37. | <br>

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$$ \& \& <br>

\hline | $0.50 / d 20$ |
| :--- |
|  reifeted bid price of pesponsible bidder, en deternined by $t$ the cono bexd | \& $C$ \& See rationale above <br>


\hline | STATE-AID |
| :--- |
| -0180001 page 16.215 |
| Page 32, Part 15. After reviewing the first two sections of the proposed FAR we noted with some degree of concern that the fAR has eliminated reference to the Foreign Assistance Act in Part 15 Section 15.215, "Otherwise authorized by law", which is the section that we will use in citing authority to award contracts. |
| A complete reading of the proposed FAR section leads to the conclusion that AID is covered under- Subpart (b) (3) (19) which refers to "agency- statutory authorfty for negotiating contracts without advertising." However, despite our conclusion that this covers us, we wish to note the elfmination in 15.215 of the specific reference to the Foreign Assistance Act contained in Subpart 1-3.215(a)(1) of the FPR. We also wish to point out that it is A.I.D.'s interpretation that the Agency is covered, in Subpart 15.215, by the reference to other agency tuthority. |
| CSA |
| $0482-08$ |
| Page 69, Paragraph 15.215 |
| Comment |
| Section 321 of the Transportation Act of 1940 ( 49 U.S.C. 65) permits negotiation for transportation services when the services required can be procured from any common carrier. This is an important exception that permits the negotiation of transportation services under the above described conditions. The absence of this citation may be construed to mean that certain transportation rates may not be negotiated. |
| Recommendation |
| The following example listed in FPR 1-3.215(a) (3) should be brought forward in this section of the FAR: "Section 321 of the Transportation Act of 1940 (49 U.S.C. 65). (This law permits negotiation for transportation services, when the services required can be procured from any common carrier. This authority shall not be used to evaluate competition from companies which are not common carriers when the services may also be performed by such companies.)" | \& $C$


$C$ \& | 0100-001 The contents of the comment are noted. As indicated in the comment. paragraph (b) of PAR 15.215 preserves the authority conferred by other legislation to negotiate contracts. The Foreign Assistance Act of 1961 ( $2 \overline{2}$ O. S.C. 2151 et seg.) is just one of any number of typical examples of such legislative authority. |
| :--- |
| The PPR includes some typical examples and the DAR does not. The FAR gives only one example. It is clearly just an example, and ve do not believe it is necessary to provide an all-inclusive listing. |
| 0482-008 As noted in rationale 0100-001 above. Section 321 of the Transportation Āct of 1940 (49 U.S.C. 65), like the Foreign Assistance Act of 1961, is just one of an̄y number of typical examples of authority conferred by other legislation. We do not believe that FAR 15.215 will be misconstrued. It states clearly |
| "Purchases and contracts may be negotlated if otherwise authorized bȳ law... This statut provision preserves the authority to negotiate contracts conferred by other legislation... When negotiating pursuant to this authority. cite the authorizing law In the purchase or contract instrument....." | <br>

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\end{tabular}

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A - Accepted C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council
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| INTERIUR 1. COMMENT | 2. |
| :---: | :---: |
| $0094 \% 8$ <br> $15.215(b)$ - We believe a reference to the applicable portion of part 19 should be included to cover joint manll businens sec-atides for the oeke of clarity. | c |
| ALPA |  |
| $0.05 f^{2}$, <br> 15.215 (b) $\cos (1)$ | $C$ |
| Change "cite the authorizing law" to "the staturory authority shall be cited" |  |

A - Accepted $C$ - Not accepted
$M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council

| EPA 1. COMMENT | 2. ${ }^{\text {ISP }}$ | 3. RATIOKALE |
| :---: | :---: | :---: |
| $10109048$ <br> Sec. 15,216 , paragraph (a) It is suggested that a statement to the effect that the FAR does not extend these negotiation authorities to agencies subject to 41 D.S.C. 252 (c) be included. | A | to FAR 15.200, FAR $15.216(a)(1)$ and <br> I5.217(a)(1) each state that 41 U.S.C. $\overline{2} 52$ (c) contains no comparable negotiation authoriモy to 10 U.S.C. 2304(a)(14) and (16). The comment seems to indicate that the above coverage does not adequately convèy its intended meaning: i.e., that authorities 10 U.S.C. 2304(a)(14) and (16) äre not extended to agencies subject tō 41 U.S.C. 252(c). FAR $15.200(c)$ is revised to include a succ̄̄inct statement regarding this matter. |
| Hun |  |  |
| $\left.\begin{array}{c}0086908 \\ 15.216 \\ (5)(2)\end{array}\right\}$ <br> -Section $15.211,15.213,15.214$ and 15.216 require that the head of an agency must make the determination before these negotiating suthorities may be used. Historically in sections 211, 213 and 216 it was thought the expenditure of the large sums of money, which would be required in each of these instances, mandated review by the head of an agency to prevent arbitrary and wasteful apending of the federal budget. In recent years the implementation of onB Circular a-109 and other, management controls has provided for meaniagful review by the head of an agency. To ingert the head of an agency into the process again by signing a determination and finding (D\&F) will only increase the amont of time needed to process a procurement and duplicate evaluation efforts mandated by other legislation; e.g. OMB Circular A-109. While eection 214 does not heve a liske moount of money associated with it, the insertion of the head of the agency into the rewiew process is just as menningless. Circuastances warranting the use of this authority would be procurement related rather than manckement lasuea. | $C$ | 0086-008 See 0086-005 on page 022-35. |
| GSA 250/h8 <br> (b) Application. | $M$ | 0501-028 Although the exact editorial Changes suggested in this comment have not been adopted, FAR 15.216 (b) (1) is revised for clarity. |

## DISPOSITION CODES



| A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council |  |




## DISPOSITION CODES

A - Accepted
C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council

| DOD <br> $0108 \mathrm{l}_{52}$ <br> 1. COMMENT <br> 15. 302 <br> (c). <br> Also we recomend deletion of the rast sentence in 15-302(c). This sentence tends to vitiate the requirement that an agency must obtain competition for new procurement and implies that quantities in addition to those required for the initial requirement may be treated as other than new procurement. The comptroller General has held that the fact that an acquisition could be effected with greater convenience or even at less cost from an incumbent contractor is not relevant to whether the statutory requirement for competition is applicable. 41 Comp. Gen 484 (1962). | $\begin{gathered} 2 . \\ \text { DISP } \\ \text { A } \end{gathered}$ | 3. RATIONALE <br> 0108-052 The last sentence of FAR 15.302(c), as issued for comment, was based almost entirely apon the next to last sentence of DAR 3-301(d) which has no FPR corresponding coverage. As such, it vas included as a gratuitous exarfle intended to be helpful not only to DOD but to civilian agencies as well. Since deletion of this sentence does not result in an ambiguity, PAR 15.302 (c) is revised as recommended. |
| :---: | :---: | :---: |
| INTERIOR $0094 \div 9$ <br> 15.302(d) - The sentence under peragraph (d) should contain a reference to the applicable portion of Subpart 17.2 dealing-with options. | $C$ | 0094-091 In PAR 15.302(d). inclusion of a crcss-reference to PAR Subpart 17.2 is not considered by us to be necessary to ensure the proper understanding of the material in paragraph (d). |
| EPA <br> 0109 85, 302, paraçraph (d): The use of the ward "quantity" is too restrictive: Froquently options are used to extend a period of performance. | $C$ | 0109-050 FAR 15.302(d) restates the requirement of DAR 3-301 (e) that when an option is anticipated the D\&F shall include the approximate quantity to be awarded initially and the extent of the increase to be permitted by the option. The language of FAR $15.30 \overline{2}(\mathrm{~d})$ does not preclude including and exercising options in other areas auch as period of performance. |

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DISPOSITION CODES
A - Accepted
C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council



| INTERIOR <br> 1. COMMENT <br> 009478 <br> 15.306- In the third sentence, the word "contractor" should be changed to "offeror" to maintain consistency with the rerminology used in the rest of PART 15. <br> EPA $\begin{aligned} & 0109651 \\ & \mathrm{sec} \\ & \hline 15 \end{aligned}$ <br> sec. 15. 306: There is an implication in the thira sentence that the provision is applicable only to sole source acyuisition because of the use of the terms "request for proposal" and "a prospective contractor." The intention of the sentence should be clarified before adoption in the FAR. <br> ADPA $15.306$ <br> ourinchange to read "request for proposals has been furnished to prospective contractors .... contracts". |  | 3. RATIONALE <br> 0094-093. 0109-051, and 0103-088 Although the exact wording suggested in these comments has not been adopted verbatim, the third sentence of FAR $15.3 \overline{0} 6$ is revised for clarity. |
| :---: | :---: | :---: |
| NSF <br> $0071-04130507$. <br> Hy third cotment concerns the requirement in'15.211 and 15.307 that contracts negotiated for research and development be supported by witten deterainations and finding, signed by the head of the agency. While this in a scatutory requirement, I urge OFPF to work toward elininacing ic. Formal advertising is rarely, if ever, appropriate for RoD contracting for the simple reason that precise specifications cannot be witten. This is specifically recognized and stated in Section IV of the Defense fequigition Resulations and in the latest FAR draft version being informally eirculated. If aritten determination is needed at all, it could be accommodated under the authorities in 15.210 , which do not require eignature by the hed of the agency. <br> I don't know of any compelling reasons that have been advanced in support of this requifement, and continuing it results only in an unnecesary (paperwork exercise in obtaining the required bead of the agency approval. | D | 0071-004 See 0071-003 on page 022-36. |
| EPA <br> U109. 052 15.309 TABLE I. <br> Table I, Signatory Authorlty: it is our cpinion that this table is not necessary and will result in confusion. In lieu of the table, it is suggester that the material in the table be incorporated in the negotiation authorities as an additional paragraph entitled "Signatory Authority." This approach will consolidate all of the pertinent material in the particular section in Subpart 15.2 as it relates to each negotiation authority. | C | 0109-052 (a) We do not agree that Table I is unnecessary and will result in confusion. The comment recoqnizes that the FAR must include the material in the table but suggests that it be incorporated in Subpart 15.2, Negotiation Authorities. Eut to do so would make Subpart 15.2 more complex and less understandable. <br> (b) Farthermore, to include signatory authority paragraphs in appropriate portions of FAR 15.201 through 15.217 would introduce extraneous matter into Sutpart 15.2. Signatory authority and negotiation authority are two different subjects. Conversely, removing the treatment of siqnatory authority from Subpart 15.3, Determinations and Findings to Justify Negotiation, which would be required if the suggestion were adopted, would fragment the coverage unacceptably: surely treatment of the signatures required on D\&F's belongs logically with the basic coverage of D\&F's. <br> (c) The table's organization enables users to ascertain readily the signatory authority required for those negotiation authorities requiring a DEF to justify use of negotiation, in effect providing a useful briage between FAR Subparts 15.2 and 15.3. And, finally, display in table format has the additional advantage of clearly depicting the differing signatory reguirements under the two statutes, which are not readily evident in a narrative presentation. |

A - Accepted $\quad C$ - Not accepted
$M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council



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A - Accepted C - Not accepted
    M - Accepted but modified D - Major policy change -- deferred to the FAR Council
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N. Accepted
$M$ - Accepted but modified $D$ - Not accepted

- Major policy change -- deferred to the FAR Council


## 1. COMMENT

DOT

3. RATIONALE

0781-002 (a) It seems as though the Commenter may have inadvertentiy confused several issues regarding FAR Subpart 15.4 (i.e.. applicability, format, and a standard form). It is misleading for the commenter to state that this subpart "is appropriate when a fixed-price contract is to be awarded" and that "the uniform contract format is not appropriate for....on a cost-reimbursement basis." Even when a fixed-price negotiated contract is contemplated, Subpart 15.4 or the uniform contract format may not apply to the solicitation (see for example FAR 15.401, 15.406-1, and 15.406-2).
(b) The comenter's concern that certain key RFP information "will be buried among the boiler plate" is unfounded because there will be no "boiler plate" under the FAR approach.
(c) In our opinion, there should be no "uniform instructions" per se for technical or cost proposals because of differing agency needs. The far format approach strives for solicitation uniformity by having, for example, the instructions to offerors or quoters regarding technical or cost proposals $\bar{p}$ laced in Section $L$ of the solicitation (see FAR 15.406-5(b)). Other examples of solicitation uniformity achieved through the FAR uniform format iñclude placing in Section $k$ the solicitation provisions that require representations, certifications, or submission of other information by offerors or quoters (see FAR 15.406-5 (a)), and placing in Section 1 the contract clauses (see FAR 15.406-3). The uniform format provides that when a solicitation includes certain information, that information is to be placed in the specified lettered Section of the solicitation/contract (see FAR Table 15-2 and FAR 15.406-2 (a) through (h), 15.406-3, 15.406-4, and $15.406-5$ (a) through (c)). The uniform format does not dictate a form;
(d) Regarding the commenter's stated belief that the FAR Subpart 15.4 material should be used as an optional standard format, it must be noted that even when FAR Subpart 15.4 applies to a solicitation (see FAR 15.401), FAR 15. $\overline{40} 0-1$ (a) states the solicitation format is to be used "to the maximum practicable extent," cites specific instances when the format is optional, and further states that the format does not apply in the specified instances, one of which is contracts requiring special contract forms prescribed elsewhere in this regulation that are inconsistent with" the uniform contract format. In stating the actual form to be used, $F \bar{A} R$ 15.406-2 (a) clearly indictates that, in certain circumstances. no one form is mandated.

| 1. COMMENT <br> HHS | 2. DISP M | 3. RATIONALE <br> 0908-009 Subpart 15.4 does refer to solicitations addressing OMB Circular A-76 issues. As stated in FAR 15.402(c), Subpart 7-3 (the FAR coverage addressing the Circular) does provide additional instructions for solicitations involving the A-76 cost comparisons between Government and contractor performance. In addition, FAR $1 \overline{5} .411(b)$ is revised to include a further reference to $A-76$, the Supplemental Handbook, and Subpart 7.3 for safeguarding cost comparison information. We regret that the EAR Subpart 7.3 coverage was not available for comment with this Subpart 15.4. |
| :---: | :---: | :---: |
| consia <br> 0777-00/1. In $\frac{15.400}{}$ the terms RFP and RFQ should <br> Reason: The torme should be used in a consistent format throughout the regulations. All definitions should be located in one place. <br> MAF I <br> Heed for Definitions <br> of Key Terms <br> $0795-002$ 15.400 <br> At the beginining of Subpart 15.4 , there are a number of references to requests for proposais (RFPs), requests for quotations (RFQs), solicitations, and proposals. For the must part, the first and aecond and the third and fourth terms appear to be used interchangeably without an attempt to distinguish one from another. We think that this is 1ikely to cause confusion as to what precisely is meant when these terms are used. The obvious way to handle this, it seems to us, is simply to define these and other relevant terms at the outset of the projected coverage. <br> O5A <br> $0943-002 \quad 15.400$ <br> Subpart 15.4 <br> General Comment. <br> Subpart 15.4 contalns much information concerning "proposals" and "quotations", hut does not define the terms. It is possible for a reader to construct a reasonably useful working definition of the terms, but if definitions were provided, they would reduce the potential for contlicting interpretations. <br> Recommendation. provide specific definitions of the terms "proposals" and "quotations." <br> CATEFPILLAR TFAGTOF $C O$. $\begin{aligned} & 075 \%-003 \quad 15.400 \end{aligned}$ $15,400$ generally an 01 subparagraph. A definition subparagraph is needed $t$ o cover the definition of RFP, RFQ, quotation and offer. | C | 0777-001, 0775-002, 0943-002, and 0759-003 These comments are appreciated. The drafters of FAR Subpart 15.4 had repeatedly proposed to define or distinguish the terms mentioned in these comments for man $\bar{y}$ of the same reasons given by the commenters. However, a project decision was made to adhere more closely to the DAR and FPR approach in this regard. This project decision took Into consideration that the general discussion of the terms in FAR 15.402, together with the long established and accepted usage, conveyed the meaning. Further, FAR Subpart 2.1 contains words and terms which, as used throughout the FAR, shall have the meanings set forth in that Subpar $\bar{t}$ 2.1. unless (a) the context in which they are used clearly requires a different meaning ör <br> (b) a different definition is prescribed for a particular part or portion of a part. Subpart 2.1 states that an offer means $\bar{a}$ response to a solicitation that, if properIy accepted, would bind the offeror to perform the resultant contract. Under advertised procedures, an offer is called a 'bid' and under negotiated procedures a 'Proposal." For unsolicited proposals that may or may not constitute offers see Subpart 15.5." Care is being exercised to ensure that the FAR forms, solicitation provisions, and contract clauses indicate, as appropriate, that "offer" and "offeror" means "bid" and "bidder" in advertised solicitations, or, stated differently, that "offer" means "bid" in formal advertising and "proposal" in negotiation. |
| - |  | - |




A - Accepted $\quad$ C - Not accepted




A - Accepted $C$ - Not accepted


| I. - Accepted | C - Not accepted |
| :--- | :--- |
| F - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council |  |

[10T $\quad$ 1. COMMENT

RECOMMEND: (1) Uniform Contract Formats for construction, research and development, and other contract types for which the proposed uniform contract format is not appropriate.

$0781-010$
15.406 15.406

Another failure is that uniform schedules for cos and pricing data are not provided. Such uniformity would signiffcantly ease the burden of submitting cost and pricing data and the burden of evaluating it
(8) For solitions and faster award

For solicitations which require the submission of certified cost and pricing data, uniform supporting schedules should be provided. This not need to adjurden for companies who would ments. See Attachment $B$ for sample schedules.
$0781-012\left\{\begin{array}{l}\text { finally, a detailed table of contents would be } \\ \text { helpful. }\end{array}\right.$
(9) A
9) A table of contents on the back cover (or inside back cover if the solicitation is a self-matier would be helpful for locating subject areas in complex solicitation. See Attachment $C$ for an example.


M - Accepted $\quad \mathrm{C}$ - Not accepted
$M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council



A - Accepted $C$ - Not accepted
$N$ - Accepted but modified D - Major policy change -- deferred to the FAR Council
$\left[\begin{array}{c}\text { not } \\ 078 /-017 \\ 15.406-2\end{array}\right.$

1. COMMENT
$078 /-017$
RECOMMEND: Revise the paragraphs and sections as follows:

| 2. |  |
| :---: | :---: |
| DISP | 3. RATIONALE |
| $C$ |  |
| $0781-017$ and $0781-018$ |  |
| 013 on page $201-18$. |  |

$0781-018$
$15.406-2$
RECOMMEND: Add new Section $A$ as follows:
"(a) Section A. Solicitation Summary. Insert one or two page summary of the salient characteristics of the solicitation (anticipated award date, date proposals due, proposed contract type, set-aside information, Government property, preproposal conference, etc.). Reference the paragraph(s) where detailed information can be located.

CousiA
0777-003 3. In 15.406-2 section for "Reports" should be added.
Reason: The requirement for reports and the distribution of reports should be identified. This has a direct impact on cost and data rights.

0777-003 If a contract is to provide for submission, as a deliverable, of data or reports, that requirement would be stated In the solicitation and resulting contract, as is-now the case. Depending upon the agency practice, solicitations and contracts can provide for separate pricing of reports and data. $\bar{A}$ change to FAR 15.406-2 is not necessary.
P. Accepted $\quad C$ - Not accepted
$N$ - Accepted but modified D - Major policy change -- deferred to the FAR Council



I - Accepted $\quad \mathrm{C}$ - Not accepted
$M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council



| ```nat \\ 1. COMMENT \[ \begin{gathered} 0781-0.26 \\ 15.406-4 \quad \text { RECOMMEND: Delete the paragraph number and title. Change the } \end{gathered} \] section titile to "List of Attachments."``` |  | 3. RATIONALE <br> 0781-026 It wounld be incorrect to delete the FAR sursection number (see 0781-025. 0759-006. and 0745-008 on page 201-23). In FAR 15.406-4, the title of Section J is Changed as suggested and the explanatory words of instruction are expanded. |
| :---: | :---: | :---: |
| - $781-0.27$ R $\quad$ RECOMMEND: Delete the paragraph number and title. | C | 0781-027 It would be incorrect to delete the number and title of FAR subsection 15.406-5 (see 0781-025, 0759-006, and 0745-008 on page 201-23). |
| $0781-028$ <br> $15.406-5(\mathrm{a})$ <br> RECOMMEND: Change title to "Offerors or Quoters Representations and Certifications." Change the sentence to read "Include in this section those standard solicitation provisions that require representations, certifications, or other 'fill-in-the-blank' submissions by offerors or quoters." <br> NSF $0765-007\left\{\begin{array}{l} \text { far para, } 15 \times 406-5(a) \text { : It would be helpful to identify what representations and } \\ \text { certifications are generally required, and/or where in the FAR the information } \\ \text { and appropriate language can be found. } \end{array}\right.$ | $C$ | 0781-028 It would be inaccurate to adopt this recommendation because the FAR does not make a differentiation between standard and nonstandard solicitation provisions. <br> 0765-007 Paragraph (a) of FAR Section 15.406-5 is not designed or intended to be a detailed checklist. Solicitation provisions are prescribed throughout the FAR, and, in addition, FAR Part 52 gives necessary instructions Éconcerning this subject. |
| DOT <br> 0781-029 <br> 15.406-5(b) <br> RECOMMEND: <br> Change title to "Other Solicitation Provisions." <br> Delete everything following the first sentence. | $C$ | 0781-029 We believe that to adopt this recommendation would result in loss of clarity and loss of the distinction made in FAR 15.406-5 (a) and (b) between information required from offerors or quoters and information required to be furnished to offerors or quoters. <br> 0781-016 and 0763-003 As indicated in FAR 15.405-5(b), Section $L$ is where offerors or quoters should be given instructions as to how the agency wants the proposal structured, including appropriate instructions for separate technical and cost proposals. These comments require no change to FAR 15. $\overline{4} 06-5(\mathrm{~b})$. |

Thes commiant in conthinued on the next page.)


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A - Accepted C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council
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[^17]A - Accepted $\quad$ - Not accepted
$M$ - Accepted but modified D - Major policy change -- deferred to the FAR Council


| A - Accepted | $C$ Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified D - Major policy change -- deferred to the FAR Council |  |


| 1. COMMENT |  |  |  |  |
| :---: | :---: | :---: | :---: | :---: |
| CATERFILLAR TRACTOR CO.$\begin{aligned} & 070^{\circ} 9-007 \quad \frac{15.407 \text { (b) (1) thru (12) and (c) thru (f) }}{15.407} \quad \text { The word "at" can be deleted where stated before clause number. } \end{aligned}$ |  |  |  |  |
|  |  |  |  |  |

Internal Comment
9996-019 Meredith Murphy, FARPO
FAR Section 15.106 now contains prescriptions for two clauses:
(a) 15.106-1 prescribes 52.215-1, Examination of records.
(b) 15.106-2 prescribes 52.215-2, Audit.

This will necessitate the renumbering of clauses
prescribed in Subpart 15.4 (which now begins with
52.215-2) to prevent duplicating clause numbers.


Sections $15.407(b)(3)$ and $52.215-6$ require a provision on unnecessarily elaborate Sections $15.407(b)(3)$ and $52.215-6$ require a provis. While such a provision may be . proposals to be included in all soliciatate it seems very inappropriate in appropriate in certain types of procurement, it seems very. Accordingly, we
those many cases where we are procuring commercial items. those many cases where we ale procuribed for use where applicable, rather than
believe that provision should be prescrible believe that provision shou
for use in all solicitations.




| A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified D - Major policy change -- deferred to the FAR Council |  |

\begin{tabular}{|c|c|c|}
\hline \begin{tabular}{l}
1. COMMENT
\[
\begin{aligned}
\& 9998-078 \\
\& \text { DAC } 76-25 \quad 31 \text { OCTOBER } 1980 .
\end{aligned}
\] \\
3-503.1 Bidders Mailing Listrs. Bidders mailing lists for negotiated contracts shall be established, maintained, and utilized in accordance with 2-205. \\
3-503.2 Delivery of Solicitations to Prospective Offerors. When a purchasing office is located in the United Stanes, any solicitation sent to a prospective offeror located at a foreign address shall toe sent by international air mail, if security classification permits. \\
DOT
\[
\begin{array}{r}
0781-033 \\
15.408(\mathrm{c}) \\
\hline
\end{array}
\] \\
"Should be changed to require use of international airmail in any circumstances when the contracting officer determines it to be appropriate. A Contracting Officer in Japan, for example, should airmail solicitations to Korea and Taiwan.
\end{tabular} \& DISP
A

A \& | 3. RATIONALE |
| :--- |
| 9990-078 DAC 76-25, issued after FAR Subpart 15.4 was released through the Federal Register for comment, changed the word "procurement" to "contracts" in DAR 3-503.1, and does not necessitate $\bar{a}$ change to EAR Sections 15.403 or 15.408. |
| However, it also added a phrase to the DAR 3-503.2 language, the counterpart of FAR $15.403(c)$. FAR $15.40 R(c)$ is revised accordingly. |
| 0781-033 FAR 15.408(c) is revised in response to the commenter's concern. | <br>

\hline | AFGE |
| :--- |
| 67P7:02 Under propose $\$ 15.409$, a description of the format and circumstances of a pre-proposal conference in aescribed. AFGE believes the description of the conference is deficient in that a labor organization representing the affected omployees is not specifically granted attendance. Any misstatement as to the scope of work to be performed under the contract may prove detrimental to the in-house workforce when the cost comparison results are released. Equally important, misinformation given to offerors at this meeting will result in a substandard quality of work provided by the eventual contractor. Consequently, a statement should be added in $\$ 15.409$ permitting a labor organization representing affected employees to be present at this conference. | \& $C$ \& 0787-002 We can appreciate the commenter's view. However, the coverage in FAR $15.40 \overline{9}$ closely parallels the corresponding DAR coverage and to include the statement suggested in the comment is beyond the scope of the $F A R$ project at this time. <br>


\hline | 9998-079 |
| :--- |
| DAC $\# 76-25 \quad 31$ OCT 1980 | \& A \& 9993-079 No change to $\operatorname{FAR} 15.409$ is required by this Dic. <br>

\hline
\end{tabular}

DAC \#76-25 31 OCT 1980
This DAC, issued after FAR Subpart 15.4 was released through the Federal Register for comment, changed "procurements" to "acquisitions" in DAR 3-504.1(a) and changed "procured" to
"acquired" in 3-504.1(b). The third sentence of DAR 3-504.2(a) was changed to insert "including qualifying country sources" after "Adequate notice shall be given to prospective offerors."
In DAR 3-504.2(c), "procurement" was changed to "acquisition."

ARTHUR D. LITTLE


| A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council |  |


(tomment cont' an next pays)


A - Accepted $C$ - Not accepted
$M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council


| A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified $D-M a j o r ~ p o l i c y ~ c h a n g e ~-~ d e f e r r e d ~ t o ~ t h e ~ F A R ~ C o u n c i l ~$ |  |


| NASA <br> -769-004 <br> 15.422. This paragraph would eliminate the provision in the NASA PR 3.802-4(b) that permits contracting officers to consider late proposals "when in the best interest of the Governament" and would substitute the current DAR/FPR procedures (standerd), which offer ao latitude for fulgment. but simply forces a result by the application of a prestructured rule. <br> NASA stongly objects to the proposed FAR coverage and to the OFPP position thar "che risks of protest or unfair treatwent arising under the alternate procedures (referring to FPR 1-3.802-2 and NASA PR 3.802-4(b)) outweigh the potential benefits." To the contrary, NASA's experience has been just the opposite. <br> To our knowledge, we have never received a protest or been accused of unfair trearment in connection with our "best interest of the Government" policy. In view of our demonstrated success in this area, we belleve it would be a clearly regressive step (especially in the area of RKD procurements) for the FAR to adopt a policy that would prohibit an agency from contracting with the most competent firm merely because, for any one of a number of trivial reasons, the firm's proposil was recelved late. <br> HHS <br> 0908-005 In reference to FAR SS 15.412 and 52.215-9, this Department strongly 15.412 . objects to the elimination of the use of the altemate procedure and provision for consideration of late proposals prescribed by FPR S 1-3.802-2. OFPP's rationale for eliminating the alternate late proposal coverage does not appear sound when considering the factual circumstances involved. Your statement that use of only the "late is late" provision "lends itself to a consistent Govern-ment-wide procedure" appears to be a whitewashing of the situation. One could just as easily argue that use of both late proposal provisions establishes a consistent Government-wide approach, especially when considering that the alternate approach is a fair means of allowing the acceptance of a proposal which is in the best interests of the Government. Your second statement that "the risks of protest or unfair treatment arising under the alternate procedure outweigh the potential benefits" is not factual. This Department has found that there is less "risk" than with use of the "late is late" provision. Besides, GAO routinely and sumarily dismisses protests arising from use of the FAR advocated "late is late" provision and, as of May 1, 1980, reports that it has only four (4) protest cases involving the alternate provision while those involving the "late is late" provision are virtually innumerable. We have enclosed a copy of a memorandum received from the Public Health Service which illustrates why we stress the importance of retaining the use of the alternate provision. <br> 6SA <br> 0943-006 FTNT *1/Page 25 (15.4)/FR NOT 15.4 (Para. 2.) Footnote 1, page 25; and Federal Register notice, summary statement \#2 <br> Comment. It is quite possible that the elimination of the alternate procedure (FPR 1-3.802-2) applicable to the consideration of late proposals under certain specific conditions will be detrimental to the Government in terms of cost advantage and superior technology. In negotiated acquisitions, flexibility-which is inherent in this process--and the opportunity to accept innovative ideas and significant reductions in cost, should not be denied because of any occasional administrative burdens the flexibility may create. It appears to be counter-productive to simplify the regulation (a money and time saving effort) and yet have those regulations preclude the consideration of significant scientific or technical advances and/or possible substantial cost savings solely because a proposal was not timely submitted. <br> If there is a preponderance of evidence giving rise to the fear that "the risks of protest or unfair treatment arising under the alternative procedures outweigh the potential benefits", then we aefer to those who must weigh that evidence in judgment. If, however, the fear is just that, then it is more likely that the advantages outweigh the disadvantages. <br> Recommendation. Provide in 15.412 for (1) a procedure to permit acceptance of late proposals under certain conditions to be specified by the agency head, or (2) a procedure to permit the extension of the due date when the agency head has specified the precise conditions when this action may be taken. | DISP D | 3. RATIONALE <br> 0769-004, 0908-005, and 0943-006. Also see comment 0765-009 on page 201-28 and 9996-006. 0908-006 and 0816-003 on page 201-42. The FAR includes only the basic late proposals provision currently prescribed in both the DAR and the FPR. It omits (a) the FPR alternate Frovision that fermits consideration of a late croposal received before a determination of the competitive range has been made, and (b) the NASA alternate provision that fermits consideration of a late progosal received before award is made. In <br> considering the comments received on this Eroposed FAR coverage, it should be noted that (a) in comment 0791-001, on page 20147. GAO states "We have no objection to the draft seqment as croposed" and (b) out Of 35 commenters, only 6 (DOA, DOE, GSA, HHS, NASA, and NSF) express dissatisfaction with the "late is late" concept. One of these 6 acknowledges that it has always recognized the potential for miguse of the alternate FPR procedure and has not "widely used" it. Another dissenter indicates that if its Erocurements were similar to many DOD or GSA procurements, where evaluation requires weeks or months, then it "would subscribe to the 'late is late' Fhilosophy." Several of the 6 dissenters suggest that a system or frocedure be included in the FAR covering an alternate frocedure but requiring that use of the alternate procedure be (a) justified and approved at a level higher than the contracting officer, (b) under certain conditions to be specified by the agency head, or (c) used to permit the extension of the due date when the agency head has specified the precise conditions when this action may be taken. Because this office continues to share ofpp's view that treatment of late proposals shoūld be consistent throughout the Government and Lecause it is beyond the scope of the FARPO charter to decide upon the efficacy of consideration of a late proposal up "until the competitive range has been established" versus up to "before award is made" the FAR continues to provide for only the basic provision currently Frescribed in both the DAR and FPR. Action on the dissenters' comments is deferred to the FAR council. |
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| A - Accepted C - Not accepted <br> M - Accepted but modified $D$ - Major policy change  | er | to the FAR Council |
| :---: | :---: | :---: |
| 1. COMMENT <br> COHSIA $0777-005$ <br> 5. In $15.412(a)$ "modification" should be relocated to a "definition" section. <br> Reason: All "definttions" should be ser forth at front end of each part of subpart. This generally has been so in other draft parts. FAR format should be consistent in this regard. | $2$ <br> DISP <br> C | 3. RATIONALE <br> 0777-005 The procedure dated 4 June 1981 For defining terms in the FAR permits restriction of a definition if it is done with intention and precision. This is the case in FAR $15.412(\mathrm{a})$, where the definition applies to the word only as used in Section 15.412 . |
| AFTHUR D. LITTLE <br> $65 A$ <br> 0943-0.04 <br> Paragraph 15.412(b), page 23 <br> Comment. Because of flexible work hours, the term "normal close of business" may not convey the same meaning that it once did. <br> Recommendation. <br> Revise the second sentence in FAR $15.412(b)$ to read as follows: "Unless the solicitation states another specific time, the time for receipt is 4:30 p.m., local time for the designated Government office, on the date that proposals or quotations are due." | $C$ $A$ | 0745-018 We do not believe that acceptance of this comment would result in a noticeable improvement. |
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| AFTHUR D. LITTLE | $C$ | 0745-019 We do not believe that acceptance of this comment would result in a noticeable improvement. |
| CiSA <br> 0943-005 <br> Paragraph 15.412(e), page 24 <br> Comment. FAR $15.412(e)$ erroneously implies that telegraphic proposals or quotations may be transmitted by registered or certified mail. <br> Recommendation. Revise $15.412(e)$ by deleting the words "and, if necessary, telegraphic proposals or quotations" from the end of the last sentence. | A |  |


| A - Accepted $C$ - Not accepted <br> M - Accepted but modified $D$ - Major policy change -- de  | deferred to the FAR Council |  |
| :---: | :---: | :---: |
|  | $\left\lvert\, \begin{gathered} 2 . \\ \text { DISP } \\ C \\ C \end{gathered}\right.$ | 3. RATIONALE <br> 0772-007 and 0781-034 To return or destroy these documents could result in loss of n̄ecessary evidence. FAR 15.412(f) is not uñlike its corresponding DAR. Other than reasons of identification, There would be no reason to open the documents listed in FAR $15.412(f)$ that are not considéred. |
|  |  |  |
| HUGHES AIRCFAFT CR. <br> It is suggested that the following paragraphs be added to Section 15.413 - Disclosure and use of information before award: <br> $0731-\infty 1$ <br> (d) Proposals constituting deliverable items under a contract may be restricted in the same manner as when subraitted at private expense. When this is the case, such proposals will be treated the same as proposals prepared at private expense. <br> $0731-002$ <br> (e) The entirety of an unsuccessful proposal, if restricted, shall be given the benefit of exclusion 4 of the Freedom of Information Act. <br> $0731-003$ <br> (f) The entirety of a successful proposal shall be given the benefit of exclusion 4 of the Freedom of Information Act if an opposition has been or still can be filed to the award of the contract to which the proposal pertains. <br> Rationale <br> Under the basic data clause DAR7-104.9(a), only engineering and detailed procurement data relating to items, components or processes developed at private expense can be submitted with limited rights. Thus, under this clause, little, if any data in a proposal, can be restricted. It does not appear to be equitable for the government to get a contractor's best ideas and concepts for designing a system and then be allowed to turn it over to the party they selected to perform the contract. <br> With regard to (e), a losing contractor should not have to prove that every item in his proposal is proprietary. If anything, a losing contractor's proposal should be returned to him once an award has been made. <br> With regard to (f), oppositions must be filed within ten days after an award. It is considered grossly inequitable to give one's proposal to someone who might ultimately perform under the contract. In most cases it is only necessary to wait until the opposition filing period is over before releasing disclosable portions of the awardee's proposal. <br> The intent of the Freedom of Information Act was to provide a means for citizens to get access to government records. Instead, the Act has been utilized more for industrial espionage than anything else. This, of course, is a problem for Congress to straighten out. | $C$ $C$ $C$ | 0731-001, 0731-002, and 0731-003 As the rationale accompanying these comments Indicates, tampering with the Freedom of Information Act requires action by Congress. FAR 15.413 does not, and cannot, change the existing policies. |


| C - Not accepted |  |  |
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| 1. COMMENT <br> J. KAY MCLIERMOTT \& CO. <br> a770-004 Under 15.413 Disctilosure and use of Information Before ward, paragraph (a), $15.413(a)$ we take exception : to use of the phrase not having a legitimate interest". We view this phrazise ab extremely vague and subjective and deluting the rights of contractons to : limit disclosure rights of information contained in their proposals. The c-nontracting officer should not be allowed to make this determination miti-inout authorization from the Contractor. This section also appears to be in conflict with 52,215-11, Restriction on Disclosure and use of Data. | 2. | 3. RATIONALE <br> 0770-004 We do not understand why the commenter takes exception to the phrase "not having a legitimate interest." If That phrase were deleted, the information could conceivably be released to anyone in the Government. We do not believe there is a conflict between FAR $15.413(a)$ and the provision āt 52.215-12 (formerly 52.215-11). |
| ARTHUR D. LITTLE | $C$ | 0745-020 FAR 15.413(a) states that no information contained in the proposals or guotations shall be made available. That includes the type of information the commenter has suggested adding. |
| AFGE <br> $0787-003$ The landuage contained in proposed $\$ 15.413$ (a) provides a mechanism werereby the employee's right to a meaningful appeals procenture under the provisions of OMB Circular A-76 is emasculater. Specifically, the proposed section bars release of ip tormation contained in proposals or quotations to the publie or "to anyone in the Government not having a legitimate irrcerest" - Howovor, appeals procedures mandated by OMB Circu: ar A-76 are often invoked before an award of a contract ia made. Much of the information necessary to file an appes 1, or alternatively, much of the information necessary for employees to determine whether the provisions of A-76 have peen complied with, depend on employee access to information contained in proposals. Consequently, access should be provided to labor organizations representing the affected Fedexal employees. Language to this effect should be included ; $n$ the proposed section since representatives of affected federal employees can be regarded as having a legitimate ir terest in the information contained in a proposal. | $C$ | 0787-003 FAR 15.411(b) is revised to äccommodate OHB Circular No. A-76, its supplemental Handbook, and FAR Subpart 7.3 Tsee comment 9996-092 on page 201-33). No further change to FAR $15.413(a)$ is believed to be necessary. |
| NASA <br> $0769-065 \frac{15.413(\mathrm{~b})}{10}$. Becaume the first sentence covers the entire period of the procurement prior to away, the second sentence could literally be read as meaning that the contracting officer conld not conduct written or orel discussiona with firms in a competicive range, if such discussions could in any way give one prospective contraitor an advantage over another. This is almost certain to be inconsistent with that part of the FAR which addresses oral or writen discussions, since the lerter will in all likelihood authorize or direct that, in at least wome circumstances proposed weaknesses be discussed with those firms in the competitive range. In view of this, it appears that the author of this prowision intended to address a narrower time period than that indicated by the imad-in language of the first sentence, and this materfal should accordingt, be redrafted to more accurately reflect that intent. 15.413(b) comenincont'd onnact page | C | 0769-005 FAR 15.413(b) is not intended to address a narrower time period than that indicated $\underline{\text { b }}$ y the lead-in lanquaqe (i.e.. during the preaward or preacceptance period of a negotiated acquisition) of the first sentence, nor should it, in our opinion. It accūrately reflects the intent. The DAR coverage corresponding to FAR $15.41 \overline{3}(b)$ is included under the heading "Disclosure of Information During the Pre-Award or Pre-Acceptance Period." Neither FAR $15.41 \overline{3}(b)$ nor the Corresponding DAR are inconsistent with the FAR coverage addressing oral or written discussions (FAR 15.610). This comment letter is dated June $19,19 \overline{0} 0$ so the commenter was unable to review the FAK 15.610 coverage since $F A R$ Subpart 15.6 was not released for public comment until Māy 1981. In addition to the prohibition of auction techniques, FAR $15.610(\mathrm{~d})$ specifically directs that in conducting written or oral discussions with responsible offerors who suminit proposals within the competitive range the Government personnel shall not enqaqe in technical leveling (i.e.. helping an offeror to bring its proposal un to the level of other proposals through successive round̄s of discussion, by pointing out weaknesses resulting from the offeror's lack of diligence. competence. |

A - Accepted
M - Accepted but modified $D$ - Not accepted

- Major policy change -- deferred to the FAR Council


| A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council |  |


A - Accepted $C$ - Not accepted
$M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council

| 1. COMMENT' | 2. <br> DISP | 3. RATIONALE |
| :---: | :---: | :---: |
| CATEFFILLAR TRACTOR C:C, $0759-009 \text { 52.215-4 }$ <br> If the definitions applicable to 15.4 are included in their proper sequence we can see no reason to retain this subparagraph. This would, in turn, change the reference at 15.407 (b) (I). <br> DOT $\begin{array}{r} 0781-035 \\ 52.215-4 \\ \hline \end{array}$ <br> I believe the terms defined are sufficiently well known that the definitions are not required. <br> RECOMMEND: Delete the clause. | $C$ | 0759-009 and 0781-035 We believe this solicitation provision is necessary for many reasons including the fact that regardless of where in Subpart 15.4 the terms are defined. Subpart 15.4 is not a part of the solicitation, and these terms must be understood for purposes of the solicitation. |
| ETHA M. QUINN $\begin{aligned} & 9996-107 \\ & 52.215-6 \end{aligned}$ <br> The provision at FAR 52.214-2 for IFB's is similar to the provision at 52.215-6 (formerly 52.215-5) for RFP's. A minor wording change in 52.215-6 is necessary in order to achieve maximum parallelism. | $A$ |  |
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A - Accepted $\quad C$ - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council

| 1. COMMENT <br> 9998-080 <br> DAC $\# 76-26 \quad 15$ DEC 1980 <br> This DAC, issued after FAR Subpart 15.4 was released through the Federal Register for comment, changed the citations in the preface to conform to the uniform contract format. <br> VA | 2. DISP A | 3. RATIONALE <br> 9998-080 No change to FAR 52.215-7 (formerly 52.215-6) is required. <br> 0766-002 See rationale 0776-001 on page 201-28. |
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| DOT | $C$ | 0781-037 :Hore specific agency instructions of the type mentioned in the comment should be included in Section 1 , Instructions, conditions and notices to offerors and quoters. nccordingly, we believe there is no need to alter the provision at 52.215-9 (formerly 52.215-3). <br> 0781-036 The word "packaqes" is inserted into the provision at 52.215-9 (formerly 52.215-8). The addition of "if any" would be incorrect since a solicitation should include a time or a dāte for receipt of offers or quotations. We believe that this provision is broad enough to be incli.led in all requests for proposals and requests for quotations. |


| A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified D - Major policy change -- deferred to the FAR Council |  |



| A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council |  |


| 1. COMMENT <br> the other proposals had not been evaluated by the Board of Contract Awards and a competitive range had not been established. <br> If our procurements were similar to many major Defense or GSA procurements, where evaluation of proposals requires weeks or months, then we would subscribe to the "late is late" philosophy. However, we have a difficult time securing competition in many of our Forest Service's natural resource related contracts and we are convinced the adoption of the proposed FAR without the cited alternate clause would be detrimental to many of our Forest Service operations. The transmittal sheet for FPR Amendment 118 discusses the views of other Civilian Departments (see enclosure). <br> GAO <br> 079/-001 <br> 52.215-9(0) We have no objection to the draft segment as proposed. However, we understand that your office is presently considering our suggestion that express mail be treated similarly to certified mail under the late bia/proposal clause for possible future inclusion in Subpart 15.4. <br> SHAW, FITTMAN, FOTTS, \& TROWERIDUE <br> $0927-82$ <br> $\frac{52-215-9}{\text { of Proposals or Sumissions, Modifications, and Withdrawals }}$ <br> of Proposals or Quotations. <br> As we discussed on the telephone yesterday, and on behalf of our client Federal Express Corporation, I am enclosing herewith for your information a preliminary draft of certain proposed revisions to the late-bid provisions of the proposed Federal Acquisition Regulations (FAR's). <br> The primary purposc of the enclosed suggested modifications to the FAR's is to bring the late-bia provisions up to date by recognizing the advent -- and widespread use -- of modern overnight express services offered by both the USPS (Express Mail) and by a number of private express carriers (e.g., Federal Express Courier-Pak service). <br> At the present time, the $F A R^{\prime} s$ provide protection against the late receipt of a bid or other submission or response only where certified or registered first-class mail is used as the delivery method five days prior to the specified deadine. In reality, however, most bids and responses are now sent via the far more efficient and reliable overnight express services, and not by ordinary mail. The increasing degree of commercial reliance upon those next-day delivery services is evidenced by their very rapid growth in recent years, by the introduction of guaranteed next-day-delivery Express Mail service by the usps, and by the adoption of postal Service regulations which specifically authorize an exception to the postal monopoly over the transportation of "letter" mail to permit private express carriers to carry extremely urgent documents having a next-day-before-noon delivery requirement (39 CFR Part 320, effective November 26 , 1979). <br> We believe that the widespread and justifiable reliance on such express services in sending bids or responses to the Government warrants a revision to the late-bid provisions as a matter of both fairness and practicality. Inasmuch as the primary purpose of the late-bid provisions is to provide protection for the timely sender of a bid which is delayed en route or lost at the destination due to circumstances beyond his control, it makes no sense to deprive persons who utilize the most efficient and reliable means of transmission now available of the same protection extended to persons who continue to use ordinary mail. <br> At your suggestion, we intend to pursue acceptance of the enclosed proposed modification in the context of the present Defense Acquisition Regulations (DAR) and Federal Procurement Regulations (FPR), and we understand that that process, if successful, will automatically result in the incorporation of our proposal into the far. <br> I very much appreciate your interest and guidance, and we will welcome any additional suggestions you may have concerning the content of the amendments we are urging and solutions to the problem of insuring a probative and fraud-proof means of establishing the date and time of tender to the carrier through whom delivery is accomplished. <br> In accordance with $15.407(b)(6)$, insert the following provision in all solicitations: | DISP | 3. RATIONALE <br> 0791-001, 0927-002. 0745-022, 0781-038. 0759-010, and 0775-004 while we aaree that these sugqestions to accommodate express mail service such as that offered by.USPS and Federal Express hove merit, to adopt them at this time is beyond the scope of the FARPO charter. As of March 29. 19 $\overline{3} 2$, neither the DAR nor the FPR have been revised to incorporate these suggested changes. The same is true regarding changing the "5 day rule" to a "3 day rule". |
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| A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council |  |

## 1. COMMENT

LATE SUBMISSIONS, MODIFICATIONS, AND WITHDRAWALS OF PROPOSALS OR QUOTATIONS (DATE)
(a) Any proposal or quotation received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made and it--
(1) Was sent by registered or certified mail not later than the fifth calendar day before the date specified for receipt of offers (e.g., an offer submitted in response to a solicitation requiring receipt of offers by the 20 th of the month must have been mailed by the 15 th ); or
(2) Was sent by Express Mail or other priority express overnight delivery of couriex service not later than one calencar day prior to the bid receipt date specified; or
(3) Was sent by means (1) or (2) above (or by telegram, if authorized) and it is determined by the Government that the late receipt was due solely to the mishandling by the Government after receipt at the Government installation; or
(4) Is the only proposal or quotation received.
(b) Any modification of a proposal or quotation, except a modification resulting from the Contracting officer's request for "best and final" offer, is subject to the same conditions as in subparagraphs (a)(1), (2) or (3)
above. above.
(c) A modification resultinq from the contracting officer's request for "best and final" offer received after Officer's request for "best and final" offer received a considered unless received before award and the late re ceipt is due solely to mishandling by the Government after receipt at the Government installation.
(d) The only acceptable evidence to establish the date of sending of a late proposal, quotation, or modification sent by either means specificd in subparagraphe (a) (1) or (a) (2) above, is either: (i) a 0 . or Canadian Postal from the U.S. or Canadian postal Service or fii) the date from the U.S. or Canadian Postal Service or (ii) the date of shipment shown on the consiqnee's copy of the carrier's shows a legible date, the bid, modification or withdrawal shall be deemed to have been sent late. The term "postmark" means a printed, stamped, or otherwise placed impression that is readily, identifiable without further action as having been supplied and affixed on the date oftion as having been supplied and affixed on the date Service on the date of mailing. Therefore, offerors or quoters utilizing the mails should request the postal quoters utilizing the mails should request the postal on both the receipt and the envelope or wrapper.
(e) The only acceptable evidence to establish the time of receipt at the Government installation is the time/date stamp of that installation on the wrapper or installation.
(f) Notwithstanding paragraph (a) above, a late modification of an otherwise successful proposal or quotation that makes its terms more favorable to the Government will be considered at any time it is received and may be accepted.
(g) Proposals or quotations may be witharawn by written notice or telegram (including mailgram) received at any or by an offeror or an authorized representative, if the representative's identity is made known and the representative signs a receipt for the proposal before award.

A - Accepted $C$ - Not accepted
$M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council

| 1. COMMENT | $\begin{array}{\|c\|} 2 \\ \text { DISP } \end{array}$ | 3. RATIONALE |
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| ```DOT 0381-039 52.215-9(e) Does "installation" need definition? At our head- quarters building, for exmple, mail is not time/date stamped until received by an addressee and no other evidence of recejpt is maintained.``` | $C$ | 0731-039 It is virtually impossible to āccurately define "installation". However, its meaning has been establisher througn usage over the years. |
| AFGE <br> 0787-04 Finally, proposed $\{52.215-9( \pm)$ provides a mechanism for contractor buy-ins. By permitting a late modification of a proposal by a successful bidder, the door is thereby made available for an offeror, who initially could not produce services to the Government more choaply than Government personnel, to adjust his estimate so as to beat the in-house estimate. Then, after the availability of an in-house workforce is removed, this "successful" offeror is thereby free to raise costs which will be passed on to the Government via an increase in the cost ceiling by the contracting officer. | $C$ | 0787-004 The provision paragraph wording to which the commenter takes exception is almost identical to the corresponding DAR and FPR wording. Unless one presumes bad faith and unscrupulous behavior on the part of Government contracting personnel and contractor personnel, we believe it is unreasonable to assert that paragraph (f) of FAR 52.215-10 (formerly 52.215-9) provides a mechanism for contractor buyins. The commenter apparently fails to give proper credence to the meaning of "a late modification of an otherwise successful proposal or quotation that makes its terms more favorable to the Government...". |


| $\begin{array}{ll}\text { A - Accepted } & \text { C - Not accepted } \\ \text { M - Accepted but modified } D \text { - Major policy change -- de }\end{array}$ | er | tc |
| :---: | :---: | :---: |
| 1. COMMENT <br> MAPI <br> 0775-005 <br> 52. 215-10 <br> Authorlzed Negotiators <br> (FAR 52.215-10) <br> A provision in all solicitations, entitled Authorized Negotiators, would require the offeror or quoter to furnish a liat of the names, tities, and telephone numbers of those persons who would be authorized to negotiate on its behalf with the government. <br> We think it would be desirable, both in the interests of mutuality and eliminating any possible misunderstanding in this connection, to require the government likewise to list those who are authorized to negotiate on the governent's behalf. <br> consia <br> $0777-009$ In $52.215-10$ add the following sentence: "The government further warrants that the individual assigned to conduct negotiations on its behalf is properly authorized to negotiate for the government". <br> Reason: The contractor is entitled to the same assurance as the government that the individual sitting on the other side of the table is duly authorized to negotiate on behalf of the government. | 2. DISP 6 |  <br> 0775-: : : \& . . .......... nthouah these <br> comere: : : :- : : : : nave merit, we do not <br> beluer. $=\cdot$ : : : : = : oc is necessary to <br>  <br> ssec: : : ...........: sersonnel are <br> aurase_- : :~ッロ: ine on the <br>  <br>  <br> the $3: 1:$ : - |
|  | $C$ |  |
| HHS <br> 0908-007 In s 52.215-11, a solicitation provision concerning the use and disclosure of data in proposals is offered. Based upon past experience, we do not believe this provision is adequate and find it deficient in that it does not notify the offeror that portions of the proposal may have to be disclosed if a Freedom of Information Act (FOIA) request is received, and the Government determines the requested material is releasable. This Department has experienced numerous problems by using an open-ended provision similar to the one in § 52.215-11, so we are presently revising our procurement regulations to incorporate FOIA coverage and provide more definitive coverage concerning the treatment of data in proposals. Enclosed is the solicitation provision we have developed. OFPP should consider adopting a similar provision in lieu of the one provided. <br> The following provision shall be included in the RFP: <br> The proposal subinitted in response to this re- <br> quest may contain data ftrade secrets; business <br> data, e.g., commercial information, financial in- <br> formation, and cost and pricing data; and techni- <br> cal data) which the offeror, including its <br> prospective subcontractor(s), does not want used or disclosed for any purpose other than for evaluation of the proposal. The use and disclosure of any data may be so restricted; provided, that the Government determines that the data is not required to be disclosed under the Freedom of Information Act, 5 U.S.C. 552, as amended, and the offeror marks the cover sheet of the proposal with the following legend, specifying the particular portions of the proposal which are to be restricted in accordance with the conditions of the legend. The Government's determination to withhold or disclose a record will be based upon the particular circumstances - (cont'd an mert bars.) | C | 0908-007 FAR 52.215-12 (formerly 52.215II) places a duty on offerors to place a restrictive legend on data the offeror does not wish disclosed. The source for this provision is DAR 3-501 (b)L(xxiv), which implements DAR Appendix L. Section VI (Exemption) at C3 and 4, and DAR 3507.1. DAR Appendix $L$ is placed in context by DAR 1-329, Release of Procurement Information. more specifically, DAR 1-329(c) (3) and (4). <br> Phase I of FAR Part 24 spreadsheets and dis̄poses of DAR Appendix $L$ and DAR 1-3̄̄2. FAR $24.204(\mathrm{~b})(1)$ provides guidance on requests for release of a record and specifies as one test "whether it was submitted under a restrictive legend." Further FAR 24.205. Exemptions, at paragraphs (b)(3) and (b) (4) parallel the statutory exemptions (3) and (4) (as reflected in DAR 1-329(c)(3) and (c)(4); and DAR Appendix $\bar{L}$, Section VI c 3 and $c$ 4). FAR $24.205(\mathrm{~b})(4$ )(iv) provides that a restrictive legend on a document does not by itself place the document under this exemption or create a significant and Iegitimate Governmental purpose for withholding the document (contracting officers shall follow the procedure in 24.204(b) if there is a request under the Act for a document bearing a restrictive legend). |

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A - Accepted C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council
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1. COMMENT

- 

involving the record in question and whether
the record may be exempted from disclosure under the Freedom of Information Act:

Data contained in the portions of this proposal which have been specifically identified by the offeror as containing restricted information shall not be used or disclosed except for evaluation purposes: provided, that the restriction does not limit the Government's right to use or disciose data if it is obtained from another source without restriction.

However, the offeror acknowledges that the Government may not be able to withhold a record (data, document, etc.) nor deny access to a record reguested by an individual (the public) when an obligation is imposed on the Government under the Freedom of Information Act, 5 U.S.C. 552, as amended.

The Government shall make the determination whether a record is required to be released under the Freedom of Information Act.

The offeror agrees that the Government is not liable for disclosure or use of umarked data and may use or disclose the data for any purpose, including the release of the information pursuant to requests under the Freedom of Information Act.

Offerors are cautioned that proposals submittel wit. ${ }^{2}$ restrictive legends or statements differing from the above legend may not be considered for award. The Government reserves the right to reject any proposal submitted with a nonconforming legend.

| 2. | 3. RATIONALE |
| :---: | :---: |

3. RATIONALE
.



\begin{tabular}{|c|c|c|}
\hline 1. COMMENT \& \[
\begin{array}{|c|}
\hline 2 . \\
\mathrm{DISP}
\end{array}
\] \& 3. RATIONALE \\
\hline \begin{tabular}{l}
MAPI \\
Explanation to Offerors \\
(FAR 32.215-13) \\
\(0790-0006\) \\
An Explanation to offerors provision would be required in all \\
52.215013 \\
requests for proposals, stating the terms and conditions under which an offeror dasiring an explanation or interpretation of the solicitation, drawings, specifications, etc., might obtain such explanation or interpretation. We note that in certain reapects the language in the provision appears to be inconsistent with the language of proposed FAR 15.410(c) which covers the same subject. For example, the latter provision atates that any such information provided to a prospective offeror or quoter "shall be furnished promptly to all other prospective offerors or quoters ... if ... the lack of such information would be prefudicial to a prospective offeror or quoter." On the other hand, the RFP provision in proposed far 52.215-13 requires the furnishing of such information to all prospective offerors "1f the lack of it would be prefudicial to uninformed orferors" (underscoring added). We assume that no such difference in treatment here is intended, and we recomend that the adjective "uninformed" be deleted together with other inconsistencies in treatment. \\
ETHA M. QUINN
\[
9996-103
\] \\
52.215-14 \\
The provision at FAR 52.214-6 for IFB's is similar to the provision at 52.215-14 (formerly 52.215-13) for RFP's. \\
Miscellaneous minor wording changes in 52.215-14 are necessary in order to achieve maximum parallelism.
\end{tabular} \& A

A \& <br>

\hline $$
\begin{array}{ll}
\text { ARTHUR D. LITTLE }
\end{array}
$$ \& $C$ \& 0745-024 Nonitoring of this varies throughout the agencies. It does serve a useful purpose in that it is one means through which mailing lists are purged and sources rotated. <br>

\hline
\end{tabular}

ETHA M. QUINN
9996-104
52.215-15

The provision at FAR 52.214-9 for IFB's is similar to the provision at 52.215-15 (formerly 52.215-14) for RFP's. A minor wording change in the last sentence of 52.215-15 is necessary in order to achieve maximum parallelism.
A - Accepted
C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council


AFTHUR D. LITTLE


EPA
0772-005 (It is recomended that the last line of 52.215-15(a) be revised to 0772-005 read as follows (recamended revision underlined):
(a). ".... the Govermment; Cost or price, technical quality and other
This revision would acormodate award of a cost type contract, and would more clearly reflect the source evaluation/selection process for a negotiated procurement.
ETHA M. QUINN
9996-105
52.215-16(b)

The provision at FAR 52.214-10 for IFB's is similar to the provision at 52.215-16 (formerly 52.215-15) for RFP's. A minor wording change in paragraph (b) of $52.215-16$ is necessary in order to achieve maximum parallelism.

EPA

> 077,0006 In paragraph $52.215-15$ (c), we recommend that the phrase "Cost or price" t2.215-15 be substituted for the womd "price" to accormodate award of a cost reinbursenent (c). type contract.

| $\begin{gathered} 2 . \\ \text { DISP } \\ M \end{gathered}$ | 3. RATIONALE <br> 0775-007 and 0777-010 Althouch the exact wording suqaeste: is not adopted, paragraph (a) Qf FAR 52.215-1G (formerly 52.215-15) is revised to cover the concerf expressed in these comments. |
| :---: | :---: |
| $M$ |  |
| $\begin{aligned} & C \\ & M \end{aligned}$ | 0745-025 The phrase in the suagested addition describes a factor that would be included in "and other factors considered". A change to paraaranh (a) of the provision àt 52.215-16 (formerly 52.215-15) is not considered to be necessary. <br> 0772-005 and 0772-006 Although the wording suggested in these comments is not àdopted. appropriate changes are made to paragraphs (a) and (c) of the provision at 52.215-16 (formerly 52.215-15). |
| $A$ |  |
| $A$ |  |
|  | - |

A - Accepted $\quad C$ - Not accepted
$M$ - Accepted but modified D - Major policy change -- deferred to the FAR Council

A - Accepted $C$ - Not accepted
$M$ - Accepted but modified D - Major policy change -- deferred to the FAR Council

| 1. COMMENT <br> DOT <br> The second sentence of paragraph $\begin{aligned} & 0781-048 \\ & 52.215-15(f) \end{aligned}$ $\qquad$ (f) should be deleted--it is unnecessarily duplicative and probably without legal effect. <br> ARTHIR D. LITTLE | $\begin{gathered} 2 . \\ C \\ C \end{gathered}$ | 3. RATIONALE <br> Rationales on previous page |
| :---: | :---: | :---: |
| 9998-081 <br> DAC \#76-26 15 DEC 1980 <br> This DAC, issued after FAR Subpart 15.4 was released through the Federal Register for conment, changed the citations in the prefaces of the DAR equivalents to the FAR provisions at 52.215-16 and -17 to conform to the uniform contract format. <br>  | A | 9998-081 No change to the referenced FAR Erovisions is required. |
| ARTHUR <br> D. LITTLE | $\subset$ | 0745-027 The commenter gives no reason why paragraph (a) of the provision at 52.215-17 (formerly 52.215-16) should apply only to IFB's. As shown in the footnote with the Phase I draft, we believe that the reworded provision does and should apply to neqotiated actions. |
| GATEFFILLAF TFACTGK EO, <br> $0759-013$ 52.215-16(c) <br> Delete "or that reject any of the terms, conditions and provisions of the solicitation,". No such limitation is placed on those that mail their offer or quotation (52.215-8). It is a negotiated purchase and such exceptions must be negotiable. <br> COISIA <br> 0777-0/2 12. In 52.215-16(c) delete "or that reject any of the terms, conditions and provisions of the solicitation,". <br> Reason: No such limitation is placed on those that mail their offer or quotation (52.215-8). It is a negotiated purchase and such exceptions must be negotiable. | $C$ | 0759-013 and 0777-012 The language and intent of paragraph (c) of FAR 52.215-17 (formerly 52.215-16) is essentially the same as its corresponding DAR 7-2003.29. He believe that it is not in the best interest of the Government to delete the phrase as suggested for several reasons. paragraph (c) of the provision does not say that the Government will or must exclude from consideration telegraphic responses that reject any of the terms conditions, and provisions of the solicitation; it merely says that they may Le excluded. Urgency is one of the reasons for authorizing telegraphic responses to a solicitation. Theretore, it is only reasonable to acknowledge that there will be occasions when, for reasons of, urgency or otherwise, time may not Fermit the delay incident to negotiating such differences. We believe'that the Government would be remiss if the Erovision at 52.215-17 did not alert offerors or quoters to this possibility. The language of paragraph (c) of provision 52.215-17 is reinforced by the provision ät 52.215-16 (formerly 52.215-15). |


| A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified D - Major policy change -- deferred to the FAR Council |  |


| 1. COMMENT | 2. | 3. RATIONALE |
| :---: | :---: | :---: |
| DOT <br> $0781-042$ <br> 52.215-17 <br> $\left\{\begin{array}{r}\text { The } \\ \text { str } \\ \text { RECOMMEND: } \\ \text { Add } \\ \text { alt }\end{array}\right.$ <br> The "Order of Precedence" provision is too constraining for services or research and development. <br> Add the sentence "The following provision may be altered if necessary to meet a specific requirement." <br> COLISIA <br> 0791-013 <br> 13. In the Order of Precedence clause 52.215-17, following the word "schedule" add "and any attachments or specific references contafned therein". <br> Reason: There has been a concern expressed regarding the relationships between the Uniform Contract format specified in 15.406-1 and the Order of Precedence clause at 52.215-17. Speciffically, Section h, Special Contract Requirements, withir the Uniform Contract format, is at the same time both part of the schedule and could be part of the specificacion requirements. <br> EPA <br> 0172-010 <br> 9. We are unable to corment on the propriety of the order of precedence 52.215-17 proposed in 52.215-17. For example, without having the identity of "(b) Representations," we cannot be sure of their predominance in all cases over reguired contract clauses. | $C$ $C$ C | 0781-042, 0777-013, and 0772-010 It is true that Section $H$ is a part of the Schedule. But it also is true thāt FAR $15.40 \bar{\sigma}^{-1}(a)(5)$ states that the uniform contract format does not apply to contracts requiring special contract forms prescribed elsewhere in the FAR that are inconsistent with the uniform contract format. Limiting this provision to actions under the uniform contract format permits flexibility for non-routine actions to be tailored with regards to order of precedence. As was indicated on page 41 in footnotes 2. and 3. of the related phase I spreadsheet, this provision does not necessarily reflect the needs of acquisitions not subject to the uniform cōntract format. In construction ācquisitions, for example, specifications take priority over drawings. Under the proposed provision drawings, coming within "Other documents, exhibits, añd attachments", would take priority over specifications. A slightly different version of this provision is on SF 33 A . The DAR version is adopted because it expressly excludes the specifications from the Schedule. |
| LIOT <br> $0781-0.43$ <br> $52.215-18$ <br> The "Period for Acceptance" provision is too constraining for services or research and development. <br> RECOMEND: Develop a provision which (a) allows the Government to state the period necessary for proposal evaluation, negotiation, and contract award, and (D) states the offeror's right to withdraw an offer at any time. <br> UOE <br> 0776009 <br> Section 52.215-18_provides for a standard solicitation provision providng for * $6 \sqrt{\text { day offer acceptance period. This is not sufficient time for many }}$ solicitations and the fintroductory section should clearly allow agencies to ingert a longer period when jubtified. <br> EFA <br> $0772-011$ <br> 10. The provision in 52.215-18 (Period of Acceptance of offer) does not 62. 215-18 clearly address procurements involving services to be performed under a oost type contract. It is, therefore, recomended that use of this provision not be required in RFP's contemplating award of a cost type contract for services. | $C$ $C$ $C$ | 0781-043, 0776-009, and 0772-011 The offeror's right to withdraw an offer is clearly stated in paragraph (g) of the provision at FAR 52.215-10 (formerly 52.215-9), and we do not believe that is is necessary to restate that right in this provision. In writing this provision during Phase $I$, the drafters considered including a Minimum Ācceptance Period provision similar to that contained in FAR 52.214-16: however, a project decision was made not to do so. The reasons (which seem equally valid todayt included the fact that (a) contracting offices should be discouraged from the practice of "tacking on" excess periods of time for evaluation, negotiation, and coñtract award. (b) when the contracting office knows in advance of solicitation issuance that evaluation, negotiation, and award is likely to take longer than 60 days. Section $L$ can be used to request that offerors allow a stated minimum number of calendar days for ácceptance of offers, and (c) contracting offices are not precluded from requesting offerors to extend their acceptance period after (continsud on maxt pape.) |


| A - Accepted | $C$ - Not accepted |
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| $M$ - Accepted but modified $D ~-~ M a j o r ~ p o l i c y ~ c h a n g e ~--~ d e f e r r e d ~ t o ~ t h e ~ F A R ~ C o u n c i l ~$ |  |


A - Accepted $\quad$ - Not accepted
M - Accepted but modified $D$ - Major policy change -- deferred to the FAR council



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A - Accepted C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council
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$\left\{\begin{array}{l}\text { 1. COMMENT } \\ \text { NOTE: . To facilitate readibility and com- } \\ \text { parison of the Phase I FAR form and the } \\ \text { Revised FAR form, each is spreadsheeted } \\ \text { in full size in the appropriate column } \\ \text { but on separate pages. }\end{array}\right.$
(aisp


A - Accepted C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council
(1. COMMENT
A - Accepted $C$ - Not accepted
$M$ - Accepted but modified $D$ - Major policy change -- deferred to the par Council


A - Accepted $C$ - Not accepted
$M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council
L. COMMENT
A - Accepted
C - Not accepted
$M$ - Accepted but modified D - Major policy change -- deferred to the FAR Council

The following respondents either cancurred with or had no comment on this PAR entity:

Commenter
Letter/Comment ilumber

| $\begin{aligned} & A T \$ T \\ & 0440-007 \end{aligned}$ |
| :---: |
| $\begin{aligned} & C / A \\ & 0442-007 \end{aligned}$ |
| $\begin{aligned} & 6 A O \\ & 0443.007 \end{aligned}$ |
| TREASURY, $0446.067$ |
| $\begin{aligned} & 0 P M \\ & 0449.007 \end{aligned}$ |
| Canada $0452-007$ |
| $\begin{aligned} & \text { CODS/A } \\ & 0455-007 \end{aligned}$ |
| $\begin{aligned} & H U D \\ & 0458-007 \end{aligned}$ |
| $\begin{aligned} & \text { TVA } \\ & 0 \& 59.007 \end{aligned}$ |
| $\begin{aligned} & \text { STATE } \\ & 0462-007 \end{aligned}$ |
| $\begin{aligned} & D O C \\ & 0463-007 \end{aligned}$ |
| $\begin{aligned} & \text { EPA } \\ & 0465.007 \end{aligned}$ |
| $\begin{aligned} & D 0 A \\ & 0469-007 \end{aligned}$ |
| Panama Canal 0472-007 |
| $\begin{aligned} & \text { NFFE } \\ & 0483-007 \end{aligned}$ |
| $\begin{aligned} & A B A \\ & D S 25-001 \end{aligned}$ |

## DISPOSITION CODES

A - Accepted $\begin{aligned} & \text { C - Not accepted } \\ & M \text { - Accepted but modified } D \text { - Major policy change -- deferred to the FAR Council }\end{aligned}$

A - Accepted $C$ - Not accepted
$M$ - Accepted but modified $D-M a j o r ~ p o l i c y ~ c h a n g e ~--~ d e f e r r e d ~ t o ~ t h e ~ F A R ~ C o u n c i l ~$

## 1. COMMENT

## NASA-0451-001 GENERAL (continued)

The NASA policy also recognizes, however, that trade secret marking is not necessarily a prerequisite to protection under present day law. Hence, it provides safeguards for unmarked commercial information (which can be technical information) and financial information which is considered privileged or confidential in that its disclosure to the public could cause substantial harm to the owners. competitive position or inpair NASA's ability to obrain necessary information in the future. This additional protective Reasure is based on the court's decision in the National Parks v. Morton case (498 w. 2 d 765 (D.C. Cir. 1974)), which has been subsequently reaffirmed in numerous instances.

It is important to note that this later protective measure is very significant for protecting unsolicited proposal infornation since the unsolicited offeror, as distinguished from a solicited offeror, aly not have advance notice of the marking requirement for trade secret protection and could otherwise forfeit his information by failure to comply.
Another area addressed by NASA in its revised proposal policy, and lacking in the FAR draft policy, concerns the agency's general position on handling Fola requests for proposal information. This coverage resulted not only from numerous outside inquiries as ro NASA's practices in responding to FOIA requests on proposals, but also from the belief that it was in NASA's, as well as the public's interest, to acknowledge the Government's potential limitations, as well as its opportunities in protecting proposal information from the disclosure mandate of the FOIA.

As stated in paragraph 1.304-2(c)(4) of the enclosure, NASA's policy provides that (a) proposals may be considered agency fecords under the FOIA, in which event the agency will have the responsibility of determining whether release must be made to third parties; (b) agency records must be furnished unless they fall within an exemption; (c) NASA cannot guarantee that a proposal or portion thereof would be exempt; (d) it is NASA's general practice to provide notice to the owner of proposal data before actually releasing it pursuant to a FOIA request, and further, time permitting, to consult with the owner where it would appear to be of as Sistance to NASA in making a determination concerning the eligibility of particular proposal data as an exemption. ke feel that this latter practice is of even greater importance because of the Supreme Court's recent holding in Chrysler
Corp. V. Brown, $47 \mathrm{U} . S . L . W .4434$ (April 18 , 1979 ). Corp. V. Brown, 47 U.S.L.N. 4434 (April 18, 1979).
Lastly, NASA has found it essential that it be permitted to obtain its evaluation outside the Government (support service contractors, specific peer groups for experiment review) When deemed necessary. This right, which is not normally obtained under the proposed far uraft, has always been closure ond conflict of interest controls without objectis from industry or the educational community

In summary, it is our opinion that the FAR draft policy fall considerably short of presenting proposal policy which meets the needs of NASA and its offerors, and no reason is seen why these deficiencies should not be of equal concern to other Government agencies urilizing a proposal program. Accordingly, we strongly feel that the above discussed aspects ere vital to proposal policy existing today under the impact of the FOIA and should be seriously considered for use in any FAR coverage. If desired, we will be pleased to make available NASA representatives to assist in this undertaking.

It should be noted, in this regard, that we have also drafred, at the informal request of Mr. Phillip G. Read, proposed
Part 27 of the FAR covering the acquisition of data and rights in data. Recognizing that policies concerning proposals are interrelated therewith, we included in such draft certain provisions dealing with the treatment of proposal information. There should, therefore, be coordination between the drafting efforts of Parts 15 and 27 of the FAR.
(Continuch-page $113-4$ )

A - Accepted
C - Not accepted
M - Accepted but modified D -
Major policy change -- deferred to the FAR Council

*PRD means Procurement Regulation Directive
PTD 77-17
$045 /-00 /$ general pollcies
\%
${ }^{[2]}$ It is only ehreugh zuch access that NaSA cas freperly evaluate proposils and eitective ly adrinister
xesultinq acentracts. Examples of the kinds of dat. zequired by NAsA incluive descriftions of innovative
 eraffirig. costing data ar.d practices. and husines,
 data may cons:itute trade secrets of the ciferor and cr
 inforataon tich is privileaged or contionitial, an -nich, if subsequently disciosed to the rublic, caulo cause surstantial harm to the cuner's corfetitive
position cr impair MASA's atility tc of tair necessary Hosirion cr impir masA's atility te of taitr necessary
infurmation in the iuture.
 Ircmoves the uninhisitod tonarsinssicn of privatt irnovations as well as ccrresfonding ecsst atd business ryivate intellectual frepcrty xiqhite xesidisic in suen


 cifering rrot bertion to the extent ferritted urder thit yoints witis referrenee to the sreedor of intormation het (foLk) $\leq$ isc 352:
und profosils may te corsidered "aceney records"
 Farticuiar records must se redeazed to third parties

(Costinund - page $113-5$ )
2.
A - Accepted $C$ - Not accepted
$M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council



## DISPOSITION CODES



1. COMMENT

NASA.0451-001-GENERAL(continued)

masa procurement regulatich

## DOE

OFB4-001 GENPRAL
The basic policy objective for unsolfcited proposals should be to encourage submission of unsolicited proposals to the maximum extent possible with a inimum of paperwork burden and delay on the proposer and the Federal agencies. The approval should take into consideration agency practices
which have been validated by che cest of cime and be flexible enough to which have been validated by the rest of cime and be flexible enough to
leview of this far draft is premature at this time because is provisions uili depend upon draft provisions on Rights in Technical Data. The ton uill depend upon draft provisions on Rights in Technical bata. The ton
areas of policy must be considered together because they are intertwined.

In order to achieve the above objective, the policy goveming unsolicited proposals should take into consideration the following factors:
(1) Persons aubmitting unsolicited proposals are frequently unfalliar with regulations for arking and may incorportate in then information exempt of protectible under 5 U.S.C. 552 legend;
(2) Some agencies such as DOE frequently use non-Governmental evaluators so evaluate proposils;
(3) Proposels from univernities any incorporate proprietary data, e.g.oproprietary data of licensors, joint venturers, or e-g., proprietary data of
(4) Contracte may be based on unsolicited proposals, in regard to which proprietary date considerations are negotiated; and
(5) Delaya in forwarding unsolicited proposals to evaluators should be minimized so that agency responsiveness is maximized.

$\dot{A}$ - Accepted $\quad$ C - Not accepted
$M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council

| 1 | 20 | 3.2 |
| :--- | :--- | :--- |

DOE 0534-0OI-GENERAC (eontincael)
4. show in the attacheent, Subpart 9-3 of 41 CFt - DOE' procedures for proposals - all of the abore factors are accomodated. Por example, it is DOE policy (41 Crk 9-3.150-2) to treat all proposala in confidence Hithin ifatiations of the law. The FAR, through the use of the cover sheet handing notice in 15.509 , recognized this concept explicitl.. However, FAR should further eaphasize this concept through policy otatesent to parallel and support its cover sheet notices. BHY
The FAR approrch toward aricing of proposals assumes that evaluation vithin the Coverment is the rule, and evaluation outside the Government is the exception. This approach causes considerable extra administrativ burden for agencies such as DOE who frequently use operating contractors and consultants to perform evaluation. Inasmuch as the Far in 15.509(e) recognizes that evaluation by non-Government personnel must be under conditions of conidentiality, there is no reason why the markine in 15.509(a) should permit evaluation only within the covernment. Based on our experience, we think mot proposers do not and will not object to evaluation by non-Governent personnel under conditions of confidentiality, By and large. proposers the object to outside evalustion will do so or grounds of conflict of interest. In general, most unsolicited proposals pertain to modest R\&D efforts not involving major acquisitions or projects which would be more likely to involve conflict of interest. DoE in 41 CFR 9-3.150-4 (a) provides administrative control to manage the infrequent conflicts problem. In our judgement, there should be no added administrative burden and delay for any agency by adopting the DoE approach which treats as the exception the proposer's desire for evaluation within the Government af94 - Con (
Adoption of the DoE approach (which does not require two-way correspondence to accommodate those proposers who will permit evaluation outside the Covernment) will eliminate the complex provisions of $15.509(\mathrm{e})$, (f) and (g). Aiso, we belleve the DOE notice in 41 CFR 9-3.150-3 and procedures In $9-3.150-4$ accommodate situations where non-Government evaluation is precluded. This DOE procedure could be modified for FAR use by providing that the notice ordinarily permitting outside evaluntion (c.f., 41 CFK
$9-3.150-2(a))$ be stamped "GOVERNMENT EVALUATION ONLY" whenever a proposer 9-3.150-2(a)) be stamped "GOVERNENT EVALUATION ONLY" whenever a proposer _-so requests.

Adoption of the DOE marking pproach would also eliminate the complex procedures in 15.509 for treating proposals from educational and nonprofit institutions and proposals from others regarding change and deletion of language. On this point, the administration associated with changing: language on notices and legends is clearly much greater and more susceptible to error chan merely stamping as proposed above.

## 2-sung

In wation 15.509 (c) recomend requirement to return proposals containing a ledgefifferent than required be revised to provide an alternative of
the proposal is to be considered. nother area of concern is the lac of visibility in the far to an appropriate contract clause covering of visibility in the FAR to an appropriate contract clause covering
sftuations where contract is bised on a proposal. While such a clause sftuations where contract is bszed on a proposal. While such a clause (see 41 CFR $9-3.150-2(\mathrm{c})$ ) should be spelled out more clearly than is implied in the legend in $15.509(\mathrm{a})$. The FAR approach does not give Wisibility to the clause mechanism by which the Governoent's rights in proposal data are clearly defined as "unilimited rights" except for marke portions.

The FAR draft on either solicited or unsolicited proposals should not be finalized until questions relating to the Government's policy on Rights in Data (i.e., technical data) are resolved. At present, the FAP draft or unsolicited proposals asames that the Fir policy on Rights in Technical Data will be that of the entire Government. In our opinion, the FAR policy on data including proposals is not directed (as DOE's policy) toward the use of proposal and negotiation procedures for identifying proprietary data wich may be apecifically used in the performance of contract mork. This direction is highly involved in doe mod is essencial to the drafting of witable contracts with many comercial firms having extensive proprietary portfolios. The DOE procedure in 41 CFR 9-3.151-1 and 3.151-3 provides means for negotiating proprietary data requirements in proposale which in turn impacte on selection of contract clauses. This FAR draft makes no provisions for such negotiations and clause determinations.

The language in the FAR on proposals will, however, uitimately depend on gar policy and provisione on Rights in Date, and meaningful review of thie FAR Araft mut ameit promulgetion of the FAR data policy,

## ACHYANB <br> The proposed FAR provinion OS Ske no distincton between uns

insolzcired aties. We belleve such distinction is appropriate and recommend that the provisions of the enclosed zubpart 9-4.51 of the Department of Energy pocurement ketulation, copy enclosed, be incorporited into the Far. (Continued-page 113-9)

| A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified D - Major policy change -- deferred to the FAR Council |  |



## PART 9-3 PROCUREMENT BY NEGOTIATION

5-3.000 Scope of part.
This part implements and supplements the policies and procedures governing procurement This part implements and supplements the
by negotiation set forth in FPR Part 1-3.

## Subpart 9-3.1 Use of Negotiation

69-3.102 Factors to be eonsidered in negotiated contracts.
In addition to other factors to be considered in FPR 1-3.102. the Contracting Officer must inquire of, and secure complete information from, the prospective contractor as to background patent applications and patents in order that a determination regarding need for a "background palents" provision can be made.
69-3.103 Dissemination of procurement Information.
See 10 CFR Part 709, Public Records, for regulations relating to the availability of DOE records to the public.
69-3.150 Proposal information.
89-3.150-1 General.
Information contained in proposals will be used only for evaluation purposes except to the extent such information is generally availabie to the public, is already the property of the Government, or the Government already has unrestricted use rights, or is or has been made available to the Government from wny source, including the proposer or offeror, without restriction. The term "proposals" as used in this section, includes responses to program opportunity notices
(PONs), program research and development announcements (PRDAs)and solicitations of a (PONs), program research and development announcements (PRDAs)and solicitations of a similar nature. in addition to requests for proposels (RFPs) and unsolicited proposals. As a practical matier, DOE cannot assume any responsibility for disclosure or use of any such informe tion unless it is identifed by the proposer or offeror in accordance with this section. Unless
a solicitation specifies otherwise, DOE will not refuse to consider a solicited proposal or an unsolicired proposal merely becuuse the propossl is restrictively maried.
79-3.150-2 Trcatment of proposal information.
(a) A proposal may include technical data and other data, including trade secrets and/or privicged or confidential commercial or financial iaformation, whtch the proposer does not want disclosed to the public or used by the Government for any purpose other than propasal each line or paragraph thereof containing the data to be protected and mark the cover sheet of the proposal with the notice set forth immediately below. Solicitation documents shall in clude instructions to proposers to mark their, proposals in this manner:

## Notice

The dete cantained in pages _of this. piropossit have been mubmitied in confidence and contain tiade secrets of proprictary information, and wuch duth shall be used of disclosed only for evaluation purposes, provided that if a contract is proposal, the Government shall have the right wo use or dinclose the data berein to the extent provided in the coniract. This rextriction does not limit the Government righ to use or disclase dela oblemed withoul resinction from any source, including the proposes.
Reference to this notice on the cover sheet should be placed on each page to which the notice applies. Data, or abstracts of data, marked with this notice will be retained in confidence and used by DOE or its designated representative(s), ineluding Government contractors and consultants, as set forth in \$9-3.150-4, below, solely for the purpose of evaluating the proposal. The data so marked will not otherwise be disclosed or used without the proposer's prior written permission except to the extent provided in any resulting contract, or to the extent required by law. Proposers should be aware of the provisions of $\$ 9-3.150-4$ if they desire to modify the above notice or otherwise seek to limit the evaluation to the Government only. The restriction contained in the notice does not limit the Government's right to use or disclose any date contained in the proposa) if it is obtainable from any source, including the proposer, without restriction. Although it is policy to treat all proposals as confidential, the Government assumea no liability for disclosure or use of unmarked data and may use or disclose such data for any purpose. See FPR 1-3.103(b) regarding disclosure to other offerors.

M - Accepted but modified D - Major policy change -- deferred to the FAR Council


59-3.150-3 Handling notice.
In order that proposals may be handied in confidence consistent with the policies set forth in this section, the following notice shall be affixed to a cover sheet attached to each proposal upon rectipt by DOE. Use of the notice neither alters any obligation of the Government, nor diminishes any rights in the Government to use or disclose data or information.

## procuremlent reculations

2-3.150-4
notice for handling proposals
This proposel mhall be used or duplicaled onif for DOE eviluation purposes. and


 avined in this proposal if it in alredy getecrally availabte to the public. in alread. ernment, or is wo beciomes availabte from any source. inchuding the proposct, without rexrictions
5-3.150-4 Disclosure ortside Goverament.
(a) Policy.

It is DOE poicy to have proposais evaluated by the most competent persons availabic in Government. In addition, DOE frequently meets its evaluation needs by having proposals re viewed by evaluators and contractor organizations operating or managing government-owned netities. Outside evaluations may be made provided the requirements in (b) and (c) below are met. A decision to employ outside evaluators shall take into consideration requirements fo tionship, if any, betwern the proposer and the prospective ouside and the competitive rela onship, if any, between the proposer and the prospective outside evaluator.
(b) Approva!

Decisions to evaluate proposais outside she government shall be made by the Source Selection Official with the concurrence of the Senior Procurement Officisl. Headquarters, for all source evaluation board procurements, or by the Senior Program Onficial or designee with the concurrence of the HPA or his designee for other procurements. If the proposal under consideration expressly indicates that only Government evaluation is authorized and evaluation outside the Oovernment is nevertheless desired, the proposer ahould be advised that DOE may be un able to give full consideration to the proposal unless the proposer consents in writing to having the proposal evaluated outside the Government.
(c) Agreement with evaluator

Where it is determined to evaluate a proposal outside the Government, such as by consul ants, grantees and contractors including those who operate or manage Government-owned acilities, the following agreement or an equivalent arrangement for the treatment of the propo a shall be obtained from the outside evaluator before DOE furnishes a copy of the proposal wach perton. In addition, care should be taken that the handling notire required by $\$ 9-3.150-5$ * afized to a cover sheet atisched to the proponal hefore it is disclosed to the evalustor.
(Continued - page 113-11)
A - Accepted $C$ - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council

| D6E | 1. COMMENT <br> 4.001-G ENERAL (aOntinue <br> Conmmons for evaluating pmonosals <br> Whenever 508 formakes a information eotained in the propostl only for DOE evalation parposes ad to trea! the information chati-d in confidence. This requirement doet eop sply to informa. son othemed from any woorce. incinding the proposer. whithowt retriction. Any notice of statriction foced on the propots by either DOE of the ociginator of the <br>  - provicions strictly complied with. Upan connitation of the eviluation, the recipien shall reliurn all eopies of the proposal and aburscts. if any. to the DOE office whick 租itisly furnibised the proposal for evaluation. Unless amothorized by the DOE initinting office, the stripient thall wot coacect the originator of the propoat con- <br>  |
| :---: | :---: |

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## sinusens

d. S. DFPARTMEMT OF EAFRG
-3.150-5 Debriefings to masmectenfol efferors.
Upon written request, unsuccessful offerors (those ciminaled from competition at earliter stages, as well as those in contention up to the final selection) will be accorded formal debriefings. Such debrieflugs must be requested within 10 working days of receipt of notification of elimination from consideration or announcement of seiection. Debriefings will be provided al and prior to awaed of the contract. However, when the exigency of the situation will not permit delaying the wward in order to debrief unsuceessful offerors, such debriefing may be conducted delaying the award in order
after award of the contract.
\$-3.151 Identification of proprietary data in proposals.
9-3.151-1 Solicited proposals (Including PONis and PRDAs).
Even though the staiement of work contained in a solicitation sets forth the known requirements for technical data, i.e., technical data which will be speeified to be delivered, there is onssurance that the contractor will deliver all of this data because paragraph (e) of the Rights proprietary dat from delivery In of $99-9.202-3$ (e)(2) permiss the eaph proposer intends proprietary data from delivery. In order to asceriain the lechnical data eath proposarelude the provision for limited rights in proprictary data set forth in optional paragraph (g) of the Rights provisionical Data (ions form) cleuse, the provision set forth in 59-3.151-2 shall be included in the solicitation. This provision explains that solicitations will include DOE's known requirein the solicitation. This provision explains anat sormust submit a list identifying to the best of its mentr for technical data, and that me pe withheld as propritiary data, or state that no technical date will be witheld The submission of such list does not constifute a stipulation or decermination by the Government that the data identified therein are in fact proprietary. In addition, the provision to be included in the solicitation refers to the Additional Technical Data Requireprovision to be included in the solicitution refers to the Add conal $\$ 9-9.202-3$ (c). as beine included in the proposed contract where, due to programmentic considerations, it is contemplated thal all of the requirements for technical data will not be known at the time of contracting. When a proposer specifically identufies the proprietary be known at the time of contracting. When a propeser sised by the appropriate program manager, determine whether:
(a) the Government needs limited rights in the proprietary data, in which case the optional paragraph (g) will be included in the Rights in Technical Data (long form) clause;
(b) the Government needs the right to recuire the contractor to license proprietary data to the Government and responsible third parties, in which case optional paragraph (h) will be included in the Rights in Technical Data (long form) clause; and
(c) the Government needs unlimited rights in the proprietary data, in which case negotiations may be held to purchase or obsain a suitable license in the proprietary data.

## 8)-3.151-2 Solicitations.

The following provision shall normally be included in solicitations which may result in contracts calling for research, deveiopment, or demonsiration work or contracts for supplies in which deliyery of required technical data is contemplated
 forth DOE's known requirencata for lectinical data The Additionai Tecthocul Das Reosuirements ciause. if included in this solicisuion. provides the Goveroment with tile option to urder Additionat techacel deth the requirements fof which ore not twowe at the time of contractes. There in, however. a builhin timitation on the kind




4
phicurembeit regulations
-3.132 !
that, to the best of yout knowiedper. no dals will te wilhheld. of suhmita ine identify. ing the proprectery dats which. to the Dest of your knowiedgr. will hetiy be wwid ing the propnctary dita which, to the Dest on four
(continused-page 113-12)

| A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council |  |



Subpart 9-3.2 Circumstances Permitting Negotiation

## 9-3.200 Scope of subparn.

(a) Section 302(c) of the Federal Property and Administrative Services Act of 1949, as mended, authorizes the negotiation of contracts, and is apphcable to AEC (now DOE) pro curement. Section 302(c)(15) of the Federal Property \& Administrative Service Act of 19.99 as amended, permits negoliation when otherwise authorized by law, provided that in such even The requirements of that Act shall apply. Accordingly, when the Federal Property and Admini other law is used as the basis for negotiation, the requirements of section 304 of the Fedirat Property and Administrative Services Act of 1949, as amended. are applicable, except as pro vided in these regulations.
(b) Contracrs to support industrial mobilication plans may be negotiated under scetor 302(c)(1) of the Federal Property and Administrative Services Act of 1949, as amended, or cetion 302(c)(15) of that Act and the Atomic Energy Act of 1954, as amended, if the requisite circumstances exist and the required findings and determinations can be made.

## 89-3.202 Public exigency.

This exception may be applicable where a facility must be attered or repaired immediately in order not to interfere with essential production end the need for the work could not have been reasonsbly foreseen

## (9-3.204 Personal of professional services.

(c) Formal advertising procedures shall not be used for contracts for architect-engineer or other professional engineering services. Such coniracts may be negotiated under section $302(c)(4)$ of the Federat Property and Administratue Services Act of 1949, as amended. or rection 302 (e)(15) of that Act and the Alomic Energy Act of 1954, as amended. However. the exemption provided for in $\$ 9-3.405-5$ (b) does not apply to contraets negotiated under section 302(c)(4) of the Federal Property and Administrative Services Act of 1949, as amended. Profewsional architect engineer services shall be negotiated in accordance with sy-4. 10 and FPR i4.10
(d) Surveying. mapping, and field or laboratory tests of construction workmanship and materials and equipment should be classificd as professional serviees when they clearfy require planning, direction, supervision, or interpretation by professional engineers as a cond performance, or when ane contractor wis. Dependiag upen the nature and requirements of a particular contract, professional engineering services may involve activities such as the following.
(1) Overall direction of the technical work;
(2) Supervixion of wark performed by technicians, sub-professionals, or nonprofessional employees;
(3) Determination of the methods or procedures for mecomplishing the requirements of the contract,
(4) Interpretation of the methods or procedures for accomplishing the requirements of the contract; and
(s) Direct performance of required prolessonal services
(c) When the services are such that the planning and execution can be performed by persionnel having only a practical knowiedge of the use of instruments and rechmques, such as routine acrial photographing and testing, and do not require any professional engineering competence

A - Accepted | C - Not accepted |
| :--- |
| M - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council |


(a) "Headquarters-designated contract" means a special research contract which results from an authorization to a field office from a Headquarters office to enter into or continue such consract on the basis of an approved research proposal.
(b) "Contractor" means the educational or not-for-profit rescarch orgenization which enters into econtract with DOE for the performance of specified research.
(c) "Research proposal" means a request by an institution for support of a research project, together with a detailed description of the project and its relationship to DOE's program, and detuiled information as to backgrownd and experience of principal investigators, facilitics, and environment of the institution, and cost and cost-sharing errangements, if any.
89-4.5102 Geseral.
The DOE, by rtatute, is permitted to participate in research programs that are related to atomic and other forms of energy.
89-4.5103 Resench program objectives.
(a) Under sections 31 and 31s of the Atomic Energy Act of 1954, as amended, DOE is directed to exercise its powers in such manner as to insure the continued conduct of research and training activities and to assist in the acquisition of an ever-expanding fund of theoreticas and practical koowledge in the following fields:
(1) Nuclear procences;
(2) The theory and production of atomic energy, including processes, material, and deviees related to euch production;
(3) Utilization of apecinl nuclear material and radionctive material for medical, biological, ngriculturnl, balth, on military purposes;
(4) Utilization of special nuclear materials, radionctive material, and processes entaited ot the utilization or production of atomic energy or such material for all other purposes, including industrial and commercisl mes, the generation of ustible energy and the demonsiration of advances in the commercial or industrial application of atomic energy;

PROCUREMENT BEGULATHONS
(5) The protection of health and the promotion of anfety during research and production activities; and
(6) The preservation and enhancement of a viable environment by developing more effi cient methods to meet the sation's energy needs.

## p-4.5104 Other objective.

(a) Hendquarters-designated special research conatracts are entered into by negotiation under the authority of section 31c of the Atomic Energy Act of 1954 and section 302(c)(5) of the Federal Property and Administrative Services Act of 1949. In planning, Begotiating, and administerims such conatrects, the objectives are $\mathbf{1}$ :
(1) Assure a continuing flow of new knowledge in fiekds related to the responsibilitics of DOE:
(2) Respect the traditions of the contracting institution and encourage the quest for new knowiedge without restinctions on acientific initiative, to the extent compatible with the law: and the protection of the public interent
(3) Provide reasonable levels of support which will increase the astional capability in energy ficlds and enable the contracting institution to strengtion its research programs in areas of interest to DOE; and
(4) Mainumin effective contect with the ecientific community $s 0$ that:
(i) Scientists and students will be encouraged to expand their interests in fields of im portunce to DOE
(ii) The scientific strength of the country can be brought to bear more effectively on DOE problems;
(Continuek-page (13-14)
A - Accepted $C$ - Not accepted
$M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council

| 1. COMMENT <br> DOE 0534-001-GENERAL (contimuel) <br> (iii) The DOE will be continuousfy mware of developments of value to its activities in the academic communities; and <br> (iv) An adequate supply of suitably trained scieatists will be available for employment to meer energy program meeds. <br> (b) The contractor is responsible for conducting the research and is expected to carry out the project or projects in a manner consistent with the agreed-upon objectives and requirements. These include the obligation to comply with applicable lawt and regulations. The contractor is genernlly expected to follow its mormal business prectices and to tre its existing eccounting syatem. <br> -4.5105 Uneolicited research propotalis. <br> Unsolicited proposals for DOE anistance may be initiated by scientirss interseted ip doing setearch. If DOE desires to solicit sesearch proporals, the tolicitation procedures in $89-4.58$ or cther evisting procurement wolicitation procedurzs will be med. Prior to submitting proporals, the interested scientist, this or her inititive may discuss the project informally with DOE. Following auch discussions, the proposel should be submitted in eccordance with $89-4.906$ and 69-4.908. <br> 59-4.5106 Selection, wreparnation, and award of remearel contracts. <br> 19-4.5106-1 Ceneral. <br> In order to maintain a comprehemsive and well-integrated raterch program, evaluation of research proposals and selection of educational institutions to conduct scientific research is centralized in Hesdquarters. However, field offices may be assigned responsibility for handling the final arrangements and nontcehmical administration of auch contronts. | $\frac{2}{\mathrm{DISP}}$ | 3. RATIONALE |
| :---: | :---: | :---: |

GTE
 Unsolicited Proposals. Specifically, section 15.503 provides as followe:
(a) Unsolicited proposals are a valuable means for Government agencies to obtain unique or innovàive methods or approaches to accomplishing their missions from sources outside the Government.
(b) Advertisine material, commercial product offers, contributions, or technical correspondence as derine: in 15.501 are not unsolicited proposals.
(c) A vali\# unsoidesiė proposi: ris::
(1) Be unique or Innovative;
(2) Be independently origincítez and developes : the offeror;
(3) bit prepared without Governmart supemveter;
(L) Include surficient detast to per:i a ce:t:fination that Government support coulet worthwhlle and the proposed wort cowid texct. the agency's research and developner: $:$ other missior responsitilities; ars
(三) Not be en advence froposel for a specien documented agency reculremerit that car. fo accuirec by competitive methods.
(d) Unsolicited proposals in resfonse to er arera: Fi.: are consiceree it be inderemontly ortetrene:
(e) Agercies that receive meritoricus unsolicited praposals not relates to their miseions may iceriets for the offeror other agencies whose missions tifis a reasonetie relationship. to the proposal's sutit: matter.
(Continued page 113-15)

0420-001 The DAR/FPR definitions of an unsolicited proposal do not include the word "services". The PAR definition constitutes a relatively minor modification of the DAR/FPR. In addition it is believed that services, if they can be the subject of an unsolicited proposal, can be considered "a task or effort" and therefore inclusion of the word "services" is unnecessary.

| A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council |  |

GTE

## 1. COMMENT

0420-01 15.501 (Continuad)
G.E is concernej that the proposed frovisions on ursc:ited proposals do not specificaliy address unsclicited "sEn ? proposezs such as a proposai to provide a new telecominnicepropostis such as a froposai to provide a new telecomman
tions system. Tne current FPR anc DAF sections contin. tions system. Tne current Fpr anc DAF sections conicit
specific references to "services". The new wordine used unje unsolicited proposels appeers to incluce only products or réunsolicited proposals appeare to incluce only products or ré
scarch and ocvelopment efforte under its ecope. he belie:t scarch and ocvelopmant eiforte under its scope. tis beife: conceive of no reason to treat unsolicited service" proposeis different than unsolicited products froposals or R\&D proposils.

GTE proposes a minor chanze that would remove any dout and insure that unsolicited proposals involving the provisicr of services would be acceptable. Specifically, we propose that the word "service" be added to the definition of "unsolicited proposal" in section 15.501 so that it would read:
'Unsolicited proposal' means a written offer to provide a product or service to the Government or to perform a task or effort for the Government which offer is submitted to the Government by an offeror without solicitation by the Governent and with whe tract.

## Emandel Kintisch


$0457-03$ (1) The use of the word "solicitation" appearing in the
16.07 definition of "program Research and Development Announcement (PRDA)" in 15.501 is inconsistent with 15.503 (d) which states that PRDAs invite unsolicited proposals. We recommend that the definition of PRDA be revised to read as follows:
" 'Program Research and Development Announcement (PRDA)' means an announcement of an agency's interest in receiving unsolicited proposals in broadly described areas of science and technology base research and development."
$046 /-04(2)$ Since instruments other than a contract (grants and
15.501 cooperative agreements) are frequently used to make an award based upon an unsolicited proposal, we recommend that the words "or other agreement" be added after the word "contract". in the definition of "Unsolicited proposal" in 15.501

## va

## 3 Subpart 15.5

4/66-09 The definition of Program Research and Development Announcement (PRDA)
$15.50 /$ contained in or Prograw 15 recults in contradiction of terms contained in section 15.501 results in a contradiction of terms. The use of an unsolicited proposel by definition cannot be proffered in ance an unsolicited proposal by definition cannot be proffered in response to a solicitation by the Governent.

DOE
0534 -05 L5.5el
To "facilitate broader wre and application of the definition o unsolicited proposal" in section 15.501 , delete last word in the sentence thich is "contract" and replace with the word "support." The uritten offer may result in eupport through vehicle other than a contract.


A - Accepted
C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council

A - Accepted
C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council

1. COMMENT
ADPA $0456-00 / 15: 503$ (Conctimued)
Sin the Minitn Siatcs Cont of Clamis

No. 4-72
(Decided May 18, 1977)

GRISMAC CORPORATION v. THE UNITED STATES

John J. Reed, attorney of record for plaintiff. Hudson, Crejke, Koehler \& Tacke, of counsel.
Frances L. Nunn, with whom was Acting Assistant Attorney General Myron C. Baum, for defendant.

Before Nichols, Kunzig aid Bennett, Judges.

## opinion

Nuchols, Judge, delivered the opinion of the court: This case is before the court on defendant's exceptions to fact findings. eonclusion of law, and proposed opinion filed Rule $134(\mathrm{~h})$ The Cacts found by the court in accordance with Rule $134(\mathrm{~h}$. The facts lound by the courn are those stated exceptions to the trisl judge's fact pindines os they wis exceptions to the result jif suebsed we difer as they would not change the result if sustained. We differ with the trial judge's legal conclusions, though we are greatly aided by his able analysis of the novel and interesting problem presented. We conclude that the action cannor be main-
tained and the petition must be dismissed tained and the petition must be dismissed.

## 2

The suit is under the Tucker Act, 28 U.S.C. $\%$ 1491, to enforceesai alleged contract or contracts "implied in fact." The parties have rior discussed, nor do we considerwhether the action is maintainable in face of 31 U.S.C. $\$$ 200. Our conclusion is reached on other grounds.

Our legal conclusion considerably diminishes the amoun: of detiail as 10 the facts that need be stated
In the-rpring of 1969 plaintiff submitted proposals 63314 sind 63316 to the Army Ammiunition Procurement and Supply Agency at Joliet, Illinois ("APSA") and proposa: 63313 to the Savanna Army Depot in Savanna, Illinois Proposal 63313 was handied by ARSA along with the other two. Each proposal was headed "Unsolicited Value Eng neering Proposal." No. 63313, dated March 20, 1969. recommended that the decks for wooden paliets used as a base for storing und handling boxed ammunition empluy a cheaper CD prade of plywood instead of the prevailing CC Grade. No. 63314, dated March 21, 1969, recommended the same plywood substitution for wirebound ammunition crates. No. 63316. dated June 18, 1969, recommended reduction of the standard deck size of the pallet from 2 :
 thal hee rather than hree decks could be obsaned from a standard size $48^{*} \times 96^{*}$
time accomood sheet and at the same
timate the varying stacked dinensions of lime accommodate the varying stacked dimensions of
ammunition boxes loaded thereon, with an obvious saving ammunition boxes load from wast reduction
Each of the thrce proposals bore the following restrictive legend
Notice: The data contained herein shall not be disclosed outside the government. or duphicated, used, or disclose in whole or in part, for any purpose other than to
this proposal be macepted by the government. the government shall have the rights to the use of the data. and may duplicate or disciuse, in whole or in part, in any
manner and for any purpose whatsoever, and shall have manner and for any purpose whatsoever, and shall have or permit others to do so, to the extent necessary to fully
utilize the proposal. unize the proposal.
Each proposal also expressed the plaintifrs desire to negotiate conpensation in the form of a share in the
(Continued-page 113-19)
A - Accepted $\quad C$ - Not accepted
$M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council

| 1. COMMENT <br> Government's prevent and future contract savinge attribut. able to use of the proposal. <br> Because of the "value engineering" title on each of plaintiffs proposals, all three when received by APSA's Value Engineering Office ("VEO") were forwarded to appropriate Army offices charged with the evaluation of value engineering change proposals ("VECP"). VECP's were (and are) cost reduction propusals offered wo the Government under existing express contracts pursuant to Armed Services Procurement Regulation "ASPR") 1-1701. II ieqq., 32 C.F.R. $\$ 8.1701$ es ecq. (1969). If a proposal was deemed meritorious, ie., technically adequate, beyond existing contract requirements, and cost-saving, the cognizant office was to incorporate it into current procurement specifications for that item. Since a compensable VECP could be submitted by a contractor only under an existing contract containing a "value engineering incentive clause," he would be compensated if at all by an adjustment under his existing contract. No separate contract to compensate for use of the idea was needed. <br> The problem here is that despite the fact that plainify had no express contract with the Army containing a value engineering incentive clause as a busis for its proposals, the proposals themselyes were nevertheless incorporated intoArmy procurement specifications as if they were VECP's, And were thereafter used throughout the Army. At the outeat APSA's VEO noted that the proposals were "unsolicited," ie., without an existing contract as a predicate, but raised no questions and did not alter its procedures on that account. The thought of procedural defjciencies did not occur to VEO until after the Army had adopted and used the suggestions. instead, stated, VEO routed the proposals uppoi receipt to the cognizant offices for processing. No. 63314 went to Picatinns Arsenal at Dover, New Jersey ("Picatinny"), and Nos. 63313 and 63316 went to APSA's Technical Data Division ("TDD"). After processing clearance through a chain of technically cognizant offices the proposals were changed in minor respects, adopted, and thereupon distributed to all Governmentowned, contractor operated ("Gocon) load plants as official changes (mostly <br> 4 <br> mandatory) in the applicable technical instructions and/or engineering orders, 50 that thereafter all such pallets had to conform to the changes suggested by plaintiff (changes in material for wirebound boxes were optional), with minor mendments. <br> In point of fact the ideas were not entirely new. Some Army installations had arrived at similar ones, unknown $\bar{T}$ plaintiff and the officials with which it deale, and had put them into effect. Details as to this are not necessary as it in not the ground of our decision, though defendant has argued lack of noveliy at length and denies that plaintiff actually brought bout the changes in practice abovementioned. We do not pass on this. <br> Having, as it mpposed, put plaintiffs ideas to extensive use, VEO belatedly turned its attention to the question of eqmpensation. Plaintiff obviously never expected to make its contribution for nothing, and the effective immediate. seizure and use of it with the failure to compensate or even discover a basis of compensation, caused and still causes the Army to cut a bruto figura, as an Italian would say. Initially, the problem was a dispule among Army lawyers as to whether 10 U.S.C. $\$ 2386$ (further discussed below') and implementing regulations (as to which also see below) permitted the expenditure of procurement funds to pay plaintiff for jts ideas. Then surfaced the issue of originality, and other matter throwing doubt on the value of the ideas. Plaintiff wanted $\$ 1,500,000$, and is demanding $\$ 3,519,761$ here,- with percentage of future savings. Ultimately $\bar{A} P S A$ decided to work up a proposal to pay $\$ 50,000$ under the present statutory successor to the First War Powers Act, now so U.S.C. 5 1431-1435, as the effectuation of an informal commitment. Implementing regulations under This authority, as they were then, are in ASPR \& 17-000 and $f f, 32$ C.F.R. $\$ 17.000$ and $f$. (This and subsequent ASPR feferences are to the January 1, 1971 revision.) There were stringent limitations that circumscribed any ection of this kind; the APSA officials could not have done it on their own; and there is nothing to show that the right to make a legal payment could have been established. The (continued-page 113-20) | 2. <br> DISP | 3. RATIONALE |
| :---: | :---: | :---: |

A - Accepted $\quad$ C - Not accepted

| 1. COMMENT <br> ADPA 0456.001 <br> proposal was dropped because plaintiff rejected the $\$ 50,000$ as wholly inadequate. <br> The findings and the trial judge's proposed opinion deal exiensively with the question of identifying who in the Armed Forces might have had authority to bind the Government to a contract implied in fact of the kind described, and when auch a person was found, whether acquiescence in the procurement could be imputed to him. We think all this is interesting but here preempted by the question whether anyone except Congress had such uthority. Congress could have created money liability in a case of this kind, but the question to be faced is whether it ever did. Eattport S.S. Corp. Y. United States, 178 CL. CI. 699, 372 F. 2d 1002 (1967). In that case, too, defendant cut a bruta figura, for by bureaucratic bungling it had caused plaintiff substantial loss, but this was not enough for. Liability in this court <br> Padbloc Co. v. United States, 161 C. Cl. 369 (1963), quite closely resembles in its facts the case at bar. It indicates that the Government can be liable to pay compensation on an implied contract theory if it misappropriates and uses intellectual property not amounting to a patent or copyFight, and submitted under restrictive clauses for the purpose of making a salc, ln that case, however, the property was a design. The findings include several pages of drawings By virtue of 10 U.S.C. 8 2386, funds appropriated for procurement could have been used to purchase a "desian," by the statute's express terms. Thus the implied contract was one which could have been made express, and the Eastport standard was met. This is not spelled out in the opinion, presumably because not debated by counsel. But the case is clearly not authority that the Government may be mulcted under an implied contract in asituation where it could not have made an express one that would be binding. <br> We agree with the Army lawyers that the decisive issue in this case is whether 10 U.S.C. 2386 athorizes expenditure of appropriated funds to purchase suggestions of the kind plaintiff submitted. That section reads as follows: | 2. | 3. RATIONALE |
| :---: | :---: | :---: |

Funds appropriated for a military department avail. able for making or procuring supplies may be used to cocuire any of the following ir the accuisition relates to to, that-department:
(1) Copyrights, potents, and applications for patents
(1) Copyrights, potents, and applications for patents. tions for peatents.
(3) Designs, processes, snd manufacturing data.
(4) Releasts, before suit is brought, for past infring
(4) Releast, before suit is brough1, for past infringe.
ment of patents or cupyights. ment of patents or copyrights.
We do not think plaintiffs ideas naturally fit any of these sistutory categories. The mot juste for them appears to us to be "suggestions" Congress did not authorize expenditures under $\$ 2386$ for mere suggestions. That it 8 4503, which authorizes payment of cash awards for the honorary recognition of an employee [of the Government? who
(1) by his suggestion [emphasis supplied invention, tributes to the efficiency, economy or other improvement of Government operations: * 4 . This of course was given the widest passible scope, pursant the lump of the Civil Service, where incentives to leaven the lump of the Cwil Service, where too often with respect to promotion and rewards. The nature of the "suggestion" that might oualify for an award appears in Shaller v. United Stotes. 202 CL. Cl. 671 , cert. denied, 414 U.S. 1092 (1973). There is no evidence of any euch liberality U.S. 1092 (1973). There is no evidence of any euch hibarality respecting outtide parties subbitting sumber
The distinction between mere tuggestions and secrets, designs, processes, or date protected as intellectual property, is recognized in law respecting dealings of private paries. Thus in Federal Welding Serices, Inc. V. Diogardi,
$\mathbf{1 8 4}$ F. Supp. 333 (i.D. N.Y. 1960 ), the court held that the concept of limiting the height of metal caskets to 24 inches, concept of limiting the height of metal caskets to 24 inches,
mothat three could be stacked one on top of another, in one (Contimucel -Paye $115-21$ )

| A - Accepted | C - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified D - Major policy change -- deferred to the FAR Council |  |



| A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified D - Major policy change -- deferred to the FAR Council |  |

ADPA O445t-001 | 1. COMMENT |
| :---: |
| (503 Continued |

indicate that the proposals dealt with are proponils to enter into $R \& D$ contracts.

Finally, ASPR § 17-204-4 provides authority for formalizing informal commitments under certan circumdiances. Generally it will permit payments to persons who have taken action without a formal contract, for example. where a person has furnished property or services pursuant to written or oral instructions from a military officer and relying in good faith upon his apparent authority. As indicated above, the statute behind this is 50 U.S.C. 5 1431-1435. This was the auihority under which the proposed $\$ 50,000$ payment would have been made, but it is not contended that this discretionary authority adds anything to the legal remedies, if any, available in this court The very existence of $i t$. however, negatives or tends to negative the supposition of broed procurement euthority not founded on statute, which will Eupply an implied contract hability where an express contract could not be made
We do not find any other ASPR provisions that have a bearing and must_reject the attempt to use a collage of citations out of context from here and there in those vast volumes to prove inferentially the existence of a procurement authority that is not expressly granted in statute, nor asserted in the procurement regulations, ASPR, to exist. The dispute among the Army lawyers mentioned above, is reflected in part in plaintiffs exhibits 21, 22 and 27, in this case. Both sides recognized that the issues were unprecedented. It appears that the Army Materiel Command General Counsel, Kendall Barnes, took ensentially the position tsken here, Le, that the plaintiffs proposals were mere suggestions not covered by $\$ 2386$. He seems to have stated the view thatit "2386 applies only to legally protected inteliectual property. This may be too restrictive a reading, but rejection of it does not necessarily extend the nection to mere suggestions. The JAG took the contrary view. He relied as legislative history on a recital of similar provisions antedating the enactment of the present $\$ 2386$ into permanent law in 1953, but failed to show that any predecessor law was ever actually used as authority to pay

10
for suggestions or ever was eo construed. Legislative history of $\$ 2386$ itself is apparently hard to come by. The remainder of his argument seems to consist of references to general statutes not on their face purporting to gran procurement authority, and to the ASPR provisions at. Tridy mentioned. The JXG used the bootstrap argumen 1 Tready mentioned, that the terms of reference to Subpart B, Part 9 in ASPR \& 1-1701(c) momehow elevetes the former B, Part 9 in ASPR \& 1-1701(c) womehow elevates the former. into procurement authority. Nothing in our decision,
Kowever, is to be read as stating the JAG was wrong in. holding that the Army could pay. Orismac an agreed mettlement withoui illegality
Our position is based on and applies only to the remedies _uvailable in this court. We sey nothing as to the legahty of eny payments that procurement officials might voluntarily make to setile claims of persons other than employees who have made useful suggestions. The difficulties encountered there may have been imaginary, as the JAG thought, or onay have been real. We do not pass on that
In view of the foregoing, we conctude that defendant's officials, highor.lowi in the Department of Defense, did not have authority to make express contracts obligating appropriated funds for the purchase of suggestions, thatin the absence of such authority, it was not legally possible forthem to make implied contracts enforceable here. to the same end, and that the unit here having no other foundation, it cunnot be maintained.
Accordingly, the petition is dismissed
A - Accepted $C$ - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council

A - Accepted $C$ - Not accepted
$M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council


Emanura Kinetisca
: o4t7-30 $15.504(\mathrm{c}) \quad$ 2-3 Subetitute "without wiking any" for "in e manner that frecludes". The sutetitute is a more direct injunction not to comit the Government.
HEW

## $0468-03$

5.504 Under paragraph 15.504 (c), we recommend that the coverage be (c). munanded to guard mainst mency personnel soliciting an
of 6 -05 In closing, we offer the following comment on Subpart 15.5 0,65-0 We agree that agencies shoula make available information re15.504 garding agency missions and responsibilities to potential Hfferors. Hower, we believe that contacts with agency formation personnel could resurt in disclosure of adance in formation on specific procurement requirements, proposed or contemplated, and to do 80 might give the recipient of the information (or create the impresssion of giving) an unfair stressed in your final development of the unsolicited proposal regulation.

| $\begin{gathered} 2 . \\ \text { DISP } \end{gathered}$ | 3. RATIONALE |
| :---: | :---: |
| $C$ | 0441-011 The term "technical correspondence" is defined at 15.501. |
| $C$ | 0466-012 Establishment of a Governmentwide time frame for this purpose is impractical becanse of the differing sizes, appropriations, etc., of the fagencies. |
| $m$ | 0441-012 and 0447-20 Adoption of Mr. Kintisch's comment 0447-020 clarifies this statement. |
| $A$ |  |
| $C$ | 0468-003 and 0468-005 पe believe 15.5 as written is clear concerning the actions of "agency personnel. horeover, the commenter has not proposed a change that can be reviewed and analyzed. |




| A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified D - Major policy change -- deferred to the FAR Council |  |



A - Accepted | C - Not accepted |
| :--- |
| M - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council |

| 1. COMMENT <br> ARTMUR D. LitrLE INC. 15.507 (a) <br>  <br> Emanvel Kintisch <br> Chane "unique" to "inrovetive, unique, or y.-jitorloos" (to coaform to the trilogy used in othe: places in the araft). <br> DOE $0537-15 \quad 15.507(0) \theta)$ <br> Becomand paragraph (a)(3) of section 15.507 be revised to add to the eriteria "mique "the additional criteria of "imovative or meritorious methods, approaches or Ideas originated or Iifembered by the offeror" which appear in $15.506-2$ (a)(1). All of these terms relating to "criteria" should also be defined in the definition section. <br> DOD <br> $/ / 5$ FAR 15.507(b) - This paragraph, which requires that the 0477-05 contracting officer award a contract to the offeror of an 15.507 unsolicited proposal if the specified conditions are ful- <br> (1) i£lled, does not adequately recognize the discretion a contracting officer may exercise in such cases. Yoreover it is silent regarding the offeror agreeing to a reasonable price and appropriate contract terms prior to a contract being mwarded. For the Ioregoing reasons, it is suggested that the following language from the correspondiay DAR and FPR provisions be used es the introduction: "A negotiated, noncompetitive acquisition is permissible when....." <br> $D \triangle E$ <br> 0534016 <br> Revise paragraph (b) of eection 15,50 ( $)$ (ead "The contracting officer shall make megotiated non-competitive award in support of an acceptable unsolicited proposal then ..." <br> MDARTIA MMARIETIA <br> $0433-01$ 15 $1507(\$)$ <br> It occasionally happens that aember of an RFP proposal team Einally experiences the germination of an idea that had been planted months or years before, during the proposal effort. If his firm won the competition, his idea could become value engineering change proposal, to the benefit of the innovator, his firm, and the Government. But if his firm had been unsuccessful, the idea could come to fruition only through an unsolicited proposal. Unfortunately, the history of the vE clause on unsolicited proposals, now delered, gives scant encouragement to a contractor to spend the necessary effort. <br> I believe that opportunities such as this could be more effectively promoted, to the benefit of all parties, by offering epecific encouragement to contractors, and definitive pricing instructions to contracting officers in an additional paragraph as follows: <br> FAR 15.507 - Contracting Methods/ DAR 4-910 - Merhod of Procurement <br> (d) When favorably evaluated unsolicited proposal is to be procured, for the purpose of developing an innovative detign idea to decrease the production price of an item already in development or production by another contractor, the unsoliciced proposal contractor's fee shall include, over and above an equitable fee for the development task, shmre of the savings realized by the Government. The basis of savings shall be the unit cost reduction negotiated with the original design contractor when the idea ic incorporated, multiplied by the quantity of items contracted for during the three highest years of production after incorporation. A $25 \%$ hare of that savings ahall be paid under the development contract with the unsolicited proposal Contractor, from time to time, as contracts for production are entered into. | DISP | 3. RATIONALE <br> 0441-015 Interpretive observation, not necessarily correct, for which no change is appropriate. <br> 0534-015 Acceptance of Mr. Kintisch's 0447-031 comment considered a better change. <br> 0477-005 By changing "shall" to "may" meets the intent of the comment. <br> 0534-016 Proposed change would not improve the paragraph. (See also rationale for 0534-017, previous page). <br> 0433-001 This comment, in effect, proposes that we authorize the submission of unsolicited value engineering proposals. At one time the DAR included coverage on unsolicited value engineering proposals but it was deleted as a result of the Grismac Corporation decision by the Court of claims. A copy of that decision is part of the ADPA comment 0456-001 with reference to 15.503 (p. 113-17). Adoption of this proposal would be erroneous. |
| :---: | :---: | :---: |

## DISPOSITION CODES

| A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified $D-$ Major policy change -- deferred to the FAR Council |  |



1. COMMENT
$0450-03^{3}$. $\frac{\text { Paragraph } 15,508(a)}{\text { to include the same or simi paragraph should be changed }}$ to include the same or Eimilar ianguage as that set forth in FPR 1-4.911. That language allows the agency the right to solicit competitive proposals to attain the sarae or similar results as suggested in the of and agrees to the provided the "offeror is notified of and agrees to the intended use."

## DOI

$0487-16$ 2. 15.508(a) - We belfeve this section might be interpreted to preciude $15,50{ }^{4}$ issuing a competitive solicitation to procure the study of a new area
(a). Wend that the section be revised to more cleariy thlustra, we recomcumstances under which information in an unsolicited proposal can be used in solicitations or negotiations in order to permit uniform implementation.
0457-1? $15.508(\mathrm{~B})$ - we believe it is important to include guidance on the impact of the Freedom of Information Act requests for disclosure of restrictively marked information in order to assist the contracting Officer in his determination respecting release.

## HEW

Under Subpart 15.5, Onsolicited Proposals, paragraph 15.509(d) provides a legend to limit the disclosure of data submitted in an unsolicited proposal:

We believe the offeror, when submitting an unsolicited proposal must be informed that situations may arise when all, or por-
$04 / 88-0$ tions, of the proposal may have to be disclosed to the public
under the requirements imposed by the freedom of information
16.509 Act (FOI). The legend, as written, conveys a false impression outside the Federal Government. Furthermore, it appears that outside the Federal Government. Furthermore, it appears the caveat following the legend in the FPr version of the legend, but omitted as unnecessary in the FAR draft, covers the to notify the contracting officer rather than the offeror. We recommend that a notice or legend be developed that will inform an offeror subritting an unsolicited proposal of the possibility that data may have to be disclosed under the FOI.
We do not believe this portion of the draft on unsolicited proposals clearly reflects the intent of OFPP policy letter No. 78-3. In addition, the intent of 78-3 must also be inclided olsewhere in the FAR to cover all competitively solicited proposals since it applies to them as well as un- solicited proposals.

DOI
048718 4. 15.509- We believe the notice set forth under this section should 15.509 include a reference to the requirements of this Freedom of Information Act to ensure adequate understanding on the part of all personnel evaluating the proposal.

Emanuel Kintisen

| 0447-32 ${ }^{15.309(0)}$ subetitute "The date in tris Proposil" for "tris |  |  |  |
| :---: | :---: | :---: | :---: |
| $\begin{aligned} & 447-33 \\ & 0447.37 \end{aligned}$ |  | 1 | Subotitute "The date in tris Proposal" for "ziz |
|  |  |  |  |
|  | Lesino | - | Subtitute "avrilalio" for obteirtele" (ther |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
| 0447-36 | ceroro | 11 | Crase "in" to "are" (date it the plurel) |

3. Rationale
4. 

DISP

0487-016 By accepting the comment at 0450-003. the intent of this comment will be satisfied.

0487-017 Agree that guidance on the impact of the FOIA is desirable; however, it should be included in 24.2 not here in 15.5

0468-001 See paragraph 15.509(e) on page 113-30. consideration under Subpart 24.2.

0447-033 This change is considered editorial in nature and therefore is not necessary.

0447-034 The word "obtainable" conveys our intent, "available" does not.

0447-035 The use of the term "data" is used in a singular, collective sense. Therefore, this change is not necessary.

| :A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| M - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council |  |



DOJ
(coments 0461-09 orsme).
Subsection $15.509(d)$ and (e)(1). We suggest that the statement required to be placed on a cover sheet and the modification to the statement be printed on a standard form available through the supply system.
R R tionale
This is a cost saving suggestion. If the information were pre-printed it would only require the placing of a cover sheet on a proposal. The ilternates to this would be to have a cover sheet typed in each case, or purchase a stamp containing the statements, or for each agency to have pre-printed forms. If the forms were printed for all agencies and obtainec tinrough the supply system, similar to obtaining a Standard Fonm, it appears ithat there would be an overall cost savings to the Government.

NASA
$045 /-06$ (4) Paragraph $15.509(e)$ requires the coordinating office w. 69 believe thet cover sheet on the unsolicited proposal. We believe that requiring the coordinating office to perform this function is an unnecessary incursion into individual agency operating practices and will create undesirable ramifications for agencies where responsibility for dealing with such matters is decentralized. This problem was specifically avoided when the BAR/FPR counterpart was Mritten, since no organizational unit was designated to perform this function. We recommend, therefore, that the sord "agency" be substituted for "coordinating office" in this matter or that the present DAR/FPR version be adopted.
$N \leq$
$0460-\infty 1$ (e)
aragraph 15.509 lef requires the return of proposals which contain arcices conctring the use of proposal data which differ fros the standard lezzed prescribed in $15.509(\mathrm{a})$. HSF favors the DAR approact wict requites return of proposals with more restrictive legends. I 1. Dula appar to be clearly in the Goverments interest to atcept and valuaie prowsals with less restrictive notices. The curre.r FPR and rovased FAE ajproach effectively eliminates any discretion on the part i. ar azecies ane is sipply without rational basis. At a minian, the



A - Accepted C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council


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    A - Accepted C - Not accepted
    M - Accepted but modified D - Major policy change -- deferred to the EAR Council
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## 1. COMMENT

The following respondents either concurred with or had no comment on this FAR entity:

Commenter
Letter/Comment No.
COGR
1151-001
VA
1159-001
AFGE
1161-001
CANADIAN EMBASSY
1162-001
CIA
1164-001
OPM
1169-001
NAT'L INDUST. FOR THE BLIND
1170-001
TVA
1172-001
SBA
1183-001
panama canal co. 1198-001

M - Accepted but modified D - Major policy change -- deferred to the FAR Council

| $1754-001 \quad 15.6 \text { GE }$ <br> The Society belleves that the source selection process for the acquisition of expert, consulting and professional services nhould be conducted with primary emphasis on technical qualifications and professional expertise, with price as a secondary factor. Such services require specialized training. experience and ability; the quality and dependability of the service rendered is the paramount goal in acquiring the services, not the lowest price. SREA believes that PAR Part 15.6 fails to adequately reflect the appropriate method for source selection in acquisition of expert, consulting and professional services. SREA is concerned that the emphasis on price is overly stressed, and that the regulations insufficiently reflect the technical aspects of service acquisitions in this area. With these general observations in mind, SREA submits the following comuents with reference to several ubparts of FAR Part 15.6. <br> While part 15.6 would not normally apply to the procurement of appraisal services, as they would usually come within the exceptions contained at Section 15.602, relating to amall purchase contracts and sole source awards, there are some larger contracts which will be governed by the provisione of Part 15.6. SREA believes that the comments set forth below are also generally applicable to other types of contracts for professional and consulting services. | 2. ${ }_{\text {DISP }}$ | 3. RATIONALE <br> 1754-001 We do not agree with the commenter's concern that FAR Subpart 15.6 overstresses emphasis on price and fails to sufficiently reflect technical aspects such as technical qualifications and professional expertise. <br> FAR 15.605 <br> clearly states that evaluation factors should be tailored tō each acquisition and include only those factors impacting upon the source selection decision. While FAR $15.6 \overline{0} 5(b)$ does require that price or cost be included as an evaluation factor in every source selection, it also lists other factors that may apply to a particular acquisition. Technical excellence, management capability, and personnel qualifications are included. Further, paragraph (c) of FAR 15.605, as revised, succinctly states, "While the lowest price or lowest total cost to the Government is properly the dec̄iding factor in many (emphasis added) source selections, in certain acquisitions the Government māy select the source whose proposal offers the greatest value to the Government in terms of performance and other factors. This may be the case, for example, in the acquisition of research and development or professional services..." (emphasis added). Although it is true, as stated in paragraph (b) of FAR 15.605, that the evaluation factors that apply to an acquisition and the relative importance of those factors are within the broad discretion of acquisition officials, those same officials must adhere to the policies and procedures prescribed in FAR Subpart 37.2--Services of Experts and Consultants. |
| :---: | :---: | :---: |
| SERI <br> 1154-00/-15.6 GE <br> 1. Gereral. This appears to be good effort. Hovever, from a $R$ a $D$ standpoint it is lacking in soveral sress. As SERI is totally involved in the $R$ a field ve feel this far does not adequately recognize the many sey differences between procuring hardware and $R \& D$ services where the stetement of worix is not explicitly definitive. Soue consideration might be given to uriting a special section covering some of the difforences. | $C$ | 1154-001 FAR Subpart 15.6 is not intended to present delailed cuverage of the type suggested in the comment, nor do we believe thāt accomplishment of various agencies ${ }^{\bar{\prime}}$ missions would be facilitated if the FAR were to do so. FAR Subpart 15.6 acknowledges that R\&D acquisition is an area that may require selection of evaluation factors directed more towards such factors as technical excellence than towards lowest price or total cost (see FAR $15.6 \overline{0} 5(c))$. The subject of R\&D contracting is covered in Part 35 of the FAR, and section 35.003 specifically discusses evaluation for award of an R\&D contract. |
| HOL <br> 1182-001-15.6 GE <br> The FAR is silent about informal source selection procedures. Agencies use internal evaluation procedures (generally based on their formal evaluation procedures) to evaluate proposals on less complex procurenents whici do not exceed a given dollar threshold. The FAR should recoynize whese alternate procedures and mandate thee : | $C$ | 1182-001 The connenter's suggestion for the mak to manciate that agency "internal evaluation procedures" be written and available for public review is not accepted, since that action is beyond the scope of the EAR Eroject's authority. |
| - |  | 1 |

$A$ - Accepted $C$ - Not accepted
$M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council

\begin{tabular}{|c|c|c|}
\hline \begin{tabular}{l}
WESTINGOUSE \\
1. COMMENT \\
1/23:001- \\
Subpart 15.6 - Source selection \\
1. It is suggested that the subpart be retitled "Selection of offerors," or sore similar titie. \\
Peason: The term "Source Solection" is often usod to mean the selection of firms or sources fram wham a proposal will be solicited.
\end{tabular} \&  \& \begin{tabular}{l}
3. RATIONALE \\
1123-001 The commenter's concern is one \(\bar{O} f\) semantics, and we do not believe that the suggested subpart tīle change would result in an improvement, nor would it produce a clearer meaning.
\end{tabular} \\
\hline \& \& \\
\hline \begin{tabular}{l}
DOE \\
1171-001 \\
- \(\frac{15.600}{\text { selection }}\) - \(1-3.805-1\) specifically called out that selection procedures were "generally" applicable and were "not applicable where their use would be clearly inappropriate." Consideration should be given to retaining this language in the FAR.
\end{tabular} \& \(C\) \& \begin{tabular}{l}
1171-001 FAR Subpart 15.6 is structured somewhat different than its corresponding DAR and \(F \bar{P} R\). It also seeks to foster Government-wide uniformity in the application of policies and procedures for selection of sources in competitive negotiated acquisitions, while allowing some necessary flexibility. We believe that the commenter's suggestion to include the \(F P R\) words to the effect that selection procedures are" generally applicable" and are "not applicable where their use would be clearly inappropriate" could be counter-productive to that aim. Further, because of FAR section \(15.6 \overline{0} 2\), \\
Applicability, we do not believe the suggested additional word's are necessary.
\end{tabular} \\
\hline \begin{tabular}{l}
Doc \\
-1188-001 \\
Subpart 15.6 - Source Selection \\
15.601 Definitions \\
The last sentence under the definition of "Ciarification" seems questionable as stated, Unilke discussion (see definition below, clarification does not give the offeror an opportunity to revise or modify its proposal." \\
Is this statement really true? Doesn't the opportunity to correct apparent clerical mistakes in the proposal present the offeror with the opportunity to revise its proposal? we feel that the last sentence is more appropriately stated as, "Unilike discussion (see definition below), clarification does not give the offeror an opportunity to revise or modify its proposal except to the extent that correction of apparent clerical mistakes resules in a revision." \\
not \\
\(1194-013\)
\end{tabular} \& A

$M$ \& 1194-013 The revision made (as a result ce gornent $1123-001$ above) to ti.e $\overline{\mathrm{F}}$ A? !-rnl definition of "clarification" <br>
\hline
\end{tabular}

## DISPOSITION CODES

A - Accepted
C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council

\begin{tabular}{|c|c|c|}
\hline \begin{tabular}{l}
noc. \\
1. COMMENT
\[
\begin{aligned}
\& 1156-016 \\
\& 15.601
\end{aligned}
\] \\
Deficiency is defined as "any part of a proposal that fails to satisfy the requirements of the Government." We also question the accuracy of this definition. Part of a proposal may satisfy the Government requirements, but may still be susceptible to fmprovement (deficient 7) and still warrant discussions. This situation seems to be recognized under 15.610 Written or oral discussions, paragraph (c) (2). "Mdvise the offeror of deficiencies in its proposal so that the offeror is given an opportunity to satisfy fully the Government's requirements.* \\
We suggest that the word "fully" be incorporated into the definition as follows: Deficiency", as used in this subpart, weans any part of a proposal that falis to satisfy fully the requirements of the Government."
\end{tabular} \& \[
\begin{gathered}
2 . \\
\text { DISP } \\
\hline
\end{gathered}
\] \& \begin{tabular}{l}
3. RATIONALE \\
1188-016 DAR 3-805.3(a). upon which the \(\bar{F} A R\) definition of "deficiency" is based, reads: "A deficiency is defined as that part of an offeror's proposal which would not satisfy the Government's requirements." To adopt the conmenter's suggested wordiñ could result in an inadvertent policy change.
\end{tabular} \\
\hline \begin{tabular}{l}
LIOT \\
1194-014 \\
Page 2, 15.601 \\
The fourth line of the "Discussion" definition should be changed as follows: \\
"acceptablity of a proposal, or for determining a proposal's relative merit, or (b) provides the offeror an..." \\
This change will allow the SEB more latitude in analysis of the various proposals. \\
DOA
\[
1196-001-15601
\] \\
Consider changing the definition of "Discussion" to read: -Discussion, "as used in this subpart, means any oral or written comminications between authorized representatives of the goverrment and the offeror, that concerns the substance of the proposed contract including cost and price, quality, quantity, delivery, testing, and compliance with preference program requirements." \\
GSA
\[
1622-001
\] \\
paragraph 15.601, page 2 \\
Recommendation \\
Clarify the definition of "Discussion" by changing to read: -...communication between the Government and offeror, whether or not initiated by the covernment, that \(\ldots\) " (Emphasis denotes suggested ađdition). See 51 Comp. Gen. 479 (1972).
\end{tabular} \& \(C\)

$C$

$A$ \& 1194-014 and 1196-001 We believe that the $\overline{F A R}$ definition of "discussion" already contains the essence of the commenter's suggestions. We believe, for example, that the FAR phrase "involves information essential for determining the acceptability of a proposal" could embody the issue of determining a proposal ${ }^{\text {T}}$ s relative merit. The same is true of the suggested "communications...that concerns the substañe of the proposed contract...." <br>
\hline
\end{tabular}

| A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council |  |


A - Accepted
C - Not accepted
$M$ - Accepted but modified D - Major policy change -- deferred to the far Council

| $G S A$ | 1. COMMENT | 2. |
| :---: | :---: | :---: | 3. RATIONALE

paragraph $15.603(\mathrm{a})$., page 3
DISP

1622-002 (a) There is a difference in the meanings of "maximum competition" and "maximize competition." In the case of FAR 15.603 (a), the latter was (and
Comment
By its very nature (see PPR 1-3.200), a negotiated procurement continues to be) the intent, and paragraph
es not entall maximum competition. The negotiated objective
is to ensure competition to the maximum practicable extent among
is to ensure competition to the ming the Government's requirements.
It appears that DOD Directive 4105.62 , III, $A, l(c)$ has been
It appears
misstated.
Recommendation
Change to read:
-(a) Maximize efficiency and minimize complexity of solicitation, evaluation, and the selection decision.

## 1622-003

Paraigraph 15.603(b), page 3
Comment
This statement implies that only proposals are to be evaluated impartially and comprehensively, However, DoD Directive 4105.62 states that the contractor's capability should also be evaluated.
Recommendation
Rewrite $15.603(b)$ to agree with DOD Directive 4105.62, III, A, 1(b).

1622-004
paragraph 15.603 (c), page 3
Comment
DOD Directive 4105.62 , IIT. A. $1(a)$ indicates that performance is expected to best meet Government objectives at an affordable price. The thought of "affordable price" is not conveyed in the PAR draft.

## Recommendation

Include the phrase "at an affordable price" in 15.603(c).
SERI
$1164-003$
3. 15.603 (c)

Tert: Rnsure selection of the source whose proposal has
Change: the greatest value to the government in terms of probable performance and cost for that performance.

Comment: Proposals should alvays be evaluated with reapect to probable performance - and beat value considers all major aspects - as it should.
noc
-1/85-003-15.603(c),
15.603 Purpose

Paragraph (c) seems to put too much emphasis on the "highest degree of realism" of an offeror's proposal. The proposal with the highest degree of reallsm may not necessarily be the one
considered the best to meet stated Government requirements. We suggest a slight revision, as follows: Ensure selection source whose proposal demonstrates that requlrements." OD
(45-0.-00 Charge and reason
15. $603(\mathrm{c})$ Revise paragraph $15.603(\mathrm{c})$ by deleting that portion which reads "whose propasal has the highest degree of realism and."
 botwen $\mathrm{V}, \ldots, \ldots$ and and the responsibility the offeivi.

| A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified $D$ - Major policy change -- deferred to the far Council |  |


A - Accepted
$M$ - Accepted but modified $D$ - Mat acepted

- Major policy change -- deferred to the FAR Council

A - Accepted
C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council


| A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modificd D - Major policy change -- deferred to the FAR Council |  |


| ALPA 1. COMMENT | DISP | 3. RATIONALE |
| :---: | :---: | :---: |
| $1180-001$ 15,605(d) <br> One of the provisions of the Source Selection segment causes us special concern. Parograph 15.605 (d), as now written, carries the implicotion that cuntroctors' cost proposals for cost reimbursement contracts connot be relied on becouse they are not valid indicators of final costs. In other words, contractors cannot be relied on for realistic or truthful estimates of their costs and will submit any estimates that will result in awords. We think that such an implication is unrealistic and that the situation portrayed in the draft is grossly exaggerated. In our opinion, this approach is evidence of negative thinking that does not belong in the FAR. We suggest that 15.605 (d) be rewritten to reod as follows: | $C$ | 1180-001 We believe that the commenter is placing an erroneous negative interpretation on the words of FAR 15.605(d). This paragraph closely parallels the DAR and FPR language, and we are not convinced that that language should be altered at this time. |
| "In awarding a cost reimbursement contract, the primary consideration should be which offeror can perform the contract in a manner most advantogeous to the Government. Cost estimates should be examined carefully to assure that they are realistic. In any event, the cost proposal should not be the predominant factor ond should not in itself be controling in owarding such contract." |  |  |
| SERI |  |  |
| $\begin{aligned} & 154.006 \\ & 15.605(d) \end{aligned}$ | C | 1154-006 The last sentence of FAR <br> $15.605(\mathrm{~d})$ is almost verbatim from the DAR |
| Text: The primary consideration should be |  | and FPR, and we do not believe it should be altered at this time. |

Chage: value and be the most advantageous overall to the governiment.
nuc
$1158-006-15.605 \mathrm{~cd})$
We suggest that the last sentence of paragraph (d) be expanded to
conform with this language, "The primary consideration should be
which offeror can perform the contract in a manner most
advantageous to the Government, as determined by evaluation of proposals in accordance with the established evaluation critería.-
DOT
$1194-016$
Page $5,15.605(\mathrm{~d})$
The following should be added after the last sentence of paragraph (d):
$15.605(d)$ is almost verbatim from the DAR and FPR, and we do not believe it should be altered at this time.

NASA
b. Para. $\mathbf{2 5 , 6 0 5 ( e ) \text { . Nasa selection procedures do not require }}$
 technical considerations, these factors are of essentially equal
weight. for the purpose of this coverage. de might be prudent to cincluge some discussion on this point.

ADPA

| $\begin{aligned} & 1180.003 \\ & 15.605(\mathrm{e}) \end{aligned}$ | 1 | Insert "significant" before "evoluation," to conform to the current DAR provision, which is a better statement of the requirement that evaluation foctors be stated in the solicitation. |
| :---: | :---: | :---: |
| UIEIA |  |  |
| 1174-00 |  |  |

1153-005 Notwithstanding what the NASA selection procedures do not reguire, the EAR $15.605(e)$ coverage is supported by
1194-016 To adopt the commenter's
suggestion would impose a Government-wide mandatory requirement not presently in existence. As such, it would be a new policy, and is beyond the scope of this offices's authority. Comp. Gen. decisions, as outlined in rationale 1189-005 and 1154-004 on page 321-8.
$1180-003$ FAR $15.605(e)$ is not intended t
"conform to the current DAR provision." Rather, it is supported $\bar{b} y$ Comp. Gen. decisions, as outlined in rationale 1189005 and 1154-004 on paqe $3 \overline{2} 1-3$.
$1174-001$ Change the words "need not" to "should".


## DISPOSITION CODES




## DISPOSITION CODES

A - Accepted $\quad C$ - Not accepted
$M$ - Accepted but modified D - Major policy change -- deferred to the EAR Council

| Dot $\quad$ 1. COMMENT | 2. | 3. RATIONALE |
| :---: | :---: | :---: |
| $\begin{aligned} & 1194-019 \\ & \text { Page } 11,15.607(\mathrm{a}) \end{aligned}$ | $C$ | 1194-019 The commenter gives no reasons |
|  |  | for the suggested change, and we can |
| The word "anbiguities" should be inserted after the word "irregularities" in the first sentence, and the word "informalities" be eliminated. |  | perceive none. Further, the DAR and the $\overline{F P R}$ do not include the commenter's suggested wording. |
| [10C 1188 -005-15:607(a) |  |  |
| 118.607 Disclosure of mistakes before award | $C$ | communication prejudices the interest of |
| Paragraph (a), third sentence, also uses similar broad language which is subject to differing interpretations. The specific wording in question is, "If the resulting communication prejudices the interest of other offerors." Niso the second sentence erroneously cites 15.610 , instead of 15.601 . |  | other offerors" is based on similar DAR Ianguage, and we do not believe that it is subject to misinterpretation. The reference to FAR section $15.610^{-}$is the one intenced. |
| We suggest elimination of the third sentence and revision of the second sentence as follows: "Comanication with offerors to resolve these matters is clarification, to the extent that discussions remain within the definition of "clarification" included under 15.601. $=$ |  |  |
| GSA -1622-009 |  |  |
| Paragraph 15.607(a), page 11 | C | 1622-009 The last sentence of FAR <br> 15.607(a) is almost verbatim from the DAR, |
| Comment |  | and we believe that the additional words suggested by the commenter serve no useful |
| The final sentence of this section provides that if a contracting officer's communication with an offeror regarding minor informalities or irregularities prejudices the interest of other offerors, the contracting officer "shall not make award without discussions with all offerors within the competitive range." |  | purpose. |
| Recommendation |  |  |
| We recommend that this sentence be clarified by adding the words "to remedy the prejudice," immediately after the word "range," |  | * |


| A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified D - Major policy change -- deferred to tio EnR Council |  |


A - Accepted
C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council

A - Accepted $C$ - Not accepted
$M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council

| AT\&T <br> 1. COMMENT <br> 1173-002 <br> 15.608 (a) Proposal evaluation (Page 12) <br> Recommendation - Add the following sentence to (a) cost or price evaluation: <br> The use of cost or price analysis shall not be required where the price negotiated is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantitics to the genaral public, or prices set by law or requiation. <br> Conment - Cost or price evaluation (analysis) is not generally required as stated in the proposed draft because the competitive nature of the marketplace for commercial products tends to control the elements of cost and profit of items sold in substantial quantities to the general public. Also, the elements of cost and profit are regulated by Governmental Utilities Commissions for products and services for which prices are set by law or regulation. | $\begin{gathered} 2 . \\ \text { DISP } \\ C \end{gathered}$ | 3. RATIONALE <br> 1173-002 We do not believe that the suggested addition to FAR $15.608(\mathrm{a})$ is necessary because that paragraph directs the contracting officer to see Subpart 15.8, where the subjects of established catalog or market prices and prices set by law or regulation are dealt with extensively. |
| :---: | :---: | :---: |
| ```DOD 1450-005 15.608(b) Revise paragraph 15.608(b) to read: "Technical evaluation. The contrecting officer shall ensure that the proposal meets the minimum requirements in the solicitation. The cognizant techntcal officita, in documenting the technical evaluation, shall include:" - REASON: Clarify``` | $C$ | 1450-005 Implicit in the FAR 15.608(b) statement that "If any technical evaluation is necessary beyond ensuring that the proposal meets the minimum requirement in the solicitation ..." is the fact that the contracting officer must ensure that the proposal does meet the minimum requirements. |
| LuCC <br> $-1128-010-15 \cdot \cos (6)$ <br> Paragraph (b) would be more clearly understood if it were expanded slightly. Suggested wording follows, "If the established evaluation criteria considers more than a mere meeting of minfmum requirements, it will be necessary for technical evaluations to be conducted in accordance with the | $C$ | 1188-010 In a practical sense, the thrust Of the commenter's points is already included in FAR $15.603(a)$. Nore detailed instruction is best left to the discretion of the acencies. |

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A - Accepted C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to Eie Far Council
```

| GSA 1. COMMENT | 2. | 3. RATIONALE |
| :---: | :---: | :---: |
| 1622-010 <br> paragraph 15.608, page 12 <br> Comment <br> The remaining area of proposal evaluation is not listed (i.e.. administrative or contractual). Further, no mention is made as to when any technical or Eunctional demonstrations (e.g., benchmarks) should be conducted. Where it is likely that questions will arise or additional information will result upon completion of these demonstrations, they should precede best and final offers to avoid reopening negotiations later (see B-195982.2, May 14, 1981; 81-1 CPD 374). <br> Recommendation <br> Supplement subparagraph (b) to provide that demonstrations should normally precede best and final offers. Add a new subparagraph (c) concerning the evaluation of the type of contract to be used. | ${ }_{C}^{D I S P}$ | 1622-C1: in FAR 15.603(b), we do not believe that it is necessary to break out, as sevarate areas of proposal evaluation, items such as technical or functional demonstrations or selection of contract type. These are areas that normally are consicered at the time the solicitation is being srepared. When it is anticipated that tecinical or functional demonstrations will be necessary in the evaluation process, the solicitation will so state. Should the need for demonstration not become apparent until during the evaluation process, FAR sections 15.610 and 15.611 indicate procedures and timing. |
| [nut $\begin{aligned} & 1194-02! \\ & \text { Page } 12,15.608(b)(2) \\ & \hline \end{aligned}$ <br> The first portion of chis paragraph should be amended as follows: <br> "An anelysis of each offeror's technical approach, incluaing an assessment..." <br> As currently written the subparagraph requires the technical person to reader judgement on the acceptability or unacceptability of proposals, a decision reserved for the Source Selection Official. | $C$ | 1194-021 FAR 15.608(b)(2), in our opinion, correctly indicates that the cognizant technical official's documentation shall include an analysis of the technically acceptable and unacceptable proposals, including an assessment of each offeror's ability to accomplish the technical requirements. |
| SERI |  |  |
| $\begin{aligned} & 1154-009 \\ & 15.608(b)(3) \end{aligned}$ Tert: A summary, matrix or quentitative technical ranking of esch proposal in relation to the best rating possible. proposal in relation to the best reting possible. | $C$ | 1154-009 The FAR 15.603(b)(3) wording does not preclude preparing the ranking suggested by the commenter. |
| Add: or a rank ordering of all proposals in relation to ach other. <br> Comment: There are two key elements. One, which proposals are acceptable, and two, which proposal is the best deal for the goverument. |  |  |
| GAO <br> $-1244-001-15.609(a)$ <br> The draft sets out at section 15.609(a) the factors which must be considered by the contracting officer in determining the competitive range. The proposed FAR provision states the contracting officer shall consider <br> "price and other factors * *" while the current Defense Acquisition Regulation (DAR) at section $3-805.2$ provides that competitive range shall be determined on the basis of "price or cost" and other factors. <br> We assume that the FAR provision eliminated the word "cost" only to more accurately reflect the language of 10 U.S.C. \$ $2304(\mathrm{~g})$, which describes competitive range in terms of "price and other factors considered," and not to eliminate proposed cost as a factor in determining competitive range. We believe that the word "price" as used in 10 U.S.C. s $2304(\mathrm{q})$ is intended to refer to both the price in a procurement leading to a fixed-price type contract and to the proposed cost estimate in a procurement leading to a cost-reimbursement type contract, and we consider both the proposed cost estimate and the proposed fixed price thus, we would not agree with the proposed Far provision if the elmmination of the word "cost" was intended to preclude the necessity for consideration of an offeror's cost estimate in competitive range determinations. | $A$ | 1244-001 The commenter is correct in the stated assumption. However, as the result of this and another comment, the word "cost" is added for çlarity. |

A - Accepted $C$ - Not accepted
$M$ - Accepted but modified $D$ - Major policy change -- deferred to the EAR Council


| A - Accepted M - Accepted but modified $D$ - Not accepted - Major policy change | err | to the FAR Council |
| :---: | :---: | :---: |
| NSF <br> 1. COMMEN'S <br> $1179-002$ <br> $\frac{15.609(d)}{}$ - Although $m$ endorse the option by the Contracting officer wnclearit technical proposals separately from price proposals, it is sugcest inclusion of coste proposisis in this option (an the fpr allown) athout restricting avard to the low offeror. <br> SERI | 2. DISP $M$ | 3. RATIONALE <br> 1179-002. 1154-010, 1196-002, and 1171-005 As the result of other comments received, paragraph (d) of FAR 15.609 is revised. and that revision should alleviate some of These commenter's concerns. |
| $\begin{aligned} & 1.54-0.0 \\ & 15.609(d) \end{aligned}$ <br> Coment: In the R a Darena unpriced porposais are frequentiy requested. In the true $R$ a $D$ arene "technical excellence" is of paramount importance. It is an unforgiveable waste of both the government's and the offeror's time and money to keep in the competitive range, a proposal that will got vin an award. This section appears to be taken from the "two step" approach. Do not apply it acrose the board. The competitive range should be comprised solely of those proposals potential capable of winning an award. | $M$ |  |
| DOA <br> $1196-002 \div 15.609(d)$ <br> For clarity, change the second sentence of 15.609 (d) to read, "Except in acquisition of architect-engineer services, any acceptable unpriced technical proposal from a responsible source shali be considered in the initial competitive-range determination." | $M$ |  |
| DOE <br> 1171-005 <br>  It says that no acceptable technical proposal can be eliminated from the competitive range without considering price. The same point is made in paragraph $\mathbf{1 5 . 6 0 9}$ (a) that you must consider price(cost) and other factors before detemining the competitive range. | $M$ |  |
| $\begin{aligned} & \text { D00 } 1450-006 \\ & 15.609(d) \end{aligned}$ $\text { Revise } 15.609(d) \text { as follows: }$ | $M$ | 1450-006 FAR 15.609(d) is revised in response to this comment. |
| (1) Revise the second sentence to read: "Except in acquisition of architect-engineering services (see Subpart 3.6.4). competitive range determination must include priced proposals." <br> (2) Delete the third sentence in its entirety and substitute: "After necessary discussion of such tuchnical proposals is completed, prices shall be solfelted for all acceptable proposals." <br> REASON: These sentences as currentiy written seem to Indicate specifte type of source selection, i.e., "two-step. " It must be deleted as it appears here. If a "two-step" source selection process is to be described, it nust be so 1 dentified. |  | * |
| CODSIA <br> 1174-007 <br> Change sentence to read ".. solicit price proposals for all the acceptable technical proposals which offer the greatest value to the Government in terms of performance and other factors." | A |  |
| AT\&T <br> 1/73-003. <br> 15.609 (d) Competitive range (Page 13) <br> Recommendation - Modify paragraph (d)-item (2) as follow <br> by adding the underlined words: <br> (2) Make award to the low responsible offeror taking into consideration the evaluation factors out1ined in section $15.605(\mathrm{~b})$, either without or following discussion, ¿? appop:izte. | C | 1173-003 The evaluation factors are taken into consideration, as indicated by the words in the first sentence of $F A R$ 15. G09(d) "... they shall be evaluated to determine which ...." |
|  |  |  |
|  |  |  |
|  |  |  |


| A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified $D-$ Major policy change - deferred to the FAR Council |  |


A - Accepted $\quad C$ - Not accepted
$M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council


| A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council |  |


| 1. COMMENT <br> SOREA <br> 1754-007 <br> Another general comment may be made with regard to FAR Section 15.610 (a) (3) which proscribes the use of auction techniques by contract officials. Subsection (d) (3) prohibits auctioneering by proscribing the government from indicating to an offeror a price it must meet or discussing an offeror's price standing relative to another offeror. yet the subsection also states it is permissible to inform an offeror that its price is considered to be too high. If the policy of this subsection is to prevent "auction techniques" it seems that it would be equally inappropriate to suggest to an offeror that his price in too high.* <br> * Noteably, the DAR/ASPR is similar to the FAR but the FPR states that no discussions of any sort relating to price may occur. | 2. ${ }_{\text {DISP }}$ | 3. RATIONALE <br> 1754-007 and 1188-012 As noted by a commenter, the DAR expressly states "it is permissible to inform an offeror that his price is considered by the Government to be too high." The FPR is silent on the mater. FPR 1- $3.805-1(b)$ states, as does its curresponding $D A R$, that no indication shall be given of a price which must be met. That is not to say, as one comnent does, that the FPR states that no discuss̃ions of any sort relating to price may occur. The simple statement expressly permitted by the DAR and the FAR has never been construed to be a form of auction. More specific discussions could easily evolve into an auction, and that is why the statement is worded as it is--without qualification. |
| :---: | :---: | :---: |
| DOC <br> 1188-012-15.610 <br> Paragraph (d)(3)(i1) states, "The contracting officer and other Government personnel involved shall not engage in --(3) Auction techniques, such as --(ii) Advising an offeror of its price standing relative to another offeror (however, it is permissible to inform an offeror that its price is considered by the Government to be too high):" We question whether discussions of such a vaque nature are also not a form of auction. Don't we mean that we can discuss areas which seem excessive not based on evaluation of competitor proposals, but based on Government in-house estimates to perform the contract, or based on the Governaent's analysis of the proposal in question? We feel that the bracketed language should either be eliminated or revised to read similar to the following: Bowever, it is permissible to discuss prices felt to be excessive, based upon the Government's analysis of the contract requirements and the offeror's proposal." | $C$ |  |
| $1189-007$ Subparagraph 15,610 (d) (3) (ii) should be revised to add the words $\{$ "or unrealistic" after "too high." This would allow upward adjust(ments in buy-in situations. | $A$ |  |
|  |  |  |

A - Accepted $C$ - Not accepted
$M$ - Accepted but modified $D$ - Major policy change -- deferred to the EAR Council

A - Accepted $\quad$ C - Not accepted
$M$ - Accepted but modified D - Major policy change -- deferred to the FAR Council


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A - Accepted C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council
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JEDUC
$1166-001$ page 17 - Suggest that it be made mandatory that the source
selection authority coordinate with the contracting
officer on any actions taken.

## WESTINGHOUSE

## $1 / 23-003$ section 15.612-- formal source Selection

It is suggested that specific dollar threshoid (s) be established for use of a "formal" source selection procedure, for the sophistication of that procedure, and for the level of merbership in the evaluation board or council.
peason: A unifomity in practice amang agencies would appenr to simplify doing business with the Government, and would make subscovent Board decisions with respect to one agency more readily citable in the boards of other agencies.

## SOREA

$1754-008$ 15,6/2(a)
finally, with regard to the formal source selection procedures t 15.612 , SREA agrees that the responsible official for source selection should be formally designated as the source selection authority. SREA further believes that the technical officer should be this formally designated responsible official for formal source selection because, by definition, the select
on factors other than price. ( $15.612(a))$.

## OPA

1180-010
$15.612(\mathrm{c})$
Add to this paragraph: "Agencies may establish
their evaluation group structures and detailed method-
ologies as oppropriate to their needs, as set forth
in their individual acquisition procedures." This
statement is necessary to complement the statement in 613(b).


DISPOSITION CODES
A - Accepted
C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council

DISPOSITION CODES
A - Accepted $\quad$ C $\quad$ Not accepted
M - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council

$*$
DISPOSITION CODES

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A - Accepted C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council
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The following respondents either concurred with or had no comment on this FAR entity:

Commenter
Letter/Comment Number
AFGE
0675-002
CIA
0692-002
NSF
0696-002
CANADIAN EMBASSY
0697-002
SMITHSONIAN INSTITUTION
0708-002
EPA
0710-002
JUSTICE
0711-002
INTERIOR
0715-002
TVA
0719-002
DOT
0720-002
OPM
0721-002
HUD
0726-002
ARICULTURE
0734-002
GAO
0758-002
DOD
0963-004

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A - Accepted C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council
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R. COMMENT

## DISPOSITION CODES

A - Accepted $C$ - Not accepted
$M$ - Accepted but mozified $D$ - Major policy change -- deferred to the FAR Council


| A - Accepted | C - Not accepted |
| :--- | :--- |
| $M$ | - Accepted but modified $D$ Major policy change -- deferred to the FAR Council |


 indfvidual contracts. Approval by a Government agency would be intended to provide individual concracting officers greater confidence in a contractor decision systeas. As a result, the Government could rely upon an approved contractor system for lesser dollar value contracts which would othe require make-or-buy provisions and would need to impose upon itself
and the Contractor the burdan of a formal contract requirement (make-or-buy and the Contractor the burdan of formal contract requirement (make-or
clause, monitoring, and approval of changes) only in high dollar value contricts.

The concept is not intended to pre-eapt the contracting officer a authority, but rather to pernit the Contracting officer greater flexibility, wille decreasing the pecessity for expending contract administration resources.

The following comments are consistent with the above approach. Make-or-Buy program approvals could be part of the contractor Procurenent System
"Make-or-buy program" should be redefined as "the Contractor's written policies and procedures for deteraining whether to anke or buy spectfic items, including procedures for reassessing these deterninations when warranted."

DOE
0788-003
15.701

## OTfyen 1s,701

Additional definition should be added: "Make-or-buy plan means the Contractor's wisten plan for a opecific contract identifying those major items to be produced or work efforts to be performed in the Contractor's facilities and those to be subeontracted."

0788904
The word prime shourd be deleted from the defiaitions of "make item" and not included in definitions of Make-or-buy plans or programe, to the definition uill apply to lower tier programs or plans.

0788-004 The contractor referred to in the definition of "make" items is intended to be the prime contractor, whether or not

0788-003 The proposed wording would have the effect of changing the definition of a make-or-buy program to read "plan" instead of "program." The "program concept" recommended by the respondent is not made a part of the FAR for reasons stated in rationale 0788-002 above. To add this additional definition is therefore not necessary. The wording in the definition of make-or-buy program is changed, however, to make it clear that the make-or-buy program is a part of the contractor's plan. the word "prime" is included in the definition. The present wording makes it clear that a make" item is produced or performed by the prime contractor. Policies for subcontracting programs are adequately covered in FAR Part 44. Coverage here pertains to make-or-buy decisions concerning prime contractors only.

| A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| M - Accepted but modified D - Major policy change -- deferred to the FAR Council |  |


A - Accepted C - Not accepted
M - Accepted but morified D - Major policy change -- deferred to the FAR Council

| CODSIA <br> 1. COMMENT <br> 0727-001 <br> $0727^{801} 15.70 \alpha$ <br> The undersigned member associations of the Council of Defense and Space Industry Associations appreciate the opportunity to comment on the Federal Acquisition Regulation. As industry has previously commented we believe the inclusion of consideration of the implementation of socio-economic policy of the government to be inappropriate in the make or buy decision process. It is totally appropriate once a "buy" decision has been made and as a criterion to be used in the contractor's acquisition process but such considerations are inconsistent with the other factors that are appropriately taken into account as a make or buy program is being established for each contract. Accordingly, we recommend deletion of the socio-economic considerations from the following sections of the FAR language: 15.702 General (c) 15.705 (b), $15.706(\mathrm{~b})$, and $15.706(\mathrm{~d})(3)$. $\begin{aligned} & \text { GSA-004 } \\ & 087.702 \end{aligned}$ <br> corment <br> $0814^{004} \frac{15.702}{\text { This paragraph states that the Government reserves the right to }}$ review the contractor's make-or-buy program to ensure, among other objectives, "(c) implementation of sociosconomic policies." This is a marked change from the predecessor regulations (FPR and DAR) and provides no further direction as to how the socioeconomic policies are to be put in practice, or reconciled with low cost and technical risk objectives. <br> Recommendation <br> It is recommended that additional guidance in the area be provided or if the implementation is elsewhere in the FAR, an appropriate cross reference should be provided. $\begin{aligned} & D O E \\ & 15.702 \end{aligned}$ End Paragraph 15.702 after "(b) satisfactory performance". This would <br> 0788.006 separaze soc $\overline{\text { loeconomic }}$ policy activity from business concerns and avoid confusing the two. It will alao make it easier to keep the far current as socioeconomic requirements change by not interminging the two. $\begin{aligned} & P O E \\ & 0788-005 \\ & 15.702 \end{aligned}$ <br> Insert the words "and plan" after "the right to review the Contractor"量ke-or-buy program" in line 7 to conform to the redefinition suggeted above. | 2. DIS <br> C | 3. RATIONALE <br> 0727-001 As expressed in 15 U.S.C. 631. it is the declared policy of Congress that the Government should ensure that a fair proportion of the total purchases for the Government is placed with small business enterprises. Executive Order 11623, October 13, 1971, National Program for Minority Business Enterprise, requires Federal departments or agencies to foster and promote implementation of socioeconomic policies. In keeping with these expressed intentions, it is appropriate to include such considerations in the evaluation process when making a make-or-buy decision. It would therefore be inappropriate to delete socioeconomic considerations from the referenced paragraphs. In addition, DAR 3-902.1. DAR 3-902.3(a), DAR 3-902.3(b), and DAR 3902.3(b)(v). as well as FPR 1-3.902$1(e)(4)$, cover the material set forth in FAR $15.702(\mathrm{c})$. $15.705(\mathrm{~b}), 15.706(\mathrm{~b})$, and 15.706(d). <br> 0814-004 See comment 0727-001 and related rationale, above. Implementation of socioeconomic policies is presently addressed in the referenced DAR and FPR paragraphs. Specific references ${ }^{-}$in support of socioeconomic policies, such as those to staturory citations, are not stated, so there is no problem-in keeping the far current in this respect. <br> 0788-006 Implementation of socioeconomic policies is just one of the concerns to be taken into consideration. There is no valid $\bar{r} e a s o n$ not to conside $\bar{r}$ their implications at the time other factors are being considered. page 4. |
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A - Accepted C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council


DOE
0788.009 /5.703(a)(2)
(a) (2) should be rephrased to clesrly establish that exclusion on the basis of adequate price competition is effective only when the price is the
priasty evaluation and bource selection criterion, e.g. "(2) is to be acarded primarily on the bastis of price competition, or prices are set by lav or regulation, or estabilished . . . .

0788-009 FAR 15.703(a)(2) as written, makes it clear that a make-or-buy program is not required when adequate price competition exists. Adding the words "primarily based on" would not make the policy statement clearer. The FAR more closely follows DAR 3-902.2(b)(iii).

DOE
$07889015.703(0)(3)$
Subparagraph (a)(3) is vague and any require individual agency implementing instructions. The intent ayy be clarified by adding the phrase "and is routinely avallable from commercial cources.

0788-010 The addition of the suggested phrase would create a new policy Eituation by stating that noncomplex items must also C be available from commercial sources for a decision to be made not to require a make-or-buy program.
A - Accepted $C$ - Not accepted
$M$ - Accepted but modified D - Major policy change -- deferred to the FAR Council

| ATdT <br> 1. COMMENT <br> 0718901 <br> 15.703(1) Acguisitions requiring make-or-buy programs: <br> (b) Page 4 <br> Recommendation - Add the following clause at the end of paragraph (b): <br> . . ...and (3) provides a copy of documented reasons to the contractor. <br> Comment - If the Contracting officer makes an exception to the \$i million of more rule, the contractor should be aware of the reasons. <br> TRW <br> $0712-001$ <br> $15.703(b)$ <br> In OFPP Sumary for this Subpart, signed by Mr. Haugh, states: "In order to help reduce paperwork, this FAR Subpart more actively discourages the submission of make-or-buy programs in poquisition: under $\$ 1$ million dollars." FAR 15.703 b has been rewritten from DAR 3-902.2(b)(i) purportedly to achieve this goal. <br> The designation of $\$ 1$ million dollars as the nominal threshold at which contracting officers may require contractors to submit make-or-buy programs for negotiated acquisitions without further documentation of necessity is questioned. To compensate for the effects of inflation and to offer any modicum of rellef from excessive paperwork and unnecessary submissions, it appears that the $\$ 1$ mililion figure should be increased to at least $\$ 2$ million. <br> Based on the foregoing, the following changes to the proposed FAR Subpart 15.7 are recombended: <br> 1. Change $\mathbf{1 5 . 7 0 3 ( b )}$ to read: <br> "(b) Contracting officers may require prospective contractors to submit make-or-buy programs for negotiated acquisitions with an estimated value under \$2 million only if the contracting officer (a) determines thet the information is necessary and (b) documents the reasons in the contract file." <br> DOE <br> 0755011 <br> 15.703(b) <br> Should the reasons why make-or-buy information may be required be specified. after "necessary" in (b)(1)? The requirement for the additional burden on the Contractor, which increases the costs to the Coverment without inproving the product may only be justified for purposes of emeuring lowest price to the Government or adequate qualisy control. The following rephraging may achieve this: <br> (b) Contracting officers may requite proapective contzactors to fubmit make-or-buy programs and plans for acquisicions with an estimated value under $\$ 2$ mililion only for negotioted cost-reimbursablo contracts when the Contracting officer (1) deteraine that the information is necessary to ensure conteffective make-or-buy decieions by the Contractor or to ensure adequate quality control by the Contractor, and (2) documents the reazons in the contract file." | DISP | 0718-001 FAR 15.703(b) as issued for comment actively discourages requiring make-or-buy programs for acquisitions under $\$ 1$ million. This figure has been increased to $\$ 2$ million in the revised FAR. The FAR purposely emphasizes the point that the contract files must be adequately documented to show the reasons for including any make-or-buy program in a contract under $\$ 2$ million. As a practical matter, before any make-or-buy program is incorporated into a contract, negotiations are held and an agreement is reached between the contracting officer and the contractor. The reasons for including the program in a contract under the dollar threshold should become known at that time. <br> 0712-001 FAR 15.703(b) is changed as recommended. Also see 0727-002 on page 7 . <br> 0788-011 The proposed change is more restrictive than the FAR. It is not the intent of the FAR to limit the contracting officers' decisions to the specific reasons cited. It is sufficient to emphasize that the contract file must be documented to indicate the reasons for including a make-or-buy program in contracts under the stated dollar amount. The respondent's proposed change to paragraph (b) includes an increase in the dollar threshold to $\$ 2$ million. See comment 0727-002 on page 7 . |
| :---: | :---: | :---: |
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| A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council |  |

TRW
$0712-002$
15.704

1. COMMENT

In OFPP Summary for this Subpart, signed by Mr. Haugh, states *In order to help reduce paperwork, this FAR Subpart more actively discourages the submission of make-or-buy programs in acquisitions under $\$ 1$ million dollars." FAR 15.703 b has been rewritten from DAR 3-902.2(b)(i) purportedly to achieve this goal.

In seemingly direct contravention of the stated purpose is the fmediately following FAR 15.704, which has been rewritten from DAR 3-902.2(c). The referenced DAR states: "...As a general guideline, the make-or-buy program should not include items or work efforts less than 17 of the total estimated contract price, or $\$ 500,000$, whichever is less." FAR 15.704, however, states: "...Make-or-buy programs should not normally include items or work efforts estimated to cost -less than (a) 17 of the total estimated contract price or (b) any minimum dollar amount set by the agency, whichever is less." The removal of any minimm dollar amount for inclusion of items in the make-or-buy program may well lead to a proliferation of paperwork and unnecessary submissions.
Change 15.704 to read:
"15.704 Items and work included.
The information required from a prospective contractor in a make-or-buy program shall be confined to those major items or work efforts that would normally require company management review of the make-or-buy decision because they are complex, costly, needed in large quantities, or re quire additional facilities to produce; Ras materials and off-the-shelf items shall not be included unless their potential impact on contract cost or schedule is critical. Make-or-buy program should nor normally include items or work effort estimated to cost less than (a) 17 of the total estimated contract price or (b) $\$ 500,000$, whichever is less.
GSA

Comment 0.141704
$08 / 4005 \frac{5,704}{\text { This }} \frac{15}{}$ paragraph mates that make-or-buy programs should not normally include items or work effort estimated to cost less than a) 1 percent of the total estimated contract price or (b) any minimum dollar amount set by the agency, whichever is less. A $\$ 1,000,000$ contract could result in the consideration of a $\$ 10,000$ item for a make-or-buy decision. Thus any minimum dollar amount stablished below this figure would necessarily be less than \$10,000. It is questionable whether an agency should even consider making a decision at such a low dollar level.

Recommendation
It is recommended that a $\$ 10,000$ floor, as a minimum, be established for the agencies and be included in this paragraph Perhaps even $\$ 100,000$ minimum should be considered.

DOE
078592
15.704

Recomend that the word "plan" be substituted for "program" in 11 nes 2 and 9 in aecordance with the recomendation for 15.701. Subparagraph (a) should be reutifen as"(a) one percent of the total etimated contract price or any other minisum percentage stipulated by the agency, or".

This would pernit agencies to set their on thresholds, as sose may consider a $\$ 10,000$ threshold ( 17 of $\$ 1,000,000$ ) too $10 w$, or to set sliding scales, such as different percentages for high and low value contracts.

0712-002 and 0814-005 EAR 15.704(b) is changed to read, "or (b) a dollar amount set by the agency, whichever is greater. " This will allow each agency to establish its own thresholds and even to establish set sliding scales, if necessary, to apply to low- and high-value contracts. The words "as a rule" are added to make it clear that actual application depends on individual agency determinations.

0788-012 The make-or-buy program is but one part of the contractor's plan. The program concept recommended by the respondent has not been adopted for the reasons stated in rationales 0788-002 and $0788-003$ on page 4. Also see comment 0712-002 and related rationale above. FAR 15.704(b) permits agencies to establish their own thresholds.

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A - Accepted C - Not accepted
M - Accepted but mociified D - Major policy change -- deferred to the FAR Council
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| 1. COMMENT <br> CODSIA | 2. | 3. RATIONALE |
| :---: | :---: | :---: |
| $0727-504$ <br> 15.704 - Items and work included. In the sentence dealing with raw materials and off-the-shelf items, put a period after the word "included" and delete the words "unless their potential impact on contract cost or schedule is critical". Raw materiais and off-the-shelf items are not normally "make" and leaving the issue open only adds confusion. | $C$ | 0727-004 The FAR definition of items and work included is not restricted to "make" Items. The acguisition of raw materials, commercià products, and off-the-shelf Items, while these are not normally "make* Items, can have considerable impact on contract cos̃ts or production schedules. Since the recommended change would eliminate consideration of these concerns, it is not made. |
| CODSIA $0727 e_{03} \frac{15.704(t)}{\text { Che wording in } 15.704 \text {, "(b) any minimum dollar amount }}$ <br> set, by the agency", should read "any higher dollar amount set by the agency." | $M$ | 0727-003 Although the commenter's wording is not accepted verbatim, FAR 15.704(b) is revised for clarity. |

A - Accepted $C$ - Not accepted
$M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council

| 1. COMMENT | 2. | 3. RATIONALE |
| :---: | :---: | :---: |
| DOE <br> 07189/3 <br> 25.705(a) <br> To confore to above recommendacions, reurite $15.705(\mathrm{a})$ as: <br> (*) A etatement that the plan, and program if required, and required supporting information must accompany the offer, unless the program has been approved by the Goverment (if the Contracting officer contider an approved program to be adequate assurance);". | $C$ | 0788-013 The program concept proposed by the respondent is not adopted for the reasons stated in rationale 0788-002 on page 4. Also see 0788-012 on page 9. |
|  |  | - |
| DOE <br> 0788974 <br> $15.705(\mathrm{c})$ <br> Should substitute the word "plan" for "program" in the first line. | $C$ | 0788-014 See 0788-013, above. |
| OOE $\begin{aligned} & 078985 \\ & 15.705(\mathrm{c})(4) \end{aligned}$ <br> Should be prefaced by the words "Sumpary of" to preclude a requirement for long dramnoout discusaions, eapecially if the Contractor follows an approved ake-or-buy program. <br> ARTHUR D LITTLE <br>  |  | 0788-015 The last sentence of FAR $15.705(c)(4)$ requires that reasons be in sufficient detail to permit the contracting officer to evaluate the cateqorization or proposal. The information is requested by this portion of the EAR in support of the contractor's proposed program. At this point, there is no approved program. Adding the words "summary of" would have little effect on the amount of detail the contractor should submit in order to provide sufficient detailed information. <br> 0674-011 The information in FAR 15.705(c)(4) makes it clear that reasons for categorizing items must be in sufficient detail to permit the contracting officer to evaluate the categorization or proposal. For this reason it would be inappropriate to cancel this subparagraph. |


A - Accepted C - Not accepted

M - Accepted but modified D - Major policy change -- deferred to the FAR Council


A - Accepted C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the PAR Council

A - Accepted
C - Not accepted
M - Accepted but modified D - Major policy change $\rightarrow$ deferred to the FAR Council

1. COMMEN

## DOE

078896
Paragraph (d) (3) needs to be rewritten to conform more closely to DAR, to establish that it is the existence of other competent sources, rather than any other sources, that is important, e.g-. "( 3 ) The Contractor's consideration of the competence, abllity, experience, and capacity available in other firms, especially small business, amall disadvantaged, and labor surplus stea firms."

## GSA

O8ा4: 06 15.706(d)(3)
This paragraph states that the contractor will consider we availability of other firms, especially small business, small disadvantaged business, or labor surplus area firms." Consideration of the competence, ability, experience and capacity of these firms is not mentioned. It is a matter of note, both the DAR and FPR consider these factors.
Recommendation
It is suggested that competence, ability, experience and capa bility are still essential qualities which should be taken into consideration and included in this paragraph.

## Arthur D. Little

0674-013
15.706(d) actd
(8) Contract impact, such as timing delays, costs, and performance.

0788-019 The FAR is changed as
recommended. The revised wording is similar to the information in DAR 3902.3(b)(iii) and FPR 1-3.902-1(e)(3).

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A - Accepted C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council
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| A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified $D$ - Major policy change $\rightarrow$ deferred to the FAR Council |  |


A - Accepted
C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council

1. COMMENT

CODSIA
$072700 \%$
15.70才t). Incorporating make-or-buy programs in contracts. In subparagraph (b), change the words make-or-buy programs in contract price shall be subject to equitable reduction" to "the contract price shall be subject to equitable adjustment A change to a previously negotiated make or buy categorization which was less economical may occur for a variety of reasons and may not necessarily result in a more economical price at the time of the change. For example, the change may be made because of a design change which results in a more costly item.

DOE
$0788924,18.707(6)$
paragraph (op
paragraph applies, wuch as contained in the DAR coverage ( $3-902.5$ (b)).

0727-006 FAR 15.707(b) provides the means for making downard reductions in contract price when circumstances arising after the original agreement induce the contractor to change the agreed-to item to a more economical categorization. If such a change is made, the element of the contract price that was intended to compensate the contractor for the higher costs flowing from the initial make-or-buy decision requires an appropriate adjustment. Design changes resulting in a different or more costly item may be processed under such provisions as the Changes clause.

C 0788-024 FAR 15.707 (b) is clear and concise as written. It is not considered necessary to add an example, such as in DAR 3-902.5(b).

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A - Accepted C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council
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## DOE

$0788-027$ sa,215-x alt. I
Both alternate clauses stipulate an agreement to promptly negotiate price
edjustments after receipt of approval to change the make-or-buy plan. A requirement to negotiate a price adjustment prior to approval would reiain relatively equal megotiating strengthe and would be preferable.

CODSIA

07.707
15.707 - Contract Clause. In Alternate I(d)(2) and Alternate II(d)(2), change the words kafter approval is granted, promptly negotiate with the Contracting Officer on equitable reduction..." to read "after approval is granted, promptly negotiate with the Contracting officer on equitable adjustment...*. The rationale is the same as that for subpart 15.707.

## DISPOSITIC：：CノUES

A－Accepted
C－Not accepted
M－Accepted but modified D－Major policy change－－deferred to the FAR Council

The following respondents either concurred with or had no comment on this FAR entity：

| LET「こK | COMED．I | COMAFNESR | TYPF OF COMRIFOM |
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| 1535 | U11 | S\％ | CO |
| 1きらも | Uu1 | （1） | CC |
| 1549 | UUI | ＋13 | CC |
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A - Accepted C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council
I. COMMENT

M - Accepted but modified
D - Major policy
Major policy change -- deferred to the FAR Council

1. COMMENT
i. General. The

491-001
effort be made to shorten any sentence than in most sections. Could an up to show a listing?

WEC
Since Subpart 15. GFENERAL
specific reference to Subpart 15.8 must be
flow-down required if lower-tier subust be made in the prime contract and
wise, the mequired if lower-tier subcontractors are to brime contract and
A prime contractor, other than G Goco, is is applicable to subs is meaningiess. force to subct to all regulations; this general rule subplect only to his force to subcontractors.

$$
A H D
$$

411-"1538-001 General Subpart 15.8 - Price Negotiation

1. We assume that the $\$ 500,000$ threshold, resulting ffom the recent amundment of pub. L. 8/-653, will be reflected in both defense and we recompend that it be the same threshold for
ris
411-1538-002 General
substitution of a new SEXXX Optional Forms 59 and 60 and the a minimum level of sophistication on the icing Proposal, assume We suggest that, for sophalicication on the part of all offerors. advisable to retain the of 59 and OFaged firms. it might be would like to see a Travel element and a In any event, we With explanations (see elewents 7 and a consultant element -_coverage in paragraph, 1 of the Instructions for the new to the
2. 

1491-001 The generalization of the
wording of the entire subpart as wording of the entire subpart as "abstruse". particularly in the absence any specific example(s), is unwarranted. The subpart is clearly written, given its complexity.

1526-002 Adding a requirement for a subcontracts because the clauses that are or desirable the subpart provide for are prescribed in required.

1538-001 The threshold has been increased where applicable and applicability to 15.802 (a). -

1538-002 The SF 1411 has been modified since Phase I and is now merely a cover Sheet to the offeror's proposal requiring a minimal degree of sophistication for its completion. Guionnce for preparing the froposal itself is now contained in the FhR text at $15.80:-6(b)$. The cost element oi travel an? courultant are often of such importance the srevific guidance as to hoe to wor the: En an offeror's proposal $\therefore$ ? $\because$ de $\because=n=0$ in the solicitation.
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 in tr roincitutio.
$\qquad$
A - Accepted
M - C - Not accepted

- Accepted but modified D - Major policy change -- deferred to the FAR Council


[^18]comments The commenter makes a namber of comments as to specific sections $=$ this art which will be addressed
not cupport These specific comments ac rot support the "summary" statement that rie entire suboart $n .$. .must be reovaluate by the offite of federal procurement


where applicable.


| A - Accepted | $C$ - Not accepted |
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| $M$ | Accepted but modified $D-$ Major policy change -- deferred to the FAR Council |


| 1550-001 <br> section 15.800 states in paragraph (b) that the subpart is applicable to subcontracts subject to Government consent. since consent authority emanates from the contract document, we interpret this section to mean that the subpart does not apply to those subcontracts awarded under a prime contract that do not require Government approval. If our assumption is correct, this section appears to conflict with section 15.806, and other sections, because the requirements in 515.806 apply even though consent is not required. | 2. DISP <br> C | 3. RATIONALE <br> 1550-001 The commenter states that there appears to be conflict between paragraph (b) of 15.800 and "15.806 and other sections" which it does not specify. Commenter assumes that this subpart does not apply to subcontracts that do not require Government consent to placement. The comnenter does not differentiate between (1) obtaining subcontractor data for purposes of supporting prime's price. and (2) obtaining of subcontractor data for purposes of consent to placement. For purpose of prime contract pricing, subcontractor data would be obtained under Subpart 15.8 regardless of presence or absence of consent requirements. <br> 1526-001 Comment is accepted as it pertains to substance however the actual location of the change was considered to ke better made to paragraph (b) rather than (c). The change most properly applied to paragraph (b) since it related to subcontracts requiring Government consent. In addition (a) has been changed to clarify that "subcontract pricing" is included. |
| :---: | :---: | :---: |

$\begin{array}{lll}\text { A - Acerepted } & C-\text { Not accepted } \\ M \text {-. Accepted but modified } & \text { D }- \text { Major policy change -- deferred to the FAR Council }\end{array}$


A I' Accepted C - Not acceptect
H. - Accepted but modified D - Major policy change -- deferred to the FAR Council
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1. COMMENT

DISP
3. RATIONALE
$A^{\prime A}\left(\cos ^{2} \theta^{\prime} \theta\right.$
$16+6-002\left(\operatorname{con} t^{\prime} d\right)$

1. Add the word "factual" before the word "data" in the third sentence. There is a need to repeat the word "factual because its absence has been used to support demands for certification of non-factual data.
2. Add the words "where applicable" after the word "inciude" im the fifth sentence. This is carried over from the FPR def imm tion. This will improve understanding within the Government and by organizations and individuals doing bus iness with the Government.
3. Add the word "factual" before the word "information" in sub-iite (c) in the fifth sentence. This is one of several additons. in the fifth sentence, all of which taken together are consiodered to be essential in order to eliminate the abuse which we havee tried to deseribe above. The existing string of illustratioms in the present definitions of cost or pricing data are being in the present in the field as seif-sufficient and are not being infited by the first sentence of the definition, which restricts the scope of cost or pricing data to that which is, in itself, factualHords like "information" and "data" are used in their generic
sense as the basis for demands for certification of non-factual data and information.
4. Delete the sub-item (d) and the words "data supporting projections of" and replace that with sub-item (ii) as a subset of sub-item (c). This change is made for the same reason as in the immediately preceding change. The deleted words in the present DAR definition of cost or pricing data have been used to demand certification of and the submission of business forecasts which are clearly not factual data.
5. Delete sub-item (e) and replace it with sub-item (iii). -This is an editorial consequence of the above changes.
6. Delete sub-item ( g ) and the word "estimated" and replace it with sub-item (iv). This is an erroneous application of the definition of cost or pricing data. It is a contradiction of the definition. The word "estimated" appears in the existing DAR illustration iist, but not in the FPR illustration list. The correction of an obvious error in statutory implementation is required by the Congressional policy guidelines, particularly Policy Statements $6,9,11$ and 12 of P.L. 96-83, Section 2.
7. Delete sub-item ( $h$ ) and the words "information on" and replace them with sub-item (v). The reason for this change is the same as that stated above under No.?. This is also an editorial consequence of the change proposed under No. 2 above.
8. Delete the words "that could have a significant bearing on costs" in the proposed sub-item ( $h$ ). This is neediessly repetitious of the same point which is made in the first sentence of the the same point which is made ine. Further, attaching the connotation of significance to one of several items improperiy suggests that it should apply only to that item, and that is contrary to the intent.
9. Delete sub-item (f) and replace it with the words "and (d)". This is an editorial consequence of the above changes.
10. Other changes are self explanitory.



| A - Accepted |  |
| :--- | :--- |
| M - Accepted but modified | D - Not accepted |



A - Accepted
C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council

A - Accepted $C$ - Not accepted
$M$ - Accepted but modified $D ~-~ M a j o r ~ p o l i c y ~ c h a n g e ~--~ d e f e r r e d ~ t o ~ t h e ~ F A R ~ C o u n c i l ~$

| 1. COMMENT | DISP | 3. RATIONALE |
| :---: | :---: | :---: |
| ACEC |  |  |
| $\begin{aligned} & 1560-001 \\ & 15.802 \text { Policy } \end{aligned}$ |  |  |
| Public Law 92-582 provides that price negotiations for architect-engineer contracts are to be entered into after the initial selection of the highest qualified firm. In order to assure this mandate is observed, it is recommended that the following additional Subparagraph (c) be added as follows: | C | 1560-001 The FAR at 36.607 specifically requires use of this Part 15 for $A-E$ contracts. No change is needed. |
| "(c) Contracting officers shall adhere to Public Law 92-582 (Brooks Law) requirements in negotiating architect-engineer contracts." |  |  |
| DOE |  |  |
| $1818 \text {-002 Section 15.802, Policy }$ | $M$ |  |
| This introductory section for Subpart 15.8 does not carry forward the existing basic policy for price negotiation. In our view, the primary policy statement was excluded i.e., some form of price or cost analysis should be made for every negotiated procurement action. This present FPR and DAR requirement is vaguely addressed in subsequent FAR subsection 15.805-1 (b). It is essential that the existing policies and explanatory |  | 1818-002 The essence of the coverage desired by the commenter is appropriately covered at FAR 15.805-1. |




| 1. COMMENT | ${ }_{\text {DISP }}$ | 3. RATIONALE |
| :---: | :---: | :---: |
| WEC |  |  |
| $1526-005$ <br> In 15.802(b)(1), the mening of "lovest ultimate overall cost to the Government" should be defised. If this language is meant to require considerstion of such facrors as transportation, maintenance and product life, it should so indicate. | $C$ | 1526-005 The term "lowest ultimate overall cost to the Government" is broad enough to include any and all factors, including those set forth by the commenter, which may be appropriate in a particular situation. It would be unwise to attempt to define the phrase by enumerating specific factors since to do so would run the risk of omitting some factors, which under some circumstances should be encompassed within the meaning. |
| DOE |  |  |
| $1716-002$ <br> Subsection 15.802 (b) ( $\mathbf{2}$ ). <br> This subsection should be expanded to include the following from the DAR and FPR: "This prohibition neither prevents the negotiation of fixed overhead or other rates applicable to several contracts during annual or other specific periods nor prohibits forward pricing agreenents applicable to several contracts. | $C$ | 1716-002 The material at 15.809, Forward Pricing Rate Agreement, and Subpart 42.7 . Negotiated Indirect Cost Rates, adequately covers the matters. |
| $G S A$ |  |  |
| $1682-002$ $\text { Paragraph } 15.802(b)(3) \text {, page } 3$ <br> Comment <br> The phrase Not include in a contract any amount. . " should be changed to Not inciude in a contract price any amount. . . | $A$ | 1682-002 Word "price" added. |
| ( See late comment 2014-005 on page 411-109 |  |  |

A - Accepted
C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council



Since the assumption was incorrect this proposed change is not apropos.
A - Accepted $C$ - Not accepted
$M$ - Accepted but modified D - Major policy change -- deferred to the FAR Council

## HHS

/550-002
Paragraph (a) of section 15.803 requires contracting officers to use contract audit as a pricing aid to the fullest extent possible. Our Audit Agency objects to this open-ended statement and recommends that a proviso be added in the event that they would not be able to comply with a request for a preaward audit. They indicate that FPR $\$$ l-3.809 allows for such relief. They are concerned that the current trends in the Administration towards reducing Fcderal cmployment and redirecting resources to ferret out fraud, abuse, and waste will severely limit their ability to provide contract audit support.

## TEXI

1563-003
$15.803(a)$
This paragraph provides that the contract Auditor is the Contracting
This paragraph proviaes that on contractor, accounting and audit mat ters. It fails to mention that with respect to access to contractor ters. It fails to mention chat wacts as the Contracting officer's tepresentative.

We recommend modification of this paragraph to show that the auditor is lso the Contracting Officer's representative on contractor accounting and audit matters.

## DOE

## Subsection $15.803(\mathrm{a})$

The introductory sentence significantly alters the existing policy established in FPR 1-3.809, Contract Audit As A Pricing Aid. As drafted, the FAR provides that Contracting Officers shall use contract audit services as a pricing aid to the fullest extent appropriate. The current FPR qualifying phrase cited in section 1-3.809 "except as otherwise provided by the head of the agency if audit resources are unavallable" was not included in the proposed FAR. This is a significant policy change. We agree that sound procurement policies make it advisable to establish basic poicies to seek "audit" assistance. However, such polfcy must not be made mandatory without an escape provision.
It must be recognized that audit resources are not assigned to the civilian procurement organizations. Only the Department of Defense (DOD) has created a dedicated "contract audit agency" to support its procurement requirements Civilian agencies do not have such organizations and such services are not always avaflable. It is a matter of record that several civilian audit departments do not use their resources to perform preaward reviews of prospecpartments contractor proposals. It is therefore flawed polfcy for the Government's procurement regulations to set forth a mandatory requirement which is not in the procurement organization's power to execute.

The essential FPR phrase must be included to recognize that civilian agency officials will, as they deem proper, establish overall departmental policies and procedures that maximize accomplishment of their responsibilities with available resources. As a minimum, to avoid misinterpretations, the word avaliable resources. As a minimum, the word "available." The FAR is unacceptable under any other conditions. changes made. These changes will allow for flexibility when resources are not available to provide the audit services which the contracting officer may want.

1818-001 The change in language made in response to Comment 1550-002 above satisfies the essence of this comment.


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A - Accepted C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council
Accepted but modified D - Major policy change -- deferred to the FAR Council
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## NASA

## AIA

f040003 - recommend the first sentence be deleted, as the $\frac{25.803(b)-H e ~ r e c o m m e n d ~ t h e ~ f i r s t ~ c e n t e n c e ~ b e ~ d e l e t e d, ~}{\text { fnought contained therein it natural conciugion of the }}$ thought contained therein is
remander of that paragraph.

6046-003
Paragraph 15. $803(b):$ Revise the last sentence in the paragraph

Despite Fthis prohibition dees-Ret-preelute the disclosure of
discrepancies or mistakes of fact. (such as duplications, omissions, and errors in computation) contained in the cost or pricing data supporting the proposal. shall be made promptly.

## RATIONALE

It must be equally incumbent on the government to disclose discovered (by and member of the governments negotiating team) dis and menber of the governments negctiating team
${ }_{\text {DISP }}^{2 .}$
$C$
AR $15.803(b)$ even though taken from the DAR/FPR should be modified to require the field pricing personnel to discuss their preliminary findings findings and the contractor's proposal without compromising the Government's negotiating position.

With P.L. 87-653 the contractor must submit complete, current and accurate cost or pricing data. If the audit findings are truly objective and they reveal a significant difference, the contractor should be permitted to provide additional supporting data for his proposal prior to negotiation.

He suggest that FAR 15.803 be changed to read as follows:
Field Pricing personnel shall discuss the preliminary results of
their findings with the contractor wherever there is a substantial (15\%) difference between their findings and the contractor's
proposal. If their findings are based on information from sources other
than the contractor's records, they shall not disclose to the contractor
any conclusions of their reports without the concurrence of the Contracting officer responsibie for negotiation.
3. RATIONALE

## 1604-003 The first sentence is a

 necessary and logical lead-in for the last sentence and indeed the last sentence doesn't make any sense without it.1646-003 The commenter seeks to make the disclosure by team members other than the contracting officer of discrepancies or mistakes of fact mandatory, thus placing the burden on the team members to ensure such disclosure to the offeror or contractor. Although in most cases the disclosure will be made, the responsibility for the accuracy of the factual aspect of the proposal and support data should remain with the offeror/contractor.

As for adding "shall be made promptly", it is assumed that whenever action is required of government personnel or contractor or offeror, that action will be forthcoming with reasonable promptness (unless time limits are otherwise specified). To assume otherwise would require the addition of the word "promptly" at every point where some action is required, only serving to add verbiage to the $F A R$.
A - Accepted $\quad$ C - Not accepted

## 1. COMMENT

AIA

## 1656-004

Paragraph 15,803 (b): Add the following sentence at the end of the paragraph:
"However, the contracting officer shall-not withhold from the offeror or contractor any cost or pricing data obtained from sources other than the offeror's or contractor's records, when the disclosure of such data would reasonably be expected to affect price negotiations significantly."

## RATIORALE

This change is proposed in order to correct a long-standing deficiency in the regulatory implementation of Public Law 87-653. This statutory revision to the Armed Services Procurement Act was debated at length in several iterations prior to its eventual adoption. This extensive legislative history shows that cunyress intended a single standard of truth in negotiated procurement. The Government is frequently in possession of factual information; e.g., test and evaluation reports, which would significantly affect price negotiations. It is a violation of the Congressional intent of the statute as well as the intent of Policy Statement No. 12 (fair dealing) for the Government knowingly to withhold such information from a contractor. Under current practices, such information would only be utilized in negotiations if it supported the Government's pricing position. So strong is the pressure to obtain the lowest price in negotiation that the information as a matter of polfcy would be guarded against disclosure to the contractor, if it would assist or cause a necessary upward change in the contractor's estimates.

A major premise of the OFPP's proposal for a New Uniform Federal Procurement. System is a substantial reliance on the professionalism of the Government procurement workforce. Professionalism requires the practice of the highest and best ethical standards, and this means that requirements for truth and the disclosure of relevant factual information which prudent buyers and sellers know to be significant in its impact on price negotiations should apply both ways and not just to the contractor. The need for this kind of professionalism has to be a source of reliance not just to the general public in terms of accountability for performance, it also has to be a source of reliance for the private sector contractors so as to encourage a greater participation in Federal procurement opportunities.

ADPA
$588-003$
$15.803(c)$
Chonge "inspection" to "anolytical examinotion".

## CAP TRAC

1536.010
15.803 (c)

It appears the action described in this paragraph is too late in the acquisition process. If would seent this should have occured during the budgetary process to permit the funding approval. It would seem this is the material which ant be reviewed and evaluated at this time.
2.

DISP

1646-004 It is already the practice in many instances, particularly in a sole source situation, that the contracting officer points out to the contractor during negotiation, data which would be expected to significantly affect the contractor's proposed price and which the contractor may not have considered. However, the mandatory disclosure requirement of the recommended sentence could in many instances subvert the competitive negotiation process by putting the burden on the contracting officer to give information to a particular offeror to the possible disadvantage of, not only the Government, but to the disadvantage of offeror's competitors.

1528-003 The word "inspection" more clearly expresses what is desired than does the suggested words "analytical examination". The suggested term in itself raises questions as to its meaning.

1536-010 The requirement that the estimate be done "before issuing a solicitation" does not preclude the estimate being done very early in the acquisition process to the extent possible and feasible.

| A - Accepted | C - Not accepted |
| :--- | :--- |
| M - Accepted but modified | D - Major policy change -- deferred to the Far Council |

ADPA $\quad$ 1. COMMENT

## $A \mid A$

## 1646-005

Paragraph 15.803(d): Revise the first sentence as follows Price negotiation is intended to permit the contracting or the scope the offeror to agree on a fair and reasonable price. of work and delivery requirements being contracted for

RATIONALE is imperative that the negotiators keep at the forefrother their aim is it is negotiation of a price per se is not the aim out the scope of work to negotiate a price

AIA
1646-006
Paragraph 15.803(d): Insert the following sentence after the first sentence:
"Price negotiation does not require that agreement be reached on every element of cost or that all pricing issues be resolved in the negotiation."

RATIONALE
This is a long-standing, sound and basic rule of price negotiation. It should be noted as part of the coverage of the general rules of price negotiation. It is recognized that a similar provision appears further on in the Subpart 15.8 ; however, the natural place for this statement is at the beginning in the general description of the group rules of price negotiation.

1646-007 $803(0)$ : Delete the word "strict" prior to the word "accord" in the present 2 nd sentence.

RATIONALE
The word "strict" is tautological and connotes an undesirable degree of The word "strict" is tautological to reflect specialists" opinions in the rigidity with respect to the need to reflert specialists opinions occasions. negotiated final price. Experience dictates that on numerous occasions agrement on price negotiation can on the positions of the contributing cantly, and somet the contracting officer's prenegotiation objective. One of the necessary functions of the institution and process of negotiation is to provide insights and an overview which may well represent a comp different aspect or position from that taken by either side during the preparatory ohases.

## 2.

DISP
C

C

1646-006 First part of sentence through word "cost" used. Remainder of sentence not accepted since it implies that pricing issues remain unresolved even after completion of price negotiation. This is not the case. settlement on a price finally resolves all open pricing issues.

1646-007 The word "strict" is deleted because its use is inconsistent with the word "significant" in the last sentence.

| A - Accepted C - Not accepted <br> M - Accepted but modified $D$ - Major policy change --  | ferred to the FAR Council |  |
| :---: | :---: | :---: |
| 1. COMMENT | DISP | 3. RATIONALE |
| DOA <br> 1578-001 <br> 15.803 page 6 , In the second paragraph of Paragraph (e), the Contracting officer should have the authority to make the final decision, and notify higher authority with written justification for hie decision. | $C$ | 1578-001 The existing language should be retained in that referral "to higher authority" may often have the salutory effect of injecting another party into the negotiations who may well be successful in kreaking the impasse. |
| ACEC <br> 1560-002 <br> 15.803, General <br> Subparagraph (e) should be revised as follows in order to more properly state the responsibility of the contracting officer: <br> "(e) The contracting officer's primary consiceration should be the procurement of required goods and services from responsive and responsible concerns at fair. and reasonable prices. In price negotiation, the over-all price the government pays should be of primary concern and importance. While the public interest requires that excessive profits be avoided, the contracting officer should not become so preoccupied with particular elements of a contractor's estimate of cost and profit (or fee) that the most important corsideration, the total price itself. is distorted or diminished in its significance." | $C$ | 1560-002 The proposed revised paragraph (e) does not "more properly state the responsibility of the contracting officer" and is lacking in several significant aspects. It ignores contract type as a consideration. It appears to be aimed primarily at fixed price type actions as opposed to cost type actions. It does not provide for referral to higher authority when contracting officer reaches an apparent impasse. The paragraph as written is satisfactory. |
| A D little <br> (याग 1515-003 <br> 3. Regarding subparagraph $15.803(e)$, the Contracting Officer should negotiate price which adequitely reflects the work to be performed by the Contractor, It should also be limited to incentives for efficient performince. | $C$ | 1518-003 That price "reflects the work to te performed" is obvious. As to limiting incentives for "efficient" performance, both "efficient" and "economical" performance seems desireable. |
| CAPTRAC <br> 1536-011 <br> $15.803(\mathrm{e})$ <br> This paragraph should be renumbered (e) (1) and rewritten as the statement identifing the contracting officer's primary and secondary concerne confilct with other statements in the paragraph dealing with incentive, efficient and economical performance and with the policy statement in 15.802 (b) (I). We magest the paragraph read: <br> "The contracting officer' primary concern is that the price the Government arrees to pay is reasonable and represents the lowest ultimate overall price. The contracting officer should not become preoccupled with any single element but hould balance the contract type, profit and price to provide the contractor the greatest incentive for efficient and econowical performance." <br> The second paragraph of $15.803(e)$ should be numbered (e) (1i) and the words "on mole aource procurements" fuserted in the firat infe following the word "however," |  | 1536-011 Commenter states that $15.803(\mathrm{e})$ is in "conflict" with 15.802 (b) (1). There is no such conflict. The commenter croposes limiting all of the paragraph after the first two sentences to sole source procurements. There is no reason for such a limitation. Its applicability may be primarily to "sole source" but its usage should not be so limited by the FAR. |

A - Accepted $\quad C$ - Not accepted
$M$ - Accepted but modified $D$ - Major policy change -- deferred to the fAR Council

1. COMMENT
$1552-002$
Section 15.803, paragraph (e)
The second part of paragraph (e) generally states that when a
contracting officer determines a price to be unreasonable, and
has determined that there are no alternative sources, he is to contracting officer determines a price to be unreasonable, and refer the contract action to higher authority.

To be meaningful, this paragraph should specifically state the role of the higher authority. The preceding paragraph (d) emphasized that the contracting officer is solely responsible for the final pricing decision, yet in this instance of determining that a price is unreasonable, a higher authority may evidently still choose to award at that price. This apparent contradiction should be addressed in explaining the role of the higher authority.

## HHS

1558-8poposed FAR $15.803(e)$ states if a contractor insists on a price Proposed FAR $15.803(\mathrm{e})$ states if a contractor insists on a price
that the contracting officer considers unreasonable, the contract that the contracting officer considers uneasonable, the contract
action shall be referred to higher authority. We suggest that this action shall be referred to higher authority. We suggest that this provision be expanded to spell out the criteria which a higher authorizy
might rely upon in determining whether to reject the offer or authorize might rely upon in determing whether athority's decision and reasoning process be documented for the file.
2.

552-002 It is implicit in the authority of "higher authority" that it has at least three alternatives. It can agree with the offeror and accept his offer. It can agree with the contracting officer and return action to him for his "final decision". Or, it can enter into further negotiation with the offeror. It is therefore unnecessary to "specifically state" its "role". There is no conflict between paragraph (d) which states that the contracting officer "is solely responsible for the final pricing decision" which in context means vis-a-vis the other specialists and paragraph (e) which requires the contracting officer to refer the contract to "higher authority" when faced with an unreasonable price or demand. It is "inherent" in the responsibilities of "higher authority" to become involved in such a situation.

1558-001 The comment as to spelling out criteria is impractical and undesirable. It is impractical since the facts in one situation will vary from those of another and it would therefore be impossible to spell out an all-inclusive set of criteria. Even if possible it is undesirable since it would remove a desired flexibility.

The essence of that part of the comment concerning documentation has been adopted. The rewritten language states that "the disposition of the action by higher authority should be documented". In any documentation of a decision "worth its salt" the "reasoning process" is evident.
A - Accepted C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council

| 1. COMMENT | 2. | 3. RATIONALE |
| :---: | :---: | :---: |
| NASA |  |  |
| 1604-004 <br> $25.803(e)-14, a s$ stated in 15.803(a), the contracting officer is "solely responsible for the final pricing decisions," it is unclear what is intendec by the last sentence which requires the contracting officer to refer unreasonable contractor prices or demands to nigher autnorigy. is chis a consifet detween iaeminse and reality? | 0 | 1604-004 Not accepted for the same reason as stated for comment 1552-002 above. |
| $A \mid A$ |  |  |
| 1646-008 |  |  |
| Paragraph 15,803(e): Add the words "or fee" in the first and | $M$ | 1646-008 The words "or feell added in the |
| the word "effective" before the word "efficient" in the second sentence. Insert the following sentence after the s |  | two places suggested by the commenter. |
| sentence. Insert the following sentence after the second sentence. |  | The suggested sentence was added. |
| "The negotiation of a contract type and a price are related and |  | However, the word "effective" is not |
| should be considered together with the issues of risk and uncertainiy to the contractor and the Government." |  | necessary in that an "efficient" and |
|  |  | economical" contractor is by necessity "effective". |
| RATIONALE |  |  |

The are changes are necessary in order to provide a balanced statement of
The above changes are nesstiation. Without the inserted additional
the objectives of price negotrat appears to virtually mandate the lowest massible firm fixed price as the objective of each negotiation. It is possible firm fixe price alation. recognize that this general provision will apply to the complete spectrum of Government procurement; that is, from the most exotic advanced technology to that which is almost solely price dependent. The paragraph, as it stands, inordinately stresses the objective of the lowest price.

- Accepted $\quad$ C - Not accepted

| 1. COMMENT | DISP | 3. RATIONALE |
| :---: | :---: | :---: |
| WEC |  |  |
| $\frac{15.804}{} \text { Cost or Pricing Data }$ <br> 1526-006 <br> Given the wording of the first aentence in $\mathbf{1 5 . 8 0 4 - 1 \text { (a) , it appears that pricing }}$ data my be intended to have an identity aeparate frow cost data, although the definitions in 15.801 define the two together. | $C$ | 1526-006 The term "cost or pricing data" in 15.804-1 (a) is perfectly consistent with the same term defined in 15.801 , both of which are consistent with the term in pub. L. 87-653. It was not intended, nor does it appear, that "pricing data" has an identity separate from "cost data". |
| WEC |  |  |
| 156-007 <br> The andate in $15,804-1$ (a) to "negotiate fair and reasonable prices" arguably faile to address cost-type contracte. | $C$ | 1526-007 The word "prices" as used herein includes "cost and fee" for a cost type contract (to the extent that fee is involved). |
| $W E^{C}$ |  |  |
| 1526-005. <br> The last sentence of $15.804-1$ (a) should be reworded to clarify that cost or pricing data my only be requifed under che circumstances set forth in sis.804-2. | $C$ | 1526-008 The suggested rewording is wholly inaccurate in that "cost or pricing data" are not only required in accordance with 15.804-2, where the data must be certified, but also in accordance with 15.804-5, where the data need not be certified. |

This paragraph provides that contractors and subcontractors may be required to submit cost or pricing data that is either certified or reguired
we are concerned about the requirement to subnit either certified or uncertified cost or pricing data in connection with any proposal the value of which is below the statutory threshold of $\$ 500,000$. Our experience indicates that contracting officers frequently attempt to reguire the submission of certified cost or prieing data even in conditions where the proposal is exempt from such a requirement undes P.L. 87-653, st amended. Uncertifiest cost or pricing dath are often requested by concracting officers on proposala which are below the absolute minimum floor of $\$ 25,000$. Now that the statutory threshold has been increased to $\$ 500,000$, we antielipate thet the frequency requests
increase.

We recompend that (1) the requirement for subrission of certified pricing data be eijminated in connection with proposals below the statutory threshold for reasons mentioned previously in this paper, and (2) the requirement for submission of uncertified cost or pricing data in connection with proposals belou the statutory threshold not be imposed by Contyacting Officer without justification by the contracting officer and prior approval of the fiead of the Procuring activity.

- Accepted C - Not accepted
- Accepted but modified D - Major policy change -- deferred to the FAR Council



## A1 ${ }^{A}$

$1646-010$
Paragraph 15.804 (a): Delete the second sentence in its entirety.
RATIOMALE
The first part of the second sentence (Submission of certified cost or pricing data) is needlessly repetitious. The second part of this sentence -- the reference to "uncertified" cost or pricing data -- is an error in statutory implementation. "Cost or pricing data" is a statutory term. To give it two different meanings is erroneous; and it will necessarily produce confusion, misapplication and misimplementation of the statutory requirements for cos or pricing data. The idea of using the same term to describe two essentially dissimilar bodies of data, where there is statutory and potential criminal penalties associated with the proper use of one body of data -- the statutory cost or pricing data -- is a totally novel concept. Such use is seriously questionable on legal and practical, as well as ethical grounds. or pricing of distinguishing between statutorily required certifiable cost or pricing data did information which is not factual, but which may be reasonably required to explain the offeror's estimating processes and projections, is not a new problem. It has been satisfactorily dealt with 633 . Contract instructions which appear on the reverse side of DD Form 633: Contract Pricing Proposal. It is clear the DAR appreciated the necessity to distinguish clearly and precisely between cost or pricing data capable of cert fication and other information reasonably required in order to conclude a price negotiation. Unless this distinction is maintained without exceptio the necessary line between factual, certifiable cost or pricing data and other types of information will tend to become fuzzy and disappear. It is essentidl for the DAR to avoid such an error. there are a number of other places in the proposed FAR Subpart 15.8 where this same error is repeate They will be noted and referred back to this item for justification for their elimination.

1646-009 Commenter's recommendation to change word menable" to "assist" is not an improvement. The word "enable" is a croader term which encompasses assist itself to cost or pricing data submitted the contractor it analysis" is made.

The suggestion that "or price" be added to line two is not accepted because cost or pricing data are not used in making a price analysis.

1646-010 The entire paragraph, 15.804-1, is introductory and indicates that certified or uncertified data may be required to be submitted. The details are set forth in the following paragraphs. Since it is introductory, it may well be "repetitious" when considered with the details that follow but it is certainly not "needlessly repetitious".

The remainder of the comment is based on commenter's erroneous premise that there is a difference in the data itself between "certified" and "uncertified" cost or pricing data. This is not so since whether the data is certified or uncertified does not affect "what" is submitted but merely "how" it is submitted, i.e., whether of not the submitted data is certified. Moreover. the requirement for submission of uncertified cost or pricing data is not a "totally novel concept" as contended by commenter. DAR 3-807.3(d) in the last sentence provides that the Government may require the submission of limited cost or pricing data which is uncertified. Nor is the commenter correct in implying that the submission of false certified cost or gricing data is a criminal offense whereas the submission of false uncertified cost or pricing data is not a criminal offense (18 0.S.c. 1001 makes it a criminal offense to submit "any false statement" to the Government). The commenter's rationale does not support the conclusion that the contracting officer's discretionary right to require submission of uncertified cost or pricing data should ce deleted from the FAR.


1. COMMENT

WEC

## 1526-009

18 the ASPM No. 1 referenced in $15.804-1$ (b) to be "informational oniy" uxth
respect to all agencies? Purther, if the Goverament can obtain ASPM No. 1
at no charge, the contractor should be able to do so as well particulariy
since certain DOR offices have on occasion made compliance with ASPM mandatory in our iover-cier procurement deliberations.

DOT

1. Pase 33 . Section $15-804-1 / 6)$ Paragraph(b) includes a reference
to the A5PM No. 1. This reference infers that civilian agencies are to follow that publication. If that is the intent then the language should clearly point that out.
2. 3. RATIONALE

1526-009 In answer to commenter's question, ASPM Number 1 is to be "informational only" with respect to all agencies.

The commenter is erroneously assuming that the Government gets ASPM Number 1 at no cost. The agencies pay for material received from the GPO and therefore there is no inequity in the contractor paying for same.

1648-001 FAR at 15.804-1 (b) is very clear that ASPM Number 1 "is not directive.
A - Accepted
C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council
CAP TRAC

1. COMMENT
$1536-0 / 4$
$-15.804-2(a)(3) \&(4)$ Change $\$ 100,000$ to $\$ 500,000$.
$=P A$.

EPA

$$
\begin{aligned}
& \text { Subpart } 1588 \\
& 15 y / 15, f o r-2 \\
& \text { subpart } 15,8 \text { establashes } \$ 100,000 \text { as the threshold for } \\
& \text { submission of certified cost or pricing data. The Department of } \\
& \text { Defense (DOD) Authorization Act of } 1982 \text { raised this threshold to } \\
& \$ 500,000 \text { for DOD, and the change should be reflected in the FAR. } \\
& \text { We assume that a change in the threshold for other agencies will } \\
& \text { be sought so that the FAR will have consistent requirements } \\
& \text { applicable to both DoD and civilian agencies. }
\end{aligned}
$$

$$
D O A
$$

$$
1578-002
$$ throughout the remainder of this section.

$$
E \mid A
$$

$$
1580-002
$$

$$
\text { Revise } 25.804-2 \text { by changing dollar amounts as follows: }
$$

$\$ 100,000$ to $\$ 500,000$
$\$ 30,000$ to $\$ 150,000$
$\$ 40,000$ to $\$ 200,000$
$\$ 70,000$ to $\$ 350,000$
Reason - Compliance with the intent of P.L. 97-8G as recently applied to DAR.

NASA
1604-007 (1) - (a) (4) - These subparagraphis contain those cases 15, 804-2(a)(1) - (a) (4) - These subparagraphs contain those ca these subparagraphs and examples of threshold used in these subparagraphs and ehe examples of on the contrict modifications wich met the thresnoles are bas nas raised old P.L. 87-653 amount of $\$ 100,000$. Public Lav $97-86$ has the P.L. 87-653 amounts to 5500,000. Therefore, to be in consonance vith the new requirements, the new threshold amounts thoula be raisea to $\$ 500,000$, and the example $\$$ igurss in 15,804 ,
2 (a) (2) should be $\$ 150,000$, $\$ 350,000$, and $\$ 200,000$, respectively, $2(a)(2)$ should be $\$ 150,000$, $\$ 350,000$, and
in lieu of $\$ 30,000, \$ 70,000$, and $\$ 40,000$.

## GSA

Comment
1682-001 15.foy-2
The cited "Truth in Negotiation Act" (P.L. 87-653) was amended on December 1, 1981 (P.L. 97-86) to increase the dollar thresholds for submission of certified cost or pricing data from $\$ 100,000$ to $\$ 500,000$.

## Recommendation

Revise the entire aubpart as necessary to reflect the recent increase in dollar thresholds for submission of certified cost or pricing data.



```
- Accepted C - Not accepted
- Accepted but modified D = Major policy change -- deferred to the FAR Council
```

| 1. COMMENT |  |  |  |  |
| :---: | :---: | :---: | :---: | :---: |
| TDPA |  |  |  |  |
| ,28-00, /5. Poy-2 97 , the 1982 Defense Appropriations Authorization <br> $t$, requires that Subport 15.8 , one of the segments involved in this correspondence, revised extensively to cover the increased thresholds for certified cost or pricirg <br> a. FAR segments on small purchases and research and development contracts <br> $\mid$ also hove to be revised becouse of P.L. 97-86. We secommend that the <br> :essary revisions be prepared and disseminated for review as soan as passible. |  |  |  |  |
|  |  |  |  |  |
|  |  |  |  |  |
|  |  |  |  |  |

- Accepted - Ccepted but modified D Dot accepted


## NASA

1604-006
15.804-2(a) - There are over 70 wordain this sentence. We recommend it be broken into several sentences. The exisining Dar coverage was satisfactory.

## $1646-011$

Paragraph 15.804-2(a): Modify the paragraph (1ine 5) by deleting tractor submit" to have any subcontractor or prospective subconalso be proper to ds a consequence of this deletion, it would also be proper to delete subparagraphs (3) and (4).
RATIONAIE
Unless the above deletions are made, this provision would require prime contractors to submit contractor certificates of current cost or pricing mission of the prime contracting officer, presumbly at the time of subthis is and
in $15.804-4$, which states a contradiction of the certification requirements
certificate shall be required. .
tractor certificates. A prime mable to require primes to submit subconquotations and other subcontre may, and probably does have subcontractor time of the negotiation of thactor cost or pricing data avallable at the not be expected to have concluded all contract. A prime would certainly to pricing of the prime contract and of this subcontrat pricing prior subcontractor certificates contract and, therefore, a prime would not have and respected for the past 19 years of practice under the Truen present Act. The present DAR and FPR do not require submission of truth-in-Negotiation certificates, but merely require the submission submission of subcontractor required, of available subcontractor cost or pricing appropriate or when with the prime contract pricing and cost or pricing data in connection prime's cost or pricing data. This distinction has been the prime of the also in the current FAR proposal at 15 dinction has been noted and preserved These provisions are "SS" meaning substantialily the sumparaphs (1) and (2). coverage in $3-807.4$ (a) (DAR) and $3-807.3$ (d)(l) (FPR) coverage in 3-807.4(d) (DAR) and 3-807.3(d)(1) (FPR).
The mistake in 15.804-2(a) is also exemplified by the fact that $15.804-604-2$ first noted above were deleted.
DISR


- Accepted C - Not accepted
- Accepted but modified D - Major policy change -- deferred to the FAR Council

1. COMMENT

CAP TRAC

7.534 .015 $15.804(2)(b)$

Change $\$ 100,000$. to $\$ 500,000$.

## DOA

1578-003
15.804-2(b), page 35, These figures were also changed, $\$ 25,000$ to $\$ 100,000$, and $\$ 100,000$ to $\$ 500,000$.

## DOC

1552-003
Section 15.804-2, Paragraph (b)
This paragraph concerns the possibility of requiring certified
This paragraph concerns the possi are between $\$ 25,000$ and cost or pricing data when actions should be imposed only when "the benefits will outweigh the administrative costs involved."

Qe question that the signing of the certificate represents any ubstantial administrative effort, and therefore suggest revision of the last sentence to read sinilar to the following.

> "In these cases, the contracting officer should document the file to explain why this requirement was felt necessary and what steps are to be taken to review the certified cost or pricing data."

If no action is to be taken in reviewing the data, we question the need or appropriateness of obtaining the certificate.

## EIA

1580-003
Revise $15.804-2(b)$ by changing $\$ 25,000$ to $\$ 125,000$.
Reason - The adjustment of the upper threshoid by a factor of five creates an extremely large span for special consideration of the applicability of certified cost or pricing data by the Contracting officer. An extension of the lower limit by that same factor narrows the span for special consideration and justification.

## NASA

1604-008
15. $004-2(\mathrm{D})$ - This subparagraph provices guidance for contracting ofincers as to when certification of cost or pricing alaz shoula or shovia not be obtainel when a contract or a contract
modification is delov the mandatory threshoia. in keeping uith the enange in the mandatory threshola, replace the $\$ 100,000$ asount ith $\$ 150,000$ whenever it hppeirgin this auparagraph.

| 2. | 3. RATIONALE |
| :---: | :---: |
| $A$ | 1536-015 and 1578-003 Threshold has been increased. |
| $A$ | . |
| $M$ | 1552-003 The rewritten provisions of 15.804-2 (a) (2) prohibit the contracting officer to require "certified" data under $\$ 100,000$, but allows him the discretion to require "certified" data between $\$ 100,000$ and $\$ 500,000$, "when necessary for pricing purposes". It requires the contracting officer to document the file to justify this requirement. Since 15.805 requires cost analysis in every instance in which cost or pricing data are obtained and 15.808 requires that rationale be documented in the PNM there is no reason to include such a requirement at this point. The revised language of the above references satisfies the substance of the comment. |
| $C$ | 1580-003 The commenter recommends increasing $\$ 25,000$ threshold to $\$ 125,000$. The threshold was changed to $\$ 100,000$. |
| $N$ | 1604-008 Since the comment refers to changing $\quad \$ 100,000^{\prime \prime}$ to " $150,000^{\prime \prime}$ it is hard to understand its intent: The $\$ 100,000$ must go to $\$ 500,000$ to satisfy 10 0.S.C. 2306 (f). If the commenter meant to recommend the increase of the $\$ 25,000$ floor to $\$ 150,000$ the $\$ 25,000$ floor was changed to $\$ 100,000$ (see comment 1580003). |

A - Accepted $\quad$ C Not accepted
M - Accepted but modified D - Major policy change -- deferred to the SAR Council

## 1. COMMENT

NASA


160y-4 - In the second sentence delete the words, In rare 15.804-2(b) in the frequentiy a condition occurs has no bearing on ensether cost or pricing data is deemea necessiry by the contracting officer. Also, the higher 5500,000 threshold will no contracting to more frequent need for such data.

WEC
/526-013
The first senterce of $15.804-2(b)$ should provide that for contracts or mods under $\$ 25,000$, the $c .0$. should not require "cost or pricing data or a certificate." For the "rare cases" referred to in the second aentence, the requirement eliminated.

## TEXI

1563-005
15.804-2 (b)

This provision authorizes the Contracting officer to require certified cost or pricing data in connection with proposals with values below the cost or pricing data gtatutory threshold. Despite the fact that similac language appears in the existing DAR, we are grestiy concerned about this provision. In the existing it vill result in the unnecessary expenditure of time and Firat, it will result, especially in view of the increase in the atatutory threshold. second, such a requirement contravenes the statutory threshold. if not the letter, of P.L. 87-653, as amended, and P.L 97-86.
sifit. vien of the above, we strongly recommend that this langusge be In view of the above, eliminated and that no the statutory threshold. Purther, in order to require uncertified the statutory threstold the contracting officer should be required to cost or pricing data, the and obtain prior approval of the head of the Justify such a req.
2.
3. RATIONALE

1526-013 Between paraqraphs 15.804-2 and 15.804-5 as currently written, the Government can only require "uncertified" data for pricing actions under $\$ 100,000$ and either "certified" or "uncertified" data for actions between $\$ 100,000$ and $\$ 500,000$. The criteria for obtaining "certified" data in the latter case is. "When necessary for pricing purposes". The criteria for requiring "uncertified The criteria for requiring action be under $\$ 100,000$ or between $\$ 100,000$ and 500,000 is that the Government "must limit its requirements to that data necessary to allow the contracting officer to determine the reasonableness of the price". The effect of these paragraphs give the contracting officer the requisite amount of needed discretion without imposing an unfair burden on either party- Both DAR 3-807.3 (d) and FPR 1-3.807-3 (g) (1) permit the request for even "certified" data for modifications of less than $\$ 25,000$ (would be $\$ 100,000$ now) and imposed no monetary limitation on obtaining "uncertified" data.

1563-005 The response to 1526-013 is 1563-00 responsive the authority given the contracting officer to require "certified" contracting off threshold. Exception is data below the ther's contention that this ncontravenes the spirit, if not the letter of Pub.L. 87-653". There is no reason to burden the "Head of the Procuring Agency" with the requirement that the contracting officer's request for such data be approved at that level.
 and delete the remainder of the paragraph.

RATIONALE
Public Law 87-653 has been misimplemented and promulgated in DAR and FPR and would continue in FAR uniess this material is deleted. The noted Public Law which, among other things, added paragraph (f) to the Armed Services Procurement Act (USC $10 \mathbf{5 2 3 0 6}$ - attached) is clear and unambiguous in requiring certification of cost or pricing cata and a per noncurrent in the cost or pricing data which was inaccurate, case of "the contractor or any subcontractor reque statute which require certificate. . . The pertinent provis that it applies onTy to the awards furnishing a certificate state clearly that it apples perice is expected of prime contracts or subcontraces . The statutory authority for requiring to exceed $\$ 100,000$ (now $\$ 500,000$ ). The statutory ain lesser amount apply a certificate of cost or pricing data for awards of a only to the pricing of contract changes or mod modifications. This statute applies to the pricing of subcont defective data under a certificate, or provides penaities for furnishing defect is well established that when where a certificate would be required. regulatory implementation of the a penalty arises under a statute, statute should be strict and should not exten noted the penalty provisions prescribed statutory limits. The courts have utllized such findings to and the penal intent of the statute and have utith respect to the impact create presumptions in the Governments favor of such a presumption is to on pricing of the defective data. The effect to contractor and to, in shift the burden of proof from the Government fort by a contractor to practice, virtially preclude any successful ereal damege as a result of demonstrate that the Government suffive data. (See Cutler-Hammer, Inc. the particular item or items of defective 76 .) v. U.S. 1969, 416 F. 2nd 1306, 189 Ct. Cl. 76.

Kccordingly, the OFPP should direct FARPO to revise throughout the Subpart 15.8 the erroneous provisions which authorize contracting officers to require ertified cost or pricing data in connection with contract awards below should also limit contracting officers authority to require certification below $\$ 500,000$ to rare pricing situations involving changes or modifications to prime or subcontracts, in line with be raised to ntent in such cases, it would be suggested that $\$ 25,000$ would be raised $\$ 100,000$.
In reiteration, but because of the importance of this point as a matter of roper regulation, it is emphasized that Congress did allow a breaching of the specified dollar threshold in the case of changes or moficate. Clearly, to contracts which, when awarded, would have reque of the threshold and Congress considered the question of the importance of for original awards positively decided that the threshold waspropriate for a regulatory group to of prime and subcontracts. It is innappropriate for the limits which congress take upon itself

## DOE

This requires the Contracting officer to fustify requiring certified cost or pricine data on actions of $\$ 100,000$ or less. Such sustification it considered erine data on actions of \$100, oo or idess. Such a justification fificion is to be made, t.e., the record or person above the Contracting offictr.
$1646-012$ The comenter is erroneous in
stating that 10 a.S.C. 2306 (f) includes
the word only in its language. The
commenter seeks to impose a limitation
that does not erist in the statute. The
discretionary floor for the contracting
officer has been raised to $\$ 100,000$ so
that he may require certified cost or
pricing data between $\$ 100,000$ and $\$ 500,000$
when he deess it necessary for pricing
purposes. Ihe response to $1563-004$ and
$1646-010$ is pertinent to the position here
that this discretion should not be
stripped from the contracting officer. of the contracting officer record. The ensure completeness of the recorduire the provision has been changed fy the decision file be documented to justify theing data to require certified cost $\$ 100,000$ and for any action between $\$ 100,000$ and $\$ 500,000$. Thus it wilained in the justifica
DISPOSITION CODES


## DISPOSITION CODES

A - Accepted C - Not accepted
$M$ - Accepted but modified D - Major policy change - deferred to the FAR Council
I. COMMENT
In $15.804-3(a)$ the word "certified" before the vords "cost or pricing data"
chould be deleted; and the vords "and consequently shall not require
other words, should be added after the words "cost or pricing data." In
dati is not required neither is a certificat when submission of cost or pricing

## $A T+T$

1525-002
pecomendation - on page 36, section 15.804-34) change paragraph (a)
"General. Except under the circumstances in subparagraph (c) (B) below, the contracting
officer shall not require suknission of certified
of cost or pricing data when the contracting officer
determines that prices are consistent with
paragraphs (a) (1), (2), or (3) below."
ATHT
1529-003 $\overline{51804}-7(9)$
Also, in conjuncticn with paragraphs (a) (1), (2) or (3) belaw, the contracting officer shall not reguire that Cost Acocimiting Standards (Public Law 91-379, 50 USC, App 2168) be used with negotiated ontracts.
$1506-016$
$15 \sin 4-3(a)$
Change to read "Except for sole source procurements in which the circumstances in (c) (8) below occur, in which the circumstances in (c) (b) beire octing officer shall not require subuission of certified cost or pricing data when he deteraines of certified cost or

## MSA

$1604-010$
15.804-3(a) - We belteve the general exemption for the submission of certified cost of pricing ointa for contrats above $\$ 500,000$ cnoula include the provisions now proviced only for catalog or arket price exemption unger the proposed coverage. Therefore * suggest inar the circumstances provided under 25.804-3(c)(B) be incluate in 15.803 General" and that 15.804-3 (e) (8) be dedetea. The subparagraph would thus reac:

Except when the contratting officer makes witten innting that the price is not reasonable, incluting the facts upon wifh the finding it based ant the chici of the contracting oftice mproves the innding, the contracting officer thail
hot require submission of certified cost of prieing data
whin the contracting ofincer oeternines that prices are the
resuat of or are -..
o make this change smooth and to include ali possidie case Hich qualify for exemption from the submission of certified costs or pricing data, we suggest that the words "based on be cietad from $15.804-3(a)(1)$ and (a)(2): and the word "prices" be aded to 15.804-3(a) (3) as that subparagraph's first word.

1526-015 The effect of the comment would be to prohibit the use of "uncertified" cost or pricing data which is provided for at $15.804-5$. The use should be retained (See responses to comments 1526-010 and 1646-010)-

1529-002 The suggested wording makes no improvement and the commenter fails to frovide any rationale.

1529-003 Not applicable here. cost Accounting Standards are covered at FAR part 30.

1604-010 The intent of the changes appears to be to make the "unreasonable Frice" exception of 15.804-3 (c) (8) applicable to adequate price competition; established catalog or market prices and prices set by law or regulation. This is unnecessary in that the exception is made applicable to adequate price competition by 15.804-3 (b) (2) (iii) and to catalog or market price by $15.804-3$ (c) (8) itself. The only prices to which the exception is not applicable are those prices set by law or regulation and with good reason -- the reason being that since the unreasonable price is set by law or regulation a finding of unreasonableness serves no useful purpose.

| $A$ - Accepted | $C$ - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified $D ~-~ M a j o r ~ p o l i c y ~ c h a n g e ~--~ d e f e r r e d ~ t o ~ t h e ~ F A R ~ C o u n c i l ~$ |  |


| Doc 1. COMMENT | 2. | 3. RATIONALE |
| :---: | :---: | :---: |
| 1552-00 ジ <br> Section 15.804-3, Paragraph (b) | 0 | 1552-004 As a practical matter most of |
| This section discusses exemptions from or waiver of certified cost or pricing data. The first exemption relates to prices based on adequate price competition. Paragraph (b) defines adequate price competition. |  | the price competition exemptions envisage fixed price type actions, the language as written does not preclude cost type actions. Therefore no change is considered necessary. |
| Comptroller General decisions have supported the fact that "adequate price competition" can exist in a competitive environment involving cost-type contracts. We feel strongly that a cost comparison analysis of offerors' cost-type contract proposals is sufficient to determine whether an offeror's proposal is reasonable and cost-competitive, even though the offer selected for award may not necessarily be the low-priced offer. For this reason we are of the opinion that evaluated competitive cost proposals which contemplate award of a cost-type contract may be considered to represent adequate price competition for the purpose of waiver of certified cost or pricing data and waiver of audit requirements. We therefore recommend that this condition be clearly spelled out in applicable sections of the FAR related to waiver of certified cost or pricing data and waiver of audit. |  |  |
| CAP TRAC |  |  |
| $1536-017$ $15.804-3(\mathrm{~b})(1)$ (1) |  | 1536-017 offers need be solicited as |
| 15.804-3(b)() (i) <br> to determine if price competition existe. This determination can be made earifer in the acquisition process to permit the procurement method to be |  | procedural matter. This is consistent with previous DAR coverage. The change was not made. |

## NASA

## $1604-011$

 wora "offerors" in the first inn of this subparagraph. This Change would aseure that bids firom aftiliated companies are not used to deternine adequate price competion. This change ia consistent with current thinking to consider these corporate redated offerors is non-competitive.

## gap trac

## $1536=018$ (1) <br> 15.804-3(b)(11)

Change to (1) and to read "a responsible offeror submits - priced offer remponsive to the solicitation's requirements."

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A - Accepted C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council
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## 1. COMMENT

## AIA

## 1646-0/3 Paragraph 15.804-3(b)(1)(ii) and (ii1): Insert the words "acting independently" after the words mofferors" and the (iii).

## RATIONALE

The above-related changes provide a more straightforward and less ambiguous coverage of the existing DAR and FPR requirement. The creation of a separate subparagraph on "competing independently for a contract to be awarded to the one submitting the lowest price" is a clear invitation to price auctioning. prohibits price auctioning. and sound policy which, in specific terms. prohibits price auctioning. When a regulatory provision can be stated in established policies, then that method that could be used to circumvent sound would appear to tilt toward undercutting the policy would appear to tilt toward undercutting the policy.

WEC

1526-016
In 15.804-3(b) (1) (iii), it should be stated that the priced offers need not necessarily be in a percentage proximate range of one another; for example, the conditions eet forth eight be met, all other things equal. if A Corporation subnits an offer of $\$ 100,000$ and B Corporation an offer of $\$ 200,000$.

## WEC

1526-0.0
Is this supposed to be the price" in $15,804-3(b)(1)$ (1i1i) should be spelled out "lowest overall ultimate cost" in 15.802 price" in 15.804-3(b)(2)(iii) or

WEC

## 1526-01\%

Onder $15.804-3$ (b) (1)(tit), as currently written. a c.0. who awarde a contract to the next lowest out of, for example, 8 responaive blds would be required to obrain cost or pricing data from the auccessful offeror, even if there is otherwise adequate price competition given the comparative bid prices. This carries che requirements in question too far and clearly requires change and/or clarification

## AIA

## 1646-018 <br> $\frac{\text { Paragraph } 15,804-3(b)(2)(1): \text { Add the word "known" after the word }}{\text { "more" in the second line. }}$

RATIDNALE
Without this change, this rule appears too rigid. These interested in doing business with a procuring agency have an obligation to make their interests and capabilities known. It could be damaging to the Government's interest to permit a supplier to make a reprocurement action necessary merely because he was dilatory or lax in making his interest known. This assumes, of course, that the procurement is properly promulgated through the normal channels of
solicitation
3. RATIONALE

DISP

1646-013 The requirement for independent action is contained in (iii) for which there is no reason for deleting. The cresent coverage is no less "straightforward" or "ambiguous" than that suggested by the commenter.

The addition of the word "substantially" is also not accepted in that the offer is either responsive or non-responsive.

1526-016 This is a judgemental matter for the contracting officer. The current language is broad enough to cover the example given by the commenter.

1526-0.17 "Lowest evaluated price" is a term in general usage which does not need further definition.

1526-018 If all eight offerors are responsible, responsive bidders, why go to one that's not lowest?

1646-014 Words "known and" added, thus in effect accepting comment.
A - Accepted C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the Fhr Council


This limitation on a finding of adequate price competition is vague and speculative. It is also unnecessary in order to permit a proper evaluation to be made. Elsewhere in the regulation, there is ample authority for the contracting officer to make a decision with respect to a granting of exemption from certification requirements by evaluating all relevant circumstances.
As a practical matter, there is hardly any chance that this provision would be applied consistently. As a result, this provision would encourage practices which are the opposite of the objectives of the FAR; i.e., consistency and uniformity and simplicity, to the greatest extent practicable.

## UEC

## 1526-019

The requirement in $15.804-3(\mathrm{~b})(2)$ (i11) for finding above the level of the c.o. is unnecessary, particularly to the extent that this requirement could be applied to a subcontract.

Also what does the "lowest final price"mean? (See comment under 15.804-3(b) (1) (iii) above).

## NASA

$1604-012$
$25.804-3(4)$
pries conpetit - Delete the vores "if it results directiy from price competition or" irom the first and second innes of inis subparagraph. This ehange is consistent vith the definition and Getinction made in suggested cnanges to subparagraph 25.b04-3, General. Aad the words "and terms and conditions" after the word adintion wili assure that ali factors of this sumparagraph. This decision that agequate price coaptors are included in the dectsion that adequate price competition exists.
2.

DISP
1646-015 This provision is substantially the same as the DAR coverage, except that it is more simply stated. It is not vague, speculative or unnecessary and it should be retained.

1526-019 The requirement for approval at "a level above the contracting officer" is necessary since the finding is an unusual occurrence that should have higher level management involvement with the
contracting officen. As to the second part of the comment the word "final" has been deleted which should eliminate any difficulty in understanding the term "lowest price".

1604-012 The suggested deletion is not made since the commenter's suggested changes were not made to subparagraph 15.804-3 (see response to 1604-010). As for the suggested addition of "and terms and conditions", adding these words could very well be requiring a comparison between government and commerical terms and conditions. This is not deemed advisable.
A - Accepted $\quad$ - Not accepted
$M$ - Accepted but modified D - Major policy change -- deferred to the FAR Council

| WEC 1. COMMENT | 2. | 3. RATIONALE |
| :---: | :---: | :---: |
| $1526-020$ $15.804-3(\mathrm{c})$ Eatablished Catalog or Karket Prices | $C$ | 1526-020 This is sufficiently clear. Who lut an offeror could provide data needed to justify an exemption? |

## CAP TRAC

$1536-019$
$15.804-3(c)$
15.804-3(c)
the second sentence delete in order to quis for this exemption." Contractors have no control over the terms of the proposed purchase. Iike to see the Government uot be condition of conditions but it should concrary to the PL.

See late comment 1982-001 on page 411-108

## WEC

[^19]
## AlA

1646-016
the word "principaliy" $15-804-3(c)(5)$ : In the 3 rd line after the word "be" insert RATIONALE

To clarity paragraph intent.

1536-019 The second sentence of the subparagraph was changed to eliminate "or other contractual provisions". The comment has merit in that the offeror should not have to bear the responsibility of comparing nother contractual
frovisions" as between Government and commerical sales. This so since many of the terms and conditions of sales to the Government are unique by the very fact that it is the Government and therefore the comparison responsibility placed on the offeror should be primarily in terms of quantity and delivery requirements.

1526-021 15.804-3 (c) (3) does not exclude supplies or services from being "commerical items" merely because the Government may be the largest buyer. For example, one cannot conceive of anyone buying more paper clips than the Government. yet, despite the fact that perhaps the Government is the largest purchaser of paper clips they would still qualify as items that are "regularly used for other than Government purpose, etc." The crucial factor is the "purposes" to which the item is put not how much of it the Government buys.

1646-016 An "item" is either bought "for Government end use" or not. The addition of the word "principally" only tends to confuse the issue. If quantities of an item are being sold, with some sold for Government end use and some sold for nonGovernment end use, the quantities sold for Government end use cannot be considered "general public" sales.
A - Accepted $\quad C$ - Not accepted
$M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council

| WEC <br> 1. COMMENT |
| :---: |
| 1526-022 <br> The last sentence of $15,804-3(c)(7)$ is not found in che DAR's or FPR's and appars to impose another umpecessary requirement. Consider, for example. a procurement of 100,000 itens where the price of each item varies $\$ 1.00$ from the catalog price; the paragraph as written would require cost or priciag data. It should be sufficient in such a situation to allow access to cost or pricing data but to limit the submission of cercified data to situations where the per item variance from catalog price is significant. This suggestion would apply equally to a situation where a procurmeent calls for a non-scandard package size and the bid price includes a per item premium for the non-standard pecicage, e.8. 200,000 bottles of aspirin each containing 325 pills (nonstandard) and a $\$ .50 /$ bottle premium. It is'not even likely that the C. 0 . would be auccesaful in obteining cost or pricing data from the contractor under those circuastances. |

## CAPTRAC

1536-020
15.804-3(c) (7)

In the eighth line delete "cost or" and in the eleventh iine change $\$ 100,000$ to $\$ 500,000$.

NASA


NRSA
16-4゙ー014
15.804-3(c) (8) . Delete this subparagraph (see comments in 15.804-3(a)(above).
$A \mid A$

## $1646-017$

Paragraph 15.804-3(c)(8): Add the following sentence at the end of the paragraph "Such findings shall be provided to the offeror(s)".

RATIONALE
The offeror must be put in a position to (1) assess the validity of the finding and/or (2) provide any missing factual data, if any, that would result in negotiation of the findina.
HUD

Contresting onfice in above the contracting offlcer."

| 2. | 3. RATIONALE |
| :---: | :---: |
| $M$ | 1526-022 Phrase "unless an exception or waiver is granted", has been added to end of last sentence. In response to comments made regarding SF 1412 (DD 633-7) discussed hereafter, paragraph 15.8043 (e) (4) was added which allows the contracting officer to grant a waiver where no individual line item exceeds $\$ 50,000$. Thus under the additional wording of 15.804-3 (c) (7) when read in conjunction with $15,804-3(\mathrm{e})(4)$, the commenter's example would no longer pose a croblem. |
| $M$ | 1536-020 Change from $\$ 100,000$ to $\$ 500,000$ has been made. The words "cost or" have not been deleted. The phrase "cost or pricing datam is one term with a particular meaning which should not be fragmented. |
| $A$ | 1604-013 Change has been made. |
| $C$ | 1604-014 See comment 1604-010 and rationale therein. |
| $C$ | 1646-017 This proposed change is not considered appropriate in that the appropriateness of the disclosure of information within the agency's files should be a matter of discretion to be left to that agency. |
| A | 1562-003 Changed as suggested. (Commenter apparently meant 3 (c) (8) rather than 3 (b) (8)). |

A - Accepted
C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council

## 1. COMMENT

$A \mid A$

> 1646-05y D0633-7

In Instruction 3, the materiality qualification regarding the submission of detailed changes in catalog price, discounts, actual sales prices or discounts, volume of actual sales, or
ratio of sales for Government end use to sales and other ratio of sales for Government end use to sales and other categories must be retained.
RATIONALE
The deletion of the materiality rule is a violation of the objectives of the FAR Program. It is a fundamental principle of regulation that rules of materiality with respect to the implementation of statutes are automatically to be provided fur and encoursged. In a set of detailcd instructions, therefore, it is useful and perhaps essential, that the prudent reminders of the rule of materiality be included at strategic points.
It is our opinion that OFPP should zero-base; that is to say, it should throw out completely the enormously complex and essentially hostile approach of the existing regulations to the connercial item exemption. It is clear that congress intended that there actually should be, through the conmercial item exemption, an encouragement in the use of commercial
items. When those producers of commercial items who might otherwise be items. When those producers of commercial items whe might otherwise be
attracted to Federal Procurement are repelled, it is the taxpayer who suffers.

## CAR TABC

$1576-04 y^{-D D}-33-7$ \#
The first instruction of the SFRXX form to replace 663-7 should be changed to reflect the lataguge of PL 87-653 by the additon of (d)
reading, "Based on adequate price competition."
2. ${ }^{2}$
$m$
1646-054 Materiality specifically crovided for in that only changes which cause a cumulative impact exceeding $\$ 50,000$ must be expressly set forth. See 15.804-3 (e) (1) of text which replaces that part of the instructions on the 633-7 (now SF 1412) that dealt with "materiality".

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A - Accepted C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council
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A - Accepted
C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council

$$
\begin{aligned}
& \angle A P \text { TRAC } \\
& \qquad \begin{array}{l}
1536.02, \\
15.804-3(f)(1) \\
\hline
\end{array}
\end{aligned}
$$

1. COMMENT

At the end of the paragraph following the word
"exemption" add "in writing to the offeror and this
determination is conclusive on the Government "
2.
DISP
$1536-021$ It is implicit that if the
contracting officer grants an offeror an exemption the contracting officer is going to notify the offeror - it's inconceivable that he wouldn't and it is most likely that that notice will be in writing.

As to what is probably the "heart" of the comment, that the exemption be "conclusive on the Government", it would be a serious error to adopt the suggestion. That would mean, for example, that if the contracting officer discovered that some of the information on which he based his determination to grant the exemption was false, he could not withdraw the exemption even before award is made, because the determination was "conclusive". This possibility alone is sufficient to warrant rejection of that part of the comment.

1536-022 15.804-3(f)(2)(1) Change 55\% to 517 and 75\% to 65\%.

CAPTRAC
1536.023
15.804-3(f)(2)(1i) In the third ine following the word "sales" add "of

1580-004
Revise $15-804.3(f)(3)$ as follows:
Change the second sentence to read: "If the contractor uses his own records to support the claimed exemption, access to his records is limited to, etc......

Reason - The way the FAR draft is currently written access to contractor's records is automatic regardless of the dasis of his claim for exemption.

Prices established by law or regulation would have not support in the contractor's records. Support for catalog prices could be from records other then the contractor's.

| A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council |  |


|  | 2. |
| :---: | :---: |
| 1. COMMENT | 2 ATSE |

$17(6-004$
Subsection 15.804-3(f).
is unclear as to how low the waiver of certified cost or pricing data may
it is unclear as to how low the waiver of cerce the contracting officer.

$$
C A N E M B
$$

$1541-001^{\circ}$ The Canadian Commercial corporation advises that Draft far Part 15, Page 40. Section 15-804-3(I), which details a waiver far subuission of cost or pricing data in contract negotiations deals in exceptional circumstances only. Canadian Commercial
15.804-3(i) deals in exceptional circumstacessful operation in support of U.S. Corporation consider: thar successin operan upon continued acceptance of C.C.C. endorsement and consequentiy a blanket vaiver on subaistion of cost and pricing data.

1716-004 It is not clear whether the commenter is referring to "exemption" or to "waiver". This is so since, although discussing waiver" he cites 15.804 (f) which deals with "exemption", as does 15.804-3(9). whereas "waiver" is discussed at $15.804-3$ (i) - If he is referring to 15.804-3(f) the exemption authority is in the contracting officer and there is no delegation contained therein. Likewise there is no delegation contained in 15.804-3 (g) where the exemption authority is with the chief of the contracting office. As for the waiver authority contained in 15.804-3(i) that authority is with the head of the agency (except if the contract is with a foreign government or agency, the authority is with the head of the contracting activity) which authority he may delegate. It is true that it is not stated therein to whom he may delegate that authority. There is no reason to restrict his discretion.

1541-001 DAR also used the term "exceptional cases" and the canadian commerical Corporation had blanket Commerical Corporation had blanket
coverage. since the FAR language is similar there is no reason to believe that the phrase exceptional cases" will pose a problem for the Corporation. As for that part of the comment relating to blanket waiver, the phrase, "for a specific contract or subcontract not otherwise exempt" was deleted, thus allowing the head of the agency the flexibility previously available under DAR.

- Accepted $\quad$ C - Not accepted


A - Accepted
C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council


A - Accepted | C - Not accepted |
| :--- |
| M - Accepted but modified $D$ - Major policy change -- deferred to the PAR Ccurci: |



WEC
$1526-004$
15.804-4(d) refers to a contractor's "price proposal." As noted with respect to a previous subsection, this language arguably faila to addreas the cost-type contract eituation in which one vould expect a "cost proposal."

```
TEXI
    1563-007
    15.804-4(e)
```

This paragraph stipulates the conditions under which a Contracting Officer shall not require a certificate of current cost or pricing date. It dues not state that Contracting officess will be prohibited from obtaining a certificate on proposals which fall below the statutory threshola.

We believe the forementioned prohibition should be included in this paragraph.

## NASA

$1604-015$
 reaudant with 15.804-3(a).

| 2. ${ }_{\text {DISP }}$ |
| :---: |
|  |  |

1604-017 The comenter fails to point out what is unclear in the third and fourth sentence. A detailed evaluation or the words resulted in minor changes to make the sentences more clear. The word "to" was changed to read mas of" in the third sentence. The fourth sentence on the ninth line was ended after the word "available". The deleted part of the fourth sentence was redundant with 15.804 2. No other part of the paragraph is redundant. The emphasis of this paragraph is in regard to cut-off dates for certain data which may not reasonably be available "as of" the date of handshake on price and thus is the only place in this subpart of the $F A R$ where such emphasis is made.

1526-024 Word "price" is deleted before the word "proposal" thus eliminating the more restrictive language.

1563-007 The commenter is correct in his statement that this provision does not prohibit the contracting officer from obtaining certification of cost or pricing data below the statutory threshold. It would be wholly inappropriate to include such a prohibition here since other crovisions of the FAR allow the contracting officer to require certification on proposals falling below the threshold (see 804-2(a) (2)).

1604-018 This subparagraph is not redundant in that it is addressed to that limited situation where the solicitation may have requested the data and it is later determined, because of the applicability of one of the 15.804-3(a) exceptions that a certificate should not Le required. 15.804-3(a) is the broader Faragraph setting forth the exceptions and 15.804-4 (e) discusses the more limited, specific situation.
A - Accepted $C$ - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council

1. COMMENT

JASA
1604-0/\% Replace the $\$ 300,000$ meunt vith $\$ 500,000$ in the $\frac{\text { 35, pot-ich }}{\text { two pleces it Replact ine } \$ 300,000 \text { in this oubparagraph. }}$

CAP
trac

1536-025
$15.804-4(\mathrm{~h})$
Change $\$ 100,000$ to $\$ 500,000$.

DOC
1552-006
Section 15. B04-4, Paragraph (h)
We question the requirement for certified cost or pricing data as stated for negotiated final pricing actions - termination settlements, final indirect cost rate settlements and total final price agreements for fixed-price incentive and redereminable price agre

To the extent that negotiation and final agreements are based on actual recorded incurred costs, we do not understand this actual recorded incurred costs, we do not underatand this requirement. Consistency would require a certificate for ever cost-type contract, and "we do not believe that is intended." We are of the opinion that claims involving proposed. not incurred, costs were meant to be covered by the certificate requirement, and that the FAR segment should be revised accordingly. suggested wording follows.
*Negotiated final pricing actions (equitable adjustment claims, termination settlements and amilar actions) which contain projected costs of $\$ 100,000$ or more in the final price settlement must be supported by certified cost or pricing data.
2. DISP

1552-006 commenter would insulate "incurred costs" from the requirement of certification. A contractor's allegation that costs were incurred and an allegation as to their dollar value, should not be immutable and should be subject to the same scrutiny as "prospective" costs, there being no more reason to rely on the mere statement of the contractor in one situation than in the other.

Moreover, the comment in effect rejects that part of the definition of "Cost or pricing data" contained in 15.801 which states that "they are all the facts that can be reasonably expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred" (emphasis added)-

See late comment 2014-013 on page 411-111

- Accepted C - Not accepted
- Accepted but modified D - Major policy change -- deferred to the FAR Council


| A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| M - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council |  |

TEXI $\begin{array}{r}1563-008 \\ \hline\end{array}$

This provision states that the Contracting officer way require a prospective contractor to submit uncertified cost or pricing data.
We have previously stated our belief that authorizing the Contracting officer to require a prospective contractor to submit uncertified oowt or pricing data will be practice that will be abused. We have suggested previonsiy that the contracting officer may not require such data without the justification and prior approval of the Head of the Procuring Agency.

We reconmend this provision be amended according to our previous yecommendation.

CAPTRAC

$$
1556-026
$$

15.804-5(c) Change $\$ 100,000$ to $\$ 500,000$.

## /552-007

Section 15.804-5, Paragraph (c)
The first sentence of paragraph (c) basically states that
for awards of uncertified cost or pricing data may be required for awards not expected to exceed $\$ 100,000$, if analysis of in quoted cost factors will provide pricing results. " The phrase revised to. if not clear, and we therefore suggest the wording be determined neccessary to of selected cost factora is determined neccessary to establish reasonableness of the proposed

A - Accepted $C$ - Not accepted
$M$ - Accepted but modified $D$ - Major policy change - deferred to the FAR Council

| 1. COMMENT | 2. | 3. RATIONALE |
| :---: | :---: | :---: |

15.804-6 Procedural Requirement:
$\frac{15.804-6}{1526-025}$
$1526-025$
knowing whether hers a problem becuuse the C.O. In may casea has no way of knowing whether he will require cost or pricing data until he receives and evaluates the of fers. The aubsection as a whole will result in the c.o. A contractor or subcontractor bidding in the RFP or ITB to protect hinself. consider to be a compertitive bituation what he and the Contracting officer consider to be a competitive situation may subsequently be requested to maraish not be prepared to accept; the bidder perheps would not har/aubcontractor a bid in the first instance had it been perhaps would not have submitted
a bid in the first instance had it been avare of such a eircumstance.

## NASA

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1404-021
5.804-6(a) - It is suggestod that the voras mor note in (1) and
Si,ime,a)
megative duty on the part of the offeror.
```

NASA
1504-022
15.804-6(a) - It 15 suggested that the phrase in unusual cases" be efieted fron line 10. vndest defined, the phrase aocs nothing to-the sentenre because the contracting officer will have a good idea in most cases of the need for pricing data, certification, etc., well kefore receiving and evaluating offers. One should have more faith in the contracting officer's judgement than does the commenter. The contention relating to the contracing officer's requesting data so as "to protect himself" is not accepted. Bidders should have a familiarity with the regulation and therefore they should be "aware of such a circumstancer i.e. that they may be requested to submit cost or pricing data.

1604-021 The "whether or not" wording addressed to the contracting officer in no way "imposes a negative duty on the part of the offeror ${ }^{n}$. (emphasis added) -

1604-022 The words "in unusual cases" have been deleted since it appears redundant to "if they are later found necessary" by the contracting officer.

## AIA

$1646-019$
of the paragraph. "In issuing following words at the beginning of the paragraph. "In issuing solicitations of any type".

## RATIONALE

We believe that the vehicle by which the contracting officer shall specify the requirenent should be identified and that it should be the document that

## DISP

1526-025 As a practical matter there is no problem for the contracting officer,
3. rationale
A - Accepted
$M$ - Accepted but modified $D$ - Not accepted

- Major policy change -- deferred to the FAR Council


| A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council |  |

$1563-025$

D0633
The third sentence in this instruction requires the contractor to The third sentence in contracting officer any cost or pricing information which comes into the contractors possession after the initial submission.

- believe this sentence is redundant to the last sentence in that we believe this sentence The requirement for submission of cost or instruction which states: He believe the sentence in question should be removed because it is e believe the sentence in question administrative effort which would serve no useful purpose.

2. 

DIST
3. RATIONALE

TE

## 1. COMMENT

```
1563-025 SF 1411 (DD Form 633) has been
revised to remove instructions. The FAR
text at 15.804-6(b) gives necessary
guidance for proposal preparation.
The commenter's contention that the third
sentence is Mredundant to the last
sentence" is not valid. The third
sentence requires offeror to submit
sentence requires updated data "promptly". The fourth
(last) sentence states that the
requirement for data submission lasts up
until "the time of final agreement on
gricen.
Furthermore, the comment that "the
sentence in question be removed because it
is redundant and requires unnecessary
administrative effort which would serve no
useful purpose" indicates the
    inconsistency of the commenter's argument.
    How can a requirement that is merely
    "redundant", i.e., repetitive of a
    requirement that already exists, create
    requirement that already exises,ort?
```


## DISPOSITION CODES

A - Accepted $C$ - Not accepted
$M$ - Accepted but modified D - Major policy change -- deferred to the FAR Council


## EISFOSITION CODES

A - Accepted . C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council

| 1. COMMENT | 2. | 3. RATIONALE |
| :---: | :---: | :---: |


$\qquad$

```
A - Accepted C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council
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A - Accepted C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council
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## Dic-usrtion CODES

A - Accepted
C - Not accepted
M - Accepted but modified $D$ Major policy change -- deferred to the FAR Council


| A - nccepted | $C$ - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council |  |



$|$| 2. |
| :---: |
| DISP |
| $i$ |

1491-003 The provisions at 15.804-6(G) (2) define the threshold for that data which is required to be submitted to the Government for the purpose of pricing the subcontract portion of a prime proposal. The thresholds in the other provisions, cited by the commenter, are for other purposes. since the purposes are different, there is no conflict.

1491-004 This comment is a continuation of comment 1491-003. The six references given in comment $1491-003$ are concerning thresholds for different purposes and are therefore not saying "the same thing".

The reference to "other similar repetitive instructions" is so vague as to preclude a meaningful response.

M 1536-027 The comment as it relates to changing dollars is accepted. Changes have been made pursuant to this comment and others. As for the commenter's second reason for the need for a "complete rewriting" of the paragraph i.e.. that "it bears little relation to the replaced DAR and FAR paragraph", the paragraph is almost identical to DAR $1-3.807 .4$ (a) and FPR 1-3.807-(d) (1) except for the fact that (iii) in the FAR paragraph is an addition which gives some needed discretion to the contracting officer.

## $1545-002$

2. Paragraph $(g)(2)$ of section $\frac{15.804-6}{}$ (page 53) states that a data must also submit, or require to be submittest or pricing accurate, and complete subcontractor cost or prici current, the subcontract estimate is (i) $\$ 1,000,000$ or pricing data when more than $\$ 100,000$ and more than 1000,000 or more, (ii) both tractor's proposed price, or (iii) when required in prime consolicitation. This requirement appears required in the (a) (3) in section $15.804-2$ (page 34 ) which states chath paragraph prime contractor furnishes certified cost or pricing when the subcontractor must also submit cost or or pricing data, the subcontract expected to exceed $\$ 100,000$.

It appears this paragraph requires complete rewriting as the dollars stated do nor appear replaced DAR and FPR little relation to the

E?

1545-002 Commenter deleted the key to subparagraph 15.804-6 (9) (2) in that the phrase "to the Government" was omitted from the quote. Had that phrase not. in fact, been present in the subparagraph there would indeed be an apparent conflict. However whereas subparagraph 15. 804-6 (g) (2) requires such subuission to the Government, paragraph 15.804-2 does not, but ratłer submission to the prime or higher tier subcontractor. When this distinction is noted, there is no conflict Letween the cited portions of the $F A R$.

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A - Accepted C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council
```



## DISPOSITION CODES

A - Accepted
C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council


| A - Accepted | $C$ - Not accopted |
| :--- | :--- |
| $M$ - Accepted but modified D - Major policy change -- deferred to the FAR Council |  |

1. COMMENT

| 2. |  |
| :---: | :---: |
|  |  |
|  |  |
| $C$ |  |

1537-001 It is inconceivable that all of the "exceptional cases" could be described because it is impossible to foresee all of the circumstances warranting application of this subparagraph. The manner in which the provision is presently written, $i$.e., allowing the contracting officer (with the approval of the chief of the contracting office) to exercise discretion is much creferred.

1545-003
3. Paragraph (i) of section 15,804-5 (page 54) lists actions the contracting officer may take to excuse the contractor's failure to comply with subcontractor cost or pricing data requirements so that the prime contract may be awarded.
One of the actions listed is to allow additional time for submission of data up to the date of agreement upon the prime contract price. It is not clear what purpose this action would accomplish since the prime contract cannot be awarded until ther is agreement upon the prime contract price.

Another action insted is to consider a different contract type Since the type of contract does not dictate cost or pricing data fequrrements, this action would not be appropriate for excusing failure to comply with such requirements.

1545-003 Both FPR and DAR contain these actions and even the commenter does not specifically request their elimination. There are occasions when the use of these actions are appropriate and they should be retained.
A - Accepted
C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council
L. COMMENT

| A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified D - Major policy change -- deferred to the FAR Council |  |

I. COMMENT
Paragraph (C) of section $15.804-7$ states that if data were not
adequately verified at the time of negotiation, the contracting
officer shall request an audit. our Audit Agency is concerned
that a contracting officer could awarda contract under a data
pressure situation and later request an audit because the data the
was not adequately verified. This would create a hardship for the
auditor because the contractor would probabiy be less cooperative
after the contract has been awarded.

| DISP | 3. RATIONALE <br> 1550-004 It appears that the commenter is assuming that the words "not adequately verified" place the burden of verification on the contracting officer. The intent is to require verification, not by the contracting officer, but by the contractor. To make this absolutely clear the words "by the contractor" were added after the words, "or were not adequately verified." |
| :---: | :---: |
| $C$ | 1646-026 In a rewrite of this subparagraph, for other reasons, the sentence containing the term "cost performance" has been eliminated. <br> The suggested addition of the word "contract" is unnecessary since the word appears earlier in the sentence and a repetition adds nothing. <br> The suggested deletion of "solely" and addition of "but only because of defective cost or pricing data" were not accepted. <br> The effect of these changes might well be interpreted as restricting the contracting officer's right to reprice contracts for reasons other than defective pricing, i.e., where either the terms of the contract or a statute give the contracting officer that authority. <br> There is no need for "the admonition to |

overzealous contror "the admonition to overzealous contracting officers."

| A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council |  |


A - Accepted
C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council


DISPOSIMION CODES
$\begin{array}{ll}\text { A - Accepted } & C \text { - Not accepted } \\ M \text { - Accepted but modified } D \text { - Major policy change }- \text { deferred to the FAR Council }\end{array}$

A - Accepted
C - Not accepted
M - Accepted but modified D
Major policy change -- deferred to the FAR Council


| A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council |  |

1. COMMENT

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183-002 $15.805-1$
the audit reports are adyisory Price Negotiation Provisions that contracting officer is solely to the contracting officer and the contracting officer is solely responsible for the final pricing in Department of Defense 5000.42 it is not exactly liear how the contractor is supposed to look to the not exactly ciear how the contractor is supposed to look to the contracting officer only for such decisions when other parties, such as auditors, have comprehensive and effective overview authority. This is a concern even final pricing authority.
s-
$3-$

15-74-001

1. In $\frac{15.805-1}{}$ add the business utilization development specialist to the list of those to be consulted as appropriate.
$E p i$
1546-005
2. Section $15.805-1$ (page 84 ) requires a price analysis and when cost or pricing is required, a cost analysis of an offeror's or subcontractor's proposal. The traditional practice has been to require either a cost analysis or a price analysis to determin price reasonableness. We spe no reason for the far's departure when one may serve the practice. Requiring both types of analyses when one may serve the purpose is not practical.

See late comment 2014-019 on page 411-112

EPF

## 1545-004

4. Paragraph (0) of section $15.805-1$ (page 84) requives the contracting officer to make a cost analysis before making a price analysis when cost or pricing data is reguized. This requirement appears to conflict with that in paragraph (c) of section 15.804-5 which states the contracting officer shall not conduct a cost analysis of a proposal for $\$ 100.000$ or less without first atternpting to determine price reasonableness
by using price analysis.

| $\frac{2 .}{\text { DISP }}$ | 3. RATIONALE |
| :---: | :---: |
| $\cdots$ | 1533-002 Commenter makes no specific recommendation for change to FAR. There is nothing in DOD Directive 5000.42 which derogates from the contracting officer's overall pricing responsibility. |
| i) | 1574-001 In the first sentence the phrase "... specialists in contracting ..." has teen changed to read "... specialists in fields such as contracting ..." to ensure that it is recognized that the listing of specialists is not all inclusive. |
| $N$ | 1545-005 Although the commenter states that the "Traditional practice has been to require either a cost analysis or price analysis to determine price reasonableness" but not both, this certainly is not what was envisioned by the DAR nor even the FPR. DAR 3-801.1(d) |
|  | provides that "Depending on the information available, a price arrived at by cost analysis should be corroborated through price analysis technique." FPR 1-3.807-2 (a) concludes that "Price analysis may also be useful in corroborating the overall reasonableness of a proposed price where the determination of reasonableness was developed through cost analysis." Thus both the DAR \& FPR anticipate situations where both cost and price analysis would be done. Where cost analysis was made, both the DAR $\&$ FPR made the price analysis discretionary. The FAR, as written, also makes the price analysis discretionary in such instances. |
| C | 1545-004 There is no conflict. 15.804-5 as rewritten provides that "The contracting officer should not require submission of cost or pricing data for a pricing action expected to be $\$ 500,000$ or less without first attempting to determine reasonableness of price by using price analysis (see 15.805-2)." In those cases where price analysis alone will not suffice, the contracting officer oblains cost or pricing data, does cost analysis and then corroborates cost analysis by Erice analysis. |

A - Accepted
C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council

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H^{1+}>
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1550-005
Paragraph (b) of section $15.805-1$ implies that the contracting officer performs cost analysis but price analysis is performed by someone else. We recomend this paragraph be revised to more
$1+\because$
1542.004

1 Pase 84 , Section $15-805-1(b)$ in the first line, The contracting officer shall obtatn a price analysis..." add the words "prepare or" between the words $\rightarrow$
$6-\dot{\gamma}$
$1682-004$
paragraph $15.805-1(b)$, page 84
Commert
There are times when the contracting officer must be the one to perform the price analysis.
Recommendation
(a) Change the first sentence to read, The contracting officer shall obtain or perform. . .
(b) Insert the words "or obtain" between "make" and "a" at line 5 .
$\therefore$
1550-006
Paragraph (c) (I) of section 15, 805-1 states that the contracting officer shall require prospective contractors to perform price analysis for all significant proposed subcontracts and purchase orders. This wording poses three questions: (1) what does significant" mean? (2) Who performs price analysis on subcontracts and purchase orders not considered significant? and (3) who makes the determination as to significance - the Government or the contractor? Therefore, we recommend the word "significant" be
deleted. In addition, we recommend that paragraph (c) (2) be revised to read: "(2) cost analysis when the prospective subcontractor is required to submit certified cost or pricing data."

## Npisi

1604-026
15.805-1(c) - Remove the word "certified" from the last line of enis subparagraph. bike the contracting ofificer, the prime contractor or an upper tier cubcontractor may requite their subcontractor to provide cost or pricing data which does not nave to de certified to assure the reasonableness of the pricing result.
2.
3. RATIONALE
1550-005, $1562-004$ and $1682-004$ The
faragraph has been revised to more clearly
state the intent. Although the revised
language states that "...the contracting
officer shall make...", we think it
implicit that the contracting officer may
do so through use of other government
personnel on the contracting officer
staff.

1604-026 The word "certified" was


| 1. COMMENT <br> DOF | $\stackrel{2 .}{\text { DISP }}$ | 3. RATIONALE |
| :---: | :---: | :---: |
| 1578-000 <br> $\frac{15.805-2}{}$ page 84 , We suggest rewording such as "The Contractiny officer is responsible for selecting and using one or more of the following price-analysis techniques to insure a fair and reasonable price." | 5 | 1578-005 The commenter would limit the contracting officer to one or more of the five listed techniques. We deem such a restriction unwise in that it is conceivable that a particular situation might warrant use of a technique not listed. |
| $\ldots=$ |  |  |
| 1550-007 <br> Paragraph (b) of section 15, 805-2 does not provide meaningful guidance to contracting officers. We recommend this paragraph be revised to incorporate the language of either DAR § 3-807.2(a) (2) or FPR \& 1-3.807-2(b) (1) (ii). | $C$ | 1550-007 Any contracting officer "worth his salt" would consider such factors. Detailed, specific language is not necessary. |

## DISPOSITION CODES

A - Accepted
C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council


A - Accepted C - Not accopted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council


| A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified $D$ - Major policy change - deferred to the FAR Council |  |



## DISPOSITION CODES

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A - Accepted C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council
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A - Accepted C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council
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|  | 1. COMMENT |
| :---: | :---: |
| $\begin{aligned} & 1536-071 \\ & 15.805=5(a)(1)(11) \end{aligned}$ | Change $\$ 250,000$ to $\$ 500,000$. |
| $\because 5 C$ |  |

152b-031
in 15.805-5 (a) (1)(1i) and 15.805-5(a)(i)(iid) - a certfficate should not be required for contracts below the audit threshbold, for if there is no audit. what is the worth of the certificate?

Although the language provides that the Contracting officer may not require an audit, it is inconceivable that he/she would approve a subcontract of the value of $\$ 400.000$ without an audit.

Given the nature and number of exceptions in $15.805-5(\mathrm{~b})$, it would appear Given the contracting officer will always ask for an audfe.

$15 \overline{36} \cdot 032(1+1)$
$15.805(1)(1)(1+1)$
Delete cost-sharing.
$1404-029$
15.005-5(a)(1)(i,i1) - Fepiace the $\$ 500,000$ amount with $\$ 1,000,000$. Nasa currently uses the $\$ 2,000,000$ figure. The decieion by fask to go to the $\$ 1,000,000$ figure was based on projected cost savings for audit services and advice received from dCAA. In their report on audt thresholds, dCan stated that audits of cost reimbursement proposals below $\$ 1,000,000$ providea oniy marginal returns when one consifers the cost of audits ana other Itwiting factora.

1552-011
Suction 15.805-5, Yaragraph (a) (1), (i) (ii) and (iii)
This paragraph establishes dollar thresholds for proposals requiring audit for various types of contract. A practical problem in attempting to adhere to these thresholds is the subcontract costs within the stated thrcsholds, especially since of subcontract ensts within the stated thrcsholds, especially since audits below the thresholds are discouraged. For example, we may have received a fixed-price proposal for $\$ 175,000$ which contains prime contractor costs of $\$ 75,000$ and two subcontract proposals three separate audits to evaluate these proposals is to obtain adhere to the $\$ 100,000$ fixed-price contract thes y y have to request these audits. We according threshold, we would dollar threshold language be revised to raingly recommend that the if the prime contractor or individual subconire formal audit only exceed the stated thresholds.

- Accepted C - Not accepted
- Accepted but modified D - Major policy change -- deferred to the FAR Council

| POC, 1. COMMENT | 2. | 3. RATIONALE |
| :---: | :---: | :---: |
| $1552-012$ <br> Section 15.805-5. Faragraph (a)(2) |  |  |
| Waiver of audit or a request for less-than-complete field pricing support are authorized when all or some information sufficient to determine the reasonableness of the proposed cost or price is already available. In situations wherein forward pricing rates are readily available from a cognizant Government Audit Agency. and the proposal under review is composed primarily of labor and indirect costs, is it sufficient to obtain telephonic information from the Auditor, or is it necessary to formally request a full-blown audit? <br> We are of the opinion that the telephone information would | $C$ | 1552-012 The specific example is only one of a multitude of situations which can be conjured up, which situations, if one wanted to detail them, could fill up pages and pages of the FAR. The purpose of the existing language is to provide a broad parameter within which the contracting officer should act and within which he must exercise his own judgment. |
| We are of the opinion that the telephone information would consitute "information already available" and could be used to waive the audit or to request a less-than-complete audit. if this opinion is correct, we suggest that this paragraph be modified to specifically recoqnize this condition. |  |  |
| See late comment 2014-022 on page 411-113 |  |  |
| TEXI |  |  |
| $\begin{array}{r} 1533-018 \\ 15.805-5(0) \\ \hline \end{array}$ |  |  |
| This paragraph states that Contracting officers should not request audit or field pricing support for proposed contracts or modifications of amounts less than those specified in Paragraph 15.805-5(a)(i). (Presumeably these limits will be revised upward as a result of the increase to $\$ 500,000$ in the Truth-in-Negotiations threshold.) <br> We believe that the authority of the contracting officer to exercise discretion in requesting field pricing support will be subject to abuse and therefore should be minimized. In unusual cases, subject to the Contracting officer's justification and the prior approval of the nead of the procuring agency, it would be acceptable for the Contracting officer to request audit or field pricing support for proposals below those levels stated in 15.805-5(a)(1). <br> In this case, we recommend changing the "should not" to "shall not... except when such action can be justified by the contracting officer and approyed by the Elad of the Procuring Agency.* |  | 1563-011 The level of authority to obtain kelow threshold audit should not be raised from the contracting officer to the "Head of the Procuring Agency". Particularly is this so since the thresholds have been raised which will result in an increase of such audits with which the Hyead of the Procuring Agency" might well become inundated if the "buck" is passed up to him for no good reason. |
| 100 |  |  |
| 153-2-013 <br> Section 15.805-5, Paragraph (b) |  |  |
| We strongly support the statement not to request audits unless determined necessary. However, this paragraph indicates that requesting audits of proposals less than the stated thresholds will be a rarity. This situation may be true for other than cust-type contracts, but for cost contracts involving contractors not under continuous review by a Government Audit Agency. audits will routinely be revulred under the $\$ 500,000$ threshold. This audit requirement is felt necessary to enable a determination that the contractor maintains an acceptable accounting system for purposes of accumulating and recording costs under a cost-type contract. We suggest that paragraph (b) be expanded to specifically address this requirement as routine, rather than an exception. | $C$ | 1552-013 The policy is that an audit will not be required below threshold unless the contracting officer determines that he needs an audit for one or more of the reasons in FAR 15.805-5 (b). The exception may be more frequent than in the past because of higher thresholds, however, the policy still should be as stated, i.e.. obtain an audit below threshold only when determined necessary by the contracting officer. The example given by commenter certainly comes within (b) (1) and the audit could be made under its authorityTherefore, the treatment in the FAR is appropriate. |

A - Accepted
C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council

1. COMMENT
$1526-032$
$\frac{15.805-5(c)(1)}{\text { perhaps other agencies, however, do nor have } A C 0 \text { ing officers, DOE, and }}$
perhaps other agencies, however, do not have Aco's.
$\leftrightarrows$

1526-033
$15.805-5(c)$ (1) should also provide for an audit to be requested by the contractor in appropriate lower tier procurements.

## 1530-008

Paragraph (c) (I) of section 15.805-5, among other things, prescribes a method tor requesting audits that conflicts with our Department's regulations. It states that requests are to be sent directiy to the cognizant audit office whereas our regulations require that the request be sent to the appropriate HHS Regional Audit Dirnctor regardless of the cognizant agency. This is another example of the DOD carrv-over, and we recommend it be revised.

TEY :

1563-012
15.805-5(d)

This paragraph would allow both contract auditors and contracting fficers technical representatives access to contractor financial data, Prior to this draft, FAR access to such data was restricted to auditors only.

We recommend that this provision be modified to make it clear chat only the auditors have access to contractor financial data and further that required to do it thesentatives need to access such data that they be required to do it through the auditors

| $2 .$ | 3. RAtionale |
| :---: | :---: |
| $C$ | 1526-032 certain agencics may not have someone called "ACO" but in these agencies there is some contracting officer "administering the contract". It is implicit that these contracting offices are encompassed within the term "ACO". See FAR Part 2 definition of "contracting officer" for further support of the above. |
| C | 1526-033 There is no instance where the contractor should be able to directly request a Government auditor to perform an audit on a subcontractor. At any time the contractor deems it necessary and justifiable he should seek assistance through the appropriate contracting officer (Aco or contracting officer at contracting activity). |
| $C$ | 1550-008 The intent of $15.805-5$ (c) (1) is that the audit request skip the ACO when field pricing support is not available. It does not preclude internal agency routing of a request on its way to an auditor. |
| C |  |
|  | 1563-012 Technical representatives are authorized to request and obtain only that data "necessary to the discharge of their responsibility". This reflects no change from either the DAR or FPR. |


DOC

| $1552-014$ |
| :--- |
| Section $15.805-5$, Paragraph (e)(2) |

include "an explanation of the basis and, the audit report should offeror in proposal proparation." we are of the opinion the this type of information is required to enable meaningful that analysis. However, this information should be required as part rather than a cost or pricing data received from the offeror,
posed on the Auditor.
officer, rather than the Auditor be placed on the contracting in the cost analysis process. What that it be addressed early required, it is incumbent upon whether or not formal audits are cost proposals which adequately contracting officers to obtain used in proposed preparation. In the the bases and methods documenting this type of information absence of receiving and a cost or price analysis can be supported as being adequate or acceptable.

$$
A^{\prime} ;
$$

1646-035 (', e) (3)
Paragraph $15.805(e)(3)$ : Revise the paragraph as follows:
"An identification of the original proposal and of all sub-
sequent identifiable writter-fermat submissions by which cost or pricing data were either submitted or identifich."
RATIONALE
Submission of updated cost or pricing data must not be limited to "written
1552-014 The comment is well taken. In rewriting the instructions previously part at $15.804-6$ (b) 633 (SF 1411 ) the FAR text at $15.804-6$ (b) contains the procedural aspects of cost proposal preparation. Also included is the requirement that the contractor describe the contractor's sufficieng process in some detail so that allow information is available to this information cost analysis. Therefore this information should be on hand when the cost analysis is done and the auditor can confirm its validity. However, there is nothing objectionable in requiring that information in the audit report. If the offeror complies with the FAR requirement to the auditor will be readily available to the auditor and can easily become part of his audit report, but if the offeror those not comply, the auditor should take those steps necessary to obtain the necessary information and include it in his report.

1646-035 In lieu of replacing "written formal" with "identifiable" the language has been revised to include both.
"
... suhsequent written formal
submissions..." has been changed to read "... subsequent written formal and other that reference is to $15,805-5$ It appears that reference is to $15.805-5$ (e) (3).

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A - Accepted C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council
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1. COMMENT

1552-015
Section 15.805-5, paragraph (f)
We suggest that this paragraph be expanded to conform with our earlier suggestions made under Section 15.803. Paragraph (b). (E).
"Nevertheless, this prohibition does not preclude discussions deemed necessary to ensure that
preliminary conclusions drawn (prior to report
submittal) are reasonable, and are based upon the
most current, complete and accurate data available
to the offeror."
Nrs.
$1604-030$
$\frac{15,805-5(f)}{11 n e t h r e f .}$ add with the offeror" after the word costs" in

A - Accepted $C$ - Not accepted
$M$ - Accepted but modified D - Major policy change -- deferred to the FAR Council


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A - Accepted C - Not accepted
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HASA
1. COMMENT
    1604-031
    25,8QG(a) - Please acc the woras or is unable to performan
        adequate price analybis= detveen tne words -data" periogmancost",
        the sixth line of this subparagraph. This change is consistent
        #ith the gufaance that the contracting ofilcer may perform cost
        thresholda; it vili encourage the prime contracto mandatory
        subcontractor to do the same. 
    SA
            1646.037
                    Paragraph 15.805(a): In the 8th line, end the sentence with the
                    word "evaluations".
        RATIONALE
```

It is erroneous to reopen the definition of "cost or pricing data" and insert, by this device, "the results of subcontract reviews and evaluations". The existence of a review and evaluation, conducted by the prime contractor, is a fact, but the contents of the review and evaluation do not thereby become
factual data. In fact, the review and evaluation by a prime of a subcontractor's estimate is almost entirely made up of judgmental and analytical and speculative material. It is a distortion and contradiction and misapplication of the definition of cost or pricing data to state here that "the results of subcontract reviews and evaluations" form a part of that cost or pricing data. The provision which is recomended here for deletion is one carried over from the OAR and FPR, where it was added, apparently, to enhance the likelihood of Government defective pricing claims.
Reviews and evaluations by prime contractors of subcontract price proposals will often contain statements with respect to the prime contractor's negoIt is not unusual, therefore, to see statements ind of negotiation strategy It is not unusual, therefore, to see statements indicating that the prime purchased material requirements. Is that cost or pricing data capabie purchased material requirements. Is that cost or pricing data capabie of the prime contractor to submit such a statement to the contracting officer an instance of defective pricing? If it is defective pricing should the prime contract price be automatically reduced by an amount, equivalent to the reduction on the subcontractor's proposed material cost?

It would be a violation of the OFPP policy guidelines, established for the FAR Program, if this provision were not eliminated from the FAR

See late comment 2014-024 on page 411-113
 $15.806(b) \quad$ Change $\$ 100,000$ to $\$ 500,000$.

Nuts
$160 y-032$


See late comment 2014-025 on page 411-114

| A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council |  |

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F?:1+\cdots
1. COMMENT
1518-005
Lastly, under subparagraph 15.807 the govemment negotiator
thing to set ap
strategies, raceics, and techniques, it is another to develop
objectives. Formal thining
in this area. Formal training and education is definitely needed
\(=11\)
```

1520-006
Revise 15.807 by inserting the following paragraph between (a) and (b): When there is a substantial difference between the field pricing (DCAA) report and the contractor's proposal, the Contracting officer will conduct a review of the proposal with the contractor (fact finding) prior to the establishment of a pre-negotiation objective. The field pricing team, including $D C A A$, should be party to this fact finding meling.

Reason - The Contracting officer should attempt to reconcile significant differences prior to establishing a pre-negotiation objective.

## pre

1587-001 $\frac{15807}{18}$
The combination of FAR $15.803(b)$ and 15.807 require further elaboration to miake price neyoliation fair to both the Government and the contractor.
15.807 is New Material and should be expanded to include a requfrement
for the Contracting Officer to resolve significant differences between
the contractor's proposal and Field Pricing Report prior to establishing his Pre-negotiation Position.

We propose the addition of the following paragraph between 15.807 (a) and
15.807 (b):
When there is a substantial difference between the Field Pricing (DCAA
Report and the contractor's proposal, the Contracting officer will
conduct a review of the proposal with the contractor (fact finding)
prior to the establishment of a pre-negotiation objective. The field nricing team, including DCAA, may be part of this fact finding meeting.

| $\stackrel{2 .}{\text { DISP }}$ | 3. RATIONALE |
| :---: | :---: |
| C | 1518-005 The development of strategies, tactics and techniques is inherent in the development of objectives and therefore the use of those specific words is deemed unnecessary. |
| $M$ | 1580-006 and 1587-001 A sentence was added to 15.807 (a) to cover contracting officer option to hold factfinding sessions with offeror. This sentence, is at the end of the paragraph. | . 807 (a) to cover contracting sel at the end of the paragraph.

A - Accepted $\quad C$ - Not accepted
$M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council

## 1. COMMENT

IA

## 1646-038

Paragraph 15.807(b): Delete the last sentence.
RATIONALE
The FAR should not be so detailed and specific with respect to the contents of a price negotiation memorandum. If there is to be advancerant of professionalism, simplifying of the regulations and the removal of neestess rigidities, then this sentence qualifies for deletion. in some cases, would be appropriate to require a recital of issues to be negotiated, maximum and minimum cost objectives and of a procretion and professionalism This matter can be left to the judgment and discretion and professionalis of the contracting officer.

See late comment 2014-028 on page 411-114
$N_{n}=A$

1604-033
5. $807(\mathrm{~b})(2)$ - Delete the vords "maximum and minimum" and inser $\frac{15.807(b)(2)}{\text { ene word the" before ncost objectives" in this subparagraph. }}$ This chance will be in keeping with ofpp guidance in their profit polfey Letter ( $80-7$ ) which talks of a cost and profit/fee objective.

| 2. | 3. rationale |
| :---: | :---: |
| $C$ | 1646-038 Though commenter refers to |
|  | 15.807 (b) the rationale talks about the |
|  | contents of a price negotiation memorandum, which is covered in $15.808(a)$. |
|  | As pertains to $15.807(b)$, the statement of minimal contents of the prenegotiation objectives memorandum can in no way be considered detailed and specific. |
|  | As pertains to 15.808 (a), the statement of minimal contents is greater for the price negotiation memorandum but it also reflects only a bare minimum of the data normally included in such a document. |
|  | Neither statement appears to be a reflection on the professionalism of the contracting officer. As a matter of fact, the contracting officer will in most cases far exceed the minimal requirements set forth for both memoranda. |
| $A$ | 1604-033 "... maximum and minimum cost ..." changed to "... the cost ..." which is deemed appropriate. |

## DISPOSITION CODES

A - Accepted
C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council
 considerations and on other terms and conditions of the contract These agteenents and the price negotiation are frequentiy diseussed in the same memorandum.

See late comment 2014-027 on page 411-115

## DUC

1557-017
Section 15.808, Paragraph (a) (4)
One of the requirements under minimum information to be included In the price negotiation memorandum is "the current status of the contractor's purchasing system." We are not certain as to what is meant by this phrase, (acceptability of the contractor's purchasing system?). In any event, many contracts are labor intensive and therefore no review of the contractor's purchasing system is detemined necessary. In fact, unless a large amount of materials or equipment was proposed, it is questionable
whether a review of a contractor's purchasing whether a review of a contractor's purchasing system would even be attempted. We recommend that this requirement be eliminated from the minimum information to be included in the price
negotiation memorandum. negotiation memorandum.

## GSì

1682-006
paragraph 15.808(a)(4), page 92
Comment
There may be instances when a civilian agency does business with a contractor on a very infrequent basis, and this may be the only Government activity that contractor has. In such a situation, the contractor's purchasing system will never be reviewed. Therefore, requiring a statement concerning a current status of the contractor's purchasing system wuuld be inappropriate.

Recommendation
Do not make the requirements to provide a status of the contractor's purchasing system in each negotiation memorandum a mandatory requirement.

See late comment 2014-029 on page 411-116
NHSA
1604-035
$15.808(a)(6)$ - Delete $\$ 100,000$ and insert $\$ 500,000$.

CAP TiAC
15 $236-074$
15.808(a)(6)

Change $\$ 100,000$ to $\$ 500,000$.

## $\mathrm{N}_{\mathrm{i} \div} \div \hat{\mathrm{F}}$

1604-036
15.80E(a)(7) - we suggese that ftem (7) be revised to reau
"...Tecnnical analysis. audit, and fielo pricing report
cecommendations, there applicable, anc the reaburb for any pertinent vatiances from these tecommencations" (omisaion).
A - Accepted
C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council

DISPOSITION CODES
$A$ - Accepted
$M$ - Accepted but modified $\quad C$ - Not accepted

- Major policy change -- deferred to the FAR Council


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A - Accepted C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council
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RATIONALE Paragraph 15.810: Delete this paragraph in its entirety.

It is coubtful any hard evidence exists supporting a positive cost-tc-benef it relationship between the cost and, frequently, the disruption, which beromes invoived in a full-scaie should-cost andlysis. Virtually every major pricing of major systems procurements, there are efforts made tacement or cont inuation and subcontractor capital investment and productivity incentives. value engineering programs are in effect in most major programs and provide incentives for achieving attainable ecorismies and cost progidaces. provide the should-cost approach, with its elaborate team formations and . In short, reports and high costs and its tendency to produce an unusable result not seem to have weathered the tect of time and is not in sufficiently ocigh or steady use to warrant its inclusion in the FAR.

In support of this conclusion, it is noted that the Comission on Goverament
Procurement made, through Study Group 8 - Negotiations and Subcontract ing,
nextensive review and analysis on should-cost and did reco it coprion as a standard procurement cechnique. The fuep the commission does not contain any reconmendation or suggestion about the cont inued use of should-cost.

Further, the recent 32 Initiatives for Improvement of the Acquisition Process whith are guiding DoD efforts at improving economy, efficiency and effectiveness, particularly of major systems procurements, do not contain any mention or suggestion of any use of the should-cost technique.

OFPP should consider the likelihood that the inclusion of this section in the FAR will tend to encourage planners to write should-cost requirements into acquisition plans and thereby condern programs to the expenditures of significant cnsts with questionable benef it.

## EIA

See late comment 2014-030 on page 411-116

## 1580-007

Revise 15.810 (a) by replacing the third paragraph with:
"The purpose of the should cost analysis is to evaluate the contractor's cost projections and in-plant management and operations upon which the cost projections are based. Where insufficient or uneconomical practices are identified, their impact on cost is to be quantified to develop a price objective for negotiation. Short and long range improvements in contractor's economy or efficiency are additional goals of this analysis."

Reason - The original language predetermines that inefficient or uneconomical practices must exist and if not uncovered by the analysis, indicates failure of the should cost analysis team. Instead, the thrust should be one of fact finding and the application of results as they relate to both operational practice improvements and related pricing.
A - Accepted
C - Not accepted
Accepted but modified D - Major policy change -- deferred to the FAR Council
TEXI
$\qquad$
$\qquad$

## DISPOSITION CODES

A - Accepted C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council


## DISPOSITION CODES

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A - Accepted C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council
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A - Accepted
C - Not accepted
M - Accepted but modified
D -
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                    I. COMMENT
    A.A

## 1646-044

paragraph 52.215-21(b).
add the words "plus its profit markup," RATIONALE

Since profit is included in the give back
included in the limiting side also.
$r$
1646-045
"data" insert the words "cost or second line between "defective" and RATIONALE

The only data which can be defective in this context is "cost or pricing data"
term. It is noted that the corresponding precisely defined term, and a statutory
ndefective cost or pricing corresponding DAR section does use the entire statutory
in cases where certified costa". Since this paragraph refers to pentire term that there be no loopholes created, either intare required, it is essential

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A - Accepted C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council
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$$
C A P T A B C
$$

$$
\begin{aligned}
& 1534=036 \\
& 52.215-22
\end{aligned}
$$

$$
\text { Change } \$ 100,000 \text { to } \$ 500,000
$$

```
CH:NO
        [,536-0.3)
        Chagge$loo,000 to $$00,000
        AP
```

            1646.046
    
any of these parimes furnished data of any description (3)
not accurate".
RAIIONALE
See paragraph 52.215-21(a).
A
$1646-047$
Paragraph 52.215-22(c): In line 6, after the word "Contractor"
$\frac{\text { Paragraph }}{\text { insert the words "plus its profit mark-up". }}$
RATIONQLE
See paragraph 52.215-21(0).
H2
1646-045
Paragraph 52.215-22(c): In the 2nd line between "defective" and
"data" insert the words "cost or pricing".
RATIONALE
See 52.215-21(b).

| $\left\|\begin{array}{c} 2 . \\ \text { DISP } \end{array}\right\|$ | 3. RATIONALE |
| :---: | :---: |
| A | 1536-036 and 1536-037 "\$100,000" changed to "\$500,000". |
| $\hat{r}_{i}$ |  |
| C | 1646-046 This is the same comment as 1646-043 applied to another clause. This comment is not accepted for the same reason. |
| C | 1646-047 This comment is the same as 1646-044 applied to another clause. This comment is not accepted for the same reason. |
| $C$ | 1646-048 This is the same comment as 1646-045 applied to another clause. This clause is not accepted for the same reason. |

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    A - Accepted C - Not accepted
    M - Accepted but modified D - Major policy change -- deferred to the FAR Council
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(1. COMMENT

## DISPOSITION CODES

A - Accepted
C - Not accopted
M - Accepted but modified D - Major policy change -- deferred to the far council

dISPOSITION CODES

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\begin{array}{ll}
\text { A - Accepted } & C \text { Not accepted } \\
\text { M - Accepted but modified } D-M a j o r ~ p o l i c y ~ c h a n g e ~-~ d e f e r r e d ~ t o ~ t h e ~ F A R ~ C o u n c i l ~
\end{array}
$$

(1. COMMENT

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A - Accepted C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council
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| $G: F$ - COMMENT | ${ }_{\text {DISP }}{ }^{2}$ | 3. RATIONALE |
| :---: | :---: | :---: |
| 1646-051 <br> Paragraph 52.215-24(a): In line 4, after the word "costs" insert the words "for retated changes". In line ' 5 change " $\$ 100,000$ " to " $\$ 500,000$. | $M$ | 1646-051 " $\$ 100,000$ " changed to " $\$ 500,000$ ". The words "for related |
| EATIONALE |  | changesn were not added since the change |
| The aggregate value of unrelated changes that are merely bundled in onc modification for administrative ease do not aggregately establish a threshold for P.L. 87-653 applications. |  | negates the need for change. |
| SFPTFAC |  |  |
|  | $\hat{H}$ | $1536-043 \mathrm{~m} \$ 100,000 \mathrm{n}$ changed to " $\$ 500,000 \mathrm{n}$ - |
| F: |  |  |
| $1616-052$ <br> Paragraph $\frac{52.215-24(b): \text { : } 1 n 1 \text { ine } 4 \text {, after the word "costs" insert }{ }^{\text {Pher }} \text { "for related changes". }}{}$ <br> RATIONALE <br> See Paragraph 52.215-24(a). | 0 | 1646-052 The word "cost" to which this change related has been deleted and the term "a pricing adjustment" used in lieu thereof. |

A - Accepted C - Not accepted
M - Accepted but modified D - Major policy change - deferred to the far Council

> 1. COMMENT/RATIONALE

$\qquad$
A - Accepted $C$ - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council

| TEY.I 1. COMMENT | $\left\lvert\, \begin{gathered} 2 . \\ \mathrm{DISP} \end{gathered}\right.$ | 3. RATIONALE |
| :---: | :---: | :---: |
| 1563-014 DD 633 <br> -stendard- fork $x \times x$, Contract pricing Proposal <br> Although ve recognize that the proposed Standard form is almost identical in content to the DB Form 633 dated 1 April 1979, we continue to be concerned about several requirements of the Form. Our comments hereunder will be sequenced by the block to which the comment is applicable. <br> Nane, Address, and Tolephone Number of Organizational Element Responsible for Supporting Proposal <br> We fail to comprehend a reason for the phase "responsible for supporting proposal" in this block. Within our company, several organizational elements could be responsible for supporting a proposal. Bowever, we do not perceive that it is necescary or desirable to show each of the: = organizstions in this block. Would it not be sufficient just to require the name, address and telephone number of the proposing contracting organization (a single point of contact)? | $m$ | 1563-014 Revision of SF 1411 essentially satisfies comment. The intent of the phrase "responsible for supporting proposal" was to identify the the single point of contact within the offeror organization. It was not intended to identify every part of the offeror's internal organizational component which provided support to the proposal effort. |
| TEYI |  |  |
| Although it is a minor comment, the brock cound be used to indicate, for example, whether the contract is CPFF vs FFP, Prime vs Sub, or RID vs Production. We think this should be clarifitiea. | A | 1563-015 Revision of form satisfies comment. |
| $T E Y I$ |  |  |
| $\begin{aligned} & 1565-016 \begin{array}{c} \text { with respect to an fri contract, for example, which total cost is } \\ \text { appropriate in this block; target or ceiling? } \end{array} \\ & \text { TEXI } \end{aligned}$ | $C$ | 1563-016 Form is sufficiently clear that what is sought is "target" cost with respect to an FPI contract since that is what is "proposed". Ceiling is stated as a percent of target. |
| $1563-017$ <br> Identification (aine item) DD633 <br> The note in this block requires the proposer to "list and reference the identification, quantity and total price proposed for each contract line item." It also requires a line item cost breakdown supporting this recap unless otherwise specirled by the Contracting Officer. <br> This note appears to refer to the entire series of blocks thich include (1) line item number. (2) inentification, (3) quartity, (4) total price, and (5) reference. The first sentence in the note is redundant inasmuch as there are blocks entitled identification, quantity and total price. | A | 1563-017 Form is revised to clarify that lead-in applies to all columns. |
| TEX: |  |  |
| $1563-018$ The second sentence in the note 60uld <br> net should be eliminated because a line <br> - item cost breakdown could result in an excessive and unnecessary odilinistrative effort in connection with contracts such as spares contracts, which may include hundreds, perhaps thousands, of line items. | C | 1563-018 Contracting officer has authority to delete requirement for line item fricing when circumstances warrant. |

M - Accepted but C - Not accepted
Acepted but modified $D$ ~ Major policy change -- deferred to the FAR Council

A - Accepted
C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the far Council


A - Accepted
C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council

| 2. COMMENT <br> $\mathrm{n}-5:$ | 2. | 3. RATIONALE |
| :---: | :---: | :---: |
| 1604-005 FTN, EPR <br> Comithtary b, Page - insa nas, in eariver comments regaraing Supart 7.1 - Acquisition pianning, tecommended deletion of that subpart fromine far. | $C$ | 1604-005 This comment has no applicability to Subpart 15.8 The specific material of DAR 801-3 now appears at FAR 7.104 (b). |

- 

$\begin{array}{ll}A-\text { Accepted } & C \text { - Not accepted } \\ M \text { - Accepted but modified } D-M a j o r ~ p o l i c y ~ c h a n g e ~--~ d e f e r r e d ~ t o ~ t h e ~ F A R ~ C o u n c i l ~\end{array}$




```
A - Accepted
M - Accepted but modified C - Not accepted
```



1. COMMENT
2014-907 $-\underline{0.804 .1}$ Delete subparagraph. ASPM No. 1 is for internal training only.
$D O D$
$2014-008804.2(a)$
$\$ 500,000$ "be substituted for "When mandatory" the words "Actions in excess of
with the Public Law 87-653 as memended. Note as being descriptive and in line
lesser civilian agency thresholds should be at $15-802$, Police notice of any
DOD
2014-0 The following changes are reconmended to conform the coverage to PL $87-653$
as amended. 15,804-2(a) (1) change $\$ 100,000$ to $\$ 500,000$
(2) change $\$ 100,000$ to $\$ 500,000$
change $\$ 30,000$ to $\$ 150,000$
change $\$ 70,000$ to $\$ 350,000$
(3) change $\$ 40,000$ to $\$ 200,000$
(3) change $\$ 100,000$ to $\$ 500,000$
This paragraph must be rewritten to clartfy to $\$ 500,00$
spectfic identification too.
$\because$
2014-010
. $804-2$ (b), page 35 This paragraph should be rewritten as follows:
(b) Actions of $\$ 500,000$ or less. When awarding 2 contract or issuing a
nodification of $\$ 25,000$ or less, the contracting officer shall not require
certified cost or pricing data. The contracting officer shall require
cost or pricing data for che complete action or for the specified portion
of a particular pricing action in connection with a contract or modification
between $\$ 25,000$ and $\$ 300,000$ when needed to determine that the price is fair

The modifications incorporated above are necessary to accomplish the following:
(1) Allow the contracting officer to obtain cost or pricing data on actions below the threshold whenever it is needed to arrive at a price
reasonableness determination.
(2) Eliminate the need to justify fully and explain how the benefits of obtaining cost or pricing data for actions under the threshold outweigh
the administrative costs involved.
(3) Emphasize the need to arrive at a price reasonableness determination irrespective of the threshold, wilich the basic coverage appears to ignore.

| A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council |  |

 $15.804-3(b)(3)$, page 37 It is recomended that on Ine six after "comparable
quantities" the words "terms and conditions" be added in order to complete the
criteria.
$\because 9!$
2014-012
$\frac{15.804-3 \text { (i) }}{\text { requirements }}$ is granted currently written authority to waive the P.L. 80 - 653 requiretrents is granted to the "agency head". As defined in FAR Subpart 2.1 (paragraph 2.101 Definitions), the thead of the Agency" does not include the includes the lieads of Defense Agencies (see DAR 1walver. It is recomended that the FAR be revised as de, to grant this reflect that this waiver of authority is explisitly as deemed appropriate to Defense Agency heads or their designees. -

2014-213
$15.804 .4(\mathrm{~h})$
$\$ 500,000$ as provided for is recommended that the value $\$ 100,000$ be changed to six between the word's "the" and "partial" the of PL 87-653 and that on line in order to be complere.
$\$ 500,000$ (c) , prage 43 It is recommended that the value $\$ 100,000$ be changed to "provided the exception in the latest version of PL 87-653, and to acti certification" in order to allow for the exception. after the word
$\because$
$2014-015$
15.804-6(g)(1), page 53 It is recommended that starting on line 4 Hand covered by the contractor's Certificate of Current Cost or Pricing Data" be deleted. This deletion is necessary in order to eliminate the void that would be created as to the applicability of the prime's certification of subcontractor cost or pricing dara.
$2014-Q_{2}^{1} 6$ it is further $-6(g) Q 2$
that on line nine "specified inded that the $\$ 100,000$ be changed to $\$ 500,000$ and that on line nine "specified in the solicitation to be" be deleted and in its piace the word "considered" be substituted. This is necessary to delete the miditace that $10 \%$ of the prime contractoreby subcontracts less than $\$ 1$ million specified in the solicitarion befractors proposed price would have to be could be requested for ouch subcontiats.

| $2 .$ | 3. RATIONALE |
| :---: | :---: |
| - | 2014-011 Feither DAR 3-807.7(a) (3) nor FPR 1-3.3807-1 (b) (1) (iii) mention "terms and conditions" as a critera for a price based on adequate price competition. There is no reason for addition of the suggested criteria. |
| $A$ | 2014-012 The definition of "head of the agency" at FAR 2.101 satisfies the comment without further change. |
| M | 2014-013 The commenter's recommended change was not made as specifically recommended, however $15.804-4(\mathrm{~h})$ was rewritten to more clearly reflect its intent. Total termination settlements, etc. are covered by 15.804-4 (h) (1) 15.804-4 (h) (2) was specifically included for "partial" termination settlements because of the need to be clear that the fartial termination "plus the estimate to complete the continued portion of the contract" must be used in determining whether or not the threshold for certification of cost or pricing data was |
| $\hat{i}$ | 2014-014 The entire paragraph was rewritten incorporating the increased threshold and obviating the necd for the specific wording of the remainder of the proposed change. |
|  | 2014-015 Change being made. |
| 1 | 2014-016 change being made. |


| A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council |  |

(

A - Accepted C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the far Council

$\qquad$
A - Accepted $\quad C$ - Not accepted
$M$ - Accepted but modified $D$ - Major policy change - deferred to the FAR Council

1. COMMENI

## 2014-023. 808 price negotiation memorandum

(a) At the conclusion of each negociation of an initial or revised price elements of the pricer shall promptly prepare a memorandum of the principal elements of the price negotiation. The memorandum shall be included ir the considered.
(1) The purpose of the negotiation.
(2) A description of the acquisition, including apapiate

Identifylng numbers (e.g., RFP No....................................
(3) The name, postiton, and organization of
the contractor and the Government in the negotiation of each person representing
(4) The curcent status of the colt
accounting, etc. system to the extent they were constor's purchasing, estimating
(5) If certified
whith the concracting officer-- cost or pricing data were required, the extent to
(1) Relifed on the cost or pricing data submitted and used chem in negotiating the price; and
(ii) Recognized as inaccurate, incomplete, or. noncurrent any cost or pricing data submitted; the action taken by the contracting officer and the contractor as a result; and the effect of the defective data on price
negorfated.
DISP
(6) If cost or pricing data were not required in the case of any price negotiation over $\$ 500,000$, the exemption or waiver used and the basis for
claimf $n$ or granting it.
(7) A sumairy of the contractor's proposal, the field pricing field recomnendation fint prinent variances from the feld pricing report recommendations.
(8) The most significant facts or considerations controlling the establishment of the prenegotiation price objective and final price.
(9) An explanation of any significant difference between the cotal price negotiated and the total price objective.
(10) The basis for determining the profit or fee prenegotiation objective and the profit or fee negotiated.

Note: The Government's cost objective and proposed pricing Because profit or fee is only profit or fee objective. Because profit or fee is only one of several interrelated
variables, the contracting or fee without concurrent agreement shall not agree on profit Specific agreement on the exact values or and type of contract. individual profit-analysis factors (see or weights assigned to during negotiations and should not be attempted. not required ttempted
(b) Whenever an audit or field pricing report has been submitted, the contracting officer shall forward a copy of the price negociation memorandum to the cognizant audit office and a copy to the cognizant administiditive contract
ing officer. When appropriate, infornation on tow field pricing support team can be made more effective should be pervices of the
A - Accepted
C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council


## DISPOSITION CODES

| $A$ - Accepted | $C$ - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Council |  |


| 1. COMMENT <br> 9996-012 Meredith Murphy, FARPO <br> A Govermment-wide profit policy was established by OFPP in its Policy Letter $80-7$, dated 9 Dec 80 . This policy will be included as a separate subpart in the FAR directly after Price Negoriation, Subpart 15.8. <br> Therefore, the present Súppart 15.9, Preaward and Postaward notifications, Protests, and Mistakes, will become Subpart 15.10 and should be renumberd accordingly. | $\begin{gathered} 2 . \\ \text { DISP } \\ A \end{gathered}$ | 3. RȦTIONALE |
| :---: | :---: | :---: |
| ```DOT 0781-045 15.901(a) \\ The preaward notification to unsuccessful offerors should be given in all of the instances listed except for subsistence. \\ RECOMMEND: Change the second sentence to read ".... if the contract is for subsistence.". Delete (1) through (5).``` | $C$ | 0781-045 The second sentence of FAR 15.1001(a) (formerly 15.901(a)) does not prohibit preaward notification to unsuccessful offerors in the instances listed in subparagraphs (1) through (5), provided that the preaward notification disclosure would not prejudice the Government's interest. The sentence merely states that the contracting officer is not reauired to provide a preaward notification to unsuccessful offerors in the instances listed in subparagraphs (1) through (5). |
| CATEFFILLAF TFACTOF GO. $0759-014 \quad 15.901 \text { (b) (1) }$ <br> As 15.609 has not been issued we cannot determine its relationship to this subparagraph. | A |  |
| $0943-008$ <br> Paragraph 15.901(b)(1), page 54 <br> Comment. This paragraph requires the contracting officer to notify each offeror promptly upon determination that the offeror's proposal is unacceptable. This requires the contracting officer to defend and substantiate the decision of unacceptability while the award process is occupying most of his or her time. <br> Recomendation. Clarify the requirement for prompt notification by includina the policy that is in FPR 1-3.103(b)(2)(iii). | $C$ | 0943-008 We share the concern expressed in this comment. However, because agencies differ in the timing of their notifications and debriéfings (before award or after award), and becāuse an unsuccessful offeror having a leaitimate concern is generally entitled to at least seek additional information, FAR I5.1001(b)(1) (formerly $15.901(\mathrm{~b})(\mathrm{l})$ ) is not revised to specifically include a mandatory requirement that the notice shall state that "no further information will bé available until a later time." It should be noted that the last sentence of FAR $15.1001(\mathrm{~b})(1)$ (formerly $15.901(\mathrm{~b})(1)$ ) does not specify that the notice shall state only the information in subdivisions (i) and (ij). |
| INTERIGR <br> 0801-022. 15.901(b): It is recommended that the language of FPR I-3.1:3(b) (3) permitting a general notification to offerors outside the competitive rangewhen they number more than 15 be retained. | $C$ | 0801-002 The cited FPR Ianquaqe states that where sources that are determined to be outside the competitive range number over 15, the basis for the determination may be omitted if they are informed that the basis for the determination or nonselection for further discussion or |


| A - Accepted | C - Not accepted |
| :--- | :--- |
| M - Accepted but modified D - Major policy change -- deferred to the FAR Council |  |


A - Accepted
C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council


```
- Accepted C - Not accepted
- Accepted but modified D - Major policy change -- deferred to the FAR Council
```


DISPOSITION CODES
$A-$ Accepted
$M$－Accepted but modified $\quad C$－Not accepted
D Major policy change－－deferred to the FAR Council

|  <br> ARTHUR D．LITTLE | 2. DISP <br> $C$ | 3．RATIONALE <br> 1196－003 We believe that this commenter misinterpreted the column 2 coding and footnote 1．on paqe 56 of the Phase I spreadsheet for FAR 15.1002 （formerly 25．902）．The last sentence of DAR 3 － 508．4（b）añ the first sentence of DAR 3－ 508．4（c）were coded＂OS＂，indicating omission from the FAR but recommended for inclusion in ā⿹勹巳一 implementina or supplementing publications because agencies differ in debriefinc before or after award．For example，NASA debriefings are held preferably before award．FAR 15.1002 （formerly 15.902 ）as written does not take away the contracting agency ${ }^{*}$ s option to debrief unsuccessful offerors prior to award． <br> 0745－032．The commenter gives no reason for the sugqested revision，and we do not believe adoption of the suagestion would result in an improvement． |
| :---: | :---: | :---: |
| 6．5A <br> 0943－009 <br> Paragraph 15．902（b），page 56 <br> Comment．The coverage in FAR 15．902（b）does not encompass all items of information that may not be releasable under the Freedom of Information Act，yet items 1－3 are drawn specifically from the provisions of the Act， while item 4 is not． <br> Recommendation．Revise $15.902(\mathrm{~b})$ to read as follows： <br> n（b）Debriefing information shall include the Government＇s evaluation of the significant weak or deficient factors in the proposal；however，point－by－point comparisons with other offerors＇proposals shall not be made．Debriefing shall not reveal the relative merits or technical standing of competitors or the evaluation scoring．Moreover，debriefings shall not reveal any information that is not releasable under the Freedom of Information Act；for example－－ <br> （I）Trade secrets； <br> （2）Privileged or confidential manufacturing processes and techniques：and <br> （3）Commercial and financial information that is privileged or confidential，including cost breakdowns，profit，indirect cost rates，and similar information． | A | （ |
| ARTHUR D．LITTLE | $\subset$ | 0745－033 To state，as FAR $15.1002(b)$ （formerly $15.902(b))$ does，that debriefinas shall not reveal the relative merits or technical standina of competitors or the evaluation scoring coes not mean that a contractor＂cannot receive appropriate information relative to the technical evaluation．＂Adoption of this commenter＇s sugaested deletion would result in a policy chañe beyond the scope of the FAR project． |


| A - Accepted | $C$ - Not accepted |
| :--- | :--- |
| $M$ - Accepted but modified D - Major policy change -- deferred to the FAR Council |  |

\begin{tabular}{|c|c|c|}
\hline 1. COMMENT \& 2. \& 3. RATIONALE \\
\hline \begin{tabular}{l}
GTE \\
0711-005 \\
Sub-section 15.903 - Protests Against Award. \\
15.903 \\
Sub-section 15.903 provides that protests against the award of contracts in negotiated acquisitions should be treated substantially the same as in formal advertising under sub-section 14.407-8. When subsection \(14.407-8\) was first proposed, GTE submitred comments on the protest issue. A copy of the relevant portion of our January 5, 1979, coments is attached hereto for your information.
\end{tabular} \& \(A\) \& 0771-005 The commenter's submission relative to FAR 14.407-8 will be considered at the time that particular Phase II entity is prepared. In the meantime, there is no need to alter FAR 15.1003 (formerly 15.903). \\
\hline \begin{tabular}{l}
COISIA \\
0777-0088. In \(\frac{15.904}{11 \text {, recommend the use of the words "discovery" and "discovered" }}\) in lieu of "disclosure" and "disclosed". \\
Reason: Self Explanatory \\
DAC \#76-24 28 AJG 80 \\
9998-164 \\
DAR 3-510, Disclosure of Mistakes After Award, upon which FAR 15.904 as released through the Federal Register for public comment was based, is now "Reserved" in the DAR. Its FAR counterpart is entitled "Discovery of mistakes" and covers mistakes after award as well as mistakes before award. The corresponding FPR still covers both instances, and we do not believe that it is appropriate to delete mention of mistakes discovered after award.
\end{tabular} \& \(A\)

$A$ \& - <br>
\hline
\end{tabular}

$\qquad$

## FINAL

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4-16-82
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FAR Entity 15, 15:1, 15.2, and 15.3
Control No. /Page No. 022-1
 titie Detenginetion end Eindings
Drafter quinn Reviewer Gratam/Sumers Eaitor Flangan
4. PRASE I GAR



 review, includet covarige thatogt naf 176 -29 (31 frguat 1981). Joint Review Heptins wit hold on 4pril 7 and 8 , 1982.

5. REVISED FAR


CONTRACTING BY NEGOTLATION; General Requiremencs for Negotiation; Negotfation Authotities; and Title Detecmination and Findings

Drafter Quina
Reviewer Graham/Summers
Editor Flanigan

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5. REVISED FAR

PART 15--CONI RACTING BY NEGOTIATION

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Experimental. development, or research work.
Purchases not to be publicly disclosed.
Technical eguiprent requiring Fefindardzation and interchangeability of parts.
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    CONTRACHING BY MEGOTLATICN% General Eequirements for Negotimtion; Negotiation Authoritiet; and
```

Title Determination and Findings

| Drafter | Quinn | Reviewer | Graham/Summers | Edztor | Flanigan |
| :---: | :---: | :---: | :---: | :---: | :---: |

PART IE-CCOVTRACrING EY NGOIIASION

### 15.000 Scope of part.

This part prescrites policues and procedures coverning cortracting for supplies and services by negotiation.

PART 15--CONTRPCTING BY NFGOTIATION
5. REVISED FAR

### 15.000 Scope of part.

This part orescribes policite and procedures oovermana contractinc for supplies and services by nenotiation.

Drafter Quinn Re_ Reviewer Graham/Sumers Editor Flanigan



FAR Entaty 15, 15.1, 15.2, and 15.3 Control No./Page No. 022-7 CONTRACIING EY NEGOTMATICN; Genexal Requirements for Negotiation; Negotiation Authorities; and Title Determination and Findings
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Drafter quinn
Reviewer
Grahan /Sumpexs Editor Flanigan
4. PBASE I FAR
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Title Determination and Findiggs
Drafter quign _ Reviewer Grahan Sumers Editoz Flanjgin

## 4. PRASE I FMR

SUEPART 15.1--GENERAL REQUIREMENTS FOR GEGOTIATION

```
15. 100 Scope of aubpart.
```

This zubpart covers general teguirements regarding neqotiated contractg. Detailed and specific, requirements appear throughout this requiation.

## 15. 101 Definition.

Megotiation means contracting without formal advertising. Any contract awarded without compliance with si1 the requirements of formal advertising is a nagotiated contract (ree 14.101).

## 5. REYISED FAR

SUBPART 15.1--GENERAL REGUIREMENTS FOR NEGOTIATION
15.100 Scope of subpart.

This subpart covers general requirements regaraing negotiated contracts. Detalled and specific requirements eppear throughout this regulation.

### 15.101 Definition.

"Negotiation" means contracting without formal advertising. Any contragt awarded without the ues of formal abvertising procedures is a negothated contract (see 14.101).
.102 Genexal.
Unlife formal advertising, negotiation is a more flexible ocedure that includec the receipt of proposals from
ferors. permits bargaining, and usualiy affords offerors oppoctunity to reviae their offers before award of a ntract. Bargaining--in the pense of discusgion. rgtastion, alteration of initial assumptions and positions. 1 giverand-take-axy apply to price, schedule, technical Tuifements. type of contract, or other terms of a proposed itract.

### 15.102 General.

Unlike formal advertising, megotiation is flexible procedure that include the receipt of proposale from offerors, permits bargaining, and usually affords offerors an opportunity to revise theix offers before award of a contract. Bargaining-in the senge of discussion, persuasion, alteration of initial agsumptions and positions. and give-and-take-may apply to price, schedule, technical requiremente, type of contract. or other terns of proposed contract.


Far Entity 15，15．1，15．2，and 15.3 Control No．／Page No，022－10
CONTKACTING BY NEGOIIATICN：General Requifemencs for Megotzation；Negotiation Authoritses；and Thtle Decermination and Findings
Drafter Quinn＿＿＿Eeviewer Graham／Sumpers Editor Flanigan

## 4．PHASE I FAR

## 15． 103 Jee of negotiation．

Negotiation may be usea only when permitzed under one of the 符施turory authorizations diseussed in subpart 15．2． Notwithstanding the existence of conditions permitting neqotiation under one of theae tetatutory authorizations． formal advertising shall be used for acguisitions in exceas of $\$ 10,000$ whenever it is feasible and pricticable to do so． Freasiblew means that formal advertising is possible bectuse circuratances do not preciude the use of formal adrertising （zee 14．max）．Practicable＇means that formal advertising te not only feasible but also workable，useful，realistic， expedient，or prudent．contracting officers must exercise fradgent in belecting the method of contracting．

## 5．REVISED FAR

## 15．103 Use of negotiation．

Negotiation may be used only when permitted under one the 后tatutory authorigations diseussed in Subpart 15.2 ， Notwithstanding the existence of conditions permitting negotiation under one of these statutory authorizatzons． formal advertiging thall be used for acquisitions in exc－ of $\$ 10,000$ whenever it is feasible and practicable to do Contracting offacer must exercise good judgment in selecting the method of contracting．
4. PHASE I PAR
5. REVISED FAR
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Drafter Quinn .__ Reviewer Graham/Sumarers Editor Flanigan
4. PHASE I PAR

15. 105 competition.

Nagotiated contracts shall be awarded on a competitive basis to the maximun prectical axtent. to this ends
5. REVISED EAR
15. 105 Campetition.
ghegotiated contracti thall be awarded on a competitive masis to the maximum practical extent. To this end

(b) Before negotiating a contract on a noncompetitive
(b) Befor negotiating a contract on a noncompetitive Wis the contracting officer is responsible not only for suring that competition is not feasible but also for ting whenever possible to avoid the need for onbsequent neompetitive contracts. This shall include-
(2) Taking stepa to foster competition in the future, rticulariy with respect to the availability of complete id courtite data, reasonableness of delivery requirementer, a possible breakout of components for competitive intracting.
basis, the contracting officer is responsible not only for ensuring that competition is not feasible and practicable under the existing conditions and circunstances but also for acting whenever possible to avoid the need for subsequent noncompetitive contracts. This process shall inciude-
(1) Examination of the reason precluding competition for the current requirement: and
(2) Taking steps to fowter competition in the future, particularly with respect to the availability of complete and accurate data, reasonableness of delivery requirements, and possible breakout of components for competitive contracting.


(C) Contracts in excess of $\$ 10,000$ shall not be negotiated on a nonconpetitive basis without prior reviau at a level above the contracting officex. However, review is not required for acquisitions of electric power or enexgy. gat (natural or manifactored. waters other utility services, or educational services from nonprofit institutions.
15.105
5. REVISED FAR
(c) Contracts in excess of $\$ 10,000$ shall not be negotisted on a noncompetitive basis without prior review at a level above the contracting officer. However, prior review 18 not required for acquisitions of electric power or energy, gas (natural or menufactured), water, other utility services, or educational bervices from nonprofit institutions, provided that acquigitions of public utility services shall comply with Subpart 8.3. Acquibition of Utility Services. competition should be obtained in the case of bottled gas aiftributors.


FAR Entity 15, 15.1, 15.2, and 15.3
Control No./Page No, 022-16
 Fitle Detexmination and Findings

Drafter Quinn Reviewer Graham/Summers Editor Flanigan

## 4. PHASE I FAR

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## 4. PHASE I FAR

15106 Examination of records Clawse.
fa) Thas section implements 10 U.S.C. $2313(b)$ and 41 0 S.C. $254(c)$.
Title EMEntn Eion of Freords
 Eventn tion of Ixcords
5. REVISED FAR

15106 Contract clauses.
15.106-1 Examintition of Fecords clause.
(a) This subsection $2 m p l e m e n t s ~ 10$ u S.C. $2313(b)$ and (c) and 41 U.5 C 254(c).
(b) The clause at 52.215-1, Examinations of Records by Comptroller General, shall be used in all negotlated contracts except-*
(b) The contracting officer shall insert the clause at 52.215-1. Examınation of Records by Comptroller General, in all neaotiated contracts, inciudina those awarded throuch small husiness restricted advertising, except--


$\left.1510^{\prime}=(b) / 2\right)$



$15 \therefore 2: ~$
(3) Contracts for which the ayency head authorizes anission under subpart 25 y
(3) Contracts with foreign contractors for which the agency head authorizes ormssion under subpart 259.
(c) In connection with administration of the clause in research and developinent contracts with nomprofit constitutions including subcontracts thereunder, the Comptroller General does not require original documentation of costs for transporting things.
(c) In connection wath aministration of the clause in research and development contracts with nonmrofit institutions, including subcontracts uncer these contrasts. the Comptroljer Ceneral does not require orjoinal documentation of transportation costs (exclusive of travel).

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## 4 PHMSE I FAR

52 215－1 Examination of Pecords by Comptroller General．
As prescribed by 15106 insert the following clause in all Begotiated contracts：

EXAHILATION OF RECORDS BY COIPTROLLER GELERAL（DATE）
（a）Thas clause applies if thas contract exceeds $\$ 10,000$ and was entered into by means of negotlation．

5．REVISED FAR

52．215－1 「2amiration of Records by Corptroller General．
As prescrabed in 15 106－1（b）．ansert the following clause in all negotiated contracts，including those awarded through small business restricted advertising，except（a）small purchases（not exceeding $\$ 10,000$ ：see Part i3）．（b） contracts for utility services at rates not exceeding those established to apply undformly to the public，plus any applrcable reysonable connection charge，or（c）contracts with foreign contractors for which the agency head authorizes omission under subpart 25．9：
EXAMINATION OF RECORDS BY CONPTROLLER GEMERAL（DATE）
（a）This clause applies if this contract exceeds $\$ 10,000$ and was entered into by negotiation．


## 4. PHASE I PAR

$52215-1$
(b) The Comptroller General of the United States of any authorized representative shall, untal 3 years after final paynent under thas contract or for any shorter period specified in Subpart 4.7 of the Federal Acquisition Regulation (FAR), have access to and the right to examine any of the Contractor's directly pertinent books, documents, papers, or other records involving transactions related to this contract.
(c) The Contractor agrees to include in all subcontracts under this contract a provision to the effect that the Comptroller General or any authorized representative shall, until 3 years after final payinent under the subcontract of any shorter period specified in FAR Subpart 4.7 , have access. to and the right to examine any of the subcontractor"s directly pertanent books, documents, papers, or other records involving transactions related to the subcontract. "Subcontract," as used in this clause excludes (1) purchase ordexs not exceeding $\$ 10,000$ and (2) subcontracts or purchase orders for public utility services at rates established to apply unlformly to the public.
(d) The periods of access in paragraphs (b) and (c) above for records relating to (1) appeals under the Disputers clause of thas contract, (2) litagation or settlenent of claims arising from the performance of this contract, or (3) costa and expenses of this contract to which the comptrolier Seneral or a duly authorized representative has taken exception shall, if necessary, continue until such appeals, litigation. claims, or exceptions are disposed of.
(End of clause)
(R 7-104.15 1975 JUN)
( E 1-7.103.3)
$52.2 / 5=1$ 5. REVISED FAR
(b) Tne Comptroller vencral of the United states or a duly authorized representative irom the General Accounting Office shall, until 3 years after final payment under this contract or for any shorter period specified in Federal Acquisition Regulation ( $F$ hR) Subpart 47 , Contractor Records Retention. have access to and tlie right to examane any of the Contractor's dizectly pertinent books, documento, papers, or other records involving transactions related to this contract.
(c) The Contractor agrees to include in first-tier subcontracts under this contract a clause to the effect that the Comptrolier General or a duly authorized representative from the General Accountang office shall, until 3 years after final payment under the subcontract or for any shorter period specified in FAR Subpart 4.7. have access to and the raght to examine any of the subcontractor's directly pertinent books, documents, papers, or other fecords involving transactions related to the subcontract.
"Subcontract," as used in this clause, exciudés (i) purchase orders not exceeding $\$ 10,000$ and (2) subcontracts or purchase orders for public utility services at rates established to apply undformiy to the public. plus any applacable reasonable connection charge.
(d) The periods of access and examunation in paragraphs (b) and (c) above for records relating to (1) appeals under the Disputes clause, (2) intigation or settlement of clazms arising from the performance of this contract, or (3) costs and expenses of this contract to which the Comptroller General or a duly authorized representative from the General Accounting office has taken exception shall continue until such appeals, litigation, claims, or exceptions are disposed of.
(End of clause)
(R 7-104.15 1975 JUN)
( R 1-7.103-3)

$52215-1$ 4. PHASE I FAR
(c) The contractor agrees to include in all subcontracts under this contract a provision to the effect that the Comptroller General or any authorized representative shall. until 3 years after final payment under the subcontract or any shorter period specified in FAR Subpart 4.7, have access to and the right to examine any of the subcontractor's directly pertinent books, documents, papers, of other records involving transactions related ito the subcontract. "\$ubcontract,* as used in this clause excludes (i) purchase orders not exceeding $\$ 10,000$ and (2) \$ubcontracts or purchase orders for public utility services at rates established to apply uniformly to the public.
paragraph repeated form page 091-8 fir clarity
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(c) The Contractor agrees to include an first-tiex subcontracts under this contract a clause to the effect th the Comptroller General or a duly authorized representatzv from the General Accounting Office shall, until 3 years after final payment under the subcontract or for any short period specified in FAR Surpart 4.7, have access to and tr right to examine any of the subcontractor's directly pertinent books, documents, papers, or other records involving transactions related to the subcontract.
"Subcontract," as used in this clause, excludes (1) purcha orders not exceeding $\$ 10,000$ and (2) subcontracts or [purchase orders for public utility services at rates established to apply uniformly to the public. plus any applicable reasonable connection charge.

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Tritie Examination of Records

4. PHASE I FAR
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(d) The periods of access in paragraphs (bl and (c) above
for records relating to (I) appeals under the Disputes
clause of thas contract, ( 2 ) litigation or settlement of
claims arising from the performance of this contract, or (3)
costs and expenses of thas contract to which the comptroller,
General or a duly authordzed representative has taken
exception shail, if necessary, continue until such appeais,
litigation, claims, or exceptions are disposed of.
(End of clause)
(R 7-104.15 1975 IUN)
(R 1-2.103.3)
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(d) The periods of access and examination in paraoraphs (b) and (c) above for records relatina to (1) appeals under the Disputes clause, (2) litigation or settlement of clams arising from the performance of this contract. or (3) costs and expenses of this contract to which the comptroller General or a duly authorized representative from the General Accounting office has taken exception shall continue until such appeals, latigation, claims, or exceptions are disposed of.
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(End of clause)
(R 7-104.15 1975 JUN)
(R 1-7.103-3)
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FINAL FAR Entity $15,106-2$
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NOTE* The entice text of this entity as issued for agency, industry, and public comment appears in Colum 4, and the entire text proposed for publication appears in Column 5. Any differences in these two colum not accounted for by the disposition codes and rationales reflect solely editorial changes.

As of 29 July 1982, this entity is current

## through MAC 76-35 and FPR Amendment No 221.



Control No./Page No.


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$\qquad$ Reviewer $\qquad$ Editor Fllanigan
4. PHASE I FAR

### 15.106-2 Audit clause.

This absection 3 mplements 10 U.S.C. 2313 (z). 41 U.S.C. $254(\mathrm{~b})$, and 10 U.S.C. $2306(f)$. The contracting officer shall insert the clause at 52.215-2, Audit, in all negotiated contracts except small purchases under Part 13. If the contract 1 s a facilities contract, the clause shall be used with Alternate I; otherwise the basic clauge shall be used.
$\mathrm{C} 5 / 15-02 / \mathrm{Mm} / / 15.106-2 / / \mathrm{I} / / \mathrm{Audit}$
$\mathrm{C} / \mathrm{A}$
$\mathrm{C} / 15-02 / \mathrm{Mm} / / / 15 \cdot 106-2 / /-/ /$ Audit
$5 / \mathrm{HIO}$
$52.215-2$ Audit.

As prescribed in 15.106-2, insert the following clause in all negotiated contracts except small purchases under part 13:

### 15.106-2 Audit--iegotiation clause.

This subsection mplements 10 U.s.C. $2313\{a\}$. 41 u S.C 254(b), and 10 U.S.C. $2306(f)$. The contracting officer shall insert the clause at $52 \cdot 215-2$. Audıt-Negotiation, in all negotiated contracts, except small purchases under part 13. In facilities contracts, the clause shall be used with 1ts Alternate I.

R5/15-02/EC//15.106-2//I//Audit--Negotiation
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R5/15-02/BCe//15.106-2//-//Audit--Negotiation */410
52.215-2 Audat--Negotiation.

As prescribed in $15.106-2$. insert the following clause 1 in all negotiated contracts. except small purchases under Part 13:



## 4. PHASE I FAR

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4,*+5-2
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## AUDIT (DATE)

(a) Examination of costs. If this is a costreimbursement, incentive, time-and-materials, labor-houx, or price-redeterminable contract, or any combination of these, the Contractor shali manntain-and the Contracting officer or a representative shall have the right to examine and audit-books, records, documents, and other evidence and accounting procedures and practices. sufficient to reflect properly all costs clamed to have been incurred or antloppated to be incurred in performing this contract. This right of examination shali include inspection at all reasonable thmes of the contractor's plants, or parts of them, engaged in performing the contract.
(b) Cost or pricing data. If the Contractor has aubmitted cost or pricing data in connection with pricing this contract or any modification to this contract, unless the pricing was based on adequate price competition, established catalog or market prices of comercial items sold in subgtantial quantities to the general public. or prices set by law or regulation, the Contracting Officer or a representative who is an employee of the Government shall have the raght to examine and audut all books, records, documents, and other data of the contractor (including computations and projections) related to negotiating, pricing, or performing the contract or modification, in order to evaluate the accuracy, completeness, and currency of the cost or pricing data. In the case of pricing any modification over $\$ 100,000$ to formally advertised contracts, the Comptroller General of the United States or a representative who is an employee of the Government shall have the same rights. The right of examination shall extend to all documents necessary to permit adequate evaluation of the cost or pricing data submitted.
52.2/5-2
5. REVISED FAR

## AUDIT--NEGOTIATION (DATE)

(a) Examination of costs. If this 18 a costreambursement, incentive, time-and-materials, labor-hour, o price-redeterminable contract, or any combination of these, the Contractor shall mantain-and the Contracting officer or representatives of the Contracting officer shall have th right to examane and audit--books, records, documents, and othor ovidence and accounting procedures and practices, sufficient to reflect properly all costs clamed to have been incurred or anticipated to be incurred in performing this contract. Thes right of examnation shall include inspection at all reasonable times of the Contractor's plants, or parts of them, engaged un performing the contract.
(b) Eost of pricing data. If the Contractor has submitt cost or pricing data 1 n connection with pricing thas contract or any modification to this contract, the Contracting officer or representatives of the contracting officer who are employees of the Government shall have the right to examine and audit all books. fecords, documents, and other data of the Contractor (including computations $\bar{a}$ projections) related to negotioting, pricing. or performin. the contract or modification, in order to evaluate the accuracy, completeness, and currency of the cost or pricy data. This right applies unlest the pricing was based on adequate price competition, establiahed catalog or market prices of commercaal items aold in aubstantal quantitzes the general public, or prices aet by law or regulation (sa subsection 15,804-3 of the Federal Acquisition Regulation (FAR) for an explanation of these terms). The right of examination shall extend to all documents necessary to permit adequate evaluation of the cost or pracing data符隹itted, along with the computations and projections upf

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(c) Reports. If the Contractor is required to furnish cost. Eunding, or performance reports, the Contracting officer or a representative who is an employee of the Government shail have the right to examine and audit books. recorda, other documents, and supportang materiall for the purpose of evaluating (1) the effectiveness of the Contractor's policies and procedures to produce data compatible with the objectives of these reports and (2) the data reported.
(d) Availability. The Contractor shall make avajlable at its office at all reasonable times the materials described in paragraphs (a) and (b) above, for examination, audit, ox reproduction, until 3 years after final payment under this contract, or for any shorter period specified in section 4. 705 of the Federal Acquasition Regulation (PAR). or for any longer period required by statute or by other clauses of this contract.
(1) If this contract 18 completely or partially terminated, the records relating to the work terminated shall be made available for 3 years after any resulting final termination settlement.
(2) Records relating to appeals under the Disputes claupe or to litigation or the settlement of claims arising out of the parformance of this contract shall be made avallable until such appeals, litigation, or elanms are dipposed of.
(e) The Contractor shall insert a clause contalning all the provisions of this clause, including this paragraph (e), in all subcontracts over $\$ 10,000$ under this contract, altering the clause only as necessary to identify properly the contracting parties and the contracting office under the Govermment prime contract.
5. REVISED FAR

52 215-2
(c) Reports. If the Contractor is required to furnish cost, funding, or performance reparts, the Contracting Officer or representatives of the Contracting officer who are employees of the Govermment shall have the raght to examine and audit books, records, other documents, and supporting materials, for the purpose of evaluating (1) the effectiveness of the contractor's policies and procedures $t$ produce aata compatible with the objectives of these report and (2) the data reported.
(a) Availability, The Contractor shall make available a it of $\bar{f}$ ice at all reasonable times the materials described in paragraphs (a) and (b) above, for examnation, audit, o reproduction, until 3 years after final payment under thas contract, or for any shorter period specified in section 4.705 of the FAR, or for any longer pericd required by stetute or by other clauses of this contract. In addition
(1) If this contract is completely or partially terminated, the records relating to the work terminated shall be made available for 3 year after any resulting final termanetion settlement; and
(2) Records relating to appeals under the Disputes clawe or to liztigation or the aettlement of claims axising under or relating to this contract shall be made available until such mppeals, intigation, or claims are disposed of.
(e) The Contractor shall insert a clause containing all the terms of this clause, including this paragraph (e). In all abcontracts over $\$ 10,000$ under this contract. alterir the clause only as necessary to identify properiy the contracting parties and the contracting officer under the Government prime contract.

$57 \times 15-2$
(End of clause)
(R 7-104.41 (a) 1978 AUG)
(R 1-3.814-2(a))
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## 5. REVISED FAR

(End of clause)
(R 7-104.41(a) 1978 AUG)
(R 1-3. $814-2$ (a))
(R 7-303.28)
(R 7-402.30)
(R 7-603.20)
(R 7-605.11)
(R 7-607.22)
(R 7-802.7)
(R 7-901.16)
(R 7-1702.15 1971 RPR \}
(R 7-1903.29)
(R 7-1909.24)
(R 7-2102.19)

## C5/15-02/MM01//15.106-2//I//Audit--Alternate I

Alternate I (DATE). If the contract is a facilities contract, add the following sentonce at the end of paragraph (a) of the basic clause:

The obligations and rights specified in this paragraph shall extend to the use of, and charges for the use of, the facilitiey under this contract.
(R 7-204.41(b) 1978 AUG)

Alternate I (DATE). In facilities contracts, add the following sentence at the end of paragraph (a) of the basic clause:

The obligations and rights specified in this paragraph
shall extend to the use of, and charges for the use of the facilities under this contract.
$(R$ P-104.41(b) 1978 AUG)
$(\mathrm{7} 702.48)$
$(R 7-703.41)$
$(R 7-704+33)$
FAR Entity 15, 15.1, 15.2, and 15.3
Control No. $/$ Page No. 022=17
Title Determinatzon and Findings
Drafter Quint
Reviewer Graham /Sumers Editor Flanigan
4. PHASE I FAR
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SDEPART 15.2--NEGOTHATION ADTHORITIES
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FAR Entity 15, 15.1, 45.2, and 15.3
Control No. /Page No. 022-18
cantacting by Negotiation; General Requirements for Negotiation; Negotiation Authorities: and
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Drafter quina Reviewer Grahar/Sumers Editor Elanigan
4. PHASL I FAR

## 15. 200 scope of bubpart.

(a) This subpart identifies the statutory anthorities (Including appilcation and limitationsi for uging nagotiation as a method of contracting. These authorities are exceptions to the general requirement for formal advertiging. Requirements for determination and findings to support use of sach authorities are in Subpart 15.3.
(b) The Federal Property and Administratite services nct of 1949 (41 $\mathrm{U}_{3} \mathrm{~S}=\mathrm{C}$. $252(\mathrm{c})$ ) and 10 U. S.c. 2304 (a), formerly refersed to as the hrmed services Procuremont act of 1947, each authorize, under certain conditions, the pegotiation of purchases and coneracts. The Departuent of Defense, coast Guard, and National Meronantics and Space Mdininiztration arg mblatet to 10 ․ S. C. 2304 (a). other execative agencies are subject to 41 U. S. C. 252 (c) .
(c) Conditions for the use of negotiation authoritite are Listed in 15. 201 through 15.217 feep Subpart 35. megotiation restrictiond for constraction contracts). Contracting officers shail use the $\mathrm{J}_{\mathrm{e}} \mathrm{S}_{*}$ Code citation applicable to their gency. Bach negotiatad contract shall contain a reference to the opeciflc authority under vhich it wat negotiated. Hbere appropriate, prioritics for use of a specific negotiation authority are included in the ifintations paraaraphs of this subpart.

### 15.200 scope of subpart.

(a) Thas subpart identifies the ttatutory authorities (ineluding application and ilmitatlons) for using negotiation as method of contracting. Thest authorities are exceptions to the general requirement for formal advertising. Requir*ments for determintions and finding to mupport use of thete authoritite are in subpart 15.3.
(b) The Federal Property and Administrative Servicen Act of 1949 (41 U.S.C. $252(\mathrm{c})$ ) and 10 U.s.C. $2304(\mathrm{a})$, formerly referred to as the Armed Servicea Procurement Act of 1947, each authorize, under certain conditions, the negotiation of purchases and contracts. the Department of Defense, Coast Guard, and Mational Meromaties and spac* Mdministration are subject to 10 O.S.C. $2304(\mathrm{E})$. Other executive agenciet are sublect to 41 U.8.C. $252(\mathrm{c})$.
(c) Conditions for the uee of neoctistion authorities are listed in 15.201 through 15.217 (the 36.401 for conftruction contracts). Contracting officert shall wet the U.s, Code citation applicable to their aqeacy. Note that 15.216 and 15.217 each 1 ist only one authority and that it: applicability 18 not extended by this requlation to aqencies not already subject to that authority. Exch neqotiated contract shall contain a reference to the opectifie authority under which it wan negotiated. When appropriate, prioritien for use of a specific neqotiation authority are included in the Iimitations paragraphs of this subpart.

PAR Entaty 15, 15.1, 15.2, and 15.3
Control No./Page No. 022-19
CONTRACTING BY NEGOTIATICN: General Requirements for Negotiation; Negotiation Authorities; and
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4. PHASE I FAR
15. 201 National emergency.
(a) A무냉ㅈIty.
(1) citation: 10 U. $5 . \mathrm{C}_{\text {. }} 2304$ (a) (1) or

41 U.S.C. 252 (c) (1) (see 15.200 .
(2) Purchases and contracts may be negotiated if ietermined to be necesgary in the public interest iuring a tational emergency declared by congress or the President. $t$ present. state of national emergency exists by xeason uf Presidential Proclamation No. 2914 of Decenber 16, 1950.
15.201 National emergency.
(a) Authoritzes.
(1) Citation: 10 U.S.C. 2304(a)(1) or

41 U.s.C. 252(e)(1) (ase 15.200).
(2) Purchases and contracts may be negotiated if determined to be necessary in the public interest during a national emergency declared by Congrest or the President. At prestent, a state of national energency exista by reason of Presidential Proclamation No. 2914 of December 16. 1950.
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Control No./Page No. 022-20
CONTRACTLNG BY NECOTTATIG: Genezal Requirements for Aegotiation; Nepotiation Authorities; and Title Detemmination and Findings
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| 15.201 | 15.201 |
| (b) Application- |  |
| (1) As requiced by 41 b.S.C. 252 (c) (1) and 10 O.s.C. | (b) Application. (1) As required by 4) U.s.c. 252(c)(1) and 10 U. S.C. 2304 (a) (1), it has been determined necestary |
| 230 (a) (11. It has been determined nece ebary in the public | in the public interest doring this period of national |
| intaretst during this period of national energency thet contracta be neqotiated by executive agencles under these | energency that contrsets be neqotiated by executive agencien under these authorities- |
| anthorities- <br> (i) in keeping with the labor aurplos set-aside program; | (i) In keeping with the labor furplus area set-aside program: |
| (1i) fot thilateral mall business set-asides; and | (in) For unilateral emali business get-asides, and |
| (1ii) to further the Balance of Payments program. | (iii) To further the Balance of Payments (nee Subpart 25.3) program. |



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|  | $15.201(\mathrm{~b})$ <br> 5. REVISED FAR <br> (2) In addition, it has been determined for those agenctes subject to 10 U.S.C. 2304 (a)(1) (sea $25.200(b)$ ) that contracte may be negotiated under thas authority in the following instances: |
|  |  |
|  |  |
|  |  |
|  | (1) For disaster area programs; |
|  | (11) For the totai or any part of the requirements set |
|  | aside that are not filled by awards made in accordance with |
|  | the terms of the Notice of Labor Surplus Area Set-Anide, |
|  | When the use of formal advertising is not feagible and |
|  | practicable under the carcumstances and no other negotiation authority 2 s more appropriate; and, |
|  | (11i) To place the total or any part of the requirements |
|  | set aside (untlateral or joint) that are not filled by awards to small business conceras when the use of formal |
|  | advertising is not. feasible and practicable under the |
|  | circumstances and no other negotiation authority is more |
|  | -prate |




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### 15.202

(c) Litittationg Brery contract neqotiated under these authorities shail be supported by determination and findings justifying the ur use and signed by the contracting officer (15. 3xx). These authorities shall not be uged when neqotiation is authorized for purchases of $\$ 10,000$ or leas faee 15. 203) or for purchases outside the United statem (seo 15.206).
(c) Limitationg. Every contract negotiated under $t^{2}=\overline{=}$ authoritxes shall be upported in a determination and fandings lustifying the use of the eppropriate anthorit
and signed by the contracting officer (15.307): These and simned by the contracting officer (15.307): These for purchasen of $\$ 10,000$ or lese (see 15.203 ) or for purchases outaide the United states (see 15.206 ).

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CGNTRACTING BY NEGOTLATICN: General Requirements for Negotiacion; Negotistion Authorities: and Title Determination and Findings

| Drafter | Quinn | Reviewer | Graham / Sumbers | Editor |  |
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 e authority for milateral set－asides 145.201 or for int etetesides $(15.215)$ shall be ten m hen negotiations

 $r$ bit re spiting contract；even though one or more

negotiation is authorized for purchase outside the United
 the authority for unilateral eftenfice（15．201）or for joint eftrifides（15．215）shall be cited．When negotiations have been initiated under another authority in this subpart， that authority shall be cited an the negotitition authority for any re⿻弓⿰丿丨贝刂灬luling contract，even though one or more contract e of s io，000 or less may result．


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contracting by Negotiation; General Requirements for Negotiation; Negotiation Authorities, and Title Determination and Findings


## 4. PHASE I PAR

## 5. REVISED EAR

204 Personal of professional services.
(a) Anchority.
(1) Citation: 10 Us. O. $_{2} 2304$ (a) (4) or

41 D.S.C. $252(\mathrm{c})(4)$ (see 15.200 )
(2) Purchases and contracts may be negotiated for personal professional services.
15. 204 Personal or professional services.
(a) Authorities.
(1) Citation: 10 U.s.c. 2304 (a)(4) or

41 U.S.C. 252(c)(4) (see 15.200 ).
(2) Purchases and contracts may be negotiated for personal or professional services.
fol Application. These authorities shan be used only yen all of the following conditions hivebmen satisfied:
(1) If personal services (see Subpart 3604, they are squired to be performed by an individust contractor in arson (not by a concern) : or, if profederomil cervices, aeq Hay be performed either by an individual contractor in *tron or by a concern or organization.
(2) The services are of a professional nature, or are to e performed under Government supervision and paid for on a sine basis.
(3) Acquisition of the services is authorized by law and accomplished in accordance with both the requirements of gay such law and applicable agency procedures.
(b) Application. These authorities shall be aced only when all of the following conditions have been satisfied;
(1) If personal services, they mut be performed by an individual and not by a concern (professional services, on the other hand, may performed by an individual contractor in person or by a concern or organization) (ste part 37).
(2) the services are of a professional nature. or are to be performed under Government supervision and paid for on a time basis.
(3) Acquisition of the services is authorized by law and is accomplished in accordance with the requirements of any such law and applicable agency procedures.

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205 services of educational institutions.
a) A Apthoztyy-

1) Citation: $100 . \mathrm{S} . \mathrm{C}, 2304$ (a) (S) or
\$1 b.s.c. 252 (c) (5) (see 15.200 ).
(2) purchabes and contracte man be negotiated for any Firee to be rendared by any university, college, or ot ber cational institution. (bl $\frac{\text { dop } 11 \text { cation }}{\text { The }}$ following illustrate examples of
 borities:

13 paccational or vocational training services rendered connection vith the training and education of personnel, $i$ for related necessary matorial, services, and supplies.
(2) Experimental, developmental, or research work ciduing mervictas, tests, and reports necessary or -idental theretor: and related reports.
(3) Analyses, studies, or reports.
(c) Limitations. Except as authoxized for Educational Fice iqureenents (zee subpatt $36 . x$ ), these authoritiles ili not be used when negotiation is anchorizea for rchasēs of $\$ 10,000$ or less (15. 203) or for parchases eside the united States (15.206).

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5. PEVISED PAR
(c) Limitations. These authorities shall not be used to negotiate contracts for services when any other authority in this subpart is available and appropriate.
15.205 services of educational institutiens.
(a) Authorities.
(I) Citation: 10 U.s.c. $2304(\mathrm{a})(5)$ or - 41 ע.s.c. 252 (c)(5) (see 15.200 ).
(2) Purchases and contracts may be negotiated for any sarvice to be rendered by any university, college, or other educational mnatitution.
(b) Application. Examples of services by a university, college, or other educational institution that may be contracted for under these authoritien ares
(1) Educational or vocational training services rendered in connection with the training and education of personnel, and for related necessary material, services. and supplies.
(2) Experimental, developmental, or research work (including services, testib, anc report necesting or incidental to this work). and related reports.
(3) Analyses, studies, or reports.
(c) Enmatations. Except as authorized for Educational Service Agreements, these authorities shall not be used when negotiation 1 s authoriced for purchases of 810,000 or less (15.203) or for purchases outside the United stetes (15.206).


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## 4. PEASE I FAR

15. 206 Purchsges outgide the Onited States.
(a) Aythority.
(1) Citation: 10 U.S.C. 230月 (a) (6) or

41 U.S.C. 252 (c) (6) (вee 15.200) *
(2) Purchases and contracts way be negotiated if the supplies or services are to be acquired and used outside the tnited states, ics possessions, territories, and puerto Raco.
(b) ppolication. Thase authorities thall be used only for acquigition of supplies of services whi ch are actually purchased from sources outoide and used outside the linits of the Dnited statts and its posereasions, such as supplies or services (including construction) for overseas tritallations of for the ose of overteas personnel.
(c) Itititatione When these authorities are available for the negotiation of a contract, no other negotiation authority shall be used, nor shall formal advertiging be used.
15. 207 Medicines or medical suppliea.
(a) Authorlty.
(1) Citation: 10 U.S.C. 2304 (a) (7) of

41 B.S.C. 252 (c) (7) (fee 15. 200).
(2) Purchases and contracts may be negotiated for medicines or medical supplies.
(b) hpolication. rbese authorities shall be used ony for supplies that are peculiar to the field of medicine. ineluding technical equiphent such as surgical and orthopadic appliances, X-ray supplies and equipment, and the 1Ke, but not including prosthetic equipment.
(c) Lippetations.
(1) Every contract negotiated under these autborities shall be supported by a detervimation and findings fustifying their use and signed by the contracting officer (see 15.3xy) . These authorities shall not be used when negotiation is authorized for purchases of $\$ 10,000$ or less (15.203), or for purchases outside the united States (15.206).
 advance publicity shall be given regarding the supplies Lnvolved and other relevant considerations for a peria of at ledet 15 days before contracting under this authority.

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15.206 Purchases outside the United States.
(a) Authorities.
(1) Citatzon: 10 U.5.C. $2304(\mathrm{a})(6)$ or 41 U.s.C. $252(\mathrm{c})(6)$ (see 15,200 ).
(2) Purchases and contracte may be negotiated if the supplies or services are to be mequired and used outside the United States, itz possession. its territories, and Puerto Rico.
(b) Application. These athorities anall be used only to mequire supplies or servicen that are metually purchased from sources outside and used outiside the linita of the United states, its ponetsibions, itw territories, and Puerto Rico, such as supplian or aervires (including construction) for overaeas instaliations or for the use of overgeas personnel.
(c) Limitations. When these authoritien are available the negotiation of a contract, no other negotiation authority hall be used. nor mall formal adverticing be used.
15.207 Medıcines or medical supplies.
(a) Authorntzes.
(1) Citation: 10 U.S.C. $2304(\mathrm{a})(7)$ or 41 U.s.C. 252(c)(7) (see 15.200).
(2) Purchases and contracts may be negotiated for medicines or medical supplies.
(b) Application. These authorities shall be used only for supplies that are peculiar to the field of medreine. including technical equipment such as surgical and orthopedic appliances, X-ray supplies and equipraent, and thinke, but not including prosthetic equipraent.
(e) Limitations. (i) Every contract negotiated under these authorities shall be supported by a determination and findings justifying the use of the appropratate authority and signed by the contracting officer (iee 15.307). These avthorities shali not be used when negotiation is authorized for purchases of $\$ 10,000$ of iess (15.203). or for purchases outside the United States (15.206).
(2) Whenever it is determined to be practicable, suntable edvance pubizcity shall be given regarding the supplies involved and other relevant considerations for period of at least 15 days before contracting under these authorities.


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## 4. PHASE I PAR

\$5. 208 supplies purchased for authorized resale.
(a) Authority.
(1) Citation: 10 D.siC. 2304 (a) (8) ox

41 O.S.C. 252 (c) (B) (see 15. 2001 .
(2) Purchases and contracts may be negotiated for supplies purchased for authorized resale.
(b) Apolfatiop- These authorities shall be umed only for purchases, for regale through conmassaries or other siminar facilities. orainarily these purchases will involve only brand nate or proprietary articles required by custorers of the gelling activities.

## (c) Himitationg.

(1) Evexy contract negotiated under these authorities shail be supported by a determination and findings justifying their ase and signed by the contracting officer (see 15. $3 \times x$ ) These atrehorities shall not be uked when neqotiation is authorized for purchases of $\$ 10,000$ or less. (15.203). for purchases outside the onited states (15.206). or for subsistence supplies (151209).
(2) Whenever it is determined to be practicable, guitable advance pubilcity shall be given regarding the supplies involved and otber reievant consideratione for a period of te least 15 days before contracting under these authorititas.
15. 209 subsistence supplies.
(a) Buthority.
(1) Citation: 10 U. S-C. 2304 (a) (9) or

41 U.S.C. 252 (c) (9) (see 15. 200).
(2) Purchases and contracts may be negotiated for perishable or nomperishable subsistence supplies.
(b) Applifation. Thest authorities ay be used for the purchase of any and ail kinds of subsistence supplies.
(c) सtritctitong. These authorities shall not be used when neqotiation is authorized for purchases of $\$ 10,000$ or less (15.203) or for purchases outside the United States (15.206).
15. 210 Impracticable to secure competition by formal adrertising.

## (a) Authoxity.

$$
\text { (1) citation: } 10 \text { ग.5.c. } 2304 \text { (a) (10) or }
$$

(2) Purchages and contracts may be negotiteted for gupplies or services tor which it is impracticable to secure competition.
15.203 Supplies purchased for authorized resale.
(a) Authorities.
(1) Crtation: 10 U.S.C. $2304(\mathrm{~F})(B)$ or

41 U.S.C. 252 (c)(B) (see 15.200).
(2) Purchases and contracts may be negotiated for supplzes purchased for authorgzed resale.
(b) Application. These authorities shall be used only for purchafes for resale through equmissaries or other similar ficilities. ordinarily, these purchases will involve only brand name or proprietiry articles desired or preferred by custoners of the selling activities.
(c) Eimitatione. (1) Every contract negotiated under these authoritien shall be supported by a detezmination and finding: juptifying their ust and signed by the contracting officer (see 15.307). Theae athorities shall not be used when negotistion is authorised for purchasers of $\$ 10,000$ or 1ese (15,203), for purchames outaide the United state $(15.206)$. or for mbeistence upplies $\{15.209$ ).
(2) Whenever it is determined to be practicabie, uitable advance publicity shall be given zegarding the supplites involved and other relevant considerations for a period of at least 15 days before contracting undar theee authorities.

### 15.209 Subsistence supplies.

(a) Author童ties.
(1) Citation: 10 U.s.c. 2304(a)(9) or 41 U.S.C. $252(\mathrm{c})(9)($ see 15.200$)$.
(2) Purchases and contracts may be negotlated for perishable or nonperishable subsiftence mpplies.
(b) Application. These authorities may be used for the purchase of any kind of ubsistence eupplied.
(e) Lamitations. These authorities thall not be used when negotastion if atthorized for purchases of $\$ 10,000$ or 1 ess (15.203) or for purchases outtade the United States (15.206).
15.210 Impracticable to secure competition by formal advertising.
(a) Authorities.
(1) Citation: 10 U.s.c. $7304(a)(20)$ or

41 U.s.C. $252(\mathrm{c})(10)$ (see 15.200$)$.
(2) Purchases and contracts may be negotiated for supplies or setvices for which $1 t$ if impracticable to secure corapetition.

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Reviewer Grahau/Sumbers Editor Flanigan
15.210

## 4. PHASE I FAR

(b) Application. The following iliustrate circunstances In which these authorities may be used:
(1) When supplies or services can be obtainea only from one person or firk ("sole source of supply").
(2) Hhen combetition is precluded because of the existence of patent rights, copyrights, secret processes, control of basic zaw matexial, or similar circumstances (however, the mere existence of such rights or circumstances does not in and of itself justify the use of this authoxity) (see subpart 27. $x$ ).
(3) When bids have been solicited using forpal advertising (see fart i4y, and no responsitw bid bas been recelved trom - respongible bidder, or gtep one of two-step formal advertising resulta in no or only one acceptable technical proposial.
(3) When bids have been solicited using formal advertisi= (see Part 14), and no responsiva bid has been received from eresponsible bidder. or step one of two-step formal advertlaing results in no or oniy one acceptable technical proposal.
(4) When bids have been solicited using formal advertising (ftes Part 14), and the responsive bid or bids do not cover the guantitative reguirements of the invitation for bids, in which oase regotiation 25 permitted for the remaining requintments.
(4) When bids have been solicited using formal advertasin (see Part 14), and the responsive bid or bids do not cover the quantitative requarements of the invitation for bids. , Which case negotiation is permatted for the remaining requirements.
(5) When acquixing electric power or energy, gas fnatural ox manuftactured. water, or other utility services or men the contemplated contract is for construction of a part of a utility aystem, and it would not be practicable to allow a contractor othar than the utility conpany itaelf to work upon the system.
15.210 5. REVISED FAR
(b) Application. Illustrative circumstances in which these authorities may be used are:
(1) When supplies or services can be obtained oniy from one person or firm ("sole source of supply").
(2) When competition 15 precluded because of the existan= of patent tights, copyrights, secret processes, control of basic raw material, or similar circumstancos (however, the mere existence of such right or circumstances does not in and of itself justify the use of these authorities) (see Sabpart 27.X).

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15.210(b)
4. PH 3" I FAR
$13.210(b)$
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(6) When acquiring training film, motion picture
(6) When acquaring training Eilu, motion picture production, or manuseripts.
production, manuseripts, or aimiler producte or mervices.
(7) When acquiring technical nonpersonal services
involving the assembly, instailation, or servicing for inatruction with respect to themy of equipment of a highly technical or specialized nature.
(B) then accuiring studies or aurveys otbec than for services of educational ingtitutions $\{15.205)$ of for emperifental, developpental. of research work (15.211).
(9) When acquiring constroction maintenance, repairs. alterations, of inspection, and the exact nature or amount of the work to be done is not known.
(10) When acquising stevedoring, terninal, warehousing or aminchinq zervices, and either the rates are ettablisbed by Inw or regulation or tre so numerous or complen that it is Imprateticable to set then forth in the specifications of an invitation for bids.
(11) When acquiring commercial transportation, including eervices for the oper*tion of Governtentromed vehicles. vebsols, or-aixcraft and time, space, trip, and Foyage charters, except for transportation services furnished by comuon carriers ffor which negotiation is authorized under 15.215, and Section 321 of the Transportation Act of 1940 . 49 U. S. C. 65) -
(12) When acquiring services related to the acyuisition of perishable subsistence fuch as protective storage, ieing. processing, packaging, handing, and transportation), when it is inpracticable to advertise for such services a sufficient time In advance of the delivery of the perishable subgistence.
(13) When it is impossible to draft. for invitation for bids, adequate specifications or any other adequately detalled deacription of the required suppliea or aervices.
(7) When acquiring technical nonpersonal services involvang the assembly, installation, or servicing for instruction in these matters) of equipment of a highly technical or specialized nature.
(8) When acquiring studies or surveys other than those calling for services of educational in?titutions (15.205). for experimental, developmental. or research work (15.211).
(9) when acguiring construction, mantenance, repeirs. alterations, or inspection, and the exact mature or amount of the work to be done is not known.
(10) When acquirang stevedorang, terminal, warehouting, G switching services, and the rates either are (i) established by law or regulation or (ia) so numerous or cómplex that $2 t$ If impracticable to set them forth in tne specifications of an invatation for bade.
(11) When mairing commercial transportation, fncluding (i) bervices for the operation of Governmentowned vehiclet, vessela, or aircrafe and (il) time epace, trip, and voyage charters, except for transportation fervices furnithed by common earriera ffor which negotiation is authorised under 15.215, and section 321 of the Transportation het of 1940. 49 U.S.C. 10721).
(12) When acquiring pervices related to the acquisition oi perisinble subsistence (such as protective storage, icing, processing, packaging, handiing, and transportation), when it is impracticable to advertise for such services a
tufficient tine in advance of the delivery of the perishabl= subsistence.
(13) When it is impossible to draft, for an invitation bids, adequate specifications or any other adequately detailed description of the required supplien or services.
$\qquad$

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15.210 5. REVISED FAR
(c) Limitationg.
(1) Every contract negotiated under these autborities shali be zupported by a determination and findings fostifying their use and signed by the contracting officer (15.3xx) -
(c) Limatations. (1) Every contract negotiated under these authoritret shall be tupported by a determination and finding: justifying the use of the appropriate authority and signed by the contracting officer (15.307).
(2) This authority shail not be used when negotiation is athorized by any other anthority, except that these authorities shall be used if appropriate in preference to the suthorities to negotiate purchases not to be publiciy disclosea (15.212).
(2) These authorities hall not be used when negotiation is authorized by any other authority, except that these authorities shall be used if appropriate in preference to the authorities to neqotiate purchafel not to be publicly disciosed (15.212) and for foreign military malep (ase illustrated in aubparagraph (b) (i8) above).
(3) The application illustrated in (b) (3) and (4) above shall not be used when "Small Business Restricted Advertising has been used. However, these authorities may be ased in the case of partial set-asides, unless the contracting officer decides that the failure to obtain sufficient responsive bids was caused by the existence of the set-asides (see 15.201).
(3) The applications illustrated in subparagraph: (b)(3) and (4) above shall not be usted when smali fusiness Restricted Advertising has been used (zee subpart 19,X). However, these authorities may be used in the case of partial set-asides, unless the contracting officer decides that the failure to obtain tufficient responsive bide was caused by the existence of the met-asides (zee 15,201).


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15. 211 Experimental, developmental, or research work.
(a) Authority-
(3) Citation 10 U.5.C. 2304(a)(11) or 41 D.S.C. 252 (c) (11) (see 15.200).
15.211 Experimental, developmental, or research work.
(a) Authorities.
(1) citation: 10 U.s.c. $2304(\mathrm{a})(11)$ or

41 U.s.C. $252(\mathrm{c})(11)($ see 15.200$)$.
(2) Purchases and contracts may be negotiated for suppiles of exvices that the bead of the agency determines to be for experinental. developmental. or zeaearch work, or for making or furnishing aupplies for experisent, test, development. of se search.
(2) Purchases and contracts may be negotiated for suppliws or services that the agency head determines to be for experimental, developmental, or reaearch work, or for making of furnishing supplies for experiment, test, development, or research.
(b) Applfction The following illustrate circumgtances In which theae authorities might be naedt
(1) Contracts relating to theoretical analysis, exploratory studies, and experiment in any field of science or technology.
(2) Developnental contracts calling for the practical application of investigative findings and theories of a scientific or technical nature.
(3) Contricts for such quantities and kinds of equipment, suppilies, parts, acceseories, or patent rights thereto, and drawings or deaigns thereof, as are necessary for experinent. development, research, or test.
(4) Contracts for services, testa, and reports necessary or incidental to experimentai, developmentai. or research work.
(b) Application. Illustrative circumetances in which these authorities might be uted are-
(1) Contracte relating to theoretical malysis, exploratory studies, and experiment in any field of ecrence or technology;
(2) Developmental contracts calling for the practical application of invegtigative findings and theories of a acientific or technical nature;
(3) Contracts for such quantitiet and kinds of equipnent, súpplias, partf, accessories, or patent right to these, and drawinga or depigns of ther, as are neceatary for experiment, development, regearch, or teat; and
(4) Contracts for tervices, testi, and reports necessary or incidental to experimental, developmental, or research work.


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(c) Limitytions.
(1) Every contract negotiated under these authorities shall be spoported bv determination and findings
justifying therr uae. See charts $x z$ and $x x$ in $15.3 x y$ for signatory azthority.
(2) Theae athorities shall not be uged for purchases of $\$ 10,000$ or less $(15,203)$ or for purchases outside the Dndted states (15.206).
(2) These authorities shall not be used for-
(i) Purchases of $\$ 10,000$ or less when negotiation could $2=$ euthorized under 15.203. or for purchatep outaide the Unit $=$ States when negotation could be authorized under 15.206;


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15.211(c)
(3) These authorities shall not be rsed for negotiated contracts aith educational Institutions. Those contracte shall be negotiated in accordance with 15.205.
(4) These authorities shall not be uged for contract: for quantity production, except that such quantities may be purchased under these authorities as are necesanay to permit complete and adequate experiment, development, research, or tert. Regearch or development contracts that eall for the production of a reasonable number of experimental or test models or prototypes are not contracts for quantity production.

### 15.211 (c)

(i1) Negotiated contracts with educational inttitutions, Which shall be negotiated in accordance with 15.205; or
(11i) Contracts for guantity production. except that quantities necassary to permit complet and adequate experament. development. research, or teating may be purchased under these authorities. (Research or develos= contracts calling for the production of a reasonable 텊ㄴㅡㅡㄹ of experimental or test modelia or prototypes are not contracts for quantity production.)
15. 212 Purchases not to be publicly Aisclosed.
(a) Anthority.
15.212 Purchases not to be publicly disclosed.
(a) Authoritues.
(1) Citations 10 U.E.C. 2304 (a)(12) or 41 U.S.C. $252(\mathrm{c})(12)$ (see 15.200 ).
(2) Purchases and contracts may be negotiated for suppli or eervices whose acquisition the agency head
determanes thould not be publicly disclosed because of the oharacter, ingredients, or components. or bervices whose $\quad$ 皿qutsition the ben of the agency cetermines should not be publiciy discload because of their charactex, ingredients, or components.
(b) Amolicatiog. These authorities may be uged for parchases or contracts claggified meonfidentialm or higher, or when, because of other conslderations, the contract
(b) Application, These authorities may be used for purchases or contracts classified "confidential" or higher or when, because of other considerations, the contract thould not be publiciy disclosed.
(c) Limitations.
(1) Every contract negotiated under these authorities shail be supported by a deteraination and findinge justifying their use and signad by the agency heat (see 15. 3xII -
(2) These apthorities shall not be used in preference to any other athority in 15.201 throngh 15.217. except as otherwise provided in 15. 204 (c).
(c) Limitations. (1) Every contract negotiated under these authorities shall be supported by $\Delta$ determination ā finding: justifying the use of the appropriate authority wigned by the agency head (see 15.307).
(2) These authorities shall not be used in preference to any other authority in 15.201 through 15.217. except as provided in 15.204(c).

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## 4. PHASE I FAR

5. REVISED FAR
6. 213 Technical equipment requiring standardization and interchangeability of parts.
(a) Aluthority.
(1) Citation: 10 U.S.C. 2304 (a) (13) or. 41 U.S.C. 252 (c) (13) (see 15.200).
15.213 Technical equipment requiring standardization and interchangeability of parts.
(a) Authorities.
(1) C2tation: 10 U.S.C. 2304 (a)(13) or

41 U.S.C. $252(\mathrm{c})(13)($ see 15.200$)$.
(2) Purchases and contracts may be negotiated for equipment that the head of the agency determines to be techaical eguipment for which standardization and interchangeability of parts are necesgary in the public interest, and acquisition by negotiation is necesgary to sevze that tandardization and interchangeability.
(2) Purchases and contracts may be negotiated for equipment that the agency head determines to be technical equiphent for which (i) standardization and anterchangeability of parts are necessary in the publac interest and (1i) acquisition by negotiation is neceseary 4 -hsure that tondarditetion and interchangeability.
(3) In adaition, 41 U.S.C. $252(c)$ (13) requires that the aqency head determine that acguisition without advertising . Is neceseary in special situations or in pariticular localities in order to assure standardization of equipment and interchangeability of parts and such gtandardiaation and interchangeability are necearary in the public intereat. -
(3) In addition, 42 U.S.C. $252(\mathrm{c})(13)$ requires that, if its authority la to be used, the agency head must determine that acquinition without advertising wi necessary in special situations or in particular localities in order to ateure standardization of equapment and interchangeability of parts and much standardization and interchangeability ar necessary in the public interest."

## (b) application.

(I) These authorities may be osed for the acquisition of additional mits and replacement items of specifisd makes and models of technical equipment and parts-
(i) When 41 U.S.C. 252 (c) (13) is applicable, for use in apecial bituations or in particular localities; or
(b) Appizeation. (1) These authorities may be used to acquire adiftional units and replacement items of specifi= makes and models of technical equipment and parts-
(i) When 41 U.s.c. $252(c)(13)$ applies for use in special situations or in particular localities; or

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15.213(b)(1) 4. PHASE I FAR
(ii) When technical reguirements of the armed forces or other agencies are involved and the equipment or parts are-
(A) For forces mose primary miseion is to participate in combat and the integral supporting elements of those forces;
(B) An integral part of or need in direct support of a yeapons systen; or
(C) For use in hlabxa or Havain or ootside the remainder of the Onited States, in theaters of operations, on board maval veseelo, or at advanced or detached bases;
and which have been adopted as standard items of aupply in accordance with procedures prescribed by agencies.
(2) The following illostrate circumstances in winich these authorities may be used:
(i) To ilnit the variety and guantity of parts that must be carried in stock.
(1i) To make possible, by standardization, the avallability of parts that may be interchanged among items of damaqed or worn equiprent.
(1ii) To acquire from selected suppliers technical equippent that is a vailabie from a number of suppliert but that wond have such varying pertormance or desigh charecteristics (notwithetanding detailed specifications and riqid inspection) as would prevent standaraization and interchangeability of parts.
(iv) To provide a uniform configuration of equipment for marerial programed for Military Assistance Program (MAP) countries.
(3) Before an agency deciaes to acquire speciffed makes and models under these authorities, it shall consider the Eollowing:
(i) Tbe feasibility, from an economical and timely deployment stangpoint, of distributing or redistributing on a selected qeographic basis the equipment and parts already in the aupply systen.
(2) These authoraties may be used, for example-
(1) To limit the variety and quantity of parts that must be carsied in stock;
(ii) To make available, by standardization, parts that be interchanged among items of damaged of worn eguipment:
(iii) To acquire from selected suppliers technical equipment that 15 available from a number of suppliers but Ehat otherwize would vary so in performance or design eharacteristies (notwithstanding fetailed specifications * rigid inspection) as to prevent standardization and interchangeability of parts: or
(iv) To provide a uniform confaguration of equapment fox material programmed for Military Assistance Program countries.
(3) Before an agency aechaes to acquare specified makes and models undez these authorities, it shall consider-r
(2) The feasibility, from an economical and thmely deployment standpoint, of distributing or redistributing a a selected geographic basis the equipment and parts alres 2n the supply system;

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15．213（b）（3）4．PHASE I FAR
（1i）The practicalalilty or economy of using or developing an agency design that would permit etandardization of components and parts under an agency standardization proqram．
（iii）whether standardization will fapair the capability of industry to meet mobilization requirenents of ail aqencies．
（iv）The practicability of interchanging parts and cannibalizing equipment．
（v）The probability that futare acquisition of the selected ifem of equipuent can be effected at reasonable prices．
（vi）Whether the standardization will appreciably reduce the variety and quantity of parts that mat be carzied in stock．
（19ii）Whether standardization will tender obsolete jarge dollar value inventories of equipnent and supporting parts dready in the Fupply system withcot compenseting benefitt．
（viii）Whether standardization will enhance agency misaion capability．
（ix）Posaible sayings in training personnel or in acguiring technical ilterature．
（x）Whether the standardization will adversely affect existing specifications and atandards．
（xi）The degree to which the current design of the gpectifed wake and model has been changed fros the design of the equipont of the supply system．
（xii）In cases when agency nission capability is not overriaing，whether the nenticipated benefite andifor cost savings from standardiation will equal or exceed the expected benefits andor cost savinge that would be obtained throuch monestricted competition．
（年）In arriving at a determination to standardize under cheae anthorities，the originating agency mbal conault witb pther user agencies，if appropriate，in order to insure the fail beatefte of the action．
（5）Standardization approval under these arthorities thall pe for a stated period of time that beare a reationable felationship to the ilife of the equipment．Ageney crocedures shall provide for periodic reviews to determine whether the standardiattion should be continued，revised，of Sancelled．
1

## （c）Lifnit遇tions．

（1）Every contract negotiated under these authoritwes ＇ball be supported by a determination and findings ustifying theix use and signed by the agency bead isee $\left.{ }^{1} 5.3 \times x\right)$ ．

## 15．213（b）（3） <br> 5．REVISED FAR

（11）The practicability or econony of using of developing an agency design that would perait standardization of components and parts under an agency standardization program：
（11f）Whether standardization will mpaif the capability of industry to meet mobilization requirements of all agencres：
（Iv）The practlcability of Interchanging parts and camnibalızing eguipment；
（（v）Whether future acquisition of the selected $2 t e r$ of equipment can be effected at reasonable prices；
（vi）Whether standardization will appreclably reduce the varlety and quantity of parts that mutt be carried in stock；
（vii）Whether gtandardization will render obsolete large dollar value inventories of equipment and tupporting parts already in the supply system，without compensating benefits，
（VIIf）Whether standardization will enhance agency mission capability：
（tx）Possible savings in training personnel or in aequiring technical－I⿰亻弋一𫝀ature；
（x）Whether standardization wil adversely affect existing specifications and ftandurds：
（xi）The degree to which the current design of the mpecified make and model has been changed from the design of the equipuent in the supply syrtem：and
（xii）In cases when agency mamion capability is not overriaing，whether the benefits and／or cogt gavings anticipated from standardization will equal or exceed those to be expected from unregtricted competition．
（4）In arfiving at a eetermination to standardize under these puthorities；the originating agency shall consult other user agencies，as appropriate，in order to ensure the full bencfic of the action．
（5）Standardization approval under these authoritues thali be for a stated period bearing a reasonable relationship to the infe of the equipment．Agency procedures shall provide for periodic reviews to determine whether the otandardization should be contanued，revised，or canceled．
（c）Limitations．（1）Every contract neqotiated under these authorities shall be spported by a determination and findings justifying the use of the appropriate authority and Flaned by the agency hedd lsee 15．307）．

(i) The equipment constitutes technical equipment;
(ii) Standardisation of the equipment and interchangeability of its parta are necessary in the public interest: and
(iii) When 41 U.S.C. 252(c)(13) applies, negotiation is necesary in mpecial atuations or in particular localities to assure required standardization and interchangeability; Of
(1v) When 10 u. $8 . c, 2304($ a) (13) Bpplies, acquisition of the equipment or of its parts by negotintion is necessary to
 of it: parts.
(4) Each agency shal2 maintain, on a current basifat, a mater list of iteme for which determinations and findings have been made under these authorithes.

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## 4. PEASE I FAR

15. 214 seqotiation after advextising.
(a) inthority.
(1) Citation: 10 t. S.C. $2304(a)(15)$ or 41 U.S.C. $252(\mathrm{c})(14)$ (see 15.200 ).


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15.214 Negotiatron after advertising.
(a) Ruthoritzes.
(1) Citation: 10 U.S.C. 2304 (a) (15) or 41 U.S.C. $252(c)(14)$ (see 25.200 ).
(2) Purchases and contracts may be negotiated for supplies or sexpicet for which the bead of the agency determinos that bia prices rictelved after formal adyertising are onreasonable me to all or part of the requiraments, or were not independently reached in open competition.
(2) Purchases and contract may be negotiated for suppli= or services for which the agency head determines that bid prices recelved after formal advertiling are unreasonable = to all or part of the requirements, or were not independently reached in open competition.
(b) Applisetitog Thege authoxitiets thall be uaed only when the acency head has determindi, in accordance with the requirements of $15.3 x \%$ that bid prices, fiter formal advertsing for soch supplies or services, are nnreasonable or were not independentiy reached in open competition. Indieations of possible violation of antitrust laws of collusive bidding are to be reported to the Department of Justice as provided in 3.ExX.
(b) Application. These authorities shall be used only when the aqency head determines, in accordance with the requirements of 15.307 , that bid prices, after formal advertising for auch supplies or services, are unressonabl= or ware not independently reached in open competition. Indzcations of possible violation of antitrugt laws or collusive bidding are to be reported to the Department of Justice as provided in 3.303 . Title Determination and Findings
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(1) Every contract negotiated under these authorities shall be supported by adetermination and fyndings justifying their use and signed by the agency head or where permitted by law, the agency head's designee (see charts in 15. 3x(x) -
(c) Limitations. (1) Every contract negotiated under these authorities shall be supported by a determination and findings justifying the ute of the appropriate authority and signed by the agency head or, where permitted by law, the agency head's designee (sae Table $15-1$ in 15.307).
(2) After such determination, and after rejection of all bxds, no negotiated purchase or contract shall be entered into unless--
(a) Prior notige of intention to negotiate and a reasonable opportunaty to negotiate have been given by the contracting officer to each responsible bidder that submitted a bid in response to the invitation for bids;
(21) The negotiated price is the lowest negotaated price offered by any respansible supplier: and
(iii) The negotiated price is lower than the lowest rejected bid price of a responsible bidder, as determined the agency head.
15.215 Otherwhe authorized by law.
(a) Authoritizen.
(1) Citations 10 日.s.c. $2304(a)(17)$ or

4 U.S.C. 252 (c)(15) (sete 15.200 ).
(2) Purchases and contracts may be negotiated if otherwie authorlzed by law.

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(b) hoplication This protision preserves the authority to neqotiate contracts conferred by other legislation. for example, the Small Business Act (15 U.S.C. 631 j is the basis for the negotiation of contracts aet aside for small Business concerns through joint determinatione.
(1) When negotiating purswant to this authority, cite the abthorizing lav in the purchaae or nontract instrument.
(b) Application, This statutory provision preserves the authority to negotiate contraets eonferted by other legislation, For example, the Small Business Act (15 U.s. 632) is the basis for the negotiztion of contracts set asi for tmall businest concerns through_jolnt determinations.
(i) When megotiating pursuant to thrs authority, cate *" authorizing law in the purchase or contract instrument.
(2) When 10 d. S.C. 2304 (a) (17) applies, this authority shal be paed oniy to the extent authorized by agency acofalatition regulations.
(3) When 41 J. s.c. 252 (c) (15) is applicable-
(1) The requitement of 41 U. \&-C. 254 gihall also apply, and
(1i) other statutory authority of an agency to procure mithout advertising or mithout regard to gection 3709 of the Revised statutes ${ }^{\circ}$ is construed to a uthorize negotiation purguant to 41 0. S. c. 252 (c) (15) and withont regard to the advertising requirements of 11 J. S.C. 252 (c) and 253.
(2) When 10 U.S.C. $2304(a)(17)$ applies, this authority shall be used only to the extent authorized by agency acquis
(3) 梠en 41 O.S.C. 252 (c) (15) applies--
(i) The reguirement of 41 0,S. $C .254$ (concerning stch matters as contingent fees, eraminetion of records, and Farious aspects of cost-type contracting) shail also apply and
(ii) Other etatutory muthority of an agency to acquire "wthout advertzizing" or without regard to section 3709 g the Revispu Statuter" ie construed to authorife negotlatiz purnvant to 41 U.S.C. $252(\mathrm{e})(15)$ and without regard to the edvertising tequirements of 41 U. $\bar{f} . C .252(c)$ ans 253.

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## 4. PHASE I FAR

15. 216 Technical or specialized suppiles requiring substantial initial investment or extended period of preparation for manufacture.
(a) Authority.
(1) Citation: 10 U. S.C. 2304 (a) (14).

41 U.5.c. 252 (c) contains no comparable
negotiation authority (see 15. 200) =
(2) Purchases and contracts nay be negotiated for technical of special supplies that the head of the agency determines to require s subatintial initial invegtaent or an extended period of preparation tor manufacture and for which it is determined that formal sdvertising vould be inkely to result in additional cost to the Government by reason of daplication of investment or would zegult in duplication of nectedary prepacation, which vould undaly delay the acquialtion of the property.

## (b) Apollacteion.

(1) This authority may be used for the acquisition of
 tanke. radar. guibed missiles, rockets, and mimilar itent of equipment mafor components of any of the foregoing and any rupplies of tochnical or specialited nature that ma be necessary for the use or operation of any of the foregoing. Sueh acquisition qenerally involves-
(i) Eigh starting costs already paid for by the Government or by the supplier:
(1i) Prelibinery engineerfing and developanert work that would not be useful to or mable by any other supplier;

## (iii) Elaborate apecial tooling already açuired;

(17) substantial time and effort aiready expended in developing a prototype of an initial production model: or
(v) Important deaign changes that will continue to be develaped by the suppliex.
(2) This authority will, in general, be used in situations whin it is preferabie to place a production contract with the suppliez that developed the equipnent. In such instances, the Government would (i) be asmurad of the beneflit of the techniques, tooling, and equipment a Iready acquired by that supplief, or (ii) avoid undue delay arising fron mew suppliex having to acquire such techniques, tooling, and equipment. Bowever, this exception should not be used to apoid duplication of private investant unleas the duplication would be likely to result in additional cost to the Government.

## 5. REVISED FAR

15.216 Technical or specialized supplies requiring substantial inıtial investment or extended period of preparation for manufacture.
(a) Authority
(1) Citation: 10 U.S.C. 2304(a)(14).

41 U.S.C. $252(\mathrm{c})$ contains no comparable negotiation authoraty (see 15.200).
(2) A purchase or contract may be negotiated for technienl or special supplies if the agency head determines-
(i) That they require a substantial initial investment or an extended period of preparation for manufacture: and
(11) That formal advertasing (A) would be i,2kely to result in diditional cost to the Government because of duplication of investment of ( $B$ ) would result in duplacation of neceseary preparation that would delay the acquisition unduly.
(b) Application. (1) This authority may be used to hoquire technical or specialized tupplies such an arcraft, tanks, radar, guided miseiles, rockett, and mimilar items; their major componenta; and any supplies of technical or specialised noture that may be needed for their use of operation. Such acquisition genetally involveg-m
(1) High tatarting costs already pald for by the Government or by the suppliex:
(ii) prelininaty engineering and development work that would not be useful to or usable by any otber supplier;
(iii) Elaborate special tooling already acquired;
(iv) Substantial tige and effort already expended in developinq a prototype or an initial production model; ar
(v) Important design changes that will continue to be developed by the supplier.
(2) This authority will, in general, be used in situation. when it 15 preferable to place a production contract with the supplier that developed the equipment. In such instances, the Government would (1) be assured of the benefit of the techniques, tooling, and equaprent already acquired by that supplier, or (il) avold undue delay arisic from a new supplier having to acguire such technigues. tooling, and equipment. However, this exception should not be vied to avoid dupizcation of private investment, unless the duplication would be likely to result in additional cos to the Government.


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(c) Limatations. Thas authority shall not be used unless the agency head determanes, in accordance with the requarements of 15.307, that--
(c) timitations. This authority shall not be tued unless the agency heac hat determined. in accordance with the requirements of $15,3 \times x$, that-
(1) The supplies are of a technical or special nature requíring a gubstantial initial investment oz an extended period of preparation for manufacture; and
(1) The supplies are of a technical or special nature requiring a substantial initial investment or an extended period of preparation for manufacture: and
(2) Contracting by formal advertising either-
(1) Would be lukely to result in additional cost to the Government by reason of duplication of investment; or
(2i) Would result in dupilcation of necessary preparation that would unduly deldy the acquipltion.
15.217 purchases in the interest of national defense or industrial mobilization.
(a) Authority
(1) Citation: 10 U.S.C. $2304(\mathrm{a})(16)$.

- 41 U.S.C. $252(\mathrm{c})$ contann no comparable negotiation authority (see 15.200).
(2) Purchases and contracts may be negotiatad if the agency head determines that (i) it is in the interest of national defense to have a plant, mine, or other facility, or a producer, manufacturer, or other supplier avaiłable for furnithing property or services in case of a national emergency: or (11) the interest of industrial mobilization in case of such an emergency, or the interest of nitional defense in maintaining active engineering. retearch, and development, would otherwise be subserved.
(b) Application. This authority may be used to implement plans and programs developed under the direction of the agency head to provide an industrial fobilisation base that can mett production requirements for essential aupplies and gervices. Uhe of this authority should be considered, for inttonce, when it it necessary to-d
(1) Keep vital facilities or suppliers in business or make them available in the event of a national emergency;
(2) Train a selected supplies in the furnishing of critical supplies or aervicet, prevent the loss of a supplier's ability and employees' skills, or maintain active engineering, research, and development work;
(b) Application- This authority may be used to implement plans and programs developed mader the dtrection of the agency head to provide an industrial nobilization base that can meet production requiremente for eseential military suppiles and services. The following illustrate situations when the of this authority should be considered:
(1) When mecessary to keep vital facilities or suppliers in business: or to make them available in the event of a sational emergency;
(2) When it is neceasary to train a selected supplier in the furnishing of critical supplies of services, to prevent the loss of a supplier"s abillity and employees" stilis, or to maintain active engineering, research, and development sork.

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## 4．PHASE I FAR

（3）When necessary to maintain properly balanced sources of gupply for meeting the requirement of acquisition prograng in the interest of industrial mobilization．（When the quantity required is substantially larger than the quantity that must be avarded in order to meet the objectives of this athority，that portion not required to meet such objectives will ordinarily be acquired by formai advertising or by negotiation under another negotiation authorityl．
（4）When necessary to 1 init competition for current acquisition of selpcted supplies or services approved for production planning under the Industrial Preparedness Proqrard to planned producers with whon industrial preparedness aqreenents for those items exist；or to limit award to offerors who agree to enter into industrial preparedness agreements．
（5）When necempary to create or maintain the reguired domertic capability for production of exitheal fupplies by inmiting competition to items manufactured in the onited gtates or the Onited Stateg and Canada it in not necessany to use this negotidtion authority when acquiring items cotered by subpart 8．2）．
（6）When necengary to continue in production contractors wo are manufacturing critical items when thore would otherwise be a break in production．
（7）When necestary to divide current production requirentints anong two or more contractors to provide for an caequate industrial mbilization base．
（c）Innitationge Every contract negotlated nader this unthordty bhail be supported by e deteryimetion and findings
 This authority shali not be used unleas the gency head hes determinad in accordance vith the requitiments of subpart 15.3 that：
（1）It is in the interest of national defense to bave a particular plant．咞ine，or other facility or a particulax producer．manufacturer，or other supplier apailable for furnighing supplies or services in case of a national amergency，and negotiation is necessary to that end：
（2）The interest of industrial nobilization，in case of a national entrgency woald be subserved by negotiation with a partieular supplier：or
（3）The intertst of national defense in maintaining active engineeringe rasearch，and development，would be subserved by negotiation with a particuler supplier．

## 15．217（b）

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（3）Malntain properly balanced sources of supply for meeting the requirements of acquisition programs in the interest of industrial mobilization（when the quantity required is substantialiy larger than the quantity that must be awarded in order to meet the objectives of this authority，that portion not required to meet such objectives will ordinarily be acquired by formal advertising or by nogotiation under another negotiation authority）：
（4）Limit competition for current acquisition of selected supplien or Eervices approved for production planning under the Industrial Preparednesa Program to planned producers with whom industrial preparedness agreements for those items exist，or limit award to offerors who agree to enter anto industrial preparedness agreements：
（5）Create or mantain the required domestic capability for production of critical supplies by limiting competition to itemp minufactured in the United States or the united stituts and Canada（it is not necessary to use this nosptiation authority when acquiring iteme covered by Sutpare 8．2，Jewel Bearingi and Related Items）
（6）continue in production contractora that are minufacturing critical items when there would otherwise be byfak in production；or
－（3）Divide current production requirements among two or mofe contractors to provide for an adequate indu＊trial moilization base．
䄍等
（iv）Limatationt．Every contract negotiated under this hority shall be supported by determination and findings fitifying its ute and signed by the agancy head laee 4＋307）．Thas authority shall not be ueed uniest the agency hite determines，in accordance with the requirements of 2．ppart 15．3．that－
数
（1）It 15 in the interest of national defense to have a perticular plant，mine，or other facility or a particular producer，manufacturer，or other supplier available for furnishing supplies or services in case of a national emargency，and negotiation 1 s necessary to that end；
（2）The interest of industrial mobilication in case of a national efuergency would be subserved by negotiation whth a particular supplier：or
（3）The anterest of national defense in manitaining active engineering，research，and development，would be subserved by negotiation with a particular supplier．
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4. PBASE I FAR<br>SUBPART 15.3--DETERWTNATION AND FINDINGS

## 5. REVISED FAR

SUBPART 15.3--DETERIINATIONS AMD FIUDINGS TO JUSTIFY NCGOTEATION

### 15.300 scopt of subpart.

This subpart preseriben policies and procedures for the use of determinations and findings (Dsp's) to justify the use of negotiation in lieu of formal advertiaing. Requiraments for Dif's for other actions can be found weh the appropriate vubject matter.

## 15. 301 pefinition.

A DEF is a special form of written approval by an enthorized official that is required by etatute or Fequiation as a prerequisite to taking certain contracting actions. The edetermination" is a concluaion or decision supported by the windings". The findings are statetants of fact or rationale essential to support the determination and turst cover each requirenent of the gtatute or regulation.

## 15. 302 General.

(a) A DEF in required to authorize use of certain statutory futhortties for contracting by negotiation in lieu of formal advertising. Paragraph (c). Eimitations," under the negotiation authorities described in Subpart 15.2 states whether a D8F is required (see also 15.307).
(b) A DEF shall ordinarily be for an Individual purchage or contract. Onder the proceduces described in 15.303. class DsF's may be executed for classes of purchases or contracts.
(c) The approvel to negotiate granted by a Dsp is restricted to the proposed acquisition (s) reasonabiy detcribed in that DiF. DFP's may provide for reasonable degree of flexibility, if much flexibility if not inconsistent with the negotiation authority invoived. Furthermore, in the application of an approved DeP to negotiation aituation; reasonable variations in estimated quantities or prices are permitted, unless the D\&F specifies otherwise. Increases in quantities could occur, for exarople, when negotiations reveal adattional quantities could be obtained under an approved program, within available tunds, and on terms favorable to the Government.
15.300 scope of subpart.

This subpart prescribes policies and procedures for the use of determanations and findings (DEF ${ }^{2}$ s) to justafy the use of negotiation in lieu of formal advertising.
Requirements for D\&F's for other actions can be found wath the appropriate subject matter.

### 15.301 Definition.

"Determination and findings" (Dtp) means a special form of written approval by an authorized official that is required by etatute or requlation as a prerequisite to taki re certain contracting setions. The "determination" is Cciclusion or decision supported by the findings." The fiumings are atarements of fact or rationale easential to sumport the determantion and must cover each requaranen of the statute or requiation.

### 15.302 General.

(a) A D\&F 15 required to authorize use of certain statutory authorities for contracting by negotaation in lie of formal advertising. Paragraph (e). "Limitations." under the negotiation authorities described $2 n$ Subpart 15.2 stat= whether a DEF is required (see also_15.307).
(b) A D\&F shall ordinarily be for an indiviaual purchase or contract. Under the procedures described in 15.303. class DEF's may be executed for classes of purchasts or contracts.
(c) The approval to negotiate granted by a DtF is restricted to the proposed acquisition(s) reasonably described in that DEF. D\&F's may provide for a reasonable degree of flexibility, if such flexibility $2 e$ not inconsistent with the negotiation authority involved. Furthermore, in the application of an approved Def to a negotiation situation, reasonable variations in estimated quantities or prices are permatted, unless the D\&F specifie otherwise.

EAR Entaty 15, 15.1, 15.2. and 15.3
Control No./Page No. 022-49 CONTRACTING BY NBGOTAATIOX
Detemulnation and Findings
Title Detemmination and Fiadings

| Orafter | Quinn | Revzewer | Graham /Summers | Editor | Flatigan |
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| 4. SHASE I EAR | 5. REVISED FAR $15.302$ |
| :---: | :---: |
| (a) When an option is anticipated, the Def shall state the pproximate quantity to be amarded initially and the extent if the increare to be pernitted by the option. | (d) When an option 25 anticipated, the DaF shall state the approximate quantity to be awarded inatially and the extent of the increase to be permitted by the option. |
| 15.303 clast DaP's. <br> (a) A clate D 部 authorizes negotiation of clasages of purchases or contricts. A class may consist of the same or related supplies or teryices or require essantialiy identices fuetification under the same negotistion zuthority. <br> (b) The findings in class Dap shall fully support the uae of the proposed negotiation authozity eithet for the elast of iteme as whole or for each item. <br> (o) A olats pif bhall be for apecified period, with the explration dite stated in the document. | 15.303 ClaEs DEF* <br> (a) A class Def authorizes negotiation of elasseg of purchuses or contriets. A elass miny consist of the fame or related supplies of services, or requite estentially identical justification under the same negotiation authority. <br> (b) The findings in a class DaF shall fully support the use of the proposed negotiation authority elther for the class of items as a whole or for each item. <br> (c) A class DfF shail be for a specified period. with the expiration date stated in the document. |
| (d) 青 clates Dip shall not be construed to authorize negotiation of any purchase or contract within the class which featubly and practicably coula be acconpliahed though Formil avertising. | (d) A class bef shall not be construed to authorize negotiation of any purchase or contract within the elase that feasibly and practicably could be acoomplished through formal advertising. |
| 15.304 Coatent. <br> Each Dif chall set forth enough facts and circumstances to cleariy and convincingly justily the apecific determination mede and establish that the use of formel advertising would not be feasible of practicable, As minimum, each DfF shall include, in the prescribed agency tormat, the fozlowing informationt <br> (a) Identification of the agency, the contrecting activify, and specific identification of the document as Determination and Findings. <br> (b) Nature and/or description of the action benng approved. | 15.304 Contant. <br> Each off shall set forth enough facts and circumstances to clearly and convincingly gustify the specific determanation made and estabilsh that the use of formal advertising would not be feasible or practicable. As minimum, each Dta shail include, in the prescribed agency format, the following information: <br> (a) Identification of the agency and of the contractang activity, and specific identification of the document as a "Determination and Findings." <br> (b) Nature and/or description of the action beang approved. | Title Determination and Findinge


15.304
4. PHASE I PAR
(C) citation of the appropriate gtatute and/or regulation
15.304
5. REVISED PAK upor which the $D E F$ is based (see Subpart 15.21.
(c) Citation of the appropriate statute and/or regulation upon which the D\&F is based (see Subpart 15.2).
(a) Finding that detail the particular circunstances, Facts, or reasoning essentisi to mupport the determination. Necessary supportang documentation shall be obtained from appropriate requirements and technical personnel.
(e) A determination, based on the findings, that the proppred action is justifled under the applicable atatute or regulation.
(f) Expiration date of the D6F, if required (see 15.306).
(g) The siqnature of the official authorized to sign the DST (aete 85.307 ) and the date signed.
15.305 Supersession, modification, and cancellation.
(a) If DEF is superseded by another DeF, that ection shall not render invalid any action taken under the originas D $\mathrm{FP}_{\mathrm{F}}$.
(b) A modification of the DEF will not require canceliation of the folicitation If the Daf, as modified, support negotiation under any applicable statutory authority.
(c) If a DEF is cancelled, but the facts continue to support negotiation under a statutory authority for which a DEF is not required (see Subpart 15.2), canceliation of the solicitation is not reguired.
(d) Findings that detail the particular circurastances. facts, or reasoning essentlal to support the determanation Necessary supporting documentation shall be obtained from appropraze fequirements and technical personnel.
(e) A determination, bssed on the findings, that the proposed action ts justified under the applicable statute o regulation.
(f) Explration date of the DsF, if required (see 15.306).
(g) The signature of the official authorized to sign the D\&F (see 15.307) and the date signed.
15.305 Supersession, modification, and cancellation.
(a) If a Def in superseded by another baf, that action shali not render invalid any action taken under the oragir DEF
(b) A modification of the DfF will not requare cancellation of the solicitation if the DGF, as modified. supports negotation under any applicable statutory authority.
(c) If a DuF is canceled, but the facts continue to Eupport negotiation under statutary authoifty for whach a Dsfis not requared (see Subpart 15.2), cancellation of the nolicitation is not required.

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CONTRACTING BY NEGCTIATION: General Requirements for Negotiation; Negotiation Authoritiesi and
Title Detemination and Findings


## 4. PHASE I YAR

### 15.306 Expiration.

Explration dates are required for class Dspis and are optional for individual D\&F's. Authority to act under der expires when it is exercised or on an expiration date specified in the document, whichever occurs first. Then a request for proposal has been furnished to prospective contractor before the expiration date, the athority under the Dif will continue until award of the contract (s) resulting from that solicitation.

### 15.306 Expiration.

Expıration dates are regulred for class D\&F's and are optional for individual D\&F's. Authority to act under a D\&F expires when it is exercised or on an expiration date specified in the document, whichever occurs first. When a request for proposal has been furnished to prospective offerorm before the expiration thte, the authority under the DFF will continue until ward of the contract(b) resulting Erom that colicitation.
15. 307 Signatory authority.

### 15.307 Signatory authority.

When a DEF is required, it shall be tigned by the appropriate official before the solicitation is issuad. Authority to sign and/or delegate signature authority for prfis approving usa of various negotiation authorities is as bhown in Table $I_{*}$ Under the applicable statuter, heads of agencies may not delegate their authority to Eifgn DfF's except as shown in trable $I$.

Whan DEF in required, it shall be signed by the appropriate official before the solicitation in issued. Authority to sign and/or delegate signature authority for Df?* approving use of various negotiation authorities is af shown in Table 15-1. Under the applicable tetatutes. heads of agencien may not delegate their muthority to bigh Dfr"s exespt shom in Table 15-1.

FAR Entity 15, $15.1,15-2$, and 15.3
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CONTRACTINE BY NEGOTLATLOA; General Requirements for Negotiation; Nagotiation huthorities, and Title Devermination and Findiags


15,307


Table I - continued

25307
 afficer when meither the contract nor ay eingle
modification will be orex $\$ 100,000$. When it is known in advence that the scope of the contract will be
expanded to include additional phages or then it will be phames or when it ulll be antimated coste will be used to determine the level for Eignature.
 negotiated under 10 0.s.c. $2304(1)(21)$ shall be tigned only by the agency head.
(For agencies subject to 41 U.S.C. $252(\mathrm{c})(11)$ )

Induvidual DifF' for contract Inegotinted under 41 U.S.C. $252(\mathrm{e})(11)$ shali loe shgned by the ageney hesd when more than $\$ 25,000$ w121 be obligated. Authority to - ign Det' boy be delegated to a ohief offtem
responsible formenntricting when nether the contract not my EIngle modificacion will be over $\$ 25,000$. When 1t in known in advance that the toope of the coneract the sope of the concract will be typandad co inciuge additional phowen or then it total estimated coite vill be used to determine the level of Figndture.
Clase Dtr's for contracts negotieted under 41 U.S.C. 252(e)(11) shall be signed anly by tite ageney head.

FAR Entity 15, $15.1,15,2$, and 15.3

## Drafter Quinn

 Reviewer Graham /Summers Editor Flanigan
15.307
5. REVISED FAR


## 15. 308 Retention and filing.

Signed originals of all Dits and copies of supporting documents shall be retained by each agency for at least 6 years from the date of signature.

4. PHASE I FAR

HOTE: The Entire text of chi entity as issued for agency, industry, and public comment appear a in Colum in 4, and the entire text proposed for publication appear e in colum 5, Any differences in these two columas not accounted for by the disposition code and rationale reflect solely editorial changes.

CURREMCI STATRIENT: As of July 4, 1992, this FAR entity is current through DAC 176-27.


FAR Entity $154 \% 1510$ (fomerly 159 ) Control No/Page No 201-3 Solfcitation and Recempt of Proposals and Quotathons, Preaward and Postamard Netzflcations, Title Protests, and Mistakes
Drafter Quinn ____ Reviewer Sunmers/cole_ Editor Flanigan

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## 5. REVISED EAR

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$154 \& 1510$ (formerly 159 )
Solacitation and Receipt of Proposals and Quatations, Preaward and Postaward Notifacatzons,
Title Protests, and Wistakes



（a）Requests for proposals（RFP＇s）or requests for すuotations（RFQ＇s）are used in neqotfated acquisitions to communicate Government requirements to prospective contractors and to solleit proposals or quotations from them．Except as permitted by paragraph（f）below， contracting officers shall issue written solicitations． Solicitations shall contain the information necessary to znable prospective contractors to prepare proposals or zuotations properly．Solieitation provisions and contract clauses may be incorporated into sollcitations and contracts by referenee，when authorized by subpart 52.1 ．
（a）Requests for proponala（RFP＇s）or requetet for quotation（ $R F^{*}$＊）are us屯 in negotiated acquitition to commuicate Government reguirementa to prospective contractor：and to solicit proposale or quotations from them．Except as permitted by paragraph（t）below， contracting officers shall issue written molicitatzons． Solicitations shell contain the information necossary to enable prospective contractors to prepare proposala or quotation properly．solicitation provisions and contract cleuses may be incorporated into solicitations and contracts by reference，when wifthorized by subpart 52.1 ．

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Solicitation and Recede of Proposals and vocations, Yreaward and Postawarc Notifications, Title Protests, and Mistakes
Drafter Quint E_________ Editor Flanigan
4. PHASE I FAR
4. PHASE I FAR
(d) A proposal received in response to an RFP is an offer that can be accepted by the Government to create a binding contract, Either following negotiations or, when authorized by 15.610 , without discussion. Contracting officers should normally issue rtip"s when they consider it reasonable to expect prospective contractors to respond with offers, even though they anticipate negotiations after receipt of offers. An RFP shall not be used for a solicitation for information or planning purposes.
(a) A proposal received in response to an RFP in on offer that can be accepted by the Government to create a binding contract, either following negotiations or, when authorized by 15.610, without discursion. Contracting officers should normally itu RFP' when they consider it reasonable to expect prospective contractor: to respond with offers, even though they anticipate negotiation after receipt of offers. An APp shall not be used for solicitation for information or planning purposes but may be used for solicitation involving cost comparisons between Government and contractor performance (see $7.302(b)$ ).


Solicitation and Receipt of Proposals and Uuota: 10 n , Preaward and Fostaward Notifications.
Title Protests, and Mistakes

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4. PHASE I PAR
(e) A quotation received in response to an $A F Q$ is not an offer and cannot be accepted by the Government to create a binding contract. It is informational in character and requires subsequent bilateral action of the parties to form a contract. An RFQ may be used when-
(1) The Government does not intend to award a contract on the basis of the solicitation but wishes to obtain price, delivery, of other market information for planning purposes (gee 15.405); or
(2) Due to the nature of the requirerent, the Government anticipates that prospective contractors cannot respond with offers but can respond with quotations preliminary to extensive negotiations.
(e) A quotation received in response to an RFO is not an offer and cannot be accepted by the Government to ereate a binding contract: It is informationaj in charecter and requires subsequent bilateral action of the parties to form a contract. An KFO may be ufed when=-
(1) The Government does not intend to award a contract on the basis of the solicitation but wishes to obtain price, delivery, or other market information for planaing purposes (set 15.405): or.
(2) Because of the nature of the reguirement, the Government anticipates that prospective contraetor: cannot respond with offers but can respond with guotations preliminary to extensive negotiationg.


Contracting offices shall establish, maintain, and use lists of potential sources in accordance with 14.205.

Contracting offices shall establish. maintain, and use 118t: of potential sources in eccordance with 14.205.

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Sollcitation and Receiot of Proposals
d Quotations, Preaward and Poscaward Notificarzons,
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## 4. PHASE I FAR

15.404 Presolicitation notices and conferences,
(a) General. Presolicitation notices and conferences may be usedas preliminary steps in negotiated acquisitions in order to-
(1) Develop or identify interested sources;
(2) Request prelimanary information based on general description of the supplies or services involved;
(3) Explain complicated specifications and requirements to interested firms; and,
(4) Ald prospective contractors in later submitting proposals without undue expenfitire of effort, time, and poney.
5. REVISED FAR
15.404 Presolicitation notices and conferences.
(a) General. Presolicitation noticet and conferences may be used as prelimanary stepa in neqotiated acquisitions in order tom
(1) Develop or identify interested sources:
(2) Request preliminary information beed on a general description of the suppliet or services involved:
(3) Explain complicated apecifications and requirements to interested sources: and,
(4) Aid prospective contractors in later mubaitting proposale Without undue expenditure of effort, time, and money.
(b) Presolicitation notices.
(1) When presolicitation notices are usen, the contracting officer shall prepare and issue the notice to potential sources and shall synopsize the notice in accordance with 3ubpart 5.2.
(b) Presolicitation notices. (1) When prasolicitation notlcet are used, the contracting officer ehail prepare and IEsue the notice to potential sources and shall syopsize the notice in accordance with subpart 5.2 .
(2) Each presolicitation notice thall-
(i) Define as explicitly as possible the information to be furnished in the response:
(ii) Indicate whether it is contemplated that the presolicitation notice will be followed by conference and a formal solicitation; and
(2ii) Request an expression of interest in the contemplated acquisition by a specified date.
(2) Each presolicitation notice shall-
(1) Define as explicitly as possible the information to be furmished in the response;
(1i) Indleate whether it is contemplated that the presollcitation notice will be followed by a conference and a formal solicitation: and
(iii) Request an expression of interest in the contemplated aciuisition by a specified date.




15 404(b) 4. PHASE I FAR
(3) In complex acquisitions, the presolleztation notice may also request information pertaining to management, engineering, and production capabilities. Detailed drawings, specifications, or plans wili not normally be included with a presolicitation notice.

15404 (b)
(3) In complex acquisitions, the presolicitation notice may also request information pertaining to management. engineering, and production, capabilitieg, Detailed drawings, tpecificatione, or plans will not normally be included with presolicitation notice.
(4) The contracting officer shall furnish coples of the sollcitation to (i) all those responding affirmatively to the presolicitation notice and (ii) other prospective contractors upon their request (but see subpart 9.4. Debarment, Ineligiblifty, and Suspension).
(c) Presolicitation conferences.
(1) The presolicitation conference may be used only when approved at a level higher than the contracting officer. It shall not be used as a method for prequalification of offerors.
(4) The contracting officer hall furnish copies of the sollettation to (i) all those reaponding affirmatively to the presolicitation notice and (if) other prospectave contractor: upon thoir request (but ofe subpart 9.4, Debarment, Suspension, and Ineligibility).
(c) Presolicitation conferences. (1) The presolicitation conference may be used only when approved at a level higher than the contracting officer. It shall not be used as a method for prequalification of offerors.

(2) The contracting officer shall=-
(A) Advige all organizations cespondang to the presolicitation notice of the details of any pending presolicitation conference.
(1i) Conduct the conference and arrange for technical and legal personnel to attend, as appropriate: and
(iii) Furnish copies of the solicitation to all organizations attending the conference, unlesf they deeline to participate in the acquisition.

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## 4. PHASE I FAR

15.405 Solicitations for information or planning purposes.

When information necessary for planning purposes cannot be rbtalned from potential sources by more economical and less formal means, the contracting officer may determine in writing that solicitation for information or planning purposes is justified. Each such solicitation shall include on its face the provision at 52.215-3, Solicitation for Information or Planning purposes. The cost of responding to a solicitation for information of planning purposes may be allowable under 31.205-4.
5. REVISED FAR
15.405 Solicitations for information or planning purposes. 15.405-1 General.

When information necessary for planning purposes cannot be obtained from potential sources by more economical and less formal means. the contracting officer may determine in writing that a solicitation for information or planning purposes is justified. If this determination 28 approved, in accordance with agency procedures, at a level higher than that of the contracting officer, the contracting officer shall then 3 sue the solicitation. The cost of responding to a solicitation for information or planning purposes may be allowable under $31.205=4$. Bid and proposal (BEP) costs.
15.405-2 Solicitation provision.

The contracting officer shall insert on the face of each solicitation issued for information or planning purposes the provision at 52.215-3. Solicitation for Information or Planning Purposes.


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| Drafter | Quinn | Reviewer | Summers/Cole | Editor | Flanigan |
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4. PBASE I FAR
5.406 Preparing requests for proposals and requests for quotations.
5. REVISED EAR
15.406 Preparing requests for propoaals (RFp's) and requegta for quotations (RFO's).


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soluciration and Receipt of Froposals and Guotathors, Preawara and postawerd Noti fications Titie Frorests, and Mascakes
4. PGASE I FAR
15.406-1 Uniform contract format.

Reviewer Sumners/Cole Editor Flanigan
Editor Flanigan
Quinn
5. REVISED FAR
15.406-1 Uniform contraet tormat.

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Drafter Quinn ___ Reviewer Summers/Cole Editor Flanigan

## 4. PHASE I FAR

## 5. REVISED FAR

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Drafter Quinr $\quad$ Reviewer Summers/Cole Editor Flanzgan

## 4. PHASE I FAR

(a) Contracting officers shall prepare solicitations and resulting contracts using the uniform contract format outlined in Table 15-2 to the maximum practicable extent. The format Eacilitates preparation of the solicitatzon and sontract, as well as reference to and use of those documents by offerors and contractors. The uniform contract format is optional for acguisitions outside the United States, its possessions, territories, and Puerto Rico. It does not appiy to the following:
(1) Basic agreements (see 16.802).
(2) Construction and architect-engineer contracts (see Part 36).
(3) Shipbuilding (including design, construction and conversion), ship overhauls, and shtp repairs.
(4) Subsistence.
(5) Contracts requiring special contract forms prescribed elsewhere in this regulation that are inconsistent with the uniform contract format.

15 406-1
5. REVISED FAR
(a) Contractıng officers bhall prepare folicitations and resulting contracts using, to the maximum practicable extent, the uniform contract format outlaned in table 15-2. The format facilitates preparation of the solicitation and contract, as well as reference to and use of those documents by offerors and contractors. The uniform contract format is optional for acguisitions outside the united States, its possessions, its terrxtories, and Puerto Rico. It does not apply to the following:
(1) Basic agreemants (see 16.802).
(2) Construction and architect-engineer contracts (eee Part 36)
(3) shipbuilding (including design, construetion ind convertsion) , hip overhauls. and ship repairs.
(4) Subsittence.
(5) Contrects requiring special contract forms prescribed elsewhere in this regulation that are inconsistent with the uniform contract format.


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Drafter Quinn E__ Reviewer Sumpris/cole Editor Flanigan
5.406-1
4. PEASE I FAR
(b) Solucitations to whach the uniform contract format applies shali include Partts I, II, III, and IV. Upon award, contracting officers shall not physically include part iv in the resulting contract, but shali retain in their contract file Section $K$. Representations, certificatlons, and other statements of offerors or quoters, as completed by the sontractor. Award by acceptance of a proposal on the amard portion SF 33 or SF 25 incorporates Section $K$ in the resultant contract. Contracts resulting from Reg's or otherwise requiring a bilateral rocument shall incorporate section $k$ by reference in the signed contract.

15 406-1
5. REVISED FAR
(b) Solicitations to which the uniform contract format applies thall include Parts I. II. III. and IV (see 15.406-2 through 15.406-5), Upon award, contracting of ifeers shall not physically include Part Iy an the resuiting contract, but hall retain in their contract file Section K, Representations, certifications, and other etatements of offerors or quoteri, ts completed by the contractor. Award by aceeptance of a propotal on the award portion of 88 33 or gF 26 incorporates Section $K$ by reference in the resultant contract. Contracts resulting from RFO'm of otherwise requiring a bilateral document shall incorporate Section $K$ by reference in the signed contract.


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Solicitetaon and Receipt of Proposals and Quotations, Preaward and Postaward Notifications
Title Protests, and Mistakes



Part II-Contract CIauses
$\mathbf{I}$
Contrict clauses

Part III-List of Documents, Exhibits, and Other Attachments

3

Patt IV--Representations and instructions
List of documents, exhibits, ano other attachments

K
Representations,
certifieations: ond
other statements of
offerors of guoters
4. Instructions, conditions, and notzces to offerors or quoters

4 award

15 406-1


Section

## Part I-Whe Schedule

A
8 Supplies or services and prices/costs

Description/Bpectixcations/ work statement

Packbging and matring
Inspection and aceeptance

Deliverien or performance
contrect mandiferation date

Special contract requirements

## Part II-Contract Clause

I
Contract elauses

Part III-Hist of Documents, Exhibits, and Other Attachments
$\checkmark$
List of attachments

Part IV--Representations and Instrsetions

K Reprecentations,
certifications; and other btatement: of offerore or quoters

L Instructions, conditions, and notiees to offerort or quotert

Evaluation factors for awned

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4. PHASE I EAR
15.406-2 Part I- =The Schedule.

The contracting officer shall prepare the contract Schedule as follows

## 5. REVISED FAR

15.406-2 Part I- -The schedule.

* The contracting officer thill prepare the contract Schedule as follow


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Reviewer Summers/Cole Editor Flanigan
$5.406-2$
4. PHASE I FAR
(a) Section A, Solscitation/contract form:
(1) Prepare requests for proposals on Standard Form 33*, Solicitation, offer, and Award (53 .XXX), unless otherwise permitted by this regulation. The first page of the SF 33 18 the first page of the solicitation and includes section $A$ of the uniform contract format.
$15406-2$
5. REVISED FAR
(a) Section A. Solicitation/contract form.
(1) Prepare RFP's on Standard Form 33. Solicitation, Offer, and Award (53. XXX ) , unless otherwise permitted by Part 53. The first page of the si 33 is the first page of the solicitation and includes section A of the uniform contract format.
(2) Prepare requests for quotations on Standard form 18, Request for Quotations (53 .XXX) or on agency Forms providing for section $A$ of the uniform contract format.
(2) Prepare RFQ's on Standard Form 1B, Request for Quotations (53. XXX), or on agency forms providing for section $A$ of the uniform contract format.




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5.406-2
4. PHASE I FAR
(b) Section B, Supplies or services and prices. Include in the second page of the solfcitation braef descriptions of he supplies or services; e.q.e item number, rnational stock umber/part number if applicable, nouns, and quantities. the second page may be supplemented as necessary by standard orm 36, Continuation Sheet (53. XXX).
15.406-2
(b) Section B, Supplies or services and prices/costs. Include on the second page of the olieltation brifef descriptions of the.supplies of servicas; e.g., item number. nationil stock number/pert number if applicable, nouns, and quantitles. (This inciudes incidental deliverables Euch as manuals and reports.) The fecond page may be supplemented as necetbary by Stapdard Form 36. Contanuation sheet (53. $\mathbf{x X X}$ ).
(c) Section C. Description/specifications. Include any - description or specifications neededin adaition to section B (see Part In, Specifications, Standards, and Dther product Deseriptions).
(c) Seetion C. Description/specifications/work statement. Include my deacription or ppecificationt needed in addition to section B (see Part io. Specifications, Standards, and Other Product Descriptions\}.



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Solicitation and keceapt of Proposals and Uuotations. Preaward and Postaward Notifications, Title Frotests, and Mistakes
Draiter Quin Reviewer Summers/Cole Entor Flanigan
4. PHASE I FAR
(d) Seceion D, Packaging and marking. Provide packaging,
packinge preservation, and marking requirements, if any fee
$10.004(g))$
(e) Section E. Inspection and acceptance, Inciude inspection, acceptance, quality assurance, and reliability requirements (see Part 46, Government Quality Assurancé).
(9) Section G, Contract arministration data. Include any required accounting and appropriation dateand any required contract administration information or instructions other than those on the solleltation form.
(t) Section $H_{p}$ Special contract reguirements. Include a clear statement of any special conersct requirements that are not included in Section $I$, Contract clauses, or in other fsections of the unfform contract format.
(15.406-3 Part II--Contract clauses.

Section I, Contract clauses. The contracting officer shallinclude in this section the clauses reguired by law or by this cegulation and any additional clauses expected to apply to any resulting contract, if these clauses are not required in any other section of the uniform contract format.

[^21]```
15 406-2 5. REVISED FAR
(d) Section D. Packaging and marking. Provide packaging, packing, preservation, and marking requirements, if any fee 10.004(g)).
(e) Section E. Inspection and acceptance. Include Inspection, acceptance, quality assurance, and reliability requirements (see Part 46, Quality Assurance).
(f) Section F. Deliveries or performance. Specify the requirements for time, place, and method of delivery or performance (see Part 12, Contract Delivery or Performance, and 47.301-1).
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5. REVISED FAR
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(g) Section $G_{\text {, }}$ Contract administration data. Include any requixed accounting and appropilition deta and any required contract admanistration information or instryctions other than those on the solicitation form.
(h) Section $\mathrm{H}_{\mathrm{i}}$ Special contract requirements. Inciude a clear statement of any opecial contract requirements that are not included in Section I, Contract clauses, or in other tections of the uniform contract format.

### 15.406-3 Part II-COntract clauses.

Section I. Contract clauses. The contracting officer shall include in this section the clauses required by law or by thas regulation and any additional clauses expected to be incluced in any reaulting contract, if thepe ciauses are not required in any other section of the undform contract format. See Part 52, Solieitation Provisions and contract clauses.

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Reviever Summers/Cole Editor Flamigan

## 4. PHASE I FAR

15.406-4 Part III--Documents, exhibits, and other attachments.

1
Section J, List of documents exhibits, and other
 obte, and number of pages for each attached-document.
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### 15.406-4 Part III--Documents, exhibity, and other

 attachment:Section J. List of attachmente. The contracting officer hall litat the titie, date, and number of pages for each attached document, exhibit, and other attachment.
15.406-5 Part IV--Reptesentations and instructions.

The contracting officer shall prepare the representations and instructions as follows:
15.406-5 Part IV-Repyesentat $20 n$ and 1 anstructions .

The contracting officer thal prepare the representations解d instructions as follows;
(a) Section K; Representations: certifications; and other staterents of offerors or quoters. Inciure in this section Ehose solicitation provisions that require representations, certifications. or the subinission of other information by offerors or guoters.
(b) Section $L_{\text {f }}$ Instructions, conditions and notices to offerors or quoters. insert in this section solicitation provisions and other intormation and instruetions not reguired elsewhere to guide offerors or quoters in preparing proposals or quotations. Prospective offerors or guoters may be instructed to submit technical proposils in severable parts to meet agency requarements. The severable parts should provide for separation of technical and cost or prieing data. The instructions may specify further organization of proposal or quotation parts, such as (1) administrative, (2) management, (3) technicalr and (4) cost or pricing data.
(a) Section K , Representations, certifications, and other statempnt of offeroris or guoterg Include in thif ection those bolicitation proviabont that require representations, certifications, or the submispion of other information by offerory or quoters.
(b) Section $L_{\text {, }}$ Instructions, conditions, and notices to offerors or guotere insert in this section solicitation provisicrs and other information and instructions not required elsewhere to guide offerors or guoters in preparing proposals or quotations. Prospective of ferors or quoters may be instructed to submit technical proposals in teverable parts to meet agency requirements. The severable parts should provade for separation of technical and cost or pricing data. The instructions may specify further organization of proposal or guotation parti, sucin as (1) administrative, (2) management, (3) technical, and (4) cost or pricing data.

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(e) Section M, Evaluation Eactors for award. Identify any factors other than price that will be major considerations in awarding the contract. When technical proposals or quotations are requested and award will be based on technical and other factors in addition to price or cost, the sollecitation shall specify (1) the significant evaluation factors and (2) the relative order of importance the Government places on the evaluation factors.

## 15 406-5

(c) Section $\mathrm{N}_{\mathrm{I}}$ Evaluation factors for award. Identify any factors other than price that will be major considerations in awarding the contract (zee $15.605(e)$ ). When technical proposals or quotations ere requested and award wall be based on technical and other factors in addition to price or cost, the solicitation shall specify at least (I) the sagnificant evaluation factors and (2) the relative importance the Government places on the evaluation factors.
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## 4. PHASE I FAR

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### 15.407 Solicitation provisions.

(a) "All solicitations," as used in this section, means all requests for quotations (RFQ's) other than those for information or planning purposes and all request e for proposals (REPs).
15.407 Solicitation provisions.
(a) "All solicitations," at used in this mection, means ald requests for proposals (RFP's) and all requests for quotations (ReQ's) other than those for information or planning purposes. Gee 15.405 for the solicitation provision used with solicitations for information or planing purposes. $\qquad$ - -
(b) In accordance with $15.213(\mathrm{~d})$, the contracting officer may, upon the approval of the chief of the contracting office, insert the provision at 52.215-4, Notice of Possible Standardization, in all solicitations for supplies that subsequently might be standardized for applications specified in $15.213(\mathrm{~b})(\mathrm{i})$.


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4. punse I far
(b) The following provisions shall be included in all
solicitations, tegardiess of the applicability of the
uniformeontract format, except that those prescribed in
subpagraphs (9) through (12) apply only to RFpis: 52.215-6.
-
(4) Acknowledgment of Amendments to Solicitations, at ,2.215-7.
(5) Submission of offers or Quotations, at 52.215-8.
(6) Late Submisslons, Modifications, and Withorawals of roposals or Gustations, at 53.215-9.
(7) Authorized Negotiators, at 52,215-10.
(8) Restriction on Disclosure and Use of Data, at 2.215-11.
(9) Preparation of offers, at 52.215-12.

15407
(c) The contractang officer shall insert in all' solicitations the provisions at--
(1) 52.215-5, Solicitation Definitions:
(2) 52.215-6. Type of Buszness Organization;
(3) 52.215-7, Unnecessarily Elaborate Proposals or Quotations:
(4) 52.215-B. Acknowledgment of Amendments to Solicitations;
(5) 52.219-9, Submession of Offert or Ouotations:
(6) 52-215-10, Late Submissions, modifications, and Withdrawals of Proposals or Quotations:
(7) 52,215-11, Authorized Negotiators: and
(8) 52.215-12, Restriction on Disclosure find Use of Data.
(d) The contracting officer chall insert in all RFP's the provisions at-
(1) 52.215-13, Preparation of offere,
(2) 52.215-14, Explanation to Prospective Offerors;
(3) 52.215-15. Fallure to Subsut offer; and

 be included in all solicitations to which the unfform contract format applies.
(e) The Period for Acceptance of offer provision at 52.215-18 shall be included in all RFP"s except those for constraction or architect-engineering work.
(f) The place of Performance provision at $52.215-19$ shall be included in all solicitations, except those in which the place of performance is specified by the Government.
15.408 Issuing solicitations.
(a) The contracting officer shall issue unclassified solicitations to potential sources in conformance with the policy in 15.105 and the policy and procedures in part 5 .
(b) Solfeitations involving classified information shall be kandled as prescribed by agency requiations.
(h) The contracting officer thall intert the provision at $52.215-20$. Place of Performance, in all molicitations except those in which the place of performance is specified by the Government.

### 15.408 Itsung alleitetions.

(a) The contracting officer thall itsut unclassiaied solicitations to potential sourcem in conformance with the policy in 15.105 and the policy and procedures in Part 5.
(b) solicitatzonw 2nvolvang alastfzadinforatzon be handled as prescribed by agency fegulations.


15.408 4. PHASE I FAR
(c) If the contracting office is locatedin the United States, any solicitation or related correspondence sent to a forelgn address shall be sent by international air mall.

### 15.409 Pre-proposal conferences.

(a) A pre-proposal confprence may be held to brief prospective offerors after a solicitation has been issued but before offers are submitted. Generally, the Governmert uses these conferences in complex negotiated acquisitions to explain or clarify complicated specifications and requirements.
(b) The contractim of ticer shall decide if a pre-proposal conference is regulred and make the necessary arrangements, including the following:
(1) If notice was not in the solicitation, give all prospective offerors who received the solicitation anequate notice of the time, place, nature, and scopt of the conference.
5. REVISED FAR
(c) If the contracting office is lacated in the United States and the security classification permits, any solicitation or related corresponeence tent to a foreign address shall be sent-by international air mail. Similariy, if the security classification permats, contracting offices located outside the United States shall une international aly mail in appropriate circumstances.

### 15.409 Pre-proposal conferences.

(a) A pre-proposal conference may be held to brief prospective offerort after a tolicitation has been istued but before offers are submitted. Generally, the Government upes these conferencen in complex negotiated ecquisitions to explain or clatify complicated epecifications and requirements.
(b) The contracting officer ehall decide if a pre-proposal conference is required and make the necessary arrangementa, including the following:
(1) If notice was not in the solicitation, qive all prospective offerors who received the solicitation adeguate notice of the time, place, nature, and scope of the conference.
(2) If time allows, request prospective offerors to submit written questions in advance. Prepared answers can then be delivered in the conference.
(2) If time allows, request prospective offerers to subnit witten guestions in advance. Prepared answers can then be delivered during the conference.

15. 409(b) PHASE I FAR
(3) Arcange for technical and legal personned to attend
he conference.
$15409(b)$ 5. REVISED FAR
(3) Arrange for technical and legal personnei to attend the conference, if appropriate.
(c) The contracting officer or designated representative hall conduct the pre-proposal conference, furnish all rospective offerors identical information concerning the roposed ocquisition, and make a complete record of the onference. Conferees shall be advised that--
(1) Remarks and explanations at the conference shall not walify the terms of the solicitation; and
(2) Terns of the solicitation and specifications remain ichanged unless the solicitation is amended in writing.
(c) The contracting officer or designated representative ahall conduct the pretproposal conference, furmish all prospective offerors identical information concerning the proposed acquasition, make a complete record of the conference, and prorptly furnish a copy of that record to all prospective offerors. Conferes shall be advised that-n
(1) Remarks and explanations at the conference shall not qualify the terms of the tolicitation: and
(2) Terms of the solicitation and specifications remain unchanged unlean the solicitation is amanded in writing.


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4. PHASE I FAR
${ }^{154} 40$
(b) The contracting officer shall determine if the clasing dete needs to be changed when amending a solicitation. If the time available before ciosing is insufficient prospective offerors or quoters shall be notified by telegran or telephone of an extension of the closing date, and the notification shall be confirmed in the amendment. The contracting officer shall not award a contract unless cony amendment to a request for proposals has been igsued in jufficient time to be considered by prospective offerors.
*
(c) Any information given to a prospective offeror or guoter shall be furnished pramptly to all other prospective offerors or quoters as a solifitation amendment if (i) the information is necessary in submitting proposals or quotations or (2) the lack of such information would be orejudicial to a prospective offeror or quoter.
15.411 Receipr of proposals and quotations.
(b) The procedures for recelpt and handiling of proposals and quotations in negotiated acquisitions should be similar :o the receipt and safeguarding of bids in formal idvertising (see 14.401). Proposals and quotations shall be inrked with the date and time of receipt.
(b) After receipt, proposals and quotations shall be afeguarded from unauthorized disclosure. classified roposals and quotations shall be handied in accordance with gency regulations.
5. REVISED FAR
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## 410

(b) The contracting officer shall determine if the closing date needs to be changed when amending a solieltation. If the time available before closing is intufficient, prospective offerors or quotert shall be notified by telegram or telephone of an extension of the closing date. and the notification shall be confirmed in the wratten amendment to the solicitation. The contracting officer shall not awari a contract uniess any amendments made to an
 prospective offerors.
(c) Any information given to a proppective offeror or quoter shall be furnished promptly to all other prospective offerors or quoters as a solicitation amendment if (I) the information is necessary in subuitting proposals or quotations or (2) the lack of winh information would be prejudicial to a prospective offeror or quoter.

### 15.411 Receipt of proposals and quotations.

(a) The procedures for recelpt and handing of propogals and quotetions in negotiated acquisiticna should be wamilar to the recelpt and safegutarding of bids in formal sdvertising (aee 14.401). Proposals and quotations shall be marked with the date and time of reteipt.
(b) After receipt, proposale and quotations thall be safeguarded from unauthorized diaclosure. Clasesified proposals and quotationt shall be handied in mecoramoce with agency regulations. Also see OMB Circular No. A-76, the supplemerital handbook, nd subpart 7.3, Contractor Versus Government Performance, for safeguarding cost-comparison information.

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## 4. PRASE I FAR

15.412 Late proposals, quotations, and modifications.
5. REVISED FAR
15.412 Late proposals, quotations, and modifications.


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Drafter Quinn_ Revsewer Sumers/Cole_______ Editor Flanigan
15412 4. PHASE I FAR
(a) Modificationg" as used in this section, menns a modification of a proposal or quotation, including a final modification in response to the contracting officer's request for "best and final" offers. The term does not include normal revisions of offers or quotations made during the conduct of negotiations by offerors or guoters selected for discussion.
(b) offerors or quoters are responsible for tubmitting offers or quotations, and any modifications to them, so as to reach the Government office designated in the sollcitation on time. Unless the solicitation states a specific time, the time for receipt is the normal close of business of the designated Government office on the date that proposals or quotations are due.
(c) Proposals or quotations, and modifieations to them, that are received in the designated Government office after the exact time specified are "late" and shall be considered foniy if (i) they are received before award is made, and (2) the circumstances, including acceptable evidence of date of malling or receipt at the Government installation, meet the specific requirements of the provision at 52.215-9.
(d) When a late proposal, quotation, or modification is recelved and it is clear from available information that it cannot be considered for award, the contracting officer shall promptly notify the offeror or quoter that it was received late and will not be considered. The notice need not be given when the proposed contract is to be awarded Within efew days and the notice prescribed in 15.901 (c)(1) would suffice.
(e) When a late proposal, quotation, or modification is transmitted by registered or certified mall and is received before awara, but it is not clear from available information whether it can be considered, the offeror or quoter shall be promptiy notified substantially in accordance with the notice in 14.303-2, appropriately morifiled to relate to proposals or quotations and, if necessary, to telegraphic proposals or quotations.

## 15412

## 5. REVISED FAR

(a) "Modification," as used in this section, means a modification of a proposal or quotation, including a final modification $2 n$ response to the contracting officer's request for "best and final" offers. The term does not include normal reviaions of offers or quotations made during the conduct of negotiations by offerors or quoters selected for discussion.
(b) Offerors or quoter are responsible for submitting offers or quotations, and any modification to them, so as to reach the Government office designated in the
solicltation on time. Unless the bolicitation states a
spectific time, the time for receipt is $4: 30$ p.m., local time for the designated Government office on the date that proposals or guotations are due.
(c) Propoasis or quotations, and modification to them, that are recelved in the designated Government office after the exact time specified are "late" and shall be considered only if (1) they are received before award is made, and (2) the circumstances, inciuding acceptable evidence of date of mailing or receipt th the Government ingtallation, meet the specific requirements of the provision at 52,215-10. Late Submberion, Modificition, and Withdrawals of Propoenls or Ouptations
(d) When a late proposel, quotation, or modification is received and it is clear from available information that it cannot be convidered for sward, the contrecting officer shall pronptly notify the offeror or quoter that it was received late and will not be considered. The notice need not be olven when the propoled contract it to be awarded within few days and the notice preseribed in 15.1001 (c)(1) would suffice.
(e) When a late proposal, quotation, or modifieation $2 s$ transmitted py registered or certified mail and is received before awaid, but it is not clear from available information whether it can be considered, the offeror or quoter mhall be promptiy notified substantially in accordance with the notice in 14.303-2, appropriately modified to relate to proposals or quotations.

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(f) Late proposals, quotations, and modificgtions that are*
tot considered shali be held unopened. unless opened for
identification, until after award and then retained with
sfher unguccessful proposals or quotations.
(g) The following shall, if available, be included in the sontracting office files for each late proposal, guotation, 35 modification:
(i) The date of mailing, flling, or delivery.
(ii) The date and hour of receipt.
(iii) Whether or not considered for award.
(iv) The envelope, wrapper, or other evidence of date of submission.

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5. REVISED FAR
(f) Late proposals, quotations, and modifictitiont that are not considered shall be held unopened, unless opened for identification, until after award and then retalned with other unsuccessful proposala or guotations.

Disclosure tond use of informatron before awa
(g) The following thall, if available, be included in the contracting office files for each late proposal, guotation, or modification:
(1) The date of mailing, filing, or delivery.
(2) The date and hour of recezpt.
(3) Whether or not considered for award.
(4) The envelope, wrapper, or other evidence of date of tubmiseion.

15:413 Drscloture and use of information before award.

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54413 4. PHASE I FAR
(a) After receipt of proposals or quotations, no * information contained in them or concerning the number or identity of offerors or quoters shall be made avallable to the public of to anyone $2 n$ the Government not having a legitimate interest.
15.413 5. REVISED FAR
(a) After receipt of proposals or quotations, none of the information contained in them or concerning the number or identity of offerors or quoters shall be made avalieble to the public or to anyone in the Government not having a legitimate unterest.
b) During the preaward or preacceptance period of negotiated aequisition, only the contracting officer, the zontracting officer's'superiors having contractual authority, and others specificelly authorized shali transmit technical or other information and conduct diseussions with jrospective contractors. Information shall not be furnished to a prospective contractor if, alone or together with other information, it may afford the prospectave contractor an 3dvantage over others. however, general information that is lot prejudicial to others may be furnished upon request.
(b) During the preaward or preacceptance period of a negotiated scquisition, only the contracting officer, the contracting officer': puperiort having contractual authority, and others specifically authorized shall transmit technical or other information and conduct anseuseions with prospective contractors. Information shall not be furnished to prospective contractor if. alone or toqether with other information, it may afford the prospective contractor an advantage over others (ree 15.610, Written and oral difeusion). However, general information that is not prejudicial to others may be furnished upon request.

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(c) Prospective contractors and subcontractors may place restrictions on the disclosure and use of data in proposals and quotations (see 15.407(b) (8) and 52.215-11). Contracting officers shall not exclude proposals or quotations from consideration merely becausp they restrict disclosure and use of data. The portions of the proposal or guotation that are so restricted (except for information that is alao obtained from another source without restriction) shall be used only for evaluation and shall not be disclosed outside the Government without perfission of the prospective contractor (but see Subpart 24.2, Freedom of information).

15,413
(c) Prospective contractore and subcontractors my place re\#trictions on the duplosure and use of data in proposals and guotations (see 25.407 (c)(8) and the clause at 52.215-12. Restriction on D2sclosure and Use of Data). Contracting officers shall not exclude proposals or quotations from consideration merely because they restrict disclosure and use of data, nor shali they be prejudiced by that restriction. The portions of the proposal or quotation that are fo restricted (except for information that is also obtamed from another source without restriction' shall be used only for evaluation and shall not be disclosed outside the Government without permission of the prospective contractor (but see Subpart 24.2, Freedom of Information Act).

### 15.414 Forms.

standard Form 26 (SF 26). Award/Contracts, and Standard Form 33 (SF 33). Solicitation, offer and Award, are to be used, as appropriate, in connection with negotiated aequisitions.
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Submission of offers or quotations.
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Acknowledgment of Amendments to Solicitations. Withdrawals of Proposals or Quotations.

Restriction on Bisclosure and Use of Data.
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Restriction on Diselosure and Use of Data. Preparation of offers.
Explanation to Prospective Offerors. Fallure to Submit Offer.

## contract Awara.

Telegraphic Proposals or Ouotations. order of Precedence.
Period for Acceptance of offer.
Place of Performance.

```
z Notice of Possible Standardization.
cordance with 15.213(c)(2), insert the following
on in solucitations for items that are likely to
standardized:
    NOTICE OF POSSIBLE STANDARDIZATION (DATE)
e supplies for which this solicitation has been
are established as standard, future contracts for the
d supplies may be negotiated under the authority of
15.213 of the Federal Acquisition Regulation.
```

(End of provisle7)
$\qquad$ (R7-20r $3.38 \quad 1975$ OCT)

## 15-3 Solicitation for Information or Planninq Purposes.

 n accordance with 15.405. insert the following provision the face of each request for guotations for information- planning purposes.

COLICITATION FOR INFORMATION OR PLANNING PURPOSES (DATE)
i) The Government does not intend to awnrd a contract on
ithe basis of this request for quotations or to otherwise pay for the information solicited.
(b) This solicitation is issued for the purpose of: (state put pose):
(End of provision)
(A 1-309)

See 52.215-4 on page 201-40

R2/15-03/E0//15.405-2//L//Solicitation for Information or Plar
*/

### 52.215-3 Solicitation for Information or Planning Purposes.

As preserabed 10 15.405-2, insert the following provision on the face of each solicitation $18 s u e d$ for information or planning purposes:

SOLICITATION FOR INFORMATION OR PLANNING PURPOSES (DATE)
(a) The Government does not intend to award a contract on the basis of this solicitation or to otherwise pay for the information solicited except as provided in subsection $31.205-4$, , ad and proposal (B\&P) costs, of the Federal Acquasition Regulation.
(b) This solzcatation $2618 s u e d$ for the purpose of: [state purpose).
(End of provision)
(R 1-309)

Control No./Page No. 201-40
Solicitation and keceapt of Proposals and Quotations, Preaward and Postzward Noty fications Title Protests, and Mistakes Drafter Quinn Reviewer Sumers/Cole

R3/15-04/EU//15*407(b)//L//Notice of Possible Standardization

## 4. PHASE I FAR

See 52.215-2 on page 201-39

### 52.215-4 Solicitation Definitions.

In accordance with 15.407 (b) (I), insert the followning provision in all solicitations:

## SOLICITATION DEFINITIONS (DATE)

*Advertised, for purposes of this solicitation, includes small business restricted advertising and other types of restricted advertising.
"Offer" means "bid" in formsl advertising and "proposal" in negotiation.
"Solicitation* means aninnuitation for bids (IFB) in formal advertising and a request for proposals (RFP) or a request for quotations ( RFQ ) in negotiation.
(End of provision)
(R SF 33A, Paral, 1978 JAN)
53.215-5 Type of Rusiness Orqanization.

In accordance with $15.407(\mathrm{~h})(2)$. insert the following provision in all solicitations:

TYPE OF BUSINESS ORGANIZATION (DATE)
The offeror or quoter, by checking the applicable box, represents that it operates as //_an individual. /_, a partnership, /, $/$ a nonprofit organization, or $/, \bar{a}$ cotporation incorporated under the laws of the state of ...........................
(End of provision)
(AV SF33 1977 MAR )

## */BCR

52.215-4 Notice of Possible Standardization.

In accordance with $15.213^{\circ}(\mathrm{d})$, and as prescribed in 15.407 (b). upon the aprioval of the chief of the contractine office, the following provision may be inserted in all requests for proposals and requests for quotations, other than those for information or plannang purposes. for supplies that subsequently might be ntandardized for the applications specifted in 15.213 (b)(1):

NOTICE OF POSSIBLE STANDARDI2ATION (DATE)
If the supplies for which this solzcitation has been 2ssued are established as standard, future contratts for the required supplies may be negotiated under the authority of section 15:213 of the Federal Acquisition Regulation.
(End of provision)
(R 7-2003.38 1975 OCT)
R2/15-05/EU//15.407(c)(1)//L//Solicitation Definitions */BCDEFGJKLMPRS

### 52.215-5 Solicitation Definitions.

As prescribed 15.407 (c)(1). insert the following provision in all requests for proposale and requests for quotations other than those for information or planning purposes:

## SOLICITATION DEFINITIONS (DATE)

"Offer" means "proposal" in negotiation.
"Solicitation" means a request for proposals (RFP) or a request for quotations (RFU) in negotiation.

> (End of provision)
> (f SF 33A, Pate 1,1976 JAN

R2/15-06/EQ//15.407(c)(2)//K//Type of Business Organization **/BCDEFGJKLIAPRS

### 52.215-6 Type of Business Organzzation.

As prescribed $2 n 15.407(c)(2)$, ansert the following provision in all requests for proposals and requests for quotations other than those for information or planning purposes:

## TYPE OF BUSINESS ORGANIZATION (DATE)

The offeror or quoter, by checking the applicable box, represents that it operates as $/ / /$ a corporation ancorporated under the laws of the state of
 partnership. /_/ a nonprofat organızation, or /// a joint venture.
(End of provision)
(av SF 331977 MAR)
(R SE 19E, Paza 4. 1976 JUNE)

FAR Entity 154 \& 1510 (formerlv 15 9) Control No/Page No. 201-41.
Solicitation and Recci
Title Protests, and Mistakes
Drafter Quinn Reviewer SummerslCole Edator Flanıgan
4. PHASE I FAR
52.215-6 Unnecessarily Elaborate Proposals or Quotations.

1 In accordance with $15.407(b)(3)$, insert the following provision in all solzcitations.

## UNKECESSARILY ELABORATE PROPOSALS OR QUOTATIONS (DATE)

Unnecessarily elaborate brochures or other presentations ${ }^{\text {'b }}$ beyond those sufficient to present a complete and effective response to this solicitation are not desired and may be construed as an indication of the offeror's or quoter's lack of cost consciousness. Elahorate art work, expensive paper fand bindings, and expensive visual and other presentation alds are neither necessary nor wanted.
(End of provision)
(Ay 7-2003.40 1969 ocT)
52.215-7 Acknowledgment of Amendments to Solicitations.

In accordance with 15.407 (b) (4), ansert the following provision in all solicitations:

ACKNOWLEDGMENT OF AMENDNENTS TO SOLICITATIONS (DATE)
Offerors or quaters shall acknowledge receipt of any camendment to this solicitation (a) by signing and returning the amendment; (b) by identifying the amendment number and date in the space provided for this purpose on the form for submitting on offer or quotation; or (c) by letter or telegram. The Government must receive the acknowledqment by the time specified for receipt of offers or quotations.
(End of provision)
(R SF 33 A Para 4, 1978 JAN ) $\qquad$

### 52.215-8 Submission of Offers or Quotations.

In accordance with $15.407(b)(5)$, insert the following provision in all solicitations:

SUBMISSION OF OFFERS OR QUOTATIONS (DATE)
(a) Offers or quotations and morifications thereof shall be submitted in sealed envelopes (1) addressed to the office specified in the sollcitation and (2) showing the time specified for cecelpt, the solicitation number, and the name and address of the offeror or quoter.
5. REVISED FAR

R2/15-07/EQ//15.407(c)(3)//L//Unnecessarily Elaborate Proposal * 5 BCDEFGJILMPRS

As prescribed in $15.407(c)(3)$, insert the following provasion in all requeste for proposals and requests for quotations other than those for information or planning purposes:

## UNDECESSARILY ELABORATE PROPOSALS OR QUOTATIONS (DATE)

Unnecassarily elaborate brochures or other presentations beyond those sufficient to present a complete and effective response to this solicitation are not dealred and may be construed as an indication of the offeror's or quoter's lack of cost consciousness. Elaborate art work, expensive paper end bindings, and expensive visual and other presentation axde are neither neceseary nor wanted.
(End of provision)
(AV 7-2003.40 1969 OCT)
R2/15-08/EC//15.407(c)(4)//L//Acknowledgnent of Amendments To //BCDEFGJKLHPRS
$52.215-\mathrm{B}$ Acknowledgment of Amendments to solicitations.
As prescribed in 15.407 (c)(4). ingert the following provision in all requests for proposals and requests for quotations other than those for information or planning purposes:

## ACKNOHLEDGMENT OE AMENDMENTS TO SOLICITATIONS (DATE)

Offerors or quoters shall acknowledge receipt of any amendrent to this solicitation (a) by aigning and returning the amendment; (b) by identifying the amendment number and date in the space providad for this purpose on the form for submitting an offer or guotation; or (c) by letter or telegram. The Government must receive the acknowledgment by the time specified for receapt of offers or quotations.
$\qquad$ (End of proviaion)
(R SF 33A Para 4, 1978 JAN)
R2/15-09/EQ//15.407(c)(5)//L//Submasion of Offers or Quotatic -/BCDEFGJKLMPRS
52.215-9 Submission of Offers or Quotations.

As prescribed in $15.407(c)(5)$. insert the following provision in all request for proposalt and requesta for quotations other than thope for information or plamning purposes:

SUBMISSION OF OFFERS OR OUOTATIONS (DATE)
(a) Offers or quotations and modifications thereof shall be subinitted in sealed envelopes or packages (I) addressed to the office specified in the solicitation and (2) showing the time specified for recelpt, the solicitation number, and the name and address of the offeror or quoter.

FAR Entity 15.4 a 2510 (tarmer3y 15.91 Control No. fpage No. $201-42$
Solicitation and kecespt of prodosals and Ouotations, Preaward and rostaward Nothfications.
Title Protests, and Mistahes
Drafter Quinn Reviewer Summers/Cole Edator Flanigan
52. $215=8$

## 4. PHASE I FAR

(b) Telegraphic offers or guotations will not be considered unless authorized by the solicitation; however, offers or quotations may be modified by telegraphic notice. if that notice is received by the time specified for recespt of offers or quotations.
(c) Item samples, if requared, must be submitted within the time specified for receipt of offers or quotations. Unless otherwase specified in the solicitation, these samples shall be (i) submitted at no expense to the Government and (2) returned at the sender's request and expense, unless they are destroyed during preaward testing.
(End of provision)
(R SF33A Para 5, 1978 JAN)
52.215-9 Late Submissions, Modifications, and withdrawals of Proposals or Quotations.
52.215-9
5. REVISED FAR
(b) Telegraphic offers or quotations will not be considered unless authorized by the folicitationt however. offers or quotations may be modified by written or telegraphic notice, if that notice in received by the time specified for recespt of offers or quotations.
(c) Item samples, if requared, must be submitted withan the time apecified for receipt of offers or quotations. Uniess otherwise specified in the oolicitation, these samples thall be (1) submatted at no expense to the Government and (2) returned at the sender's request and expense, unless they are destroyed during preward testing.
(End of provision)
(R SE33A Para 5, 1978 JAN)

R2/15-10/EO//15-407(c)(6)//L//Late Submits2ons, Modifacati=*/BCDEFGJKLYPRS
52.215-10 Late Submizizions. Nodifications, and Withirawais of Proposalis or Ouotations.

4. PHASE I FAR
In accordance with $15.407(b)(5)$, insert the following
covision in all solicitations:

LATE SUBMISSIONS, MODIFICATIONS, AND WITHDRAWALS OF PROPOSALS OR QUOTATIONS (DATE)
(3) Any proposil or quotation received at the office ssignated in the solicitation after the exact time secified for recelpe will not be considered unless it is celved before award 15 made and it--

52 215-10
5. REVISED FAR

As prescribed in 15.407 (c)(6). insert the following proviaion in all requeste for proposals and requests for quotations other than those for information or plannina puxpotes:

LATE SUBMISSIONS, MODIFICATIONS, AND WITHDRAWALS OF PROPOSALS OR OUOTATIONS (DATE)
(a) Any proposal or quotation received at the office designated in the solicatation after the exact time specified for recelpt wall not be conssdered unless it 2 t recenved before award $2 s$ made and $1 t-=$


FAR Entity 154615.10 (fornerly 15 9) Control No./Page No. 201-4 Soltcitation and Receipt of Proposals and Quotathun, Preaward and rostaward Notifications, Title Soltcitation and Receip

| Drafter | Quann | Reviewex | sumpers /Cole | Editor | Flanigan |
| :---: | :---: | :---: | :---: | :---: | :---: |

4. PHASE I FAR
(1) Was sent by registered or certified mail not later than the fifth calendar day before the date specified for recelpt of offers (e.g., an offer submitted in response to a solleitation requiring recelpt of offers by the 20th of the nonth must have been mailed by the 15th);
(2) Was sent by mail (or telegran if authorized) and it is fetermined by the Government that the late receipt was due solely to mishanding by the Government after receipt at the Jovernient Instailations or
(3) Is the only proposal or quotation received.

(1) Was fent by tegistered or certified mail not later than the fifth calendar day before the date specified for raceipt of offers (e.g., an offer submitted in respones to a solicitation requiring recelpt of offera by the 20 th of the month wuat have beien mailed by the 15th);

- (2) Was sent by mail (or telegram if authorized) and it 15 determined by the Govermment that the late receipt was due colely to mishanding by the Government after recalpt at the Government inatallation; or
(3) Is the oniy proposal or quotation received.


FAR Entity 1248.1510 (rormarls is 9)
Solycitation am Receipt of Proposals and quotations, Preaward and Yostaward Motifications Tutle Protests, and tiftakes
Drafter Qunn Reviewer Summers Colg Editor Flanigar


FAR Entity $13,4 \& 1510$ (1ormerl) 15 9) Control No. /Page No 201-40
Solicitation and keceipt of Proonsals and yotations, Preaward and Fostaward kotification Tritle Frotests, and Mrstakes
Drafter Quinn Eeviewer Sumwers/Cole Editor Flanigan

### 52.215-9

## 4. PHASE I FAR

(d) The only acceptahic evidence to establish the date of malling of a late proposal, quotation, or modification sent elther by registered or certified mail is the u.S. or Canadian postal Service postmark on the wrapper or on the original recelpt from the U.S. or Canadian Postal Service. If neither postmark shows legible date, the proposal; quotation, or modification shall be processed as if mailed 1ate. "Postmark" means a printed, stamped, or otherwise placed impression (exclusive of a postage meter machine impression) that is readily identifiable without further action as having been supplied and affixed by employees of the U.S. or Canadian Postal Service on the date of mailing. Therefore, offerors or quoters should request the postal clerks to place a hand cancellation bull's-eye postmark on both the recelpt and the envelope or wrapper.
(e) The only acceptable evidence to establash the time of receipt the Government insitallation is the time/date stamp of that installation on the wrapper or other documentary evidence of receipt maintained by the instaliation.
(f) Notwithstanding paragraph (a) above, a late modification of an otherwise successful proposal or quotation that makes its terms more favorable to the Government will be considered at any time it is received and may be ascepted.
(g) Proposals or quotations may be withdrawn by written notice or telegram (including mailgraml received at any time before award. proposals may be withdrawn in person by an offeror or an authorized representative, if the representative's identity is made known and the representative signs a receipt for the proposal before award.
(End bf provision)
(R7-2002.4 1979 MAR/3.802-1)

### 52.215-10 <br> 5. REVISED FAR

(d) The only tocceptable evidence to establash the date of mailing of a late proposai. quotation, or modification sent either by registered or certified mall 18 the U.S. or Canadian Postal Service postmark on the wrapper or on the original recelpt from the U.S. or Canadian Postal Service. If neather postmark shows a legible date, the proposal. quotation, or modification shili be procesered as if mailed late. "Postmark" means a printed, tamped, or otherwise placed impression (exclusive of a postage meter machine mpresition that is readily identifiable without further action as having been supplied and affixed by employees of the U.S. or Canadian Postal Service on the date of mailing. Therefore, offerors or quoters should request the postal clerks to place a hand cancellation bull 'efeye postmark on both the recelpt and the envelope or vrappex.
(e) The only acceptable evidence to establioh the tame of recelpt at the Government installation is the time/date tamp of that installation on the proposal or quotation wrapper or other documentary evidence of receipt maintained by the installation.
(f) Notwithstanding paragraph (a) above, date modification of an otherwise buccestful proposal or quotation that makes its term more favorable to the Government will be considered at any time it is received and may be aceepted.


FAR Entity $15.4 \approx 15.10$ (formerly 159 ) Control No./Page No. 201-47
Solicitation and Receipt of Proposals and Quotations, Preaward and Postaward Noti fications, Tritle Protests, and Mastakes
Drafter Quinn En_ Editor Flanigan

## 4. PHASE I FAR

52.215-10 Authorized Negotiators.

In accordance with $15.407(b)(7)$. insert the following
provision in all solicitations;

AUTHORIZED NEGOTIATORS (DATE)
The offeror or quoter represents that the following persons are authorized to negotiate on its behalf with the Government in connection with this acquisition: liist names, tities, and telephone numbers of the authorized negotiators .
(End of provision)
(R 3-501(b) Sec K (iv))
52.215-11 Restriction on Disclosure and Use of Data.

In accordance with 15.407 (b) (8), insert the following provision in all solicitations:

RESTRICTION ON DISCLOSURE AND USE OF DATA (DATE)
offerors of quoters who include in their proposals or quotations data that they no not want disclosed to the pubile for any purpose or used by the Government except Eor evaluation purposes, shall--
(a) Mark the title page with the following legent:

This proposal or quotation includes data that shall not be disclosed outside the Government and shall not be duplicated, used, or disclosed--in whole or in part--for any purpose other than to evaluate this proposal or quotation. If, however, a contract is awarded to this offeror or quoter as a result of--or in connection Whth-the submission of this data, the Government shall have the right to duplicate, use, or disclose the data to the extent provided in the resulting contract. This restriction does not limit the Government's right to use information contained in this data if it is obtained from another source without restriction. The data subject to this restriction are contained in shetts finsert numbers or other identification of shests) : and
(b) Mark each sheet of data it wishes to restrict with the following legend:
-Use or disclosure of data contained on this sheet is subject to the restriction on the title page of this proposal or quotation."
(End of provision) (R 3-501 (b) Sec S (xxiv))
Reviewer

R2/15-11/EO//15.407(c)(7)//K//Authorized Negotiators */BCDEFGJKLMPRS
52.215-11 Authorized Negotiators*

As prescribed in $15.407(c)(7)$. insert the following provision in ali requeste for proposals and requests for guotations other than those for information or planning purposes:

## AUTHORIZED NEGOTIATORS (DATE)

The offeror or quoter repretent that the following persons are authorized to negotiate on its behalf with the Government in connection with this acguigitions [1ist namen, titles, and telephone mumbers of the authorized negotiators].
(End of provision)
(R 3-501 (b) See R (iv))

R2/15-12/EO//15.407(c)(8)//4//Restriction on Disciosure and */BCDEFGJKINPRS
52.215-12 Restriction on Disclosure and the Use of Data.

Ae preacribed in $15.407(\mathrm{c})(\mathrm{E})$. insert the following provision in all requests for proposals and requeste for quotations other than those for information or planning purposes:

## RESTRICTION ON DISCLOSURE AND USE OF DRTA (DATE)

offerors or quoters who include in their proposals or quotations data that they do not want diseloned to the public for any purpose or used by the Government except for evaluation purposes, shall-

## (a) Mark the title page with the following legend:

This proposal or quotation includes data that shall not be disclosed outside the Government and shall not be duplicated, used, or disclosed-=in whole or in part-for any purpose other than to evaluate this proposal or quotation, If, however, contract is awarded to this offeror or quoter en retult of-or in conhection with-the submiseion of this data, the Government shall have $\pm^{2}$ right to duplicate, use, or dinclose the data to the extent provided in the redulting contract. This
restriction does not limit the Government's right to use information contained in thas data it it is obtanned from another mource without restriction. The data subject to this restriction are contained in sheets finsert numbere or other identificetion of sheets ${ }^{\circ \prime}$ : and
(b) Mark each sheet of data it washes to restrict with $t^{2}$ following legend:
"Use or disclosure of data contained on this sheet $2 s$ pubject to the restriction on the title page of this propostal or quotation."

> (End of provision)
> $\{$ R $3-501\{b)$ Sec $z(x \times 1 v))$

$15.4 \$ 1510$ (formerly 159 ) ana Quotations, Preaward and Postawa
$\square$ Solicitation and Receipt of Proposals ana Quotations, Preaward and Postaward Notifications, Title Protests, and Mistakes
Drafter Quinn Re__ Editor Flanigan
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FAR Entity 15 4 a 15.10 (formerly 15, 9) Control No./Page No. 201-49
Solicitation and Receipt of Proposals and Quotations, Preaward and Postaward Notifications, Terete Protests, and Mistakes


## 4. PHASE I FAR

52.215-12 Preparation of Offers.

In accordance with 15.407 (b) (9), insert the fallowing provision in all requests for proposals:

## PREPARATION OF OFFERS (DATE)

(a) Offeror are expected to examine the drawings, specifications, schedule, and all instructions. Failure to do 50 will be at the offeror "s risk.
(b) Each offeror shall furnish the information required by the solleftation. The offerer shall sign the offer and print or type its name on the schedule and each continustion sheet on which it makes an entry. Erasures or other changes tum et be initialed by the person signing the offer. offers signed by an agent shall be accompanied by evidence of that agent's authority, unless that evidence has been previously furnished to the issuing office.
(c) For each item offered, offeror shall (1) show the mite price, including packing unless otherwise specified, and (2) enter the total price in the "Amount" column of the schedule. In case of discrepancy between a unit price and sn tended price, the unit price will be presumed to be correct, subject, however, to correction to the same pent and in the same manner as any other mistake.

4
3
4

## R2/15-13/LO//15.407(d)(2)//L//Preparation of offers - /BCDEFGJKLMPRS <br> 52.215-13 Preparation of Offers.

As prescribed in 15.407 (a)(1), insert the following provision in all requests for proposals:

## PREPARATION OF OFFERS (DATE)

(a) Offerors are expected to examine the drawings, specifications, Schedule, and all instructions. Failure to do so will be at the offeror's risk.
(b) Each offeror shall furnish the 4 information required by the solicitation. The offeror shall sign the offer and print or type its name on the Schedule and asch continuation sheet on which it makes an entry. Erasures or other changes must be initialed by the pertain signing the offer. offers signed by an agent shall be accompanied by evidence of that agent * authority, unless that evidence has been previously furnished to the issuing office.
(c) For am h item offered, offeror hall (i) how the unit price/cost. including, unless otherwise specified, packaging, packing, and preservation and (2) enter the extended price/cost for the quantity of aah titer offered in the "Amount" column of the Schedule. In case of discrepancy between a unit prica/cost and an extended price/cost, the unit price/cost will be presumed to be correct, subject, however, to correction to the same extent and in the same. manner as any other mistake.


$54-1510$ (formerly 159
$\qquad$
Solicitation and Receipt of Proposals and Ouotations. Preaward and Postaward Notification
Title Yrotests, and Mistakes $\qquad$
Drafter Quinn Eeviewer Summers/Cole Editor Flanigan

## 4. PHASE I FAR

52.215-15 Concract Award.

In accordance with $15.407(b)(12)$, insert the following provision in all requests for proposals:

CONTRACT AWARD (DATE)
(a) The Government will award a contract resulting from this solicitation to the responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, price and other factors considered.

## 5. REVISED FAR <br> R2/15-16/Eu//15.407(d)(4)//L//Contract Award */HCDEFGJKLMPRS

52.215-16 Contract Award.

As prescrabed in 15.407(d)(4). insert the following. provision $2 n$ all reguests for proposals:

CONTRACT AWARD (DATE)
(a) The Gowernment will award a contract resulting from this solicitation to the refponsible offeror whoge offer conforming to the eolicitation will be most mivantageous to the Government, cost of price and other factors. Bpecified elsewhere in this solicitation, considered.
(b) The Government may (1) reject any or all offers, (2) accept other than the lowest offer, and (3) waye informalitaes and minor irregularities in offers received.
(c) The Govermment may award contract on the basis of initial offers recenved, wathout discussions. Therefore, each initial offer should continn the offeror's best terms from a cost or price and technacal standpoint.




FAR Entaty 154 \& 1510 (formerly 15 9) Control No./Page No. 201-53
Solicication and Receipt of Proposals and Quotations, Preaward and Postaward Notifications, Tatle Frotests, and Mistakes
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52.215-15 4. PHASE I FAR
(f) Neither financial data submitted with an offer: nor representations concerning Eacilities or financing, will form a part of the resulting contract. However, if the resuliting contract contains thase providing for price - reduction for defective cost or pricing datia, the contract price till be subject to reduction if cost or pricing data , furnished is incomplete, inaccurate, or not current.
(End of provision)
(R SF 33A, Para 10,1978 JAN)

### 52.215-16

5. REVISED FAK
(f) Neither financial dita suburtted with an offer, nor representations concerning facilities or financing, wil form a part of the resulting contract. However, if the resulting contract conteins a clause providing for price recuction for defective cost or pricing data, the contract prite will be subjeot to reduction if copt or pricing data furnished is incomplete, inaccurate, or not current.
(End of provition)
( R 5F 33A, Pare 10,2976 JAN)
R2/15-17/Eu//15.407(e)//L//relegraphic Proposals or ouotatic - RCOFRCTKIMPDC
52.215-17 Telegraphic proposale or ouotationt.

As prescribed in 15.407(e). ingert tive following provision in all requette for proposals or requerte for quotations. other than those for information or plannang puzposes, that authorize telegraphic proposale or quotations:

TELEGRAPHIC PROPOSALS OR OUOTATIONS (DATE)
(a) Offerors or quoters may mbuit telagraphic fesponsez to this solicitation. There responses mast arrive in the contracting office by the time focified in this solicitation.
(b) Telegraphic responses shall refer to thls solicitation and include the item or sub-items, quantities, unit pricet, tide and place of delivery, all representations and other information required by this solicitation, and a statement specifying the extent of agreement with all the tetms, conditions, and provisions of the solicitation.
(c) Telegraphic responses that fall to furnish required representations or information, of thet reject any of the terms, conditions and provisions of the solicitation, way be excluded from consideration.
(b) Telegraphic responses shall refer to this eolicitation and include the item of gub-items, quantities, unit pricet, time and plece of dulivery, all reprepantations and other information required by this solicitation, and a statment epecifying the extent of agreement with wil the terme. fonditions, and proviaiona of the solicitation.
(e) Telegraphzc repponses that fail to furnieh reguired representations or information, or that reject any of the terms, conditione and provisions of the aolicitation, may be excluded from consideration.


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154 \& 15.10 (formerly 15 9)
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Title Frotests, and Mistakes
Drafter Quinn En_... Reviewer Summers/Cole Editor Flanigan

## 4. PHASE I FAR

(d) Offerors or quaters must promptly Eian and submit
complete coples of the proposals or quotations in conflimation of theif telegraphic responses.
(e) The term "telegraphic responses," as, used in the provision, includes mailgrams.
(End of provision)
(R 7-2003.29 1964 MAR)
52.215-17 Order of Precedence.

In accordance with 15.407 (d), insert the following provision in ail sollaitations to which the uniform contract format applies:

## ORDER OF PRECEDENCE (DATE)

Any inconsistency in this solicitation shall be resolved by giving precedence in the following ordef: (a) the Schedule (excluding the specifications): (b) representations and other ingtructions: (c) contract clauses; (d) other documents, exhibits, and attachmente; and (i) the
specifications.
(End of provision)
(R 7-2003.41 1973 APR )

### 52.215-18 Period for Acceptance of Offer.

In accordance with $15.407(e)$, insert the following provision (preprinted on SF 33) in all requests for proposals except those for construction or architectengineering work:

## PERIOD FOR ACCEPTANCE OF OFFER (DATE)

In compliance with the solicitation, the offeror agrees if this offer is accepted within... calenalar days $(60$ calendar days unless a different period is inserted by the offeror) from the date specified in the solicitation for recelpt of offers, to furnish any or all items on which prices are offered at the pilce set opposite each item. delivered at the designated point (s), within the time specified in the schedule.
(End of provision)
(R SF33 1977 FHAR)

(d) Offerors or quoters-must promptiy ainn and submit complete copies of the proposals or quotations in confzrmation of thear telegraphic responief.
(*) The term "telegraphic responses," as uned in the provision, includes mailgrams.
(End of provision)
( $\mathrm{R}^{7-2003.291964 \text { MAR) }}$
R2/15-18/EQ//15.407(E)//L//Order of Precedencé */BCDLFGJKLmPRS

### 52.215-18 Order of Precedence.

As prescrubed in $15.407(f)$. inatert the following provision in all requests for proposals, and in all request for quotations. to which the uniform contract format applies. other than those for information or planning purposes:

## ORDER OF PRECEDENCE (DATE)

Any unconsistancy in this folicitation shali be resolved by giving precedence in the following order: (a) the Schedule (excluding the specifications): (b) representations and ocher instructions; (c) contract clausetf (a) other documents, exhibits, and attachments; and (e) the specifications.
(End of provision)
( 8 7-2003.41 1973 APR)

## R2/15-19/EO//15.407(9)//A//Period for Acceptance of Offer

 **/BCDEFGJKLMPRS
### 52.215-19 Period for Acceptance of Offer.

As prescribed in $15.407(g)$, insert the following provision in all requests for proposals that are not 1 Fisued on $5 F 33$ except those (a) for construction work or (b) in which the Government specifies binimum acceptance period:

PLRIOD FOR ACCEPTANCE OF OFFER (DNTE)
In compliance with the solicitation, the offeror agrees, if thas offer 18 accepted within........calentar days $(60$ calendar days unless a different period is inserted by the offeror) from the date specified in the solicitation for recelpt of offers, to furnish any or all items on which prices are offered at the price set opposite each item, delivered at the designated point(s). Within the time specified ing the Schedule.
(End of proviszon)
(R SF 331977 HMR)

# FAR Entaty 154615.10 (formerly 15 9) Control No./Page No, 201-55 

Solicitation and Receipt of Proposals and Quotations, Preaward and Poscaward Notifications,
Title Protests, and Mistakes
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### 52.215-19 Place of Performiance

In sccordance with $15.407(f)$. insert the following provision in all solicitations except those in which the plact of performance is specified by the Government:

## PLACE OP PERFORMANCE (DATE)

(a) The offeror or quoter // intends, // does not intend (check epplicable block) to pêrform any part of the work reguired under any contract that might result from this solicitation at one of more plants or facilities located at a different address from the address of the offeror or quoter as indicated in this proposal or quotation.
(b) If the offeror or quoter checks "intends" in paragraph (a) above, it shall provide the following information:

Place of Performance
(Street Address, City, County,
State, $21 p$ Code)
Ci $\qquad$
$\qquad$
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Name and Address of Owner and Operator of the Plant or Facility if other than Offeror or ouoter.
$\qquad$
$\qquad$
$\qquad$
(End of provision)
(R 3-501 (b) Sec K (viii))

K2/15-20/EU//15.407(h)//K//Place of Performance **/icDEEGJKLL,PRS
52.215-20 Place of Perforsance.

As prescribed in $15.407(h)$. insert the following provision in all requests for proposalis, and in all requests for quotations, other than those for information or planning purposes, except those in which the place of performance 25 specified by the Govermment:

## PLACE OF PERFORNANCE (DATE

(a) The offeror or guoter, in the perforinance of any contract resulting from this solicitation. // intends. /// does not intend (check applicable block) to use one or more plants of facilities located at a different address from the address of the offeror or quoter as indicated in this proposal or guotation.
(b) If the offeror or quoter checks "intends" in paragraph (a) above, it shall insert in the apaces provided below the required information:

Place of Performance
(Street Address, City, County,
State. zıp Code)
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Hame and Addreme of Owner and Operator of the Plant or Facility if Other than Offeror or Quoter
(R 3-501(b) Seck (vi11))


# FAR Entaty $154 \& 1510$ (formeriy 15.9) Control No./Page No. 201-50 

Solicitation and Receipt of Proposals and Quotations, Preawara and Postaward Notifications,
Title Protests, and Mistakes
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Solicitation and Receipt of Proposals and Quotations, Preqward and Postaward Notifications, Title Protests, and Mistakes
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# FAR Entity $154 \& 15.10$ (formerly 15.9) 

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# FAR Entity $154 \& 1510$ (formerls 159 ) <br> Control No. Page No. 201-62 Solicitation and Receidt of Proposals and Quotarions, Preaward and Postaward Notificarions, 

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in Colum 4, and the entire text proposed for
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editroxial changes.
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,1982,this entity is current
through DAC No.76-3) and FPR Amendment No. 219.

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## SUBPART 15.5--UNSOLICITED PROPOSALS

### 15.500 Scope of subpart.

This subpart prescribes policies and procedures for submission, receipt, evaluation, and acceptance of unsolicited proposals.

### 15.501 Definitions

The following definitions apply to this subpart:
"Advertising material" means material designed to acquaint the Government with a prospective contractor's present products or potential capabilities, or to determine the Government's Interest in buying such products
"Commercial product offer" means an offer of a commercial product usually sold to the general public and which the vendor wishes to see introduced in the Government's supply system as an alternate or replacement for an existing supply item.
"Contribution" means a concept, suggestion, or idea presented to the Government for its use with no indication that the source intends to devote any further effort to it on the Government's behalf.

## SUBPART 15.5-wUNSOLICITED PROPOSALS

15,500 scope of mubpart.
This subpart prescribes policies and procedures for submission, receipt, evaluation, and acceptance of unsolicited proposals.

### 15.501 Definition*.

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"Commercial product offer" means an offer of a commercial product that 18 usually sold to the general public and that the vendor withes to see introduced in the government': supply system as an alternate or replacement for an existsupply item.
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Coordinating office" means a point of contact established within the agency to coorbinate the receapt, evaluation, and disposition of ursolicited proposals.
"Progran Research and Development Announcement (PRDA)" means an announcement in the forn of a general solicitation for proposals in areas of science and technology bese reserch and development of interest to the issuing agency.
"rechnical correspondence" means written requests for information regarding Government interest in fesearch areas, submissions of research descriptions, prepioposal explorations, or other written technical inquiries.
"Unsolicited proposal" means a written offer to perform a task or effort subiaitted to the Government by an offerar without solicitation by the Government and with the objective of obtaining a contract.
"Coordinating office," at used in this tubpart, means a point of contact egtablished within the agency to coordinate the receipt. evaluation, and dimpotition of unsolicited proposals.
"Program Research and Development Announcement (PRDA)," as used in this aubpart, means an announcement in the form of $a$ general statement of need in areas of eclence and technology-based research and development of interest to the istulng agency.
"Technical correspondence," as uaed in this subpart, means written requeats for information requrding Government interest in recearch areas, aubtassion of researeh descriptions, preproposel explorations, and other written techmicel inguiries.
"Unsolicited proposal" means a written offer to perform a tamk or effort ubmitted to the Governaent by an offeror without solicitation by the Goverament, with the objective of pbtaining a contract.

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### 15.502 Policy

Agencies shall encourage the submission of unsolicited proposals and avoid organizational or regulatory constraints that may inhibit generation and acceptance of innovative ideas from prospective contractors.

### 15.503 General.

(4) Unsolicited proposals are a valuable means for Government agencies to obtain unique or innovative methods or approaches to accomplishing their missions from sources outside the Government.
(b) Advertising material, commercial product offers, contributions, or technical correspondence as defined in 15.501 are not unsolicited proposals.
(c) A valid unsolicited proposal must--
(1) Se unique or innovative;
(2) Be independently originated and developed by the offeror
(3) Be prepared without Government supervision;
(4) Include sufficient detail to permit a determination that Government support could be worthwhile and the proposed work could benefit the agency's research and development or other mission responsibilities; and
(5) Not be an advance proposal for a specific documented agency requirement that can be acquired by competitive methods.
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### 15.502 Policy.

Agencies shall encourage the anbaitesion of unsolicited proposals and avoid organizational or regulatory constraints that my inhibit generation and acceptance of innovative, unique, or meritorious ideas from prospective contractors.

### 15.503 General.

(a) Unsolicited proposals are a valuable means for Government agencies to obtain innovative, unique, or meritorious method or approaches to accomplishing their missions from sources outside the Government.
(b) Advertising material, commercial product offers. contributions, or technical correspondence as defined in 15,501 are not unsolicited proposals.
(c) A valid unsolicited proposal mut-
(1) Be innovative, unique, or meritorious;
(2) Be independently originated and developed by the offeror:
(3) Be prepared without Government supervision:
(4) Include sufficient detail to peralt a determination that Government support could be worthwhile and the proposed work could benefit the agencyis research and development or other mission responsibilities; and
(5) Hot be an advance proposal for a specific documented agency requirement that can be acquired by competitive methods:

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(d) Unsolicited proposals in response to an agency PRDA are considered to be independently originated.
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(e) Agencies that receive meritorious unsolicited proposals not related to their missions may identify for the offeror other agencies whose missions bear a reasonable relationship to the proposal's subject matter.
(e) Agencies that receive meritorious unsolicited proposals not related to their missions maj identify for th offeror other agencies whose missions bear a reasonable relationship to the proposalis subject witter.

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### 15.504 Advance guidance

(a) Agencies shall encourage potential offeror to make preliminary contacts with appropriate agency personnel before expending extensive effort on a detailed unsolicited proposal or submitting proprietary data to the Government. Such preliminary contacts should include--
(1) Inquiries as to the general need for the type of effort contemplated; and
(2) Contacts with agency technical personnel for the limited purpose of obtaining an understanding of the agency mission and responsibilities.
(b) Agencies shall make available to potential offerors of unsolicited proposals at least the following free written information.
(1) Definition and characteristics of an unsolicited proposal acceptable for formal evaluation.
(2) Requirements of responsible prospective contractors (see subpart 9.1). and organizational conflicts of interest.
(3) Role of technical correspondence before proposal preparation.
(4) Agency contact points for information regarding advertising, contributions, bidders mailing lists, and other types of transactions frequently mistaken for unsolicited proposals
(5) Procedures for submission and evaluation of unsolicited proposals.
(6) Information sources on agency objectives and areas of potential interest.
(7) Instructions for identifying and marking proprietary information so that restrictive legends conform to 15.509.

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### 15.504 Advance guidance.

(a) Agencies hall encourage potential offeror to make preliminary contact with appropriate agency personnel before expending extensive effort on a detailed unsolicited proposal or subinatting proprietary data to the Government. These preliminary contacts would include-
(1) Inquiries as to the general need for the type of effort contemplated; and
(2) Contact e with agency technical personal for the limited purpose of obtaining an understanding of the eqency mission and responsibilities relative to the type of equal contemplated.
(b) Agencies shall make available to potential offeror of unsolicited proposal at latat the following free written information:
(1) Definition (see 15.501), and content (see 15.505), of an unsolicited proposal acceptable for formal evaluation.
(2) Requirements concerning responsible prospective contractor: (see subpart 9.1 ), and organizational conflict e of interest ( ${ }^{\text {e fee }}$ Subpart 9.5).
(3) Role of technical correapondence before proposal preparation.
(4) Agency contact point: for information regarding advertising, contributions, solicitation mailing lists, and other types of transactions frequently mistaken for unsolicited proposals.
(5) Procedures for submission and evaluation of unsolicited proposal y.
(6) Information sources on agency objectives and areas of potential interest.
(7) Instructions for identifying and marking proprietary information so that restrictive legends conformal to 15.509.

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(c) Agency personnel shall conduct personal contacts in a manner that precludes agency commitments concerning the acceptance of unsolicited proposals.

205 Content of unsolicited proposals.
Unsoizeited proposals should contain the following information to pernit consideration in an objective and timely manner:
(a) Basic information including--
(7) Offeror's name and address and type of organization; e.g , profit, nonprofit, educational, small business;
(2) Names and telephone numbers of technical and business ersonnel to be contacted for evaluation or negotiation wrposes:
(3) Identity of proprietary data to be used only for evaluation purposes;
(4) Names of other Federal, State, local agenczes, or parties recejving the proposal or funding the proposed effort
(5) Date of submission; and

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(c) Agency personnel shall conduct personal conteret without making any agency commitments concerning the meceptance of unsolicited proposale.
15. 505 Content of unsolicited proposals.

Onsolicited proposals should contain the following information to permit consideration in an objective and timely manner:
(a) Basme information Including--
(1) Offeror"s name and address and type of organazation; e-g-, profit, nonprofit, educational, small business;
(2) Names and telephone numbers of technical and business personnel to be contacted for evaluation or negotiation purposes;
(3) Identity of proprietary data to be used only for evaluation purposes;
(4) Hames of other Federal. State, local agencies, or parties receiving the proposal or funaing the proposed effort:
(5) Date of submission, and

(b) Technical information including--
(1) Concise title and abstract (approximately 200 words) of the proposed effort;
(2) A reasonably complete discussion stating the objectives of the effort or activity, the method of approach and extent of effort to be employed, the nature and extent of the anticipated results, and the manner in which the work will help to support accomplishment of the agency's mission;
(3) Names and biographical information on the offeror's key personnel who would be involved, including alternates; and
(4) Type of support needed from the agency; e.g. facilities, equipment, materials, or personnel resources
(c) Supporting information including-
(1) Proposed price or total estimated cost for the effort in sufficient detail for meaningful evaluation;
(2) Period of time for which the proposal is valid fa six onth minimum is suggested):
(3) Type of contract preferred;
(1) Proposed ducation of effort;
(5) Brief description of the organization, previous xperience in the field, and facilities to be utilized; and
(6) Required statenents, if applicable, about "ganizational conflicts of interest, security clearances, id environmental impacts.
(6) Signature of a person authorized to represent and contractualiy obligate the offeror.
(b) Fechnical information including-
(1) Conclse title and abstract (approximately 200 vords) of the proposed effort:
(2) A reasonably complete aiscussion stating the objectives of the effort or activity, the mathot of approach and extent of effort to be emplojed, the natare and extent of the anticipated results, and the manner in which the vork yill help to support accomplishent of the agency's mission;
(3) Hames and biographical information on the offeror's kef personnel who wonld be intolved, including alternates; and
(4) Trpe of support needed from the agency; e.g., faclizties, equipment, materials, or personnel resources.
(c) Supporting information incivaing-=
(1) Proposed price or total estimated cost for the affort in safficient fetail for meaningfol evaluation:
(2) Period of time for thich the proposal is valid (a six month minamuin $2 s$ saggested):
(3) Tupe of contract preferred;
(4) Proposed duration of effort:
(5) Brief description of the organization, previous experience in the field, and facilitaes to be utilized; and
(6) Zequired statements, if applicable, about organizational conficts of interest, security clearances, and environmental impacts.

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### 15.506 Agency procedures.

(a) Agencies shall establish procedures, including assurance of accountability, for controlling the receipt, evaluation, and timely disposition of proposals consistent with the requirements of this subpart. The procedures shall include controls on the reproduction and dasposition of proposal material, particularly data identified by the offeror as subject to duplication, use, or disclosure restrictions. $\qquad$

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## 15. 506 Agency procedures.

(a) Agencles stall establish procedures, including assurance of accountability. for controlling the receipt. evaluation, and timely disposition of proposals consistent with the requirements of this subpart. The procedures shall include controls on the reprodnction and disposition of proposal material, particularly data identified by the offeror as subject to auplication. use, or disclosure restrictions.
(b) Agencies shall establish contact points (see 15.501 )
(b) Agencies shall establish contact points (see $\mathbf{8 5} .501$ ) to coordinate the recelpt and handifng of unsolicited proposals. Contact points outside agency contracting offices shall coordinate with qualified contracting
to coordinate the recelpt and handing of unsolicited proposals. contact points outside agency contracting offices shall coordinate with gualified contracting personnel.
personnel.
15.506-1 Receipt and initial review.
(a) Before initiating comprehensive evaluation, the agency contact point shall determine if the unsolicited proposal--
(1) Contains sufficient technical and cost information;
(2) Has been approved by a responsible official or other representative authorized to contractually obligate the subnitting organization: and
(3) Complies with the marking requifements of 15.509.
(b) If the proposal meets these requitements, the contact point shall promptly acknowledge and process the proposal. if it does not, the contact point shall provide the offeror an opportunyty to submit the required data.

### 15.506-1 Receipt and initial reviev.

(a) Before initiating a comprehensive evaluation, the agency contact point shall detecmine if the unsolicited proposal--
(1) Contans sufficient technical and cost information;
(2) Has been approved by a respomsible official or other representative authorized to contractually obligate the offeror: and
(3) Complzes mith the marking requirements of 15.509.
(b) If the proposal meets these regurements, the contact point shall promptly acknorledge and process the proposal. If it does not, the contact point shail provade the offerot an opportunity to submit the required data.


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(c) Agencies are not required to perform comprehensive evaluations of unsolicited proposals not related to their missions. In such cases the agency contact point shall promptly reply to the submitter and state how the agency interprets the proposal, why it is not being evaluated, and the disposition or intended disposition of the material.

### 15.506-2 Evaluation.

(a) Comprehensive evaluations shall be coordinated by the agency contact point, who shall attach or imprint on each unsolicited proposal circulated for evaluation the legend required by $15,509(\mathrm{~d})$. When performing a comprehensive evaluation of an unsolicited proposal, evaluators shall consider the following factors, in addition to any others appropilate for the particular proposal:
(1) Unique, innovative, or neritorious methods, approaches, or ideas originated or asseabled by the offeror.
(2) Overall scientific, technical, cost reduction, or socio-economic merits of the proposal.
(3) Potential contribution of the effort to the agency's specific mission.
(4) The offeror's capabilities, related experience, facillties, techniques, or unique combinations of these which are integral factors for achieving the proposal objectives.
(5) The qualifications, capabilitzes, and experience of the proposed principal investigator, tean leader, or key personnel who are critical in achieving the proposal objectives.
(b) The evaluators shall notify the coordinating office of their conclusions and recommendations when the evaluation is completed.

### 15.507 Contracting methods.

(a) f favorable comprehensive evaluation of an unsolicited proposal does not, in itself, necessarily justify negotiating on a noncompetitive basis Agency contact points shali return an unsolicited proposal to the offeror, citing the reasons, when its substance-
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(c) Agencies are not required to perform comprehensive evaluations of unsolicited́ proposale not related to their miseions. If such proposals are recelved, the agency contact point thali promptly reply to the offeror, stace fthe agency interpreta the proposal, why it if not being evaluated, the dusposition or intended disposition of the material. and the namen of other agencies that may be interested in the subject of the proposal.

### 15.506-2 Evaluation.

(a) Comprehensire evaluations shall be coordinated by tit agency contact point, who shall attach or inprint on each unsolicited proposal circulated for evalnation the legend required by 15.509(d). Then performing a comprehensuve evaluation of an ansolicited proposal evaluators shali consider the following factors, in adition to any others appropriate for the particular proposal:
(1) Onique, innotative, or meritorious methods, approaches, or ideas originated or assembled by the offer
(2) Overall scientific, technical or socio-economac mera of the proposal.
(3) Potential contribation of the effort to the agency's specific mission.
(4) The offeror"s capabilities, related experience, tacilities, techniques, or unigue combinations of tbese which are integral factors for achiering the proposal objectives.
(5) The qualifications, capabilities, and experience of the proposed prancipal investigator, team leader, or key personnel who are critical in achieving the proposal objectives.
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15. 507 Contracting methods.
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 $\qquad$ $15.507(a)$
(1) Is available to the Government without restriction from another source;
(2) Closely resembles a pending competitive solicitation; or
(3) Is otherwise not sufficiently unique to justify acceptance
(b) The contracting officer shall award a negotiated noncompetitive contract when-
(1) in unsolicited proposal has received a favorable comprehensive evaluation:
(2) It 15 not of the character described in $15.507(\mathrm{a})$ : and
(3) The agency technical office sponsoring the contract supports its recommendation with facts and circumstances that preclude competition, including consideration of the evaluation factors in $15.506-2(\mathrm{a})$, ; and furnishes the necessary funds.
(c) If the unsolicited proposal is acceptable for award without competition, the agency and offeror shall use the proposal as the basis for negotiation.

## $15.507(a)$

(1) Is available to the Government without restriction from another source:
(2) Closely resembles a pending competitive solicitation; or
(3) Is otherwise not sufficiently innovative, unique, of meritorious to justify acceptance.
(b) the contracting officer may award a negotiated noncompetitive contract when--
(1) An unsolicited proposal has received a favorable comprehensive evaluation;
(2) It 15 not of the character described in 15.507(a): an
(3) The agency technical office sponsoring the contract supports its recommendation with facts and circumstances that preclude competition, including consideration of the evaluation factors in 15.506-2(a), and furnishes the necessary funds.
(c) If the unsolicited proposal is acceptable for award without competition, the ${ }^{\text {agency }}$ and offeror shall use the proposal as the basis for negotiation.

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15.508 Prohibitions.
(a) Government personnel shall not use any data, concept, idea or other part of an unsolicited proposal as the basis, or part of the basis, for a solicitation of in negotiations with any other firm. However, this prohibition does not preclude using any data, concept, or idea avallable to the Government from other sources without restriction.
(b) Government personnel shall not disclose restrictively marked information (see 15.509) included in an unsolicited proposal. The disclosure of such information concerning trade secrets, processes, operations, style of work, apparatus, and other matters, except as authorized by law, may result in criminal penalties under 18 U S.C. 1905.
-
15.509 Lanited use of data.
(a) An unsolicited proposal may include data that the offeror does not want disclosed for any purpose other than evaluation. If the offeror wishes to restrict the proposal, the title page must be marked with the following legend: USE AND DISCLOSURE OF DATA

This data shall not be disclosed outside the Government and shall not be duplicated, used, or disciosed in whole or in part for any purpose other than to evaluate the proposal: Provided, that if a contract is turded to this offeror as a result of or in connection with the submission of this data, the Goverment shall have the right to duplicate, use, or disclose the data to the extent provided in the contract. This restriction does not imit the Government's right to use information contained in the data if it is obtainable from another source without cestriction. The data subject to this restriction 15 contained in Sheets $\qquad$ -.
(b) The offeror shall also mark each restricted sheet with the following legend:

Use or disclosure of proposal data is subject to the restriction on the title page of this Proposal.

## 5. REVISED FAR

## 15. 508 Prohibitzons.

(a) Government personnel shall not use any data, concept, 1dea, or other part of an ansolicited proposal as the basis, or part of the basis. for a solicitation or in negotiations vith any other firm uniess the offeror is notified of and agrees to the intended nse. However, this prohibition does not preclude nsing any data, concept, or idea ayailable to the Government from other sontces without restriction.
(b) Government personnel shall not daselose restrictively marked information (see 15.509) included in an unsolicited proposal. The disclosure of such information concerning trade secrets, procegses, operations, style of work, dpparatus, and other matters, ezcept as authorized by lay, may result in criminal penalties under $18 \mathrm{D} . \mathrm{S} . \mathrm{C} .1905$.

## 15. 509 Limited use of data.

(a) An unsolicited proposal may include data that the offeror does not rant disclosed for any porpose other than eraluation. If the offeror wishes to restrict the proposil. the title page must be marked with the folloving legend:

## OSE AKD DISCLOSURE OF DATA

The data in this propossi shall not be disclosed outside the Govermment and thall not be duplicated. used, or disclosed in whole or in part for any purpose other than to -valuate the proposal ; propided. that if a contract is awarded to this offeror as a result of or in connection with the mbmission of these data, the Government shall have the right to duplicate, uFe, or disclowe the data to the extent provided in the contract. Thas restriction does not limit the Government'a right to use information contained in the data if it 28 obtainable from another pouree without restriction. The data subject to this rastriction are contained in sheets $\qquad$ -
(b) The offeror shall also mark each restricted sheet uit the followng legend:

Use or disclosure of proposal data is subject to the restriction on the titie page of this Proposal.
FAR Entity _15.5

## 4. phAse I par

(c) The coordinating office shall return to the offeror any unsolicited proposal marked with a different legend than that provided in 15.509 (a). The return letter will state that the proposal cannot be considered because it is impracticable for the Government to comply with the legend and that the agency will consider the proposal if it is resubmitted with the proper legend.
(d) The coordinating office shall place a cover sheet on the proposal or clearly mark it as follows, unless the offeror clearly states in writing that no restrictions are imposed on the disclosure or use of the data contained in the proposal:

## UNSOLICITED PROPOSAL

## use of data limited

All Government personnel must exercise EXTREME CARE to more that the information in this proposal is not
Fiosed outside the Government and is NOT DUPLICATED, USED
HISCLOSED in whole or in part for any purpose other than uation of the proposal, without the written permission
os offeror. If a contract is awarded on the basis of proposal, the terms of the contract shall control losure and use.
is notice does not 1 mint the Government's right to use ration contained in the proposal if it is obtainable. another source without restriction.
is is a Government notice, and shall not by itself be rued to impose any liability upon the Government or sent personnel for disclosure or use of data contained 18 proposal.
$\qquad$ Control No./Page No,
$113-30$


Reviewer
Editor
(e) When an agency receives an unsolicited proposal wIthout any restrictive legend from an educational or nonprofit organization or institution, and an evaluation outside the Government is necessary, the coordinating office shall-
'1) Attach a cover sheet clearly marked with the legend in 509 (d);
(2) Change the beginning of this legend to read "All Government and non-Government personnel....";
(3) Delete the words "is not disclosed outside the Government and": and
(4) Require any non-Government evaluator to give written agreement stating that information in the proposal will not be disclosed to others outside the Government.

## 5. REVISED FAR

(c) The coordinating office hall return to the offeror any unsolicited proposal marked with a legend different from that provided in $15.509(\mathrm{a})$. The return letter will state that the proposal cannot be considered because it is impracticable for the Government to comply with the legend and that the agency will consider the proposal if it is resubmitted with the proper legend.
(d) The coordinating office shall place a corer sheet on the proposal or clearly mark it as follows, andes the offeror clearly states in writing that no restrictions are imposed on the disclosure or use of the data contained in the proposal:

## UHSOETCITED PROPOSAL <br> USE OF DATA LIMIted

All Government personnel must exercise EXTREME CARE to unsure that the information in this proposal is not disclosed outside the Government and is NOT DUPLICATED, USED, OR DISCLOSED in whole or in part for any purpose other than evaluation of the proposal, without the written permission of the offeror. If: contract is awarded on the basis of this proposal, the terms of the contract shall control disclosure and use.

This notice does not limit the Government's right to use information contained in the proposal if it is obtainable from another source without restriction.

This is a Government notice, and shall not by itself be construed to impose any liability upon the Government or Government personnel for disclosure of use of data contained in this proposal.
(a) The above notice is used solely as a manner of handling unsolicited proposals that will be compatible with this subpart. However, the use of this notice shall not be used to justify the withholding of a record (see 24.202) nor to 1 mproperly deny the public access to a record where an obligation 18 imposed on an agency by the Freedom of Information Act, 5 U.S.C. 552, as amended. A prospective offeror should identify trade secrets, commercial or financial information, and privileged or confidential information to the Government (see $15.509(\mathrm{a})$ ).
(f) When an agency receives an unsolicited proposal without any restrictive legend from an educational or nonprofit organization or institution, and an evaluation outside the Government is necessary, the coordinating office shall-
(1) Attach a cover sheet clearly marked with the legend in 15.509(d);
(2) Change the beginning of this legend to read "All

Government and non-Government personnel....";
(3) Delete the words "is not disclosed outside the Government and"; and
(4) Require any non-Government evaluator to give a written agreement stating that data in the proposal will not be disclosed to others outside the Government.

4. PHASE I FAR
15.509
15.507
(f) If the proposal is received with the restrictive legend $(175.509(a))$, the modified cover sheet shall allso be used and permission shall be obtained from the offeror pilor to release of the proposal for outside evaluation.
(g) When an agency receives an unsolicited proposal with or without restrictive legend from other than an educational or nonprofit organization or institution, and evaluation by Government personnel outside the agency or by experts outside of the Government is necessary, written permission must be obtained from the offeror prior to release of the proposal for evaluation. The coordinating office shall (1) clearly mark the cover sheet with the legend in $15.509(\mathrm{~d})$ or as modified in $15.509(\mathrm{e})$ and (2) obtain a written agreement front any non-Governnent evaluator stating that information in the proposal will not be idsclosed to others outside the Government.
(g) If the proposal 18 received $w$ th the restrictive legend ( 15.509 (a)), the modified cover sheet shall also be used and permiscion shall be obtained from the offeror priof to release of the proposal for outaide evaluation.
(h) When an agency receives an unsolicited proposal with or without a reatrictive legend from other than an educational or nonprofit orgenization or institution, and evaluation by Government personnel outaide the agency or by experts outside of the Government is necessary, written permasion must be obtained from the offeror prior to release of the proposal for evaluation. The coordinating office shall (1) clearly maxk the cover whect with the legend in 15.509(d) or as modified in $\mathbf{1 5 . 5 0 9 ( f ) \text { and (2) }}$ obtein a wratten agreement from any non-Government evaluator teating that data in the proposal will not be disclosed to persons out ide the Government.

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Title mares Selection

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Reviewer Sumatra Editor Divisor
4. PHASE I FAR

NOIE: The entire text of this entity as issued for agency, industry, and public comment appears in colum 4, and the entire text propose c for publication appears in Colum 5. Amy differences in these tho columns not accounted for by the disposition codes and rationales reflect solely editorial changes.
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As of Nepronker 3, 1982, this entity is current
through DAC No. 76-? and FPR Arienc. =ri No : :


Drafter Quit is___ Reviewer Summers Editor Davison


This subpart prescribes policies and procedures for selection of source or sources in competitive negotiated acquisitions. Formal source selection procedures, involving boards. councils, or other groups for proposal evaluation, are in 15612 Alternative procedures that 11 mrt discussions with offeror during the competition are discussed in 15.613.

This subpart prescribes policies and procedures for selection of a source or sources in competitive negotiated acquisitions. Formal source selection procedures, involving boards, councils, or other groups for proposal evaluation, are in 15.612. Alternative procedures that limit discussions with offerors luring the competition are discussed in 15.613.
15.001 Definitions
"Clarificaionon, as used in this subpart, means communication with an offeror for the sole purpose of eliminating minor irregularities, informalities, or apparent clerical mistaies in the proposal. It ls achieved by explanation or silstintiation, either in response to Government arse, for as initiated by the offeror unlike discussion (see finltion below), clarification does not give the offeror an opporturity to revise or modify its proposed

### 15.601 Definitions.

"Clarification," as used in this subpart, means communication with an offeror for the sole purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes in the proposal. It is achieved by explanation or substantiation, either in response to Government inquiry or as initiated by the offeror. Unlike discussion (see definition below), clarification foes not give the offeror an opportunity to revise or mollify its proposal, except to the extent that correction of apparent clerical mistakes results in a revision.

"Deficiency," cs wasa in ehzs suppart, means any part of a proposal that fazls to satisfy the regulymments of the Government.

### 2.31

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meficxency, as used in this subpart, means any part of a proposal that fails to patisfy the Government's requinements.
"Dlscussion," as used in this subpart, means any oral or written communzcatzon between the Govermment and an offeror that (a) involves information essential for determimang the acceptability of a proposal or (b) provides the offeror an opportunity to revise or modify its proposal.
"Discussion," as used in this subpart, means any oral or witten commulcation between the Government and an offerot, whether or not initiated by the Gorernment, that (a) involves information essential for deternining the acceptability of a proposal, or (b) provides the offeror an opportunity to rerise or modify its proposal.
"Source selection authority" means the Govertment officual in charge of selecting the soufce. This title is most offen ised when the selection process lis formal and the official is omeone othez than the contracting officer.
"Source selection authority" means the Government official in charge of selecting the source. This title is most of ten used when the selection process is formal and the official is someone other than the contracting officer.


## 4. PHASE F FAR

25.602 Applicability.
(a) Thit subpart does not apply to sole-souxce awards or to small purchases under part 13.

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15.602 Applicability.

(b) This subpart applies to negotiated contracting when source selection 15 basea on--

- (1) Price competition between proposals that meet the minamum Goverrment requirements stated in the solicitation or
(2) Competition involving an evaluation and comparison of prace and other factors.
(a) This subpart applies to negotiated contracting when source selection is based on--
(1) Cost or price competstion between proposals that mētr the Government's minimum requirements stated in the solicutation: or
(2) Competition Involving an evaluation and comparison on cost or price and other factors.



FAR Entity
Subpart 156
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Title Source Selection
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4．PHASE I PAR
15.604 Responsibilities．
（a）Agency heads or designees are responsible for source
selection．
（b）The cognizant technical official 15 responsible for
the technical actions related to the source felection
pross．
（c）The contracting officer is responsible for contractual actions related to the source aelection procim：lncluding－－
（c）The contracting officer it responsible for contractua （1）Issuing solicitations to which thic 展保prt applies in accordance with Subpart 15.4 and this mbperfig
（12）Conducting or coordinating cost or pros analyses as prescribed in Bubpart 15．8；
（3）Conducting or controlling all negotiatin cost or price，technical requirements，and ghat tezme and conditione；and

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（b）The cognizant technical official is responsible for the technical requirements related to the source selection process．

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（a）Agency heads or designees are responsible for source 15． 604 Responsibiluties．
（a）Agency heads or their designees are responsible for source selection．
actions related to the source selection process，incluatry＝
（1）Issuing solicitations to which this fubpart applies 1 accordance with subpart 15 ， and this mibpart：
（2）Conducting or coordinating cost or price analyses as prescribed in subpart 15．8：
（3）Conducting or controlifng all negotiations concerning cost or price，technical requirements，and other teras and conditions：and
（4）Uniess another official is designated（he source selection authority，selecting the bource foit contract award．
（4）Selecting the soirce for contract award unless another official is deeignated as the source selection authozity．


FAR Entity
Subpart la 0
Control No．／Page No．321－8
Tatle Source Selection
Dr玉きter Yutm Reviewer Sumats Editor Davison

## 4．PHASE I FAR

45.605 Evaluation factors．
（a）The factors that will be conszdered in evaluating proposals should be tallored to each acquisition and include only those factors that wall have an impact on the fource selection decision．
（1）The evaluation factors that apply to wequisition and the relative zoportance of those factorestare within the broad diseretion of agency acquisition officials．However． price or cost shail be included as an evaluetion factor in every zource eelection．Other evaluation fectors that may apply to a particular acquisition are cost realiam， technical excellence，management capability．personnel qualifications．experience．past performance 䉓家chedule，and any other relevant factors．


（a）The factors that will be considered in evaluating proposals should be tailored to each acquisition and includ only those factors that will have an impact on the source gelection decision．
（b）The evaluation factors that apply to an acquifition and the relative inportance of those fatcors are within the broad dibcretion of agency acquisition ofticiale．Bowever， price or cost to the Government shall be inciuded as an evaluation factor in every source felection．other evaluation factors that may aply to a particular ecquisition are cost realiem，technical excellence， management capability，personnel qualificationt，experience， past performance，schedule，and any other relevant factors．
15．605 Evaluation factors．

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FAR Entity Subpart 150
Control No./Page No. 121-10
Title Source selection
Drafter Quinn Reviewer Surumers Editor Davison $\qquad$
4. PHASE I FAR
(d) In awarding a cost-reimbursemert contract, the cost proposal should not be controliing, since advance estimates of cost may not be valid indicators of final actual costa. There 25 no requirement that cost-reimbursement contracts be awarded on the basis of lowest proposed cost, lowest proposed fee, or the lowest total proposed cost plus fee. The award of cost-reimbursement contracts primarily on the basis of estimated costs may encourage the submission of unrealistically low estimates and increase thwilikelihood of cost overruns. The primary consideration shepard be which offeror can perform the contract in a manner, Most advantageous to the Government.

(a) The solicitation thai clearly tatetwint evaluation factors that will be considered in making the source selection and their, relative importance (ese $15.406-5(\mathrm{c})$ ). Numerical weighty, which may be employed in the evaluation of proposals, need not be disclosed in solicitations. The solicitation shall inform offeror of any minimum requirements that apply to particular evaluation factors.


## S. REVISED FAR

(d) In awarding a cost-relmbursement contract, the cost proposal should not be controlling, gince advance estimation of cost may not be vila indicators of final actual costs. There is no requirement that cost-reimbursewent contracts awarded on the basis of lowest proposed cost, lowest proposed fee, or the lowest total proposed cost plus fee. The award of cost-reimbursement contracts primarily on the basis of estimated costs may encourage the submission of unrealistically low estimates and increase the likelihood cost overruns. The primary consideration should be which offeror can perform the contract in a manner most advantageous to the Government, as determined by evaluate of proposals according to the established emulation criteria.
(e) The solicitation shall clearly state the evaluation factors that will be considered in making the source selection and their relative importance (see 15.406-5(c)) Numerical weights, which may be employed in the evaluatiof proposals. need not be disclosed in solicitations. solicitation shall inform offerors of minimum requirement ${ }^{+}$ that apply to particular evaluation factors.


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(d, In awarding a cost-rembursement contract, the cost proposal should not be controlilng, since advance estimates of cost may not be valid indicators of final actual costs: These is no requirement that cost-reimbursement contracts be awarded on the basis of lowest proposed cost, lowest proposed fee, or the lowest total proposed cost plus fee. The award of cost-relmbursement contracts primarily on the basis of estimated costs may encourage the submission of unrealistically low estimates and increase the likelihood of cost overruns. The primary consideration should be which offeror can perform the contract in manner most advantageous to the Government.
(d) In awarding a cost-relmbursement contract, the cost proposal should not be controlling, since advance estimates of cost may not be valid indicators of final actual costs. There is no requirement that cost-reimbursement contracts $t$ awarded on the basis of lowest proposed cost. lowest proposed fee, or the lowest total proposed cost plus fee. The award of cost -reimbursement contracts primarily on the basis of estimated costs may encourage the submission of unrealistically low estimates and increase the likelihood 5 cost overruns. The primary consideration should be which offeror can perform the contract in a manner most 1
(e) The solicitation shall clearly tate the evaluation factors that will be considered in making the source selection and their, relative importance (see 15.406-5(c)). Numerical weights, which may be employed in the evaluation Of proposals, need not be disclosed in solicitations. The solicitation shall inform offeror of any minimum requirements that apply to particular evaluation factors.
(e) The solfeftation shall clearly tate the evaluation factors that will be considered $2 n$ making the source selection and their relative importance (see $15.405-5$ (c)). Monerical weights, which may be employed in the evaluation of proposals, need not be disclosed in ssilcitations. The solicitation shall inform offerors of minimum requirements that apply to particular evaluation factors.

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(d) In awarding a cost-relmbursement contract, the cost proposal should not be controlling, since advance estimates of cost may not be valid indfeators of final actual costs. There is no reguirement that cost-reimbursement contracts pe awarded on the basis of lowest proposed cost, lowest. proposed fee, or the lowest total proposed cost plus fee. The award of cost-rennbursement contracts primarily on the basis of estamated costs may encourage the submission of unrealisticaliy low estimates and increase the likelihooj of cost overruns. The primary consideration should be which offeror can perform the contract in a manner most advantageous to the Government, as determuned by evaluation of proposals according to the established evaluation criteria. factors that will be considered in making the source (aelection and their relative importance (see 15.406-5 (c)). Numerical weights, which may be employed in the evaluation of proposals, need not be disciosed in solicitations. The solicitation shall inform offerors of any minmum requirements that apply to partıcular evaluation factors.
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(e) The solicitation shall clearly state the evaluation factors that will be considered in makiag the source selection and their relative importance (see 15.406-5(c)). Mumerical weights, which may be employed in the evaluation of proposals, need not be disclosed in solucitations. The solicitation shall inform offerors of minimum requirements that apply to particular evaluation factors.

Title Source selection
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4. PHASE I FAR

### 15.606 Changes in Government requirements.

(a) When, eather before or after receipt of proposals, the Government changes, relaxes, increases, or otherwise modifies its requirements, the contracting oftificer thall issue a written amendment to the solicitation. When time is of the ensence, oral advice of changes may be given if the changes involved are not complex and all firms to be notified (see paragraph (b). below) are notified as near to the same time as possible. The contracting officer shall make a record of the oral advice and promptiy confirm the oral advice in writing (see 15.410).
(b) In deciding which firms to notify of a ehange, the contracting officer shall consider the stage in the acquisition cycle at which the change occurs and the magnitude of the change, an follows:
(i) If proposals are not yet due, the amendment shall be sent to all firms that have received a sollcitation.
15.606 Changes in Government requirements.
(a) When, exther before or after receipe of proposals, . Government changes, relaxes, increases, or otherwise modifies $1 t s$ requirements, the contracting officer shall iesue a written amendment to the solicitation. when time 1 of the essence, oral advice of changes may be given if the changes involved are not complex and all firms to.be notified (see paragraph (b) below) are notifled as near to the same time as possible. The contracting officer shall make a fecord of the ord advice and promptly conficm that advice in writing (see 15.410).
(b) In deciding which firms to notify of a change, the contracting officer shall consider the stage in the acquisition cycle at which the change occurs and the magnitude of the change, ag follows:
(1) If proposals are not yet due, the amensment shall be sent to all firms that have recerved a solucitation.

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Title Source Selection

4．PHASE I FAR
（2）If the time for receipt of proposals has passed bu
proposals have not yet been evaluated，the amendment sho
normally be sent only to the responding offerort．
（3）If the competitive range（see 15.609 （a））has been
established，only those offerors within the competitive

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（2）If the time for recenpt of proposals has passed but proposals have not yet been evaluated，the amendment shoula normally be sent only to the responding offerors．
（3）If the competitive range（see 15， 609 （a））has been established，only those offerors within the competitive range shall be sent the amendment．
（4）If a change is so substantial that it－warrants complete revision of a alicitation，the contracting officer shall cancel the original sclicitation and issue a new one， regardless of the stage of the acquisition．The new solicitation shail be issued to all firms origanally solicited and to any firms added to the original ifst．
（4）If a change is so substantial that it warrants complete revision of a colicitation，the contracting of fic shall cancel the original solicitation and issue a new one regardiess of the stage of the acquisition．the new solicitation shall be issued to all firms originally solicited and to any firms adjed to the original list．



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4. PHASE I FAR
(c) If the proposal consldered to be most advantageous to the Government involves a departure from the stated requirements, the contracting officer shall provide all offerors an opportunaty to submit new or amended proposals on the basis of the revised requixements; provided, that this can be cone without revealang to the other offerors the solution proposed in the origanal departure or any other information that is entitled to protection (see 15.407 (b) (8)).
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(c) If the proposal considered to be most advantageous $t$ the Government fas detexmined according to the establishea evaluation criterial invoives a departure from the stated requirements, the contracting officer shall provije all offerors an opportunaty to submit new or amended proposals on the basis of the revisea requirements; pravide3, that this can be done without revealing to the other offerors $t^{\prime \prime}$ solution proposed in the original departure or any other information that is entitled to protection (see 15.407 (b) (n and $15.610(\mathrm{~d})$ ).


## 4. DHASE I FAR

15.607 Disclosure of mistakes before award.

- (a) Contracting officers thall examane all proposals for minor informalities or irregularitaes and apparent clerical mistakes (see 14.405 and 14.406). Communication with offerorg to resolve these matters $2 s$ clarification, not discussion wathin the meaning of 15.610. However, if the resulting communication prejudices the intarest of other offerors, the contracting officer shall not make award without discussions with all offerors within the competitive range.
15.607 Disclosure of mistakes Defore award.
(a) Contracting officers shall examine all proposals for minor informalities or irregularities and apparent clerim nifstakes (see 14-405 and 14.406). Communication with offerors to resolve these matters 15 clarification, not discussion within the meaning of 15.610 . However, if the resulting communication prejudices the interest of other offerors, the contracting officer shall not make award without discussions with all offerors within the competitl range.
(b) Except as indicated in paragraph (e), below, mistakes not covered in paragraph (a), above, are ugually resolved during discussion (see 15.6io).
(b) Except as indicated in paragraph (c) below, mustakes not covered in paragraph (a) above are usualiy resolved during discussion feee 15.610).

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(4) If the determanatzon undet subparagraph (3), above. annot be made, and the contracting officer still contemplates award without discussion, the offeror thall be given a final opportunity to withdraw or to verify its proposal.
(5) Verification, withdrawal, or correction under subparagraphs (i) through (4), above, is not consideret 11scussion wathin the meanang of 15.610 . If, however, zorrection of a matake regulres ceference to documents; worksheets, or other data outside the solicitation and roposal in order to establish the existence of the mistake, ,he proposal antended. or both, the mastake may be corrected mly through discussions undet 15.610 .

### 15.608 Proposal evaluation

Proposal evaluation is the assessment of both the proposal and the offeror's ability (as demonstrated by the proposil) .o successfully accomplish the prospective contract.

(4) If the determuation under subparagraph (3) above eannot be made, and the contracting officer still contemplates award without discussion, the offeror shall be givert a final opportunity to withdraw or to verify its proposal.
(5) Verıfication, witharawal, or correction under subparagraphs (1) through (7) above is not considered aiscussion within the meaning of 15.610. If, however, correction of a mastake requres reference to documents, worksheets, or other data outside the solicitation and proposal in order to establish the existence of the mistake. the proposal intended, or both, the mistake may be corrected only through aiscussions under 15.610.

### 15.608 Proposal evaluation.

Proposal evaldation is an assessment of both the proposal and the offeror's ability (as conveyed by the proposaly to successfully accomplisi the prospective contract.
(a) Cost or price evaluation. The contracting officer hall use cost or price analysis (see subpart 15.8) to valuste the cost estimate or prieq, not only to determine hether it is reasonable, but also to determine the : fferor's understanding of the work and ability to perfform te contract. The contracting officer shall document the pst or price evaluation.
(a) Cost or price evaluation. The contracting officer shall use cost or price analysis (see subpart 15.8) to evaluate the cost estimate or price, not only to deterfine whether it is reasonable, but also to determine the offeror's understanding of the work and abyilty to perform the contract. The contracting officer shall document the cost or price evaluation.

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15.608
(b) Technical evaluation. If any technzeal evaluation is necessary beyond ensuring that the proposal meets the manimum requitements in the solicitation, the cognizant technical official. in documenting the technical evaluation. shall include--
(1) The basis for evaluation,
(2) An analysis of the -sehnt cally acceptable and unacceptable proposal. - 3 an assessment of each offeror's ability to
(3) A sumary, matrix, or quantitaw on technical ranking of each proposal in rulation to the best *ar - jssible. and
(4) A summary of findings.

6. PHASE I FAR

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(a) The contracting officer shail determine which proposals are in the competitzve range for the purpose of conducting wratten or oral discussion (see 15.610(b)). The competative range is determined on the basis of price and other factors that wete stated in the solicitidton and tha $\$ 1$ 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 shoula be included.

### 15.609 competitive range.

(a) The contracting officer shall determine which proposais 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 solicitatior 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 tange, the proposal should be included.

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15,607 4. PHASE I FAR
(b) If, at any tame, the contracting officer determines, as a result of wratten or oral discussion, that a proposal no longer has a reasonable chance of being selected for contract award, it may be eliminated from the competitive range. However, a proposal inxtialiy finciuded in the competitive range should not be rejected without giving the offeror an opportunity to submit a revised proposal to serve as the basis for establishing a new competitive range, unless the dascussion makes it clear that the proposal should not have been inciuded in the competitiye range initialiy.
(c) The contracting officer shall notify an unsuccessful ©fferor et the earilest practicable time that it has been eliminated from the compefitive īnge (see $15.1001(\mathrm{~b})(1)$.

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(b) If, at any time, the contracting officer determines, as a result of written of oral discussion, that a proposal no longer bas a reasonable chance of being selected fof contract award, it nay no longer be considered for gelection. However, a proposal initially included in the competitive range should not be rejeeted wi thout giving the offeror an opportunlty to submit a revised proposal to serve as the basis for remainang within the competitive range, unless the discussion makes it clear that the proposal shoula not have been included in the conspetitive range initially.
(c) The contracting officer shall notify in writing an onsuccessful offeror at the earluest practicable time that its proposal is no longer eligible for awatd (gee 15. 1001 (b) (1) )

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## 15207 <br> 4．PHASE I FAR

（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 acciepfalid．Except in acquisition of farchitect－engineer services＇（sat Subpart 36．4）．no acceptable unpriced technical proposal frofin a responsible source shall be rejected for failure to fall within the competitive range．After discussion，the contracting officer shall（i）solicit price proposals for all the acceptable technical proposals and（2）make award to the low responsible offeror，either without or following discussion as appropriate．
（d）If the contracting officer initially solicits unpriced technical proposals，they shall be oral gated 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 cost or price proposals for all the acceptable technical proposals which offer the greatest value to the Government in terns 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 \＄oppart 36．4），t competitive range determination must include cost or price proposals．


## 4. PHASE I FAR

i5.610 written or oral discussion.
(a) The requirement in paragraph (b) below, for written or oral discussion need not be applied in acquisitions-
$\qquad$
(1) Of $\$ 10,000$ or less:
(2) In which prices are fixed by law or regulation;
(3) In which date of delivery will not permit discussion;
(4) of the set-aside portion of a partial set-seride;
(5) Involving small business restricted advertlsing: or
(6) In which adequate competation 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--
(1) The solicitation notifief all offerors of the Fussibility that award right be made without discussion. and
(11) The award is in fact made without any written or oral orscussion with any offeror.
(b) Except as provided in paragraph (a), above, the

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15. 610 writen or oral alscussion.
(a) The requirement in paragraph (b) below for written or oral discussion need not be applied in acquisitions-
(1) Of 525,000 or less;
(2) In which prices are fixed by law or regulation;
(3) In which date of delivery or performance will not permat discussion;
(4) Of the set-aside portion of a partial set-aside;
(5) Involving small business restricted advertising; of
(6) In which adequate competition or accurate prior cost experience with the product or service clearly demonstrates that acceptance of the most favorable inutial proposal without discussion vould result in a fair and reasonable price: provided, that-
(1) The solicication notifued all offerors of the possitilit; that award might be maje without discussion, and
(1i) The ansil is in fact made whthout any written or oze: discussion with any offeror.
(b) Except as provideß in paragraph (a) aboft. tr

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(1) Control all discussions:
(2) Advise the offeror of deficiencies in its proposal so that the offeror is given an opportunity to satisfy fully the Government's requirements;
(1) Control all discussions;
(2) Advise the offeror of deficiencies in its proposal so that the offeror is given an opportunity to satisfy the Gavernment'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 offerbrs" proposals or the evaluation process (see 15.607 and Part 24): and
(5) Provide the offetoz a reasonabie 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 shail 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 inscussion, by pointing out weaknesses fesulting from the offeror's lack of diligence, competence, or inventiveness in preparing the proposily.
(3) Attempt to resolve any uncertannties concerning the technical proposal and other terms and conditions of the Eroposal:
(4) Resolve any suspected mistakes by calling them to the offeror's attention as specifically as possible without disclosing information concerning other offerorg' proposals or the evaluation process (see 15.607 and Part 24); and
(5) Provide the offeror a reasonable opportunity to submut any cost or price, technical. or other revisions to its proposal that may result Erom the discussions.
(d) The contracting officer and other Gopernment 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 lach of diligence, competence. or inventiveness in preparing the proposall:

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Title Source Selection.
Drafter Quinn E___ Editor Davidson
 obtain further consideration;
(in) Advising an offeror of its price standing relative to another offeror however, it is permissible to inform an offeror that its price $1 s$ considered by the Government to be too high): and
(15. - (お) 5. REVISED FAR
(2) Technical transfusion (tee., Government disclosure of technical information pertaining to proposal that results in 1 improvement of a competing proposal ; or
(3) Auction techniques, ouch 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
(121) Otherwise furnishing information about other
offerors' prices.
(iii) Otherwise furnishing information about other offerors" prices.

## 4. PHASE I FAR

(a) Upon completion of discussions, the contracting officer shall issue to all offerors still withan the competitive range a request for best and final offers.
(b) The request shall anclude--
(1) Notice that discussions are concluded;
(2) Notace that this is the opportunity to submit a best and final offer.
(3) A common cutoff date and thme that allows a reasonable opportunaty for submission of wratten 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 inthdrawals of Proposals or Quotations provision of the solicitation (see 25.412).
(c) After recelpt of best and final offers, the contracting officer should not reopen discussions unless it If clearly in the best interest of the Govermment. If discussions are reopened, the contracting officer shall $15 s u$ an additional request for best and final offers to all otferors still within the competitive range.
15.611 Best and Einal offers.

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15.611 Best and final offers.
(a) Opon completion of discussions, the contracting officer shall issue to all offerors still within the competitive range a request for best and final offers.
(b) Tne request shall include-
(1) Notice that discussions are concluded:
(2) Notlee that thas is the opportunity to zubmit 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 unst be received by the date and time specified and lis subject to the Late Submissions, Hodifications, and fithdrawals of Proposals or Quotations provision of the solicitation (see 15.412) -
(c) After recelpt of best and final offers, the esntracting officer thould not reopen discussions anless it is clearly in the Gorernment's interest to do so fe.g., it is clear that information available at that tine is inadeguate to reasonably justify contractor selection and ayard based on the pest and final offers received). If discussions are reopened, the contracting officer shall issue an aditional request for best and final offers to all offerors still within the competitive range.

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15.611
(d) Following evaluation of the best and final offers, the contracting officer for other designated source selection authority) shall select that source whose best and Einal offer is most advantageous to the Government, consistent With the established evaluation factors.
15.611
(d) Following evaluation of the best and final pffers, tr contracting officer (or other designated source selectior authority) shall select that source whose best ari final offer is most advantageous to the Government, consistent with the estanlished evaluation factors.

15.612 Formal source selection.
(a) Genera). A source selection process is considered "formal" when a bpecific evaluation group structure 15 established to evaluate proposals and select the source for contract award. This approach is generally used in hagh-dollar-value acquisitions and may be used in other acquisitions as prescribed in agency regulations. The source selection organization typically consists of an evaluation board, advisory council, and designated source selection authority at a management level above that of the contracting officer.
(b) Responsibilities

When using formal source selection, the agency head or designee shall ensure that--
(1) The official to be responsible for the source selection 15 formally designated as the source selection authorlty:
(b) Responsibilities. Hhen using formal source selection the agency head or designee shall ensure that--
(1) The official to be responsible for the source selection is formally designated as the source selection authority:
(2) The source selection authority formally establioshes an evaluation group structure appropriate to the reguirements of the particular solicitation, and
(2) The source selection authority formally establishes evaluation group structure appropriate to the requirements of the particular solicitation: and

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(3) Prior to conducting any presolicitation conferences $==15.404$ ) or issuing the solicitation, the source lection authority approves a source selection plan.
(c) Source belection plan, The plan shall include, as a 3mum=
(1) A description of the organization structure;

2) Proposed presolicitation activitles:
3) A summary of the acquisition strategy;

A statement of the evaluation factors and thesr , importance;
5.tan.

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(3) Before conducting any presolicitation conferences (see 15.404) or 1 ssuing the solicitation, the source selection anthority approves a sontce selection plan.
(c) Source selection plan. As a minimun, the plan shall Include--
(1) A description of the organzation structure;
(2) Proposed presolicitation activities:
(3) A summary of the acquisition strategy;
(4) A statement of the proposed evaluation factors and thenr relative importance:
(5)
$\stackrel{t}{1}$ te
(6)
(a)
tho
$11 e$
=ription of the evaluation process, methodology, des to be used; and
dule of significant milestones.
Selection Decisxon. The source selection tall use the factors established in the ( (aee 15.605) to make the gource selection
surce selection authority shall consider any 1 ratings, and, if requested, any recommendations evaluation and asvisory groups. However, the tzon euthority shall not be bound by the inngs. or recofmendations if (i) there is a 5. consistent with this regulation and the , 2 shed in the solucitation, for the selection 1i) the contract file is documented with the decision.
(5) A description of the evaluation process, methodology. and techniques to be used: and
(6) A schedule of significant milestones.
(d) Source Selection pecigion. The source selection anthority shall use the factors established in the solicitation (see 15,605 ) to wake the soarce selection decision.
(1) The source selection authority shall consider any rankings and ratings, and, if requested, any recommendations frepared by evaluation and advisory groups. gowever, the source selection authority shall not be bound by the rankings, ratings, or recommendations if (i) there is a rational basis, consistent with this regulation and the factors established in the solicitation, for the selection decision, and (ii) the contract file is docomented vith the basis for the decision.
supporting documentation prepared for the
decision shall show the relative differences among
ts and theit strengths, weaknesses, and risks in if the evaluatarn factors. The supporting ntation shall isflude the basis and reasons for the fion. Documenterion shall be adequate to justify the Ition of the contractor over others whose proposals, , estandpoint cf some single factor (such as lower 2) ed cost or a shorter performance period), might .ti ly appear mor advantagnous to the Governmert
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(e) Safeguarding $2 n$ formation. Consistent with Part 24 , agencles shall exercise particular care to protect source celection information on a stilict need-to-know basis.
(1) Only the source selection authority may approve the release of source selection data during the selection process. After the source selection, releasing authority
(2) Government personnel shall not contact or visit a contractor regarding a proposal under source selection evaluation, without the prior approval of the source selection authority.
(e) Safequard2ng information. Consistent fith Part 24, agencies shall exercise partzcular care to protect source selection information on a stiflet need-to-know basis.
(1) Dring the selection process, approfal by the soorce selection authority shall be obtained before any release of sonrce selection data. After the source selection, releasing authority shall be as prescribed in agency pracedures. In all cases, agency procedures should prescribe the releasing authority.
(2) Government personnel shall not contact or visit a contractor regarding a proposal under source selection evaluation, Without the prior approval of the gource selection authority.
(f) Postaward notices and debriefings. See 15.1001 (c) and 15.1002.

### 15.613 Alternative source selection procedures,

(a) The National Aeronautics and Space Administration (NASA) and the Department of Defense (DOD) have developed. and use in appropriate situations, source selection procedures that limit discussions with offerors during the competition. The pracecures are the NASA Source Evaluation Board procedures and the DOD "Four-Step" Source Selection Procedures. Detalled coverage of these procedures is in the respective agency acquisition regulations
(b) Other agencies may use exther the NASA or DOD procedure as a model in developing their own procedures, including applicability criteria, consistent with massion neede.
(f) Postaward notices and debriefings. see 15. 1001 (c) and 15. 1002
15.613 Alternative source selection procedures.
(a) The Hational Aeronautics and Space Administration (HASA) and the Department of befense (DOD) have depeloped, and use in appropriate situations, source selection procedures that ilmit discussions with offerors during the competition, and that differ from other procedines prescribed in subpart 15. 6. Fhe procedores are the insa Source Evaluation Board procedures and the Dod mpoar-step" Source Selection procedures. Detailed coverage of these procedures is in the respective agency acquisition regulations.
(b) Other agenctes may use elther the masa or poo procedure as a model in developing their own procedures. including applicability criteria, consistent with mission neepls.

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NOTE: The entire text of this entity an issued for agency, Industry, and public comment appears in colum 4, and the entire text proposed for publication appears in Column S. Any differences in these two column not accounted for by the disposition codes and rationales reflect solely editorial changes.

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te tubpart prescribet policies and procedures for ining: evaluating, negotating, and agreeing to
whing. evaluating, negotiating, and agreeing to
norating makemor-buy programs into contracts. Consent fontracts and review of contractors ${ }^{\circ}$ purchasing are separate actions covered in Part 44, actang Policies and Procedures.

## SUBPART 15.7-MAKE-OR-BUY PROGRAMS

15.700 scope of subpart.

This subpert prescribes policies and procedures for obtaining, evaluating, negotiating, and agreeing to prame contractors' proposed make-or-buy programs and for incorporating make-or-buy programs into contracts. Consent to subcontracts and review of contractore purchasing systems are separate actions covered in Part 44 , subcontracking folicies and Procedures.

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### 15.701 Definitions.

"Buy item" means an item or work effort to be produced or performed by a subcontractor.
"Make item" means an Item or work effort to be produced or performed by the prime contractor or its affiliates. subeidiaries, or divisions.
"Hake-or-buy program" means a contractor's written pian identifying those major items to be produced or work efforts to be performed in the prime contractor's facilities and those to be subcontracted.
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15.701 Definitions.
"Buy item" meang an item or work effort to be produced or performed by subcontractor.
"Make item" means an item or work effort to be produced i performed by the prime contractor or its affiliates, subsidiaries, or divisions.
"Make-or-buy program" means that part of a contractor's written plan for a contract identifying (a) those major Items to be produced or work efforts to be performed in the prime contractor's facilities and (b) those to be subcontracted.

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Tatle MAKEOR-BUY PROGRAMS


### 15.702 General.

The prime contractor $1 s$ responsable for managing contract performance, including the planning, placement, and administration of subcontracts as necessary to ensure the lowest overall cost and technical rask to the Government. Although the Government does not expect to participate in every management decision, it may reserve the right to review the contractor' make-or-buy progran when necessary to ensure (a) negotiation of reasonable contract prices. (b) satisfactory performance, or (c) implementation of socio= economic policies.
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15.702 General.

The prime contractor 28 responsible for managing contract performance, including planning, placing, and administering subcontracts as necessary to ensure the lowest overall cost and technical tisk to the Government. Aithough the Government does not expect to participate in every
managenent decision, it may reserve the right to review and agree on the contractor's make-or-buy program when necessary to ensure (a) negotiation of reasonable contract prices; (b) satısfactory performance, or (c) implementation of sacloeconomic policiea.

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15.703 Acguis2tions reguiring make-or-buy programs,
(a) Contracting officers shall require prospective contractors to submit make-or-buy programs for all negotiated acquisitions with an estamated vplue of $\$ 1$ million or more, except when the proposed contract--
5. REVISED FAR
15.703 Acquasitions requiring make-or-buy programs.
(a) Contracting officers shall require prospective contractors to subrait make-or-buy programs for all negotiated acquisitions whose estimated value is $\$ 2$ milinon or more, except when the proposed contract--
-(1) Is for research or development not requiring prototypes or hardware, and no aignificant follow-on production it anticipated:
(1) Is for research or development and--1f prototypes or hardware are involved--no significant follow-on production under the same contract is anticipated:
(2) Ia to be awarded on the basis of adequate price competition, prices set by law or regulation, of established catalog or market prices of comercial items sold in substantial quantities to the general public: or
(2) I* priced on the basis of (i) adequate price competition or (il) established catalog or market prices of commercial items sold in substantial quantities to the general pubifc. or has only prices set by law or regulation (zet 15.804-3); ot
(3) Involvé only work that the contracting officer determines is not complex.
(3) Involves only work that the contracting officer determines is not complex.

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15.703
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(b) Contracting officers may require prospective contractors to submit make-or-buy programs for negotiated acquisitions with an estimated value under $\$ 1$ million only if the contracting officer (1) determanes that the information is necessary and (2) documents the reasons in the contract file.
15.703
(b) Contracting officers may require prospective contractors to submit make-or-buy programs for negotiated acquisitions whose estimated value is under $\$ 2$ million on l if the contracting officer (1) determines that the information 15 necessary and (2) documents the reasons in the contract file.

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## 4. PHASE I FAR

15.704 Items and work included.

The information required from a prospective contractor in a make-or-buy program shall be confined to those major items or work efforts that would normally require company management revrew of the make-or-buy decision because they are complex, costly, needed in large quantities, or require additional facilities to produce. Raw materials and off-the-shelf items shail not be included, unless their potential impact on contract cost or schedule is eritical. Make-or-buy programs should not normally include items or work efforts estimated to cost less than (a) 1 percent of the total estimeted contract price or (b) any minimur doliar amount set by the agency, whichever is less.

## 5. REVISED FAR

### 15.704 Items and work 2 neluded.

The information required from a prospective coneractor in a make-or-buy program shall be confined to those major items or work efforts that would normally require company management review of the make-or-buy decision because they are complex, costly, needed in large quantities, or require adilitional facilities to produce. Raw materials, commercial products (see 11.gol), and off-the-shelf 2 tems (see 46.101) shall not be included, unless their potential inppet on contract cost or sehedule $1 s$ critical. As rule, make-orbuy programs should not include items or work efforts estimated to cost less than (a) 1 percent of the total estlmated contract price or (b) dollar amount set by the
agency, whichever it greater.


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### 15.705 Solicitation requirements.

When prospective contractors are required to submit proposed make-or-buy programs (see 15.703), the solititatic shall Inclute-
(a) A statement that the program and reguired supporiang information must accompany the offer:
(a) A statement that the program and requared supporting information must accompany the offer:
(b) N description of factor to be used in evaluating the proposed program, auch as capability, capacity, availability of emell business and labor eurplus area concerns for subcontracting, eptablishment of new facilities in or near labor surplus areas, delivery or performance achedvles. control of technical and schedule interfaces, proprietary processes; technical superiority or exclusivenesp, and technical risks involved; and
(c) requarement that the offeror's program include or be supported by the follownag information:
(1) A description of each major item or work effort (see 15.704).
(2) Categorisation of each major itam or work effort as "must make," "must buy," or "can either make or buy."
(3) For each item or work effort categorized as "can elther make or buy," a proposal to "make" or to "buy."
(4) Reasons for (i) categorizing itens and work efforts as "must make" or "must buy" and (ii) proposing to "make" or to "buy" those categorized as "can either make or buy." The reasons must include the consideration given to the evaluation factors described in the sollicitation and be in sufficient detail to permit the contracting officer to evaluate the categorization or proposal.
(c) $A$ requirement that the offeror's program anclude or $=$ supported by the following information:
(1) A description of each major item or work effort (see 15.704).
(2) Categorization of each major item or work effort at "must make," "must buy," or "can aither make or buy:"
(3) For each item or work effort categorized as "can either make or buy," a proposal either to "make" or to buy."
(4) Reasons for ( $x$ ) categorizing item and work efforts $x$ must make" or "must buy" and (ii) proposing to "make" or 4 "buy" those categorized as "can elther make or buy." The reasons must include the consideration given to the evaluatzon factors described in the solficitation and be in aufficient detall to permit the contracting officer to evaluate the categorization or proposal.

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15.705(c) continued.
(5) Designation of the plant or division proposed to make each item or perform each work effort and a statement as to whether the existing or proposed new facility is in or near a labor surplus area.
(6) Identification of proposed subcontractors, if known, and their location and size status (see also 19. xXX for subcontracting plan requirements).
(7) Any recommendations to defer make-or-buy decisions when categorization of some items or work efforts is impracticable at the time of submission.
(8) Any other information the contracting officer requires in order to evaluate the program.
15.705(c) continued.
(5) Designation of the plant or division proposed to make each item or perform each work effort and a statement as to whether the existing or proposed new facility is 1 n or near a labor surplus area.
(6) Identification of proposed subcontractors, if known, and their location and size status (see also Subpart. 19.7 for subcontracting plan requirements).
(7) Any recommendations to defer make-or-buy decisions When categorization of some 1 items or work efforts 18 impracticable at the tine of submisaion.
(8) Any other information the contracting officer requires in order to evaluate the program.
25.706 Evaluation, negotiation, and agreement.
(a) Contracting officers shall evaluate and negotiate proposed make-or-buy programs as soon as practicable after receipt and before contract award. When the program is to be incorporated in the contract (see 15.707 ) and the design status of the product being acquired does not permit accurate precontract identification of major item or work efforts, the contracting officer shall notify the prospective contractor in writing that these items or efforts, when identifiable, shall be added under the changes or Addition to Make-or-Buy Program clause at 52.215-X.
15.706 Evaluation, negotiation, and agreement.
(a) Contracting officers shall evaluate and negotiate proposed rake-or-buy programs as soon as practicable after their receipt and before contract award, when the program is to be incorporated in the contract (see 15.707) and the design status of the product being acquired does not permit accurate precontract identification of major items or work effort prospective contractor in writing that these items or efforts, when identifiable, shall be added under the clause at 52.215-21, Changes or Additions to Make-or-Buy Program.
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(b) In preparing to evaluate and negotiate prospective contractors' makeror-buy programs, the contracting officer shall request the recommendations of appropriate personnel. including technical and program management personnel, the activity small and disadvantaged business utilization specialist, and the Small Business Administration representative. The contracting officer shall request these recommendations early enough to fully consider them before (1) agreeing to a make-or-buy program or (2) consenting to a change in a make-or-buy program already incorporated in a contract.
15.706
(b) In preparing to evaluate and negotiate prospective contractors' make-or-buy programs, the contracting officer shall request the recommendations of appropriate personnel, including technical and program management personnel, and the activity small and disadvantaged business utilization specialist. The Small Business Administration representative may also be consulted. The contracting officer shall request these recommendations early enough to consider them fully before ( 1 ) agreeing to a make-or-buy program or (2) consenting to a change in a make-or-buy program already incorporated in a contract.

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15.706
(c) The contractor has the basic responsibility for make-or-buy decisions. Therefore, Its recommendations should be accepted unless they are inconsistent with Government interests or policy.
(c) The contractor has the basic responsibility for make or-buy decisions. Therefore, its recommendations should $=$ accepted unless they are inconsistent with Government
(d) Contracting officers shall give primary consideration to the effect of the proposed make-or-buy program on price. quality, delivery, and performance, including technical or financial risk involved. The evaluation of "must make" and "must buy" items should normally be confined to ensuring that they are properly categorized. The effect of the following factors on the Government* interests shall miso be considered:
(1) Whether the contractor has justified performing work in plant that differs significantly from its normal operations.
(d) Contracting officers shall give primary considerateto the effect of the proposed make-or-buy program on price. quality, delivery, and performance, including technical or financial rask involved. The evaluation of must make a"must buy items should normally be confined to ensuring that they are properly categorized. The effect of the following factors on the Government " B interests hall also be considered:
(I) Whether the contractor has justified performing work in plant that differs significantly from its normal operations.
(2) Whether the contractor's recommended program requireGovernment investment in new or other facilities in order for the contractor to perform the work in plant. (This additional cost to the Government would not be reflected the contract price.)
(3) The impact of the contractor's projected plant work
ding on indirect costa. loading on indirect costs.
(2) The impact of the contractor" projected plant work loading on overhead costs.
interests or policy.
15.706
$\qquad$ 15.7

Title MAXE-OR-EN BROGPAIAS
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$15.706(d)$ continued PRASE I PAK
(3) The contractor's consideration of the availability of
other firms, especially small business. small disadvantaged
business, or labor surplus area firms.
15.706(d) continued.
(4) The contractor's consideration of the competence, ability, experience, and capacity, available in other firms, especially small business, small disadvantaged business. or labor surplus area firms.
(4) The projected location of any required additional abilities in or near labor surplus areas.
(5) The contractor" make-or-buy history as to the type of ten concerned.
(6) The scope of proposed subcontracts, including the type nd level of technical effort involved.
(7) Other factors such as future requirements. igineering, tooling, starting load costs, market conditions, technical superiority, and the availability of sreonnel and materials.
(5) The projected location of any required additional facilities in or near labor surplus areas.
(6) The contractor's make-or-buy history regarding the type of item concerned.
(7) The scope of proposed subcontracts, including the type and level of technical effort involved.
(8) Other factors such an future requirements, engineering, tooling, starting load costs, market conditions, technical superiority, and the availability of personnel and materials.
$\qquad$
Tutle $\qquad$ MAKE-OR-BUY PROGRAMS
Drafter RCURTIS reviewer $R$ COLE Eaitor $O$ BECK
5. REVISED FAR
15.707 Incorporating make-or-buy program in contracts.
(a) After agreement 18 reached, the contracting officer may incorporate the make-or-buy program in negotiated contracts for-
(1) Major systems (see Part 34) or their subsystems or components, regardless of contract type; or
(2) Other supplies and services if (i) the contract is a cost-reimbursable contract, or cost-sharing contract in which the contractor's share of the cost is less than 25 percent, and (iif) the contracting officer determine that technical or cost risks justify Government review and approval of changes or additions to the make-or-buy program. 4
her supplies and services if (i) the contract type inm-fixed-price or fixed-price with economic price it and (ii) the contracting officer determanes that 3. or coltt ribky justify Government review and of changen or additions to the mate-or-buy program.

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15.707
(b) It may be necessary to incorporate some items of algnificant value in the make-or-buy program as "make" or, alternatively, as "buy" even though the opposite categorization would result in greater economy for the Government. If this situation occurs in any fixed-price incentive or cost-plus-incentive-fee contract, the contracting officer shall specify these items in the contract and state that they are eubject to paragraph (d) of the clause at $52.215-\mathrm{X}$, Changes or Additions to 高京e-or-Buy Program (see 15,708 ). If the contractor proposes to reverse the categorization of such items during contract performance, the contract price shall be subject to equitable reduction.
(b) It may be necessary to incorporate some items of significant value in the make-or-buy program as "make" or, alternatively, as "buy" even though the opposite categorization would result in greater economy for the Government. If this situation occurs in any fixad-price incentive or cost-plus-incentive-fee contract, the contracting officer shall specify these items in the contract and state that they are subject to paragraph (d) of the clause at 52.215-21, Changes or Additions to Make-or-Buy Program (see 15.700 below). If the contractor proposes to reverse the categorization of such items during contract performance, the contract price shall be subject to equitable reduction.

### 15.708 Contract clause.

The contracting officer binal insert the clause at $52.215-\mathrm{X}$, Changes or Additions to Make-or-Euy program, in ali contract? that incorporate a make-or-buy program. when the circumstances described in 15.707 (b) above apply, the contracting officer shall use the clause" fixed -price incentive contracts or Alternate II for cost-plus-incentive-fee contracts.

## 15. 708 Contract clause.

The contracting officer shall insert the clause at 52,215-21, Changes or Additions to Make-or-Buy Program, in ail contracts incorporating a make-or-buy program. When a leas economical "make" or "buy" categorization is selected for one or more items of significant value in certain types of contract (see $15.707(\mathrm{~b})$ above), the contracting officer shall use the clause with (a) it: Alternate I, if the contract is fixed-price incentive contract. or (b) its Alternate II, if the contract it e cost-plus-incentive-fee contract.

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## 4. PHASE I FAR

52.215-X Changes or Additions to Make-or-Buy Program.

In accordance with 15.708, insert the following clause in all contracts incorporating a make-or-buy programs

## CHANGES OR ADDITIONS TO MAKE-OR-GUY PROGRAM (DATE)

(a) The Contractor shall perform in accordance with the make-or-buy program incorporated in this contract. If the Contractor proposes to change the program, the Contractor shall. reasonably in advance of the proposed change. (1) notify the Contracting officer in writing and (2) submit justification in sufficient detail to permit evaluation. Changed in the place of performance of any "make" items in the proaraja are subject to this requirement.
(b) For items deferred at the time of negotiation of this contract for later addition to the program, the Contractor shall, at the earliest possible time, (1) notify the contracting officer of each proposed addition and (2) provide justification in sufficient detail to permit evaluation.
(c) Modification of the make-or-buy program to incorporate proposed changes or additions shall be effective upon the Contractor's receipt of the Contracting officer's written approval.

## (End of clause)

(R 7-204.20(a) 1967APR/1-3.902-3) 部
Alternate 1 (DATE). If, under the circumstances described in $25.707(\mathrm{~b})$, a less economical "make" or "buy" categorization $1 s$ selected for one or more items of significant value in a fixed-price incentive contract, add the following paragraph (d) to the basic clause:
(d) If the Contractor desires to reverse the categorization of "make" or "buy" for any item or item e designated in the contract as subject to this paragraph, it shall (1) support $1 t s$ proposal with cost and pricing data to permit evaluation and $\{2$ ) after approval is granted, promptly negotiate with the Contracting officer an equatable reduction in the contract price in accordance with paragraph (i) of the incentive price revision clause of this contract.

$$
\text { (R 7-204.20(b) } 1967 \text { APR) }
$$

Alternate II (DATE), If, under the circumstances described in $15,707(\mathrm{~b})$, a less economical "make" or "buy" categorization is selected for one or more items of significant value in any cost-plus-incentive-fee contract. add the following paragraph (d) to the basic clause:
(d) If the Contractor desires to reverse the categorization of "make" or "buy" for any item or items designated in the contract as subject to this paragraph, it shall (1) support $2 t s$ proposal with cost and pricing data to permit evaluation and (2) after approval it granted. promptly negotiate with the Contracting Officer an equitable reduction in the contract price in accordance with paragraph (e) of the Incentive Fee clause.

$$
(\mathrm{A} 7-204.20(\mathrm{~b}) 1967 \mathrm{APR})
$$

## 5. REVISED FAR

52.215-21 Changes or Additions to Make-or-Buy Program.

As prescribed in 15.708, insert the following clause in a nl contract a incorporating a make-or-buy program:

## CHANGES OR ADDITIONS TO WAKE-OR-BUY PROGRAM (DATE)

(a) The Contractor shall perform in accordance with the make-or-buy program incorporated in this contract. If the Contractor proposes to change the program, the Contractor shall, reasonably in advance of the proposed change, (1) notify the Contracting officer in writing and (2) submit justification in sufficient detail to permit evaluation. Changes in the place of performance of any "make" items in the program are subject to this requirement.
(b) For items deferred at the time of negotiation of this contract for later addition to the program, the contractor shall, to the earliest possible time. (1) notify the Contracting officer of each proposed addition and (2) provide justification in sufficient detail to permit evaluation.
(c) Modification of the make-or-buy program to incorporate proposed changes or additions shall be effective upon the Contractor's receipt of the contracting Officer" s written approval.

> (End of clause)
> (R 7-204,20(a) 1967 APR)
> $\left(\begin{array}{l}\text { (R } 1-3(902-3)\end{array}\right.$

Alternate I (DATE). If a less economical "make" or "buy" categorization is selected for on s or more items of significant value in fixed-price incentive contract, add the following paragraph (d) to the basic clauses
(d) If the Contractor desires to reverse the
categorization of "make" or "buy" for any 1 temp or 1 tens designated in the contract as subject to this paragraph. it shall (1) support 2 ts proposal with cost or pricing data to permit evaluation and (2), after approval is granted, promptly negotiate with the Contracting officer an equitably reduction in the contract price in accordance with paragra ( $k$ ) of the Incentive Price fevision--Fira Target clause or paragraph (m) of the Incentive Price Revision--Successive Targets clause of this contract.

## (R 7-204.20(b) 1967 APR)

Alternate II (DATE). If a less economical make" or "buy" categorization is selected for one or more items of significant value in a cost-plus-incentive-fee contract. dad the following paragraph (d) to the basic clause:
(d) If the Contractor desires to reverse the categorization of "make" or "buy" for any item or items designated in the contract as subject to this paragraph. it shall (i) support its proposal with cost or pricing data to permit evaluation and (2), after approval is granted, promptly negotiate with the Contracting officer an equitable reduction in the contract 's total estimated cost and fee in accordance with paragraph (e) of the Incentive Fee clause.
NOTE* The ent re text of this entity as issued for igency, industry, and public comment appears in Colump 4 , and the entire text proposed for publication appears in Colum 5. Any differences
in these two colums not accounted for by the disposition codes and rationales reflect solely edutorial changes.
At of April 12 , 2983.this entity 15 cartemt
through DAC No 42 and FPR Anacms $x+118$ •o 225

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Drafter Downey/Fromberg

## SUBPART 15.8--PRICE NRGOTIATION

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SUBPART 15. $8=-$ PRICE NEGOTIATION








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|  |  | Drafter | Downey/Fromberg | Reviewer | Pane1 | Editor | McGuire |
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Wiela pricing sepport" means e comprehensive review and ovaltation of the contractor's or subcontractor's proposal by cognizant field pricing support personnel (see 15. $205-5$ (a) (3i) . $\qquad$
"Field pricing support" mears a review and evaluation cf the contractor's or subcontractor's proposal by any or all field pricing tupport personnel (see $\$ 5.805-5$ (a) (3)).

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Forvard pricing rate agreement means a written understanding negotiated hetween a contractor and the Government to make certain rates avalable during a specified period for use in pricing contracts or modifications. Such rates represent reasonable projections of specific costs that are not easily estimated for. identified itth, or generated by a specific contract, contract end item, or task. These projections may include rates for labor, indirect costs, material obsolescence and usage, spare parts provisioning, and material handlung.
"price analysis" meane the process of examining and evaluating a proposfu arice izthout evaluating its separate cost eiements ari progosed mrofit.
"Fornard pricing rate agreement" means a written agreement negotiated between a contractor and the Government to make certain rates available durirg a specified period for use in pricing contracts or modifications. Such rates represent reasonable projections of specific costs that are not easily estumated for, identified with, or generated by a specific contract, contract end item, or task. These projections may include rates for habor, indirect costs, material obsolescence and usage, spare parts provisioning, and material handiung.
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Price analysis" means the process of examining and evaluating a prospective proposed price vithout evaluating its separate cost elements and proposed profit.

"Technical analysis," as used in thes subpart, means the examination and evaluation by engineering and other tecmical persomnel of proposed quantities and kands of materials, labor, processes, special tooling, facilities, and associated factors set forth in a proposal in order to determine and report on the need for and reasonableness of the proposed resources assumang reasonable economy and efficuency.

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$15 E_{0}$ ? 4. PHASE I FAR
(a) The Truth in Regotiations Act Pabilc Lav 87-653 (10 D. S.C. 2306 (f)), provides that the Department of Defense, the llational Aeronautics and Space Adounistration, and the coast guard shall require a prime contractor or any subcontractor to sobmit and certify cost or pricing data onder certain circumstances. The Act also requires inclasion of contract clauses that provide for reduction of the contract price by any amounts that resulted from contractor or subcontractor defective cost or pricing data. The Act's requirements shell apply as a matter of policy to all other executive agencies.
$15.502(\operatorname{com}+\mathrm{c})$ 5. REVISED FAR
(a) The Truth in Negotiations Act, Public Law BJ-653 110 D.S.C. 2906 (f)). provides that the Department of Defense, the National Aeronautics and Space Admanistration, ana the Coast Guard shall require a prime contractor or any subcontractor to submit and certify cost or pricing data under certain circunstances. The Act also requires mnclusion of contract clauses that provide for reduction of the contract price by any significant amounts that such frice was increased because of submission of contractor or subcontractor defective cost or pricing data. The Act's requirements shall apply as a matter of policy to all other executive agencies.


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(b) Contracting officers shall--
(1) purchase supplies and services from responsible sources at fair and reasonable prices calculated to resalt in the lowest ultimate overall cost to the Government;
(2) Price each contract separately and independentiy and not (i) use proposed price reductions under other contracts as an evaluation tactor or (ii) consider losses or profits realized or anticipated onder other contracts; and
(3) Hot include in a contract any amount for a specified contingency to the extent that the contract provides for price adjustment based upon the occurrence of that contingency.
(b) Contractang officers shall--
(1) Purchase supplies and services from responsible sources at falr and reasonable prices calculated to result in the lowest ultimate overall cost to the Government;
(2) Price each contract separately and independently and not (1) use proposed price reductions under other contracts as an evaluation factor or (ii) consider losses or profits realized or anticipated under other contracts; and
(3) Not include in a contract price any amount for a specified contingency to the extent that the contract Frovides for price adjustment based upon the occurrence of that contingency.

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15.803 General.
(a) Contracting officers shall use contract audit as a pricing aid to the fallest ertent appropriate. Contract auditors, although organizationally indepate, contract contracting officer's principal edvisors on contractor accounting and audit matters.
15.803 General.
(a) Contracting officers shall use contract audit as a Fricing aid to the fullest extent appropriate and available, except as otherwise authorized under agency procedures. contract auditors, although organizationaliy independent, are the contractang officer's principal advisors on contractor accounting and audit matters.

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(b) Since information from sources other than an offeror's contractor's records may significant il affect the - Ferment's negotiating position, Government personnel all not disclose to an offeror or contractor any nelusions, recommendations, or portions of administrative ntracting officer or auditor reports regarding the feror"s or contractors proposal without the concurrence
the contracting officer responsible for negotiation. is prohibition does not precinde the disclosure of
screpancies or mistakes of fact (such as applications, iffitions, and errors in computation j contained ln the cost - pricing data supporting the proposal.
(b) Since information from sources other than an offeror or contractor's records may significantly affect the Government's negotiating position, Government personnel shall not disclose to an offeror or contractor any conclusions, recommendations, of portions of administrative contracting officer or auditor reports regarding the offeror's or contractor's proposal without the concurrence of the contracting officer responsible for negotiation That prohibition does not preclude the disclosure of discrepancies or mistakes of fact (such as duplications, omissions, and errors in computation) contained in the cost or pricing data supporting the proposal.


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(c) Before issuing solicitation, the contracting officer ahall (when it is feasible to do so, and ordinarily with the assigtance of requirements and pricing personnel) develop an entibate of the proper price lefel or aite of the supplies af sectices to be parchafed. Estiatates can range front simple budgetary estimates to compler estinates based on inspection of the product itself and review of such itens as dravings, specifications, and prior data.
$15.803\left(\operatorname{Cant}_{3}\right.$
5. REVISED FAR
(c) Before 18suing a solicitation, the contracting officer shall (when at $2 s$ feasible to do so and oxdinarily with the assistance of requirements and pricing personnel) develop an estimate of the proper price level or value of the supplies or services to be purchasedi Estimates can range from gample budgetary estimates to complex estimates based on inspection of the product itself and review of such items as drawings, specifications, and prior data



(d) Prace negotiation is intended to permit the ntracting officer and the offeror to agree on a fair and sonable price. Heasonable compromises may be necessary. 1 it may not be possible to negotlate a price that is in fict accord vith all the contributing specialists" .nions or with the contracting officer's prenegotiation jective. The contracting officer is responsible for erchsing the reguisite judgment and is solely responsible t the final pricing decision. The recommendations and unsel of contributing specialists, including auditots, are Fisory only. Howerer, the contracting officer shonld clade comments in the price negotiation memorandan vhen -gnificant andit or other specialist recompendations are准 actopted.

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(d) Price negotiation 15 intended to permit the contracting officer and the offeror to agree on a fair and reasonable price. price negotiation does not require that agreement be reached on every element of cost. Reasonable compromises may be necessary, and it may not be possible to negotiate a price that is in accord with all the contributing specialists. opinions or with the contracting officer" 25 responsible for exercising the requisite judgnent and is solely responsible for the final pricing decision. The recompendations and counsel of contributing specialists. including auditors, are advisory only. However, the contracting officer should include comments in the price negotiation memorandum when significant andit or other speclalist recommendations are not adopted.


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(e) The contracting officer's primary concern is the price e Government actually pays; the contcactor's eventual cost a protit shonid be a secondary concern. The contracting ficer*s objective is to negotiate a contract of a type and th a price providing the contractor the greatest incentive Fefficient and economical performance. Therefore the ntracting officer should not become preoccapied with any ngle element and should balance the contract tiper cost, a profit negotiated to achieve a total resolt and price ir and reasonable to both the Government and the ntractofe. If, however, the contractor insists on a price - denands a profit or fee that the contracting officer onsiders unreasonable and the contracting officer has taken -1 mothorized actions (including determining the asibility of developing an alternative source) without ccess, the contracting officer shall then refer the intract action to bigher authority.
(e) The contracting officer's primary concern is the price the Govermment actualiy pays; the contractor's eventual cost and profit or fee should be a secondary concern. The contracting officer's objective 23 to negotiate a contract of a type and with a price providing the contractor the greatest incentive for efficient and econcmical performance. The negotiation of a contract type and a price are related and should be considered together with the $18 s u e s$ of risk and uncertalnty to the contractor and the Government. Therefore the contracting officer fhould not become preoccupzed with any single element and should balance the contract type, cust, and profit or fee negotiated to achieve a total result and price fair and reasonable to both the Government and the contractor. If, however, the contractor insists on a price or demanas a profit or fee that the contracting officer considers unreasonable and the contracting officer has taken all atathorized actions (including determining the feasibility of developing an alternative sourcel without success. the contracting officer shall then refer the contract action to higher authority. bisposition of the action by higher authority should be documented.

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004 Cost or pricing date.

## 804-1 General.

a) Cost or pricing data submitted by an offeror or itractor enable the Governaent to perforim cost analysis - ultimately enable the Government and the contractor to otiate fair and reasonable prices. Contractors and contractors may be requited to stbuit cost or pricing a thet are either certified (see 15.804-2 below) or ertified (see 15.804-5).
15.804
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15.804 Cost or pricing data.
15. 804-1 General.
(a) Cost or pricing data submitted by an offeror or contractor enable the Government to perform const analysis and ultimately enable the Government and the contractor to negotiate falr and reasonable prices. Contractors and subcontractors may be required to submit cost or pricing data that are either certified (see 15.804-2) or uncertified (see 15, 804-5) -


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(b) The Armed Services Procurement Regulation Manual for
b) The Armed Services Procurment fegulation annal for .tract Pricing (AsPa Fo. 1) ras issued by the department Defense to guide pricing and negotiating persomnel. It Fldes detailed discnssions and examples applyang pricing icies to pricing problems. ASPB 10. 1 is prescribed for for instruction and professional guidance. Hovever, it not directire, and its references to Department of onse forms and regniations should be considered
formational only. Copies of MSPy Ho. (Stock lo. 008-0-00221-5) mal be purchased from the superintendent of zuments, Attn: Sail zist section, D.S. Government Printing tioe. Fashington, DC 20402.

Contract Pricing fiswM No. if was $18 s u e d$ ky the Department of Defense to guide pricing and negotiating personnel. It Frorides detailed discussions and examples applyana pricing policies to pricing problens ASPM No 1 is avallable for ose for instruction and proressional guidance. However, it is not directive, and its references to pepartanent of Defenge forms and regulations should be considered informational only- Copies of ASPM No 1 (Stock ato 008-000-0022t-5y may be purchased from the superintendent of Documents, Attn: Mall List Section, U.s. Government Pranting office. Washington, DC 20402.



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## 4. PHASE I FAR

15.804-2 fequiring certified cost of pricing data.
 subparagraphs (1) throngh (4) following are taken, except then the vaiper or exemptions in $15.804-3$ below apply, the ontracting officer shall reguire contractor or sospective contractor to sabinit and to bave any sibcontractor or prospective subcontractor submit telther ctually or by specific identification in viting) cost or ricing data in support of its proposal and a Certificate of rarrent cost or pricing Data certifining that, to the best of Ltt knowledge and belief, thege data were accorate, complete, and carrent as of the date of final agreement on rice (see 15. 804-4):
(1) The avard of any negotiated contract (except for inpriced actions such as letter contracts) expected to excead $\$ 100,000$.
(2) The modification of any formally adrertised or jegotiated contract (whether or not cost or pricing data rere initially required) when the modification involves uncreases and/or decreases in costs plus profits expected to aggregate more than $\$ 100,000$ (for example, the regrirement ipplies to a $\$ 30,000$ modification fesulting from a redaction if $\$ 70,000$ and an increase of $\$ 40,000$. Itis ceguirement loes not apply Then uncelated and separately priced changes -ot which cost or pricing data would not othervise be zequired are incloded for administrative convenience in the same moditication.
(3) The ayard of a subcontract at any tier, if the zontractor and each higher tier subcontrictor have been equired to furnish certified cost of pricing data, when the subcontract is expected to erceed $\$ 100,000$.
(4) The nodification of any subcontract covered by subparagraph (3) immediately above, when the aggregate price adjestment (see subparagraph (2) above) is expected to sxced $\$ 100,000$.

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6. 804-2 Reguiring certified cost of pricing data.
(a) (1) Except as provided in (a) (2) below, or in 15. 804-3, certified cost or pricing data are required before accomplishing any of the following actions:
(1) The award of any negotiated contract (except for unpriceă actions such as letter contracts) expected to exceed $\$ 500,000$.
(11) The modificatson of any formally advertised or negotiated contract (whether or not cost or pracing data were inztially requited) when the modification involves a price adjustment expected to exceed $\$ 500,000$. (For example. a $\$ 150,000$ modification resulting from a reduction of $\$ 350,000$ and an increase of $\$ 200,00015$ a pricing adjustment exceeding $\$ 500,000$ ). This requicement does not apply when unrelated and separately priced changes for which cost or Fricing data would not otherwise be required are included for adminstrative convenience in the same modification-
(iil) The award of a subcontract at any tier, if the contractor and each higher tier subcontractor have been required to furnish certified cost of pracang data, when the subcontract is expected to exceed 5500,000
(iv) The modification of any subcontract covered by (1ii) above, when the price adjustment (see (ii) above) is expected to exceed $\$ 500,000$.
(2) If cost or pricing data are needed for pracing actions over $\$ 100,000$ and not in excess of $\$ 500,000$. certified cost or pricing data may be obtaned, unless. in the judgment of the contracting officer, uncertified cost or pricing data (see 15-804-5) will suffice. Whenever certified cost or Fricing data are reguired for pricing actions of $\$ 500,000$ or lesg, the contracting officer shali document the file to justify the requirement When awaxding a contract or issuing a modification of $\$ 100,000$ or less, the contracting officer shall not require certified cost or pricing data.
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Actions of $\$ 100,000$ or less. Then avarding a contract suing modification of 325,000 or less, the
acting officer shail not require certified cost or 29 anta. In rare cases, the conttacting officer may re certified cost or pricing data in connection with a act or moditication between $\$ 25,000$ and $\$ 100,000$. In Ceses; the contracting officer showld be able to Ey this tequirement fulily and explain hov the benefits outivelgh the administrative costs involvea.

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(b) When certified cost of pricing data are required, the contracting officer shall requre the contractor or prospective contractor to subirt fand to have any subcontractor or prospectwve subcontractor gubmit) the following in support of any proposel:
(1) The cost or pricing data.
(2) A certificate of current cost or pricing data, in the format specified in 15.804-4, certifying that to the best of its knowledge and belief, the cost or pricing data were accurate, complete, and current as of the date of fanal agreement on price.
(c) Cost of pricing data may be submitted by means of separate documents or by means of a document that identifies the sources of the data.


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804*3 Bremptions from or waiver of subnission of :ertified cost or pricing data.
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15. 804-3 Bxemptions from or vaiver of submission of certified cost or pricing data.





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(c) Established catalog or macket prices. A proposal is rempt from the requirement for submission of certifiad cost z pricing data if the prices are, or are basel on; stablished catalog or established market praces of mmereial itemp sold in substantial quantities to the ineral public. in order to gralify for this exemption, the erms of the proposed purchase fsuch as quantity. deiviery efasirements, or other contractual provisions) shonla be aquirements, or other contrintiar to those of the conmercial sales that be catalog of market price will be faif and reasonable.
(1) WEstablished catalog prices" must be recorded in a orm regalarif maintained by the manufacturer or Fendor. his form mat be a catalog, price list, schednle, or other erifiable and established record. The record must (i) be ablished of othervise available for cuatomet inspection and if) state currant or last sales price to a significant finber of buyers constituting the gener al public (see ubparagraph (5) below) -
(2) matablished market prices" are curfent prices that i) are established in the conise of or anary and usual cade betveen bayers and seliers free to bargain and (ii\} an be sabstantiated bi data From sources independent of the andfacturec or Tender.
(3) mompercial itaras" are sapplies or services cegularly sed for other than Gorernment parposes and sold or traded 7 the general p女blic in the course of normal basiness peretions.
(4) An itam 1s mold in substantial quantities only when oe qrantitios regriarip sold are sufficient to constitote a ae quantitiok regulariF sold are sufficient to constitute atiples; prototypes; or experimental units, do not meet this equirement. For services to be sold in substantial jantities, they must be customarily provided by the
facor, pising personnel regularly employed and egripment
f any in necesgary regniariz maintained solelf or incipally to provide the services.
(5) The "general public" is a significant number of buyert her than the Government or aftiliates of the offeror; the en involved ingst not be for Government and use. For the irpase of this subsection $15.804-3$, items acguired for "opernment end wse incinde itens acquired for foreign - litary sales.
(c) Established catalog or maxket prices. A proposal is exempt from the requirenent for submission of certified cost or pricing data if the prices are or are based on, established catalog or established market prices of commercial atems sold in substantial quantities to the general public. In order to qualify for this exemption, the terms of the proposed purchase, such as quantity and delivery requirements, should be sufficientiy similar to those of the commercial sales that the catalog or market price will be fair and reasonable.
(1) Mestablished catalog prices* must be recorded in a form regalariy maintanned by the manufacturer or venaor. This form may be a catalog, price list, schedule, or other verifuable and established recora. The record must (1) be published ox otherwise available for customer inspection and (ii) state current or last sales price to a aignificant number of buyers constituting the general public (see subparagraph (5) below).
(2) Estabinshed market prices" are currel.t prices that (1) are established in the course of ordinary and usual trade between buyers and seliers free to bargain and (ii) can be aubstantiated by data from sources independent of the manufacturer or vendor.
(3) mcommerclal items are supplies or services reguiarly used for other than Government parposes and sold or traded to the general public in the course of normal busithess operations.
(4) An item is *sold in substantial quantities* only when the quantities regularly sold are aufficient to constitute a real commercial market Hominal quantities, such as models, satrples, pratotypes, of experimental units, do not weet this requirement. For services to be sold in substantial guantities, they must be customarily provided by the offeror, using personnel regularly employed and equipnent (if any is necessary) regularly maintained solely or principally to provide the services.
(5) The "general public" is a significant number of buyers other than the covernment or affiliates of the offeror: the iten involved must not be for Government end use. For the Furpose of this subsection 15, 804-3. Items acquired for mgovernment end use" include stems acgulred for foreagn rilitary sales.

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(6) A price fis mbased on a catalog or market price onj. Fthe item being purchased is gufitelentip similar to the
 iffarence in prices can be identified and justified vithout -egort to cost andizsis.
(7) te an item is gubstantially sindiat to a comercisi ted for rhich there 1 s an eptabilshed catalog or masket Eice det which substantial quentitien act sold to the anetal ptblic, but the price proposed is not beged on this atalog or market price (see subparagraph (6) inmediately bovel the fontricting officet may, if foing so wili Fesglt $n$ in fait and reasonable pries. ilinit any reguirement for ost or pricing data to those data that pertain to, the ifferences petween the items. then the differenco between be ctatiog or mirket price of an item or item and the foposed totel contrict price $18 \mathrm{~s} \$ 100.000$ or more the ontrieting ofticer shail reguize 雮umilision of certifind ost or pricing deta to identifi and justify thet

(8) Byen though there is an establighat catalog or market rice of conmercial items sola in eubstantial quantities to be generin peblic, the contracting officer ntit regulre cost = pricing dite if (i) the contracting of ificer wakes a
citten finaing thit the priee is not responableq ineloding etactes upon vhich the tinding is based and fili the ifef of the contracting office approfes the finding.
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(6) A price is mkased on ${ }^{m}$ catalog or market price only tf the iten being purchased is sufficientiy similar to the catalog- or market-priced commercial item to ensure that any difference in prices can be identified and justified withuut resort to cost analysis.
(7) If an item is substantially similar to a commercial item for which there is an estabilished catalog or market price at which substantial fuantities are sola to the general public, but the price proposed is not based of thas general public, but the pice proparagraph (6) above), the contracting officer may, if doing so will result in a fasr and reasonable price, ilmit any requirement for cost or pricing data to those data that pertain to the differences between the items. When the aifiference between the cataloy or market price of an 1tem or 1 tems and the proposed total contract price is $\$ 500,000$ or more, the contracting officer ahali require submission of cortifued cost or pricing data to identify and justify that difference unless an exemption or waiver is granted.
(8) Even though there is an established catalog or market Frice of connercial itens snid in substantial quantities to the general public. the contracting officer may require cost ior pricing data if (i) the contracting officer makes a written finaing that the price is not reasonsble including written finding that the price is not rasonsble and (il) the the facts npon which the finding is based, contracting officer.


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（d）prices get br lay or requlation $A$ price get by lay cegalation ia exppt fron the requirement for subisision certified cost of pricing data．Pronouncementi in the rim of periodic ralings，revieus，or similar actions of a vernmental body，or embodied in the lats，are sufficient establish the price．
（e）clapiping and granting exemption．To receive an ex enption ender paragraph（c）or（d）above，the prompective contractor mest oranarily ckain it on ST IXI，Clain for sxemption from submisaion of Certified cost of pricing Data． The contracting officer may grant exemption and need not reguire the subuission of $5 \%$ XXf hen＝
（1）Ple Gofernment has acted favorably on at uremption clat for the same iten or sifilar item vithla the past早解：
（2）Special arrangements for the tubaission of exemption clai th hate been made in anticipation of repetitite acquisitions of catelog items：or
（3）There is fidence，before solicitation，that the item bes un acceptable established catalog or macket price or a price set bJ lew or regriation．Evidence may include（i） recent subfissions bi offerors or（ii）the contracting ofticet＇悪 knofledge of market conditions，prevailing prices， or maxter

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（d）Prices set by law or requlation－A price set by law or regulation is exempt from the requirement for subuission of certified cost or prising alata．Pronouncenents in the form of periodic rulings，reviews，or similar actions of a governmental body，or eabodied in the laws，are gufficient to establish the price．
（e）Glatiming and granting exemption－To receive an exemption under paragraph（c）or（d）above，the offeror mast ordinarily claim it on standard Form 1412 （SF 1412），Claim for Exemption from subaission of Certified cost or Pricing Data，when the total proposed anount exceeds $\$ 500,000$ and more than one catalog iten for which an exemption is clajmed exceeds $\$ 25,000$ ．Then an exemption is claimed for more than one iten in a proposal s separate SF 141218 required for each such item exceeding $\$ 25,000$ except as otherwise provided in the policitation．The contracting officer may grant an exemption and need not require the subaigsion of s f 1412 when－
（1）The Government has soted favorably on an exenption clail for the same item of sind lar items within the past year．In that case，except as otherwise directed by the contracting officer，the offeror may furnish a copy of the prior claim and related covernment action．The offeror must aleo mubmit a statement to the effect that to its knowledge fince the prior subvission，except as expresely set forth in the statement，there have been no changes in the catalog price or discounts，volume of actual sales，or the ratio of sales for Government and we to sales in other categories Which would cause cumulative change in price axceeding $\$ 50,000$ ：
（2）Special arcangements for the subatssion of exemption claing have been ude in anticipation of repetitive acquisitions of catalog iteme；
（3）There is evidence，kefore solicitation，that the item has an acceptable established catalog or market price or a price get by law of regulation．Evidence may include（i） recent abbisaions by offerors or（ii）the contracting officer＂s knowiedge of market conditions，prevailing prices， or bources：
（4）The total proposed amount exceeds $\$ 500,000$ ，but there is no indivadual catalog item with a price exceeding 350,000 ．



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(f) Verificutione (1) Then a prospective contractor requests exemption from sabmission of certified cost or pricing data, the contracting officer shall ensure that all applicable criteria in either paragraph (c) or (d) above, as appropriate, ace satisfied before issuing the eremption.
(2) SF IIX lists three categories of sales related to the ostablished catalog price of a commercial item sold in substantial quantities to the general public: A, Sales to the D.S. Government or to contractors for D.S. Covernment use; B. Sales at catalog price to the general pablic; and $C_{\text {, }}$ Sales to the general public at other than catalog price. Althongh mabstential quantities" cannot be precisely detined (see subparagraph (c) (4) above), the follouing guidelines are provided for determining whether exemption cladms submitted under the catalag price provision of SF XX meet the Mgobstantial quantities criterion:
(i) Sales to the general public are normanily regarded as substantial if (A) Category $B$ and $C$ sales are not negligible in themselves and comprige at least $55 \%$ of total sales of the iten and (B) Category B sales Comprise at least 75\% of the total of Category $B$ and $C$ seles.
(ii) Sales to the general poblic are rarely constiered substantial mough to grant an exemption if (A) category B and C males comptise less than 35\% of total sales or (B) Category B sales comprise legs than 55 . of the total of Category $B$ and $C$ males.
(iii) Ehen percentages fali between those abowe, the contracting officer shonla analyze the individual gituation in ordar to determine vhether or not an exemption is jostified.
(3) The contracting officer may verify or obtain verification fincloding audit or contract administration assiatance) of the sobmitted data pertaining to catalog of Harket prices or prices set by lay or regulation. Access to the prospective contractor"s records is inmited to accest to the facts bearing directiy on the exemption clarmed. It does not extend to cost, profit, or other data relevant solely to the reasonableness of the catalog or proposed price.
15.8.4. 3 ( (maty) 5. REvised far
(f) Verification. (1) When a prospective contractor requests exemption from submission of certified cost or pricing data, the contracting officer shall ensure that all applicable criteria in either paragraph (c) or (d) above, as appropriate, are satisfied before issuing the exemption.
(2) SF 1412 lista three categories of sales related to the established catalog price of a commercial item sold in substantial quantities to the general public: $A$, Sales to the D.S. Government or to contractors for U.S. Government use; B. Sales at catalog price to the general public; and $C$. sales to the general public at other than catalog price. Although "substantial quantities" cannot be precisely defined (see subparagraph (c) (4) above), the following gundelines are provided for determining whether exemption claims submatted tuder the catalog price provision of $S F$ 1412 meet the wibstantial guantities" criterion:
(i) sales to the general public are normally regarded as substantial if (A) Category B and C sales are not negligible in themselves and conprise at least 55 percent of total sales of the item and (B) Category $B$ sales comprise at least 75 percent of the total of Category $B$ and $C$ sales.
(i2) Sales to the general public are rarely considered tubstantial enough to grant an exemption if (A) category $B$ and ceales comprise less than 35 percent of total sales of the item or (B) Category s sales comprise less than 55 percent of the total of category $B$ and $C$ sales.
(iii) When percentages fall between those above, the contracting officer should analyze the induviaual situation in order to deternine whether or not an exemption is justified.
(3) The contracting officer may verify or obtain verification (including audit or contract administration assistance) of the subnitted data pertaining to catalog or market prices or prices set by law or regulation Access to the prospective contractor"s records is limated to access to the facts bearing directly on the exemption clamed. It does not extend to cost, profit, or other data relevant solely to the reasonableness of the catalog or proposed frice.

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(g) Individual or clags eremptions. The chief of the ntrecting office maz anthorize individual or class emptions for exceptional cases when the contracting ficer recommends that an exemption should be made, even ough the case does not strictil meet all the-criteria for talog- or parket-price exemption. The quantity and prices
actual comarcial sales compared with prices offered to - Governmant, and price relationships as influenced by erailing trade practices, are the important factors for insideration. The Government s need and the prospactive ntractor's resistance are not appropriate considerations.
(h) Price analpsis. Eren thangh an item qualifies for cemption from the requirement for submission of cectifted iat or pricing data, the contracting officer shall wake a ince andiysis to determine the reasonabieness of the price id any need for further negotiation. Onless information is railible from Government sources. it may be necessary to otain trom the prospective contractor information such as bat regacding=-
(1) The supplier's marketing system (e.g., use of jobbers, cokers, sales agencies, or distributors);
(2) The services normally provided comercial purchasers *.g. . engineering, financing. or advertising or promotionf;
(3) Mormal quantity per order: and
(4) Annual
(i) Daiver for exceptional cases. The agency head (or. if the contract is with a foreign government of agency. the bead of the contracting activity may, in exceptional cases. wive the requirement for submission of certified cost or pricing deta for a specific contract or sabcontract not othervise exenpt. rhe anthorization for the vaiver and the reasons for granting it siall be in writing. zke agency hata my delegate this anthority.

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(9) Individual or class fxemptions. The chief of the contracting office may authorzze individual or class exemptions for exceptional cases when the contracting officer recommends that an exemption should be mitde, even though the case daes not strictiy meet all the criteria for catalog- or market-price exemption. The quantity and prices of actaal commercial tales compared with prices offered to the Gowernment, and price relationships as infiuenced by prevailung trade practices, are the important factors for consideration. The Gopernmentis need and the prospective contractor's resistance are not appropriate considerations.
(h) Pxice analysis Even though an item gualifies for exemption from the requarement for subnission of certified cost or pricing data, the contracting offacer shall make a prace analysis to determine the reasonableness of the price and any need for further negotiation. Dnless information is available from Government sources, it may be necessary to obtain from the prospective contractor information sucn as that regarding-
(1) The supplıer"s marketing system (e.ge, use of jabbers. trokers, sales agencies. or distributors);
(2) The services normally provided commercial purchasers (e-g., engineering, Financing, or advertising or promotion);
(3) Normal quantity per order: and
(4) Annual volume of sales to largest customers.
(1) Maiver for exceptional cases The agency bead for, if the contract is with foreign government or agency, the head of the contracting activityl may, in exceptional cases. waive the requirement for tubuission of certified cost or pricing data. The authorization for the waiver and the reasons for granting it shall be in writing. The agency bead may delegate this authoraty.



## 15. 004 -4 Cartificate of Current cost or Pricing Data.

(a) When certified cost or pricing data are reguired under 15.804-2, the contracting officer shall require the contractor to execute a certificate of Curient Cost or pricing Data, set forth below, and shall include the erecutbd certificate in the contract ilie. The certificate states that the cost or pricing data are accurate, complete, and carrent as of the date the contractor and the Government agreed on a price. only one certificate shall be required; the contractor shall subait it as soon as practicable after price agreement is reached.

## CERPIFICATE OF CORREHT COST OR PRICIMG DATA

This is to certify that, to the best of mi knorledge and belief, the cost or pricing data (as defined in section 15. Boi of the Pederel Aequisition Pegulation (FAR) and required ander tAE subsection 15.804-2) submitted, either actually or by specific identification in vriting, to the contracting officer or to the contracting officeris

 certificetion includes the cost or pricing data supporting any advance agreements and foryard pricing rate agreements betveen the offeror and the Government that are part of the ptopostil.


* Identify the proposal. quotation, reguest for price adjnstment, of other submission involved, giving the

* (nsext the day, month, and year yhen price negotiations were conciuded and price agreement vas reached.
*** Insert the dai, month, and pear of signing, which shodid be as close as practicable to the date when the price negotiations vere concluded and the contract price was agreed to.
(End of certificate)
$15 \cdot 804-4$
15.804-4 certificate of Current cost or Prieing Data-
(a) When certified cost or pricing data are required undex 15.804-2, the contracting officer shall require the contractor to execute a certificate of current cost or Pricing Data, set forth below, and shall include the executed certificate in the contract file. The certificate states that the cost or pricing data are accurate, complete, and current as of the date the contractor and the Governtaent agreed on a price. Only one certificate shall be required; the contractor shall sulkmit it as soon as practicable after price agreenent 25 reachea.

CERTIFICATE OF CORRENT COST OR PRICING DATA
This is to certify that, to the best of my knowledge and belıef, the cost or pricing data (as defaned in section 15.801 of the Federal Acquisition Regulation (FAR) and reguired under FAR subsection $15.604-2$ subnitted, either actually or by specific identification in writing, to the contracting officer or to the contracting officer"g
 accurate, complete, and current as of .-.....-................ This certification includes the cost or pricing data supporting any advance agxeements and forward pricing rate agreements between the offeror and the Government that are part of the Eroposal.


* Identify the proposai, quatation, request for price adjustment, or other submassion involved, giving the

* Insert the day, month, and year when price negotiations were concluded and price agreement was reached.
*** Insert the day, month, and year of signing, whicn should be as close as practicable to the date when the price negotiations were concluded and the contract price was agreed to.
(End of certificate)

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(b) The certificate does not constitute a representation as to the accuracy of the contractor's judgment on the estimate of future costs or projections. It does apply to the data upon uhich the juigment or estimate was based.
this distinction between fact and judgment should be ciearly understood. If the contractor had information reasonabiy available at the tine of agreement showing that the negotiated price wis not based on accorate, complete. and negotiated price wis not based onesponsibility is not limited by any lack of personal knowledge of the information on the part of ite negotiators.
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(b) The certificate does not constitute a representation as to the accuracy of the contractor's judgment on the estimate of future costs or projections. It does apply to the data upon which the judgment or estimate was based. This distinction between fact and judgment should be clearly understood. If the contractor had information reasonably available at the time of agreement showing that the negotiated price was not based on accurate, complete, and current data, the contractor's reaponsibility is not linuted by any lack of pertonal knowledge of the information on the part of its negotiators.

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(c) Closing of catoff dates should be included as part of ae data sumbitted vith the proposal. Certain data may not r reasonably afailable prior to normal periodic elosing thes (e-g. Acteal indiract costs). Before agreement on floe, the contractor shall wpdate all data to the iatest test for which information is ceasonably available. Data ithin the contractor's or a sulcontractor's organization on attere significant to contractor managoment and to the overnment will be treated as reasonabl apailable and most e current on the date of innal agreement on price. That is ignificant depends won the circunstances or each cquisition.
(d) Posseasion of certificate of carrent cost or pricing ata is not zustitute for examining and andyzing the ontractor's price proposal.
(o) Even though the wolicitation may have requested cost r pricing inta, the contracting officer shall not reguire a -ertificete of Cerrent Cost or Pricing pata when the cosolting ayara is baged on adequate price competition stablished catalog or market prices of commercial items sold in sebstantial quantities to the general public. or pyices set by lay or regniation (see 15.804-3(a) throngh (d) .

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(c) Closing or cutoff dates shonld be included as part of the data sobmitted with the proposia. Certain data may not be reasonably available prior to normal perıodic closing dates (e.g., actual indirect costs). Before agreement on price, the contractor shall update all data as of the latest dates for which information is reasonably avallable, Data within the contractor's or a subcontractor"g organization on matter significant to contractor management and to the Government will be treated as reasonably available. what is significant depends upon the circumstances of each acquisition.
(d) Possession of a Certificate of Current cost or Pricing Data is not substitute for extunining and analyzing the contractor's proposal.
(e) Even though the solicitation may have requested cost or pricing data, the contracting officer shall not require a Certifxcate of current Cost or Pricing Data when the resulting award is bated on adequate price competition. estabilsbed catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or requlation feee $15.804-3$ (a) through (d) .


(5) The erercise of an option the price established in the innitial negotiation in which certified cost or pricing data were used does not reguire re-certification.
(5) Contzacting officers shall not require certification at the time of agreement for data supplied in support of forvard pricang rate agreaments (see 15.809) or other advamce agreements. ghen forvard pricing rate agreement or other advance agreement is used in partial support of a later contractual action that requires a certificate, the price proposal certificate shail cover (1) the data orighnally supplied to support the forwerd pricing rate agrefment or other adrance agreement referenced on the $S F$ IXI. Contrecting Pricing Proposal, and (2) all data required to update the price proposal to the time of agreement on contriact price.
(h) segotiated finel pricing actions (such as termination ettlements, Final indirect cost rate gettlements, and total -inmi price agreements for fired-price incentite and fedetermineble contracts) are contrict modifications requining certified cost or pricing data if (1) the total tinall price greement exceeds $\$ 100,000$ or (2) the partial ecmination settlement plas the estimate to complete exceeds $\$ 100$-000.
$15.804-4\left(\right.$ cout ${ }^{1}$ d $)$ 5. REVISED FAR
(f) The exercise of an option at the price established in the initial negotiation in which certified cost or pricing data were used does not require recertification.
(g) Contracting officers shall not require certification at the time of agreement for data supplied in support of forward pracing rate agreements (see 15.809 ) or other advance agreements. When a forward pricing rate agreement of other advance agreenent is used in partial support of a later contractual action that requires a certificate, the price proposal certificate shall cover (1) the data originally supplied to support the forward pricing rate agreement or other advance agreement referenced on the Standard Fora 1411 (SF 1411). Contract Pricing Proposal cover sheet, and (2) all data required to update the price proposal to the time of agreement on contract price.
(h) Negotiated final pricing actions (such as termination eettlements, final indirect cost rate settlements, and total final price agreements for fixed-price incentive and redeterminable contracts) are contract modifications requiring certified cost or pricing data if (1) the total final price agreement for such settlements or agreements exceeds $\$ 500,000$ or (2) the partial termination settlement plus the estimate to complete the continued portion of the contract exceeds $\$ 500,000$ (see 49.105 (c) (15)) -


FAR Entity Subpart 15.8
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804－5 Uncertified or partial cost or pricing data．
（a）Ewen when $\begin{gathered}\text { a } \\ \text {（aspectiva contractor is exempt from }\end{gathered}$ witting certified cost or pricing data，tbe contracting －icer may reguire it to submit uncertified cost or pricing fa needed for price negotiations．
（b）Partial cost or pricing data may be either（1） nplete cost or pricing data on a specified portion of a tefanlar ptietng action or（2）limited data on the whole icing action．
（c）For avards not erpacted to excaed $\$ 100,000$ ，the ntracting officer may require subutission of partial cost pricing data if analisis of selected cost factors rill ofide pilcing resplts．In this case，the contracting ficer shall reguire only those ata considerad adeguate to pport the limited cost analisis and shall not require －rtification．The contracting officer shall not reguire دet analysis of all or part of a proposal for $\$ 100,000$ or FES vithout firat attampting to determine the zasonsbleness of price by using price analysis（see 5．805－21 ．

15．804－5 Oncertified cost or pricing data－
Anytime an offeror or contractor is not required to sulmit certified cost or pricing data，the contracting officer may require the offeror or contractor to submit uncertified cost or pricing data．The arount of data required to be submitted should be immited to that data necessary to allow the contracting officer to deternine the reasonabieness of the price．The contracting officer should not require submission of cost or pracing data for a pricing action expected to be $\$ 500,000$ or less without first attempting to deternune reasonableness of price by using price analygis （see 15．805－2）．

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304-6 Procedural requirements.
a) The contracting officer sball specify (1) whether or cost or pricing data are requited, (2) whether or not tification will be required, (3) the extent of cost or cing data reguired if complete data are not necessary © $15,804-5$ above) : and (4) the form (see paragraph (b) ediately below in Fhich the cost or priaing data shall submittec. For nov contracte, the contracting officer 11 specify (3) through (4) abore in the nolicitation. il spacify (b) through dis not so specify, hovever, the itracting officer is not precluded in nnusuti cases from inesting such data if they are later found necessary.
$15.904 \sim 6$ 5. REVISED FAR
15.804-6 procedural requirements.
(a) The contracting officer shall specify (1) whether or not cost or pricing data are required, (2) whether or not certification will be required, (3) the extent of cost of pricing data required if complete data are not necessiory (see 15.804-5 above), and (4) the form (see paragraph (b) below) in which the cost or pricing data shail be subnitted. For new contracts, the contracting officer shall specify (1) through (4) above in the solicitation. Even if the solicitation does not so specify, however, the contracting officer is not preciuded from requesting such data if they are later found necessary.

804-bCont 4 PHASE I FAR
(b) Cost or pricing data shall be anbitted on SF IEx unless reguired to be submittad on one of tire termination forms specified in Subpart 49.6. Data supporting fortard pricing rat agreaments or final indirect cost proposals ghall be grbuitted in a format acceptable to the contracting
officer.

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(b) (1) Cost or pricing data shall be submitted on $S F$ 1011 uniess required to be submitted on one of the termination forms specified in Subpart 49.6. Data supporting forward pricing rate agreements or final indirect cost proposals shall be submitted in a format acceptable to the contracting officer.
(2) Contract pricing proposals submitted on SF 1411 with supporting attachments shall be prepared to satisfy the instructions and approprinte format of Table 15-3.

## TABLE 15-3 INSTROCTION FOR SUBYISSION OF A CONTRACT PRICING PROPOSAL

1. SF 1411 provides a vehicle for the offeror to submit to the Government a pricing proposal of estimated andfor incurred costs by contract line atem whth supporting information, adequately cross-referenced, suitable for detailed analysis. A cost-element breakdown, using the applicable format prescribed in 7A, B, or C below, shall be attached for each proposed line iten and must reflect any specific requirements established by the contracting officer. Supforting breakdowns must be furnished for each cost element, consistent with offeror's cost accounting system. When more than one contract line item is proposed, sumary total amounts covering all Iine items must be furnished for each cost element. If agreement has been reached with Government representatives on use of forward pricing rated/factors, identify the agreement, include a copy, and describe its nature. Depending on offeror's system, breakdowns shall be provided for the following basic elements of cost, as applicable:

Materials--Provide a consolidated pxiced smmary of individual material quantities included in the various tasks, orders, or contract line items being proposed and the basis for pricing (vendor quotes, invoice prices. etc.).

Subcontracted Items-Include parts, components, assemblies, and services that are to be produced or performed by athers in accordance with offeror's design. specifications, or airection and that are applicable only to the prime contract. For each subcontract over $\$ 500,000$, the support should proyde a listing by source, item, quantity, price, type of subcontract, degree of competition, and basis for establishing source and reasonableness of price, as well as the results of review and evaluation of subcontract proposals when required by FAR 15.806 .

Standard commercial Itens--Consists of items that offeror normally fabricates, in whole or in part, and that are generaliy stocked in anventory. provide an appropriate explanation of the basis for pricing. If price is based on cost, provide a cost breakdown; if priced at other than cost. provide justification for exemption from submission of cost or pricing data, as required by EAR 15.804-3 (e) -

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Interorganizational Transfer lat other than costl-Explain pricing method used, as requared by FAR 31-205-25 (e) -

Raw Material--Consists of material in a form or state that reguires further processing. Provide priced quantities of iters required for the proposal.

Purchased Parts--Includes maternal $2 t e m s$ not covered above. Provide priced quantities of items required for the Froposal.

Interorganizational Transfer (at cost)--Include geparate breakdown of cost by element,

Direct Labor--Provide a time-phased (e-g., monthly, quacterly, etc-) breakdown of labor hours, rates and cost by appropriate category, and furnish bases far estimates.

Indirect costs--Indicate how offeror has computed and applied offeroris indirect costs, 1 ncluding cost breakdowns, and showing trends and budgetary data, to crovide a basis for evaluating the reasonableness of proposed rates. Indicate the rates used and provide an appropriate explanation

Other costs-List all other costs not otherwise included in the categorzes deacribed above (e. $g_{*}$, special tooling, travel, computer and consultant services, preservation, packaging and packing, spoifige and rework, and Federal excise tax on finished articles) and provide bases for pricung.

Royaltres-If more than 5250, provide the follawng information on a separate page for each separate royalty or license fee: name and address of licensor; date of license agreepent: patent numbers, patent application serial numbers, or other basis on which the royalty is payable; brief description fincluding any part of model numbert of each contract item or component on which the royalty is payable) ; percentage or dollar rate of royalty per unit: unit price of contract item; number of units; and total dollar amount of royalties. In addition, if specifically requested by the contracting officer, provide a copy of the current incense agreement and identification of applicable claims of specific patents. (See Far 27.204 and 31.205-37).

Facilities Capital cost of Money--When the offeror elects to clam facilities capltal cost of money as an allowable cost, the offeror must submit Form CASB-CMF and show the calculation of the proposed amount (see FRR 31_20510) -

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2. As part of the specific information required, the offeror must subrit with offeror's proposal, and clearly identify as such, cost or pricing data (thet is, data that are verifuable and factual and otherwise as defined at FAR 15.801) - In addition, submit with offeror's proposal any information reasonably required to explain offeror's estimating process; including-
a. The judgmental factors applied and the mathematical or other methods used in the estimate, including those used in frojecting from known cata; and
b. The nature and amount of my contingencies included in the proposed price.
3. There 18 a clear distinction between submitting cost or pricing data and merely making available books, records, and other documents without identiflcation. The requirement for gubmission of cost or prianng data is met when all accurate cost or pricing data reasonably available to the offeror have been oubnitted, either actually or by specific identification, to the contracting officer or an authorized representative. As iater information cones into the offeror's possession, it should be promptly submitted to the contracting officer. The requirement for subuission of cost or pricing data continues up to the time of final agreement on price.

4- In sukmitting offeror's proposal, offeror must inclade an index, appropriately referenced, of all the cost or pricing data and information accompanying or ldentified in the proposal. In adaition, any future additions andfor revisions, up to the date bf aqreement on price. pugt be annotated on a supplemental index.
5. By submitting offeror's proposal, the offeror. if selected for negotiation, grants the contracting officer or an authorized representative the right to examine those books, records, documents, and other supporting data that will permit adequate evaluation of the proposed price. This right may be exercised at any time prior to award.
6. As soon as practucable after final agreement on prace. but prior to the award resulting from the proposal, the offeror shall, under the conditions stated in FAR 15.904-4. subnit a Certificate of current cost or Pracing Data.



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Onder Column (1) - Enter appropriate cost elements.
Onder Column (2) - Include (i) current estimates of what the cost would have been to complete deleted work not yet performed, and (il) the cost of deleted work already performed.

Under colum (3) - Include the incurred cost of deleted work already performed, actually computed if possible, or estimated in the contractoris accounting records. Attach a detailed inventory of work, materials, parts,
components, and hardware already purchased, manufactured, or performed and deleted by the change, inducating the cost and proposea aisposition of each ine iten. Also, if offeror desires to retain these itens or any portion of them. indicate the amount offered for them.

Onder Column (4) - Enter the net cost to be deleted which is the estimated cost of all deleted work less the cost of deleted work already performed. Colum (2) less Column (3) $=$ colums (4).

Under Column (5) - Enter the offeror's estimate for cost of work added by the change. When nonrecurring costs are significant, or when specifically requested to do so by the contracting officer, provide a full identification and explanation of them.

Under Column (6) - Enter the net cost of change which is the cost of work added, less the net cost to be deleted. When this result 18 negative, place the amount in parentheses. Column (4) less Column (5) $=$ Colum (6).

Onder Column (7) - Identify the attachment in which the information supporting the specific cost element may be found. Attach aeparate pages as necessary.
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Under Columis (9) and (10) - Enter in Column (9) the froduction costs from offeror's books and records (exclusive of preproduction costs reported in column (8) of the units completed ds of the cutoff date. Enter im Column (10) the costs of work in process as deterimined from offeror's records or inventories at the cutoff date When the amounts for work in process are not availatle in contractor's records but reilable estimates for them can ke made, enter tne estimated amounts in column (10) and enter in column (9) the differences between the total incurred costs (exclusive of preproduction costs) as of the cutofi date and these estimates. Explazn the basis for the estimates, lncluding zdentiflcation of any provisior for experienced or antlcipated allowances. such as shrinkage, rework, design changes, etc. Furnish experienced untt or lot costs for labor hours) from inception of contract to the citoft date, Amprovement curves, and any other available production-cost hastory pertaining to the item(s) to which offeror's proposal relates.

Under Columr (11) - Enter total ircurred costs (Total of coinmos (8), (9), and (10))-

Under Column (12) - Enter those necessary and reasonable costs that in contractor's judgment wh11 properly be incurred in completing the remaining work to be performed under the contract with respect to the item(s) to which contractor's proposal relates.

Inder Column (13) = Enter total estmated cost (Total of Columns (11) and (12)).

Under column (14) - Identify the attachment in wioh the information supporting the specific cost element may be found. Attach separate pages as necessary-


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(c) Closing or cutoff dates shoula be zneluded as part of (c) Closing or critoff dates should be included as part contracting officer and offeror should reach a prior undecstanding on criteria for establishing closing or cutoft dates. (See 15.804-4 (c)).
(d) The requirement for submission of cost or pricing data is met if all cost or pricing data reasonably available to the offeror are either submitted or identifled in viating by the tame of agreement on price. govever, there is a clear distinction between supmitting cost or pricing data and merely making available books. records, and other documents vithout identification. The latter does not constitute mubmission" of cost of pilicing atta.
(e) If cost or pricing data are required and the offeror initially refuses to provide necessary data, the contracting - Heer shall again attempt to secure the data. If the "ror persists in the refusal, the contracting officer \% Mithhold the avard or price adjnstment and refer the act action to higher authority, including detalls of *tempts made to resolve the matter and a statement of seticability of obtalning the supplies or services ther source.
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(c) Closing or cutotf dates should be inciuded as part of the data submitted with the proposal. If possible, the contracting officer and offeror should reach a prior understanding on criteris for establishing closing or cutoff dates (see 15.804-4 (c)).
(d) The requirement for submassion of cost or pricing data 15 met if all cost or pricing data reasonably available to the offeror are either submitted or identified in writing by the time of agreement on price. Fohever, there 15 a clear distinction between submitting cost or pricing data and merely making available books, records, and other documents without identification. The latter does not constitute "gubmission" of cost or pricing data.
(e) If cost or pricing lata are required and the offeror mitially refuses to provide necessary data, the contracting officer shall again attempt to secure the data. If the offeror persists in the refusal, the contracting officer shall withhold the award or price adjustment and refer the contract action to higher authorityr including details of the attempts made to resolve the matter and a statement of the practicablilty of abraining the supplies or services from another source.

-1 4. PHASE I FAR
(f) Preproduction and startup costs inelude costs such as preproduction engineering, speczal tooling; special plant pearrangement, tralning programs, and sucb nonrecuring costs as initial revork, initial spoilage, and pilot rans. Ghen these costs may be a significant cost factor in an acquisition, the contracting officer shall require in the solicitation that the offeror provide (1) an estimate of total preproduction and startup costs, (2) the extent to thich these costs are included in the proposed price, and (3) the intent to absorb, or plan for recovery ot, ang remaining costs. If a successful offeror has indicated an intent to absorb any portion of these costs; the contract ghall expressly provide that such portion will not be charged to the Government in any future noncompetitive paicing action.
(g) (1) The requirement for contractors to obtain cost or pricing data from prospective subcontractors is prescribed at 15.806. Hovever, these data do not have to be subaitted to the Government and covered by the contractor's Certificate of Curtent Cost or Pricing data unless called for under sabparagraph (2) imiediately following.

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(f) Preproduction and startup costs include costs such as freproduction englneering. special tooling, special plant rearrangement, training programs, and such nonsecurring costs as initial rework, initial spollage, and pilot runs. when these costs may be a significant cost factor in an acquisit 20 , the contractang officex shall require in the soilcatation that the offeror provide (1) an estimate of total preproduction and startup costs, (2) the extent to which these costs are included in the proposed price, and (3) the intent to absort, or plan for recovery of any remaining costs. If a successful offeror has indicated an intent to absorb any portion of these costs, the contract shall expressly provide that such portion will not be charged to the Government in any future noncompetitive pricing action.
(g) (1) The requirement for contractors to obtaln cost or pricing sata from prospective subcontractors is prescribei at 15.806. fowever, these data do not have to be submitted to the Government unless called for under subparagragh (2) below.
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(2) The contracting officer shall require a contractor that is reguired to submit certified cost or pricing data also to submit to the Government for cause the submission of) accurate, complete, and current cost of pricing data of) accurate, complete, and current cost or primeang from prospective subcontractors in support of each
subcontract cost estimate that is (i) $\$ 1,000,000$ or more, (ix) both more than $\$ 100,000$ and more than 10 percent of the (in) contractor"s proposed price, or (iil) specified in the prime contractor"s proposed price, or prime contract.

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(2) The contracting officer shall require a contractor that is required to submit certifled cost or pricing data also to submit to the Government for cause the subaission of) accuzate, compiete, and current cost or pricirg data from prospective subcontractors in support of each subcontract cost estimate that is (i) $\$ 5,000,000$ or more, (12) Both more than $\$ 500,000$ and more than 10 percent of the prime contractor's proposed price, or (111) consudered to be necessary for adequately pricing the prime contract.

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(3) If the prospective contractor satisfies the contracting officer that a subcontract will be priced on the basis of one of the exemptions in 15.804-3, the contracting officer normally shall not require submission of subcontractor cost or prieing data to the Government in that case. If the subcontract estimate 15 based upon the cost or pricing data of the prospectire subcontractor most likely to be awacded the subcontract, the contracting offlcer shail not require submassion to the Government of data from more than one proposed subcontractor for that subcontract.
(4) The contracting officez shall require the prospsctive contractor to sapport subcontractor cost estimates below the threshold in 15.806 (b) with any data or information (including other subcontractor quotations) needed to establish a reasonable price.
(3) If the prospective contractor satisfies the contracting officer that a subcontract $\$ 111$ be priced on the tasis of one of the exemptions in 15.804-3, the contractinz officer normally shall not fequire submission of subcontractor cost or pricing data to the Government in that case. If the subcontract estimate 15 based upon the cost or pricing data of the prospective subeontractor most likely to be awarjed the subcontrait, the contracting officer shall not require submission to the Government of data from more than one proposed subcontractor for that subcontract-
(4) The contracting officer shall require the prospective contractor to support subcontractor cost estimates belon the threshold in 15.806 (b) with any data or information (including other subeontractor quotations) needed to establish a reasonable price.

15.804-6 (corat d) 4. PHASE I FAR
(h) Subcontractor cost or pricing data shall be accurate, complete, and current as of the date of final price agreement given on the contractor"s certificate of current Cost or Pricing Data. The prospective contractor sball be responsible for updating a prospective subcontractor's data. Filiure by the prospective contractor to submit subcontract cost or pricing data may be cause for disqualification from consideration for award.
(I) When the prospective contractor has generally complied vith subcontract cost or pricing data teguirements, the contracting officer may, un exceptional cases, excuse failure to do so fot particular subcontracts and auard the prime contract. Each such excuse, unless ilmited to allowing additional time, requires approval by the chief of the contracting office. Por each subcontract involved, the contractor remains obligated to obtain prospective sabcontractor cost or pricing data before actual avard of that subcontract. Por each such subcontract, the contracting officer shall--
(1) Allow additional time for submassion of data up to the date of agrement opon the prime contract price;
(2) Mithdraw the requirement if data submitted are udequate to support the subcontract estimate;
(3) Reserve the subcontract iten for future pricing;
(4) Consider another contract type; or
(5) dake otber arrangements to provide an adequate basis for prace agreement.
(h) Succontractor cost or pricing data shall be accurate. complete, and current as of the date of final price
dgreement given on the contractor"s Certificate of current Cost or Priciny Data. The prospective contractor shail be responsible for updating a prospective subcontractor's data Fallure by the prospective contractor to submat subcontract cost or pricing data may be cause for disqualification from consideratzon for award.
(1) When the prospective contractor has generally complied with subcontrgct cost or pricing data requirements, the contracting officer may, in exceptional cases, excuse failure to do so for particular subcontracts and award the prime eontract. Each such excuse, unless limited to allowing additional time, requires approval by the chief of the contracting office. For each subcontract involved, the contractor remains obligated to obtain prospective subcontractor cost or pricing data before actual award of that subcontract. For each such subcontract, the contracting offucer shall--
(1) Allow additional time for submission of data up to the date of agreement upon the prime contract price;
(2) Withdraw the requirement if data submitted are adequate to support the subcontract estimate;
(3) Reserve the subcontract item for future pricing;
(4) Consıder another contract type; or
(5) Make other arrangements to provade an adequate basis for price agreement.

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4. PHASE I FAR
15.804-7 pefective cost or pricing data.
(a) If, before agreement on price, the contracting officer learns that any cost or pricing data submitted are fnaccurate, incomplete, or noncurrent, the contracting officer shall immediately bring the matter to the attention of the prospective contractor, whether the defective data increase or decrease the contract prace. The contracting officer shall negotiate, using any new data submitted or making satisfactory allavance for the incorrect data. The price negotiation memoranam shall reflect the revised facts.
(b) If, after award, cost or pricing data are found to be inaccurate, incomplete, or noncurrent as of the date of final agreement on price gifen on the contractor's or subcontractor's Cextificate of current cost or Pricing pata, the Goverament is entitied to price adjustment, including profit or fee, of any significant apount by which the price tas increased becanse of the defective data. This entitlement is ensured by including in the contract one of the clanses prescribed in $15.804-8$ and set forth at 52.215-21 and -22. The clanses give the Government the Ifght to a price adjustment for defects in cost of pricing data submitted by the contractor, a prospective subcontractor, or an actual subconeractor. In arriving at a price acjustment under the clause, the contracting officer shall consider--
(1) The tame by wich the cost of pricing data became ceasonably available to the contractor;
(2) The extent to which the Government relled apon the defective datat and
(3) Any understated cost or pricing data submitted in support of price negotiations, up to the amount of the Goternnent's claim for overstated pricing data arising out of the same pricing action (for example, the initial pricing of the same contract or the pricing of the same change order). Such offsets need not be in the same cost gronpings fe.g., material, direct labor, or indirect costsi.
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15.804-7 Defective cost or prielng data.
(a) If, before agreement on price, the cortracting officer learns that ans cost or pricing data sulmitted are inaccurate, incomplete, or noncurrent, the contracting officer shall imediately bring the matter to the attention of the prospective contractor, whether the defectıve data ancrease or decrease the contract price. The contracting officer shall negotiate, using any new data submitted or making satisfactory allowance for the incorrect data. The prace negotiation menorandum shall reflect the revased facts.
(b) If, after award, cost or pricing data are found to be inaccurate, incomplete, or noncurrent as of the date of final agreement on prace given on the contractor's or subcontractar's Certificate of Current cost or Pricing Data, the Government is entitled to a price adjustment. including grofit or fee, of any sigmificant amomt ty which the price was znereased because of the defectuve data. This entitlement $1 s$ ensured by including in the contract one of the clauses prescribed in $15,804-8$ and set forth at 52-215-22, Prace Reduction for Defective cost or Pricing Data, and 52.215-23, Price Reduction for Defective Cost or Fricing Data-Modifications. The clauses give the Government the raght to a frice adjustment for defects in cost or pricing data submitted by the contractor, a frosfective subcontractor, or an actual subcontractor. In arriving at a price adjustment unaer the clause, the contracting officer shall consider--
(1) The tame by which the cost or pracing data became reasonably available to the contractor:
(2) The extent to which the Government relied upon the defectıve data; and
(3) Any unserstated cost or pricing data submitted in support of price negotiations, up to the amount of the Government's claim for overetated pricing data arising out of the sarie pricing action for example, the initial prizing of the same contract or the pricing of the same change order) = such offsets need not be in the same cost groupings (e.g., material, direct labor, or indirect costs) -

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(c) If, after award, the contracting offleer learns or suspects that the data furnusbed vere not accurate, complete, and current, or vere not adequately verified as of the time of negotiation, the contracting officer shali request an audit. onder the clavse at $52.215-2$, postavard cost performance audits of negotiated contracts are Imited to determining wether or not defectire cost or pricing data vere submitted. Only if the cusit reveals that the data certified by the contractor were defectire may the andit evaluate profit-cost relationships. The contracting officer shall not reprice the contract solely because the profit was greater than forecast or because some coniangency specified in the submission failed to materialize.

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(c) If, after award, the contracting of ficer learns or suspects that the data furnished were not accurate complete, anj current, or were not adequately verified fy the contractor as of the time of negotiation, the contracting officer shall request an audit to evaluate the accurac., completeness. and currency of sald data. In the absence of a contracting officeris request, the auditor may independently initiate such a postawara reviek of cost or ericing data. Only if the audit reveals that the data certified by the contractor were defective may the profitcost relatronships be evaluated by the Government. The contracting officer shall not reprice the contract solely because the profit was greater than forecast or because some contingency specified in the submission farled to materzalize.

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(d) In addition to performing postavard audits at a contracting officer's request, an audator may independently initiate a postanard repiev of cost or pricing data.
Regardless of who requested the postaward audit, the
contracting officer shall prepare memorandum for each audit received, indicating (1) whether or not defectipe data were submitted and relled upon and (2) the results of any contractual action taken. The contracting officer shali send the aditor and the administratite contracting officer each one copy of this memorandam.

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(e) If (1) both contractor and subcontractor submitted and (2) the contractor certified cost or pricing data, the Government has the right, under the ciauses at 52. 215-21 and -22, to reduce the prime contract price if it was significantly increased because a subcontractor submitted defective data. This right applies whether these data supported subcontract cost estimates or supported firm agreements between subcontractor and contractor.
1)-4-~ (GM 5. REVISED FAR
(e) If (1) both contractor and subcontractor submitted and (2) the contractor certified cost or pricing data, the Government has the right, under the clauses at 52.215-22. Price Reduction for Defectuve Cost or Pricing Data, ang 52.215-23 Prıce Reduction for Defective cost or Prıeing Data-Modifications, to reduce the prime contract price if it was significantly increased because a subcontractor submatted defectuve data. Thas right applies whether these data supported subcontract cost estimates or supported firin agreements between subcontractor and contractor.

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(f) If Government audit discloses defective subcontractor cost of pricing data, the information necesssary to support a reduction in prime contract and subcontract prices may be arailable only from the Government. To the extent necessary to secure a prime contract price reduction, the contracting officer should make this information avazlable to the prime contractor or approptiate sobcontractors upon request. If release of the information vonid compromise Gorernment securaty or dasclose trade secrets or confidential business information, the contracting officer shall release it only under conditions that vill protect it from improper disclosure. Information made available under thls paragraph slall be limited to that used as the basis for the prame contract price reduction. In order to afford an opportunaty for corrective action, the contiacting officer should gite the prime contractor reasonable advance notice before determaning to reduce the prace.
(1) Then a prime contractor includes defective subcontractor data in arriving at the price but later awards the subcontract to a louer priced subcontractor, any adjustment in the prime contract price due to defective subcontract data is limited to the dufterence between (i) the subcontract price used for pricing the prime contract and (2i) the actual subcontracted price or the actual cost to the contractor, provided the data on which the actual sobcontract price is based are not themselves defective.
(2) Under cost-relmbursement contracts and under all fixed-price contracts except (i) firm-fixed-price contracts and (lil contracts with economic price adjustment, increases in payments to subcontractors due to defective subcontractor cost or pricing data shall be the basis for disallowance or nonrecognition of costs under the clauses prescribed in 15, 804-8 following. The Government has a continuing and airect financial interest in such payments that is onaffected by the initial agreement on prime contract price.

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(f) If Government audit discloses defective subcontractor cost or priving data, the information necesssary to supfort a reduction in prime contract and subcontract prices may be available only from the Government. To the extent necessary to secure a prime contract price reduction, the contracting officer should make this information avalable to the prime contractor or appropriate subcontractors upon zequest. I release of the information would compromuse Government security or disclose trade secrets or confidential business information, the contracting officer shall release it only under conditions that will protect it from 2mproper disclosure. Information made available under this paragraps shall be limited to that used as the basis for the prime contract price reduction. In order to afford an opportunity for corrective action, the contracting officer should give the prime contractor reasonable advance notice before determining to reduce the prime contract price.
(1) When a prime contractor includes defective subcontract data in arriving at the price but later awards the subcontract to a lower priced subcontractor (or does not subcontract for the work), any adjustment in the prime contract price due to defective subcontract data is limited to the difference (plus applicable indirect cost and profit markups) between (i) the subcontract price used for prienng the prime contract and (11) elther the actual subcontract price or the actual cost to the contractor, if not subcontracted, provided the data on which the actual subcontract prace 15 based are not themselves defective.
(2) Under cost-remmbursement contracts and under all fixed-price contracts except (1) firm-fixed-price contracts and (21) contracts with economic price abjustment, payments to subcontractors that are higher than they would be had there been no defective subcontractor cost or pricing data shall be the tasis for disallowance or nonrecognition of costs under the clauses prescrized in 15.804-8. The Government has a continuing and direct financial interest in such payments that $1 s$ unaffected by the initial agreement on frime contract price.

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## 4. PIMSE I FAR

15.804-8 contract clauses.
(a) Price Reductzon for Defective cost or Pricing Data. The contracting officer shall insert the clause at 52.215-21. Price Reduction for Defective Cost or Pricing Data, in all negotiated contracts that exceed 5100,000 when entered into, unless the contract is exempt from the requirement for certified cost or pricing data under 15. 804-3(a) or (9) or thas requirement has been ralved onder 15.804-3(1). This clause shall be included also in negotiated contracts (1) of a lesser amount when the contractor was required to submit certified cost or pricing data or (2) for which partial cost or pricing data vere obtained under 15.804-5 (c).
(b) Price Reduction for Defective Cost or Pricing DataBodifications. (i) Except as provided in subparagraph (2) folloving, the contracting officer shall insert the clause at 52.215-22, Price Beduction for Defectife Cost or Pricang Data--Lodifications, in all megotiated contracts over \$100, 000 that do not include the clause at 52.215-21 (see 14. XxX for inclusion of a similar clause in fordally advertised contracts).
(2) In exceptional cases, heads of contracting activities may valve the reguirement for inclusion of the clause in contracts with foreign governments or agencies of those goverments. The authorization for the yaiver and the reasons for granting it shall be in vriting.
(c) Subcontractor Cost or Pricing Data. The contracting officer shall insert the clause at 52-2i5-23, subcontractor cost or Pricing Data, in all negotiated contracts that erceed 5100,000 when entered into, anless the contract is exempt from the requirenent for certified cost or pricing data under 15.804-3(a) or ( 9 ) or this requirement has been Waired under 15.804-3(1). The clause may also be included, with appropriate reductions in the dollar amounts, in negotlated contracts of a lesser amount when the contractor was required to subinit certified cost or pricing data.
(d) Subconttactot Cost or Pricing Data-Hodifications. (1) zxcept as provided in subparagraph (2) following, the contracting officer shall insert the clause at 52.215-24, Subcontractor cost or pricing Datat-dodifications, in all negotiated contracts over $\$ 100,000$ that do not include the clause at 52.215-23 (see 14.IIX for requirements for inclusion of a similar clause in formaliy advertised contracts).
(2) In exceptional cases, heads of contracting actipities may valpe the requirement for inclusion of the clause in contracts with foreign governments or agencles of those governments. The authorazation for the vaifer and the reasons for granting it shall be in virting.
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### 15.804-8 Sontract clauses.

(a) Price Reduction for Defective Cost or Pricing Data The contracting officer shàl, when contract ing by negotaation, insert the clause at 52.215-22, Price Rediction for Defective Cost or Pricing Data, in solicitations and contracts wien it 15 contemplated that certifted or heertafiea cost or pricing data will be requrrea (see 15.304-2 ans 15.804-51.
(o) Price Reduction for Defective Cost or Pricing patam Modifications. The contracting offycer shall, wnen contracting sy nejotsation, xnsert the clause at 52.215-23. Price Reduction for Defective Cost or Pricing Datan Modifications, in solicitations and contracts minen (l) it 15 contenplated that certified or uncertafied cost of pricing data will be tequired (see 15.804-2 and 15.804-5) for the pracittg of contract modificarions, and (2) the clause prescribed in (a) above has not been anciuded.
(c) SuDcontractor Cost or Prielng Data. Tne contracting officer snall insert the clause at $5 \frac{1215-24 \text {, Subcontractor }}{}$ Cost or Pricing Data, in solicitations and contracts when tne elause prescribed in (a) above 15 inciuded.
(d) Subcontractor Cost or Pricing Data-Modifications The controcting officer shail insert the clause at 52.21525. Subcontractor Cost or Pricing Data-modifications, in solicicetions and contracts when the clause prescriogi in



## 4．PHASE I FAR

，15．805 proposal analysis．
15．805－1 General．
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（a）The contracting officer，exercising sole responsibility for the find pricing decision shall coordinate a team of experts and shall，as appropriate， request and evaluate the advice of specialists in contracting，finance．law，contract audit，packaging， quality control，engineering，traffic management，and price analysis The contracting of freer should hate appropriate specialists attend the negotiations when complex problems絤olving significant amounts will be addressed．The contracting officer may assign responsibility to a negotiator or price analyst for（1）determining the extent of specialists advice needed and evaluating that advice， （2）coordinating a team of experts，（3）consolidating pricing data ana developing a prenegotiation objective（see \＄5．807），and（4）conducting negotiations．
（b）The contracting officer shall obtain price analysis of the offeror＇s proposal，to ensure that the overall price of feted is fair and Feasonable．In addition when cost or pricing data are required，the contracting officer shall w he a cost analysis before making the price andivsis，to epilate the reasonableness of individual cost elements．

5．REVISED FAR
15．805 Proposal analysis．
15．805－1 General．
（a）The contracting officer，exercising sole
responsirility for the final pricing decision，shall，as appropriate，coordinate a team of experts and request ard evaluate the advice of specialists in such fields as contracting，finance，law，contract audit，packaging， quality control，engineering traffice management，and contract pricing．price analysis．she contracting officer should have appropisate specialists attend the negotiations when complex problems involving significant matters will be addressed，The contracting officer may assign
responsibility to a negotiator or price analyst for（1） determining the extent of specialists＇advice needed and evaluating that advice，（2）coordinating a team of experts， （3）consoindatirg pricing data and developing a renegotiation objective（see 15.807 ）ard（4）conducting negotiations．
（b）When cost of pricing data are required，the contracting officer shall make a cost analysis to evaluate the reasonableness of individual cost elements．In addition，the contracting officer should make i price analysis to ensure that the overall price offered $1 s$ fair and reasonable．hen cost or pricing data are not required， the contracting officer shall make a price analysis to ensure that the overall price offered 19 fall and reasonable．
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(c) The contracting officer shall require prospective contractors to perform (1) price analysis for all significant proposed subcontracts and purchase orders and (2) cost anaipsis when the prospective subcontractor has submitted certified cost or pricing data (see 15.806 (a)).
(c) The contracting officer shall require prospective contractors to perform (1) price analysis for all significant proposed subeontracts and purchase orders and (2) cost analysis when the prospective sulcontractor 15 requixed to submit cost or pricing data or the contractor is unable to perform an adequate price analysis (see 15. 806 (a) $)^{2}$.

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15. 805-2 Price analysis.

The contzacting officer is responsible for setecting and using thatefer price-analysis techniques will ensure a fait and reasonable price. One or more of tue following technigues inay be used to perform price analysis.
(a) Comparison of price quotations received 1 n response to the solicitation.
(b) Comparison of prion grotatlons and contract prices vith current quotations for the same or simalar end items.
(c) Application of rough Yardisticks (such as dollars per pound or per horsepouer, of other units) to highinght significant inconsistencies that varrant additionai pricing 1nquEry.

1d) Comparison yith competitive published price lists, pablshed market prices of commodit 2es, similat indexes, and disconnt or rebate arrangements.
(e) Copparison of proposed prices with independent GoFernment cost estimates (see 15.803 (c)).
15. 805-z Price analysis.

Tae contracting officer $1 s$ responsible for selecting and using whatever price analysis techniques will ensure a fair and reasonatle price. One or more of the following tecinlgues may be, used to perform price analysis:
(a) Comparison of price guotations recelved in response to the scircitation.
(b) Comparison of prior quotations and contract prices with cuzrent quotations for the same or similay end items.
(c) ApFlication of rough yardstacks (such as dollars per Found or per horser ower, or other units) to highlight significant inconsistencies that warrant additional pricing Inquixy
(d) Comparison with competitlve published price lists, cublished market prices of commodities. similar indexes, and discount or rebate arrangements.
(e) Comparison of proposed prices with independent Government cost estimates (see 15.803 (c)) -

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### 15.805-3 Cost analysis.

The contracting officer shali, as appropriate, use the technigdes and procedures outiined in paragraphs faj through (i) belou to perform cost analysis:
(a) Feriflcation of cost or pricing data and equiuztion of cost elements. including=-
(1) The necessity for and reasonabieness of proposed costs inclading allowances for contingencies:
(2) Projection of the offeror's cost trends, on the basis of curcent and historical cost or pricing data,
(3) A technical appraisal of the estimated labor, material, tooling, and facilities requirements and of the reasonableness of scrap and spollage factors; and
(4) The application of audited or negotiated inairect cost Iates (see Subpart 42.7). labor rates, and cost of money or other Eactots.
 pactices on tuture costs. In conducting this equluation. the contracting officer shall ensure that the effects of inefficient or aneconomical past peactices are not projecten into the future. In priging production of recentiy defeloped, complex eguipment, the contracting officer shonid make t trend annlysis of basic labor and materials costs, even in periods of felatipe price stability.
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### 15.805-3 Cost analysis.

The contractıng officer shall, as appropriate, use the techniques and procedures outlined in paragraphs (a) througt (f) below to perform cost analysus:
(a) Verification of cost or pricing data and evaluation of cost elements, including--
(1) The necessity for and reasonalieness of proposei costs, including ailowances for contingercies;
(2) Projection of the offeror's cost trends, on the basis of current and historical cost or pricing data;
(3) A technical appransal of the estrmated labor, material, tooling, and facilities requirements and of the reasonableness of scrap and spoilage factors; and
(4) The application of audited or negotiated indirect cost rates (see subpart 42.7). Labor rates, and cost of money or other factors.
(b) Evaluation of the effect of the offeror's current fractices on future costs. In conducting this evaluation. the contracting officer shall ensure that the effects of inefficient or uneconomical past practices are not projected into the future. In pricing production of recently developed, complex equapment, the contracting officer shonld make a trend analysis of tasic labor and materials even in ceriods of relative price stablilty.

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(c) Comparison of costs proposed by the afferor for individual cost elements vith-m
(1) Actual costs pregiousiy incurred by the same offeror:
(2) Erevious cost estimates from the offeror or from other offerors for the same or samilar items:
(3) Other cost estimates recelued in response to the Government's reguest:
(4) Independent Government cost estlotes by technical personnel; and
(5) Porecasts or planned expenditures.
(d) Verification that the offeror's cost subasssions are in accordance with the contract cost principles and procedures in part 31 and, vhen applicable, the requirements and procedures in part 30 , Cost Accounting Standards.
(ब) Heviev to determune whether any relefant cost of pricing data have not been either submitted or identified in writing by the contractor. If there are such data, the contracting officer shall attempt to obtain them and negotiate, using them or making satisfactory allouance for the ancomplete data (see 15.804-7(a)).
(f) Analysis of the results of any make-or-buy program revieys, in evaluating subcontract costs.

(c) Comparison of costs proposed by the offeror for indivadual cost elements with--
(1) Actual costs previously incurred by the same offeror;
(2) Previous cost estimates from the offeror or from other offerors for the same or simular items.
(3) Other cost estamates received in response to the Government" 3 request:
(4) Independent Government cost estimates by technical Eersonnel: and
(5) Forecasts or planned experditures.
(d) Verification that the offeror's cost submissions are in accordance with the contract cost principles and Frodedures in part 31 and, when applicable, the refurrements and procedures in part 30 , cost Accounting Standards-
(e) Reviey to determine whether anj cost or pitcing data necessary to make the contractor's proposal accurate, complete, and current have not been either submitted or identified in uriting by the contractor. If thete are such data, the contracting officer shall attempt to obtain them and negotlate, using them or making satisfactory allowance for the incomplete data (see 15.804-7(a)).
(f) Analysis of the results of any make-or-buy program fevieus, in evaluating subcontract costs.

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### 15.805-4 Technical analysis.

(a) When cost or pricing data are reguifed, the contracting officer shall reguest technicai analysis of proposals, asking that ceguirements, logistics, or other appropriate qualifıed personnel refien and assess. as a mznimum-
(1) The quantities and kinds of material proposed;
(2) The need for the number and kinds of man-hours and the labor mix;
(3) The special tooling and facilities proposed:
(4) The reasonableness of proposed scrap and spoilage factors; and
(5) Any other data that may be pertinent to the cost or price analysis.
(b) पhen an adit has been requested (see 15,805-5 belou), the contracting officer shall furnish a copy of the technical analisis directly to the anditor at least 5 vorking days before the due date established for the andit report, enabling the auditor to include the financial effects of the technical analysis findings in the audit report. If the technical analysis is not avallable in time to be reflected in the audit report, the andit report shall include a statement to that effect.
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15.805-4 Technical analysis.
(a) When cost or pricing data are required, the contracting officer should generally request a technical analysis of proposils, bsking that requirements, logistics, or otner appropriate gualıfied personnel review and assess, as a manimun-
(1) The quantities and kinds of material propased.
(2) The need for the number and kinds of labor nours ard the labor mix:
(3) The special tooling and facilities proposed;
(4) The reasonableness of proposed scrap and spollage factors; and
(5) Any other data that may be pertanent to the cost or price analysis.
(b) When an andit has been requested (see 15.805-5), the contracting officer should generally furnish a copy of the technical analysis darectly to the auditor at least 5 horking days before the due date established for the audit report, enabling the auditor to include the Einancial effects of the technacal analysis findings in the audit refort. If the technical analysis is not available in time to be reflected in the audit report, the audit report shall include a statement to that effect. Whether or not the audit refort incluates the financial effects of the techrical analysis findings, the audit report should be sufficientiy detalled to allow the contracting officer to determine the financial effects of technical analysis findings and changes to any such fincings. For example, inclusion of time phased audit recommended rates would provide flexibility for the contracting officer to determane the financial effects of changes in labor hours whether as a result of technical andysis findings or changes in such findings.





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（2）When sone or all inforatition sufficient to determine the reasonableness of the proposed cost or price is already皿vailable，contracting officers may request less－than－ complete field pricing support（specifying in the request the information needed）or maj waite in writing the requirement for audit ind field pricing support by documenting the file to indicate that information is to be used instead of tie audit report and the field pricing report．
（3）The audit and field pricing reports are advisory and are intended to gi te the contracting officer detailed analysis of the proposal．for use in contract negotiations． Field pricing support personnel include g but are not limited to，administrative contracting officers contract auditors； price analysts，quality assurance personnel，engineers，and small business and legal specialists．
（b）Contracting officers should not request audit or field pricing support for proposed contracts or modifications of amounts less than those specified in subparagraph（a）（1） above．An exception may be made when a reasonable pricing result cannot be established，because of（1）lack of knowledge of the particular contractor，（2）sensitive conditions，of（3）an inability to evaluate the price reasonableness through price analysis or cost analysis of existing data．
the reasonableness of the proposed cost or price 19 already available，contracting officers may request less－than－ complete field pricing support（specifying in the request the information needed）or may forego the requirement for audit and field pricing support by documenting the file to indicate what information is to be used instead of che audit report and the field pricing report．
（3）The audit and field pricing reports are advisory and are intended to gave the contracting officer a detailed analysis of the proposal，for use in contract negotiations Field pricing support personnel include，but are not incited to，administrative contracting officers，contract auditors， price analysts，quality assurance personnel，engineers，aná small business and legal specialists．
（b）Contracting officers should not request audit or frei crienng support for proposed contracts or modifications of amounts less than those specified in subparagraph（a）（1） above．An exception ray be made when a reasonable pricing result cannot be established，because of（1）lack of knowledge of the particular contractor：（2）sensitive conditions，or（3）an inability to evaluate the price reasonableness through price analysis or cost analysis of existing data．

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(c) (1) When inntiating audit and field pricing support, the contracting officer shall do so bl sending af request to the cognizant administrative contracting officer (Acol, with an information copy to the cognizant audit office. Then field pricing support is not avallable, the contracting officer shall initiate an audit by sending the request directip to the cognizant audit office. In both cases, the contracting officer shall, in the request, (1) prescribe the extent of the support needed, (il) state the specific areas for which input is reguired, fiii) include the information necessary to perform the reviev fach as the offeror's proposal and the applicable portions of the sollcitation, particularly those describing reguirements and delivery schedules) and (iv) assign a realistic deadine for recelpt of the report.
(2) Assignment of unrealistically short deadines may cedoce the quaifty of the audit and field pricing reports and may make it impossible to establish the falrness and reasonableness of the price.
(3) Agency field pricing procedures shall not preclude free and open commancation among the contracting officer, ACO, and auditor.
(d) Onli the anditor shall have general access to the offeror's books and financial records. This limitation does not preclude the contracting officer. the Aco, or thelr technical representatifes from requesting any data from or refleving offeror records necessary to the aischarge of their responsibilities. The duties of auditors and those of other technical specialists may reguire both to evaluate the same elements of estimated costs. They shall revieu the data fointly or concurrently when possible, tie auditor rendering services vithin the audit area of responsibility and the technzcal specialisits renderang seryices within their oun areas of responsibility. The auditor shall promptif report to the contracting officer any denial of access to records or to cost or pricing data considered essential to the preparation of a satisfactory audit report (see 15, 805-3(e)).

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(c) (1) When initiating audit and field pricing support, the contracting officer shall do so by serdirg a zeguest to the cognizant admanistrative contractarg officer (ACO) sitt an informacion copy to the cognizant audit office. When fleld pricing support is not available, the contractins officer snall initiate an audit by sending the request directly to the cognizan audit office. In both cases, the contracting officer shall, in the request, (1) prescribe the extent of the support needed. (il) state the specific areas for whish input is required, (111) include the information necessary to perform the review (such as the offeror's proposal and the arplicable portions of the solicitation, carticularly those describing requifements and delivery schedules), and (iv) assign a realistic deadline for recerpt of the report.
(2) Assignment of unrealistically short deadines may reduce the guality of the audit and fzeld pricing reports and may make it mopossible to establish the fainness and reasonableness of the price.
(3) Agency field pricing procedures shall not preclude free and open communication among the contracting officer. ACO. ard auditor.
(d) Only the auditor shall have general access to the offeror's books and financial records. This limitation does not preclude the contracting officer, the ACO, ar their representatives from requesting any data from or reviewing offeror records necessary to the duscharge of their responsibilities. The duties of auditors and those of orher specialists may requafe both to evaluate the same elements of estruated costs. They shall review the data jointly or concurrentiy when possible, the auditor rendering services within the audit area of responsibility and the other specialists rendering services within thejr own areas of responsibulity. The auditor shall promptly report to the contracting officer any denial of access to records or to cost or pricing data considered essential to the preparation of a satisfactory audit report (see 15.805-3(e))-


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(e) The auditor shall begun the audit as soon as possible after receiving the contracting officer's request. The auditor is responsible for the scope and depth of the audit. As a minimum, the audit report shall include the following:
(1) 字女efindings on fpectitic areas listed in the contracting officer ${ }^{1} s$ request.
(2) An explanation of the basis and method used by the offeror in proposal preparation.
(3) An identification of the original proposal and of all subsequent yEitten ford al submissions bi which cost oc pricing data sere either submitted or identified.
(4) A description of cost or pricing data coming to the attention of the auditor that were not submitted but that mat have significant effect on the proposed cost or price.
(5) A list of any cost or pricing data submitted that are not accurate, complete, and current and of any cost representations that are unsupported. then the result of deficiencies is so great that the auditor considers the proposal impaired as basis for negotiation, the contracting officer should be advised so that prompt corrective action may be taken.
(6) The originals of all technical analyses received by the auditor and a quantification of the dollar effect of the technical analysis findings.
(7) If the auditor believes that the offeror*s. estimating methods or accounting system are inadequate to support the proposal or to permit satisfactory administration of the contract contemplated, a statement to that effect.
(8) A statement of the extent to which the auditor has discussed discrepancies or mistakes of fact in the proposal with the offeror.
(e) The auditor shall begin the audit as soon as possible after recelvimj the contracting officer's request. The auditor 15 responsible for the scope and depth of the audit. As a manimufl, the audit report shall include the following:
(1) The findings on specific areas lIsted in the contracting officeris request-
(2) An explanation of the basis and method used by the offeror in proposal preparation.
(3) An identification of the original proposal and of all subsequent written formal and other idertifiable submissions ky which cost of pricing data were either submitted or xdentrifed.
(4) A description of cost of pricing data coming to the attention of the auditor that were not submitted but that may have a significant effect on the proposed cost or price.
(5) A list of any cost or pricing data submitted that are not accurate, complete, and current and of any cost representations that are unsupported. When the result of deficiencies is so great that the auditor considers the proposal impaired as a basis for negotiation. the contracting officer should be advised so that prompt corrective action may be taken.
(6) The originals of all technical analyses received ky the auditor and a quantification of the dollar effect of the technical analysis findings.
(7) If the auditor believes that the offeror's estimating methods or accounting system are inadequate to support the proposal or to permit satisfactory administration of the contract contemplated, a statement to that effect.
(8) I statement of the extent to which the auditor has discusses discrepancies or mistakes of fact in the proposal with the offeror.

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(f) The audxtor shall not discuss auditor conclusions or recommendations on the offeror's estimated or projected costs unless specificaily requested to do so by the contracting officer.
(g) If theld pricing support was not requested, the auditor shall send the completed andit report directiy to the contracting officer. If field pricing support yas requested. the auditor shall send the completed audit report to the aco for forwarding, Mithout change, with the field pricing report. The ACO shall consolidate the field pificing report inputs and send field pricung report, accampanied by the original copy of the andit report, to the contracting officer by the assigned date. The ACO shall send the anditor a copy of the field pricing report (without the audit report and technical analysist. Audit and field pricing reports shall be made a part of the official contract file.
(b) If any information is disclosed after submission of the aedit report that may significantly affect the audit Eindings, the contracting officer or the ACo should promptiy advise the auditor, who shall determine thether to lissue a sopplemental report.
(1) The prame contractor or higher tier subcontrector is responsible for conducting appropriate cost analyses before ararding subcontracts. $\quad$ oueqer, the contracting officer may reguest andit or field pricing support to analpze and evaluate the proposal of a subcontractof at any tier (notwithstanding bailability of data or analyses performed by the prime contractorl if the contracting officer belifeves that such support is necessary to ensure reasonableness of the total proposed price. this step may be appropriate when, for example-
(1) There is a business relatzonship between the contractor and subcontractor not conducive to independence and objectivity;
(2) The contractor 25 a sole source and the subcontract costs represent a substantial part of the contract cost:
(3) The contractor has been denyed access to the subcontractor's cecords; or
(4) The contracting officer determanes that, because of factors such as the size of the proposed subcontractor price, audit or Eield pricing support for a subcontragt or subcontracts at any ther is critical to a fully aetailed analysis of the ptime contract proposal.

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(f) The auditor shall not discuss auditor conclusions or recommendations on the offeror's estimated or projected costs with the offeror unless specifically requested to do so by the contracting officel.
(g) If field pricing support was not reguested, the auditor shall send the completed audit report directly to the contracting officer. If field pricing support was requested, the auditor shall send the completed audit report. to the Aco for forwarding, without change, with the field pricing report. The Aco shall consolidate the field pricing report inputs and send a field pricing report, accompanied by the original copy of the avait report, to the contracting officer by the assigned date. the Aco shall send the auditor a copy of the field pracang report (without the audut report and technical analysis). Audit and field fricang reports shall be made a part of the official contract file.
(h) If any information 13 ansclosed after submission of the audit report that may sigmificantly affect the audit findings, the contracting officer of the Aco shoald promptiy advise the auditor. who shall determine whether to issue a supplemental report.
(1) The prime contractor or higher ther subcortractor $2 s$ responsible for conductung approprate cost analyses before awarding subcontracts. However, the contracting of ficer may request audit or field pricing support to aralyze and evaluate the proposal of a subcontractor at any tier (notwithstanding avallability of data or analyses performed by the prime contractor) if the contracting officer believes that such support is necessary to ensure reasonableness of the total proposed price. This step may be appropriate when, for example--
(1) There is a busnress relationship between the contractor and subcontractor not conducive to independence and orjectivity;
(2) The contractor $1 s$ a sole source and the subcontract costs represent a substantial part of the contract cost;
(3) The contractor has been denied access to the sutcortractor's records; or
(4) The contracting officer determires that, because of \&.ctors such as the size of the proposed sutcontractor crice, audit or field pricing support for a subcontract or sur conteacts at any tier is critical to a fully detalled anilyiss of the prime contract proposal.

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(j) Wen the contracting officer reguests the cognizant Aco or auditor to reviev a subcontractor's cost estimates, the request ghall include a copy of any reviev prepared by the prime contractor or higher tier subcontractor, the subcontractor's proposal, cost or pricing data provided by the subcontractor, and, when avallable, the results of the prime contractor's cost or price analpsis.
(k) Then the Government performs the sabcontract analysis, the Government shall furnish to the prime contractor or higher tier subcontractor, vith the consent of the subcontractor reviewed, a sumary of the analysis performed in determining any unacceptable costs. by element, incladed In the subcontract proposal. If the subcontractor vithholds consent, the Government shall furnish a range of vnacceptable costs for each element in such a way as to prevent giving avay subcontractor proprietary data.
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(J) When the contracting orficer requests the cofnizant ACo or auditor to review a subcontractor's cost estimates, the request shall include, when available, a copy of any review prepared by the prime contractor or higher tier subcontractor, the subcontractoris proposal, cost or pricing frime contractorts cost or Erime contractor's cost or price analysis.
(k) When the Government performs the sutcontract analysis, the Government shall furnush to the prime contractor or hogher tier subcontractor, with the consent of the subcontractor reviewed, a summary of the analysis performed in determaning any unacceptable costs, by elenent, included in the subcontract proposal. if the subcontractor withholds consent, the Government shall furnish a range of unacceptable costs for each element in such a way as to frevent giving away subcontractor proprietary data.

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### 15.006 Subcontract pricing considerations.

(a) Subcontractors must submit to the contractor or higher tier subcontractor cost or pricing data or claims for exemption from the requirement to submit them. The contractor and higher tier subcontractor are responsible for (1) conducting price analysis and, when the subcontractor submitted certified cost or pricing data, cost analysis for all significant subcontracts and (2) including the results of subcontract reviews and evaluations as part of their own cost or pricing data submission. (See details at 15.805-5 (2) through ( K ) above.)
(b) Except when the subcontract prices are based on adequate price competition or on established catalog or market prices of commercial items sold in substantial quantities to the general public of are set by law or regulation, any contractor required to submit certified cost or pricing data also shall obtain certified cost or pricing data before awarding any subcontract or purchase order or issuing tan modification involving aggregate increases
and/or decreases in cost plus profit expected to exceed andor decreases in cost plus profit expected to exceed 3100,000. (See details at 15.804-6 (f) through (h).)
(c) The requirements in paragraphs (at and (b) immediately above, modified to relate to higher tier subcontractors rather than to the prime contractor, shall apply to lover sher subcontracts for which subcontractor cost or pricing iata are required.
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15.806 Subcontract pricing considerations.
(a) Subcontractors must submit to the contractor or higher tier subcontractor cost or pricing data or clams for exemption from the requirement to submit them. The contractor and higher ewer subcontractor are responsible for (1) conducting price analysis and. when the subcontractor is required to submit cost or pricing data or if the contractor or higher tier subcontractor is unable to perform an adeguate price analysis, cost analysis for all subcontracts and (2) including the results of subcontract reviews and evaluations as part of their own cost or pricing data submission (see 15.805-5\{1) through (k)) -
(b) Except when the subcontract prices are based on adequate price competition or on established catalog or market prices of commercial items sold in substantial quantities to the general public or are set by law or regulation, any contractor required to submit certified cost or pricing data also shall obtain certified cost or pricing data before awaiting any subcontract or purchase order expected to exceed $\$ 500,000$ or 1 ssuing any modification involving a price adjustment expected to exceed $\$ 500,000$ (see example of pricing adjustment at $15.804-2\{a)(2)$ and see 15. 804-6(f) through (h)].
(c) The requirements in paragraphs (a) and (b) above, modified to relate to higher tier subcontractors rather than to the prime contractor. shall apply to lower tier subcontracts for which subcontractor cost or pricing data
are required.


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5. 807 Prenegotiation objectives.
(a) The process of determining prenegotaation objectives helps the contracting officer to judge the overall reasonableness of proposed prices and to negotiate a fatr and reasonable price or cost and fee. In settang the prenegotiation objectives, the contracting officer shall analyze the offeror's proposal. taking into account the field pricing report, if any: any audit report and technical analysis vhether or not part of field pricing report; and other pertinent aata such as independent Government cost esthmates and price histories.
15, 0 5. REVISED FAR
6. 807 Preregotiation objectives.
(a) The process of determining prenegotiation objectives heips the contracting officer to judge the overall reasonableness of proposed prices and to negotiate a falr and reasonakle price or cost and fee. In setting the frenegotiation objectives, the contracting officer shall analyze the offeror's proposal, taking into account the field pricing report, if any: any audit report and technical analysis whether or not part of a field pricing report: and cther pertinent data such as independent Goverrment cost estamates and price histories. This pracess may include fact-finding sessions with the offeror when the contracting officer deems approfriate.

(b) Rhen a contiact of modification involqes substantial price negotiation, the contratting officer shall wite a prenegotiation objectives memorandum. Tbe scope and depth of the memorandum should be directly Ielated to the dollar value, importance, and complemity of the proposed contract or modification. Then cost andiysis is regulred under 15. 805-1. the prenegotithon objectifes memorandum shali include (i) the pertinent issues to be negotiated, (2) maximum and minimum cost objectives, and (3) a profit or fee objective (see also 15.805-3).
(c) The Gowernment's cost objective nind proposed pricing arringement directiy affect the profft or fee objective. eecause profit or fee is only one of severtl interceltted variables. the contracting officer shall not agiee on profit of fee uthont concurrent agrepment on cost and type of contract. specisic agreement on the exact pinues or wenghts名singned to indifidual profit-anaitsis factors (see is.905) is not required during negotiations and should not be attempted.
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(b) The contracting officer shall establish prenegotiation objectives prior to the negotiation of any pricing action. The scope and deptn 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 under 15.805-1, the analysis shall address in writing (1) the pertinent issues to be negotiated, (2) the cost objectives, and (3) a profit or fee ckjectrve (see 15, 805-3).
(c) ree Government's cost objective and proposed pricarg arrangement directly affect the profit or fee objective. Eecause profit or fee 15 only one of several interrelated variables, the contractirg officer shall not agree on profit or fee without concurrent agrement on cost and type of contract. Specific agreement on the exact values or weights assigned to individual profit-analysis factors (see 15.905) is not reguired during negotiations and should not be attempted.
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## 15. 808 Price negotiation memorandum.

(a) At the conclusion of each negotlation of an 2nitial or retised price, the contracting officer shalr promptiq prepare a memorandum of the principal elements of the price negotiation. The memorandom shall be included in the contract file and shall contain the following minimum information:
(1) The purpose of the negothation.
(2) A description of the acguasition, including appropriate identifying numbers (e.g. : RFP No.

(3) The name, position, and organization of each person representing the contractor and the Gorernment in the negotiation.
(4) The earrent status of the contractor's purchasing system.
(5) If certified cost or pricing data vere required, the extent to which the contracting officer-
(i) Relled on the cost or pricing data subritted and used them in negotiating the price; and
(ii) Recognized ws inaccurate, incomplete, or noncurrent ang cost of pricing data submitted; the action taken by the contracting officer and the contractor as a result; and the effect of the defective data on the price negotiated.
(6) If cost or pricing data vere not required in the case of any price negotiation ofer $\$ 100,000$, the exenption or wafver used and the basis for clalaing or granting it.
(7) A summary of the contractor's proposal, the field pricing report recommendations, and the reasons for any pertinent Fariances from the field pricing report recommendations:
(8) The most significant facts of considerations controlling the establishment of the prenegotiation price objective and final ptice.
(9) An explanation of any sugnificant difference between the total price negotiated and the total price objective.
(10) The basis for determining the profit or fee prenegotiation objective and the profit or fee negotiated.
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15. 808 Price regotiation memoxandum.
(a) At the conclusion of each negotiation of an zoitial or revised price, the contracting officer shall promptiy prepare a memorandum of the principal elements of the price negotiation. The memorandum shall be included in the contract file and shall contain the following mincmum information:
(1) The purfose of the negotiation-
(2) A description of the acquisition, including

(3) The name, fosition, and organization of each persor representing the contractor and the Government in the negotaation.
(a) The current status of the contractor's purchasing system when material is a sigmificant cost element.
(5) If certified cost or pricing data were required, the extent to which the contracting officer--
(土) Relled on the cost or pricing data submitted ard used them in negotiating the price: and
(11) Recognszed as inaccurate, incomplete, or noncurrent any cost or pricing data submitted; the action taken by the contracting officer and the contractor as result; and the effect of the defective data on the price negotiated.
(6) If cost or pricing data were not required in the case of any price negotiation over $\$ 500,000$, the exemption or wasver used and the basis for claming or granting it.
(7) If certified cost or pricing data were reguired ir the case of any price negotiation under $\$ 500,000$, the rationale for such requilement.
(8) A sumary of the contractor's proposal, the field pricing report recommendations, and the reasons for any pertinent varlances from the field prieing report recommendations.
(9) The most significart facts or considerations controlling the establishment of the prenegotiation price objective and the negotiated price including an explanation of any significant differences between the two positions.
(10) The kasis for determaning the profit or fee prenegotiation objective and the profit or fee negotiateci.




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## 15. 809 forward pricing rate agreements.

(a) Hegotiation of forward pricing rate agreements (FPRA's) mal be requested by the contracting officet or the contractor or initisted ky the adninistrative contracting offycer (ACO). In determining whether or not to establish such an agreement, the Aco should consider whether the benefits to be derived from the agreement are commensurate with the effort of establishing and monitoring it. hormally, PPRA's should be negotiated only with contractors having a signiflcant volume of Government contract proposals. Whe cognizant contract administration agency shall determane whether an PPRA will be established.
(b) The Aco shall obtain the contractoris proposad and require that it include cost or pricing data that are accurate, complete, and current as of the date of submission. The Aco shall invite the cognizant contract atiditor and contracting offices having significant interest to participate in developing a Government objective and in the negotiations. topon conpletion of negotiations, tbe ACO shall prepare a price negotiation memorandun (see 15.808) and forward copies to the cognizant auditor and to ell contracting offices that provided support. A Certificate of curtent cost or pricing Data shall not be regoired at this time (see 15.804-4 (g)) *
(c) The PRRA shall provide specific terms and conditions covering expiration, application, and data requirements for systematic monitoring to assure the validity of the rates. The agreement shall provide for cancellation at the option of either party and shall reguire the contractor to subsit to the ACO and to the cognizant contract ayditor any significant change in cost or pricing data.
(d) Offerors are required (see 15.804-4 (g)) to describe any fPRA's in ach specific pricing proposal to which the rates apply and identifi the latest cost or pricing data already subwitted in accordance with the agreement. Ali data submitted in connection with the agreement, npated as necessary. form a part of the total data that the offeror certifies to be accurate, complete, and current at the time of agreement on price for an initial contract or for a contract modification.
(e) Contracting officers should use PPRA rates as bases for pricing all contracts, modifictations, and other contractual actions to be performed during the periad covered by the agrement, unless the Aco determines that changed conditions have invalidated part or all of the agreement. Conditions that may affect the agreement's valudity shafl be promptly reported to the Aco.
(1) If the ACo determanes that the agreement 15 still walid, the Aco shall notify the individual or agency that reported the changed conditions.
(2) If the Aco determanes that a changed condition has invalidated the agreement, the Aco shall notify ali interested parties of the extent of its effect and initiate revision of the agreement.
(I) When an PPRA has been invalidated, the contractor, ACO, and contracting officer shall reflect the changed condition in proposals, cost analyses, and negotiations, pending revision of the agreement.

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## 15. 809 Fozward prichng rate agreements-

(a) Negotiation of forward pricing rate agreements (FPRA's) may be requested by the contracting officer or the contractor or $1 \Gamma 1 t l a t e d$ by the administrative contractirg officer (ACC) - In determining whether or not to estabizsh such an agreement, the Aco should conslder whether the tenefits to be derived from the agreement are commensurate with the effort of establishing and monitoring ltNormally. FPRA's should be negotaated only with contractors having a significant volume of government contract froposals. The cognizant contract admunistration agency shall determine whether an FPRA whll be established.
(b) The Aco shali obtann the contractor's proposal and requare that it include cost or pricing data that are accurate, complete, and current as of the date of submission. The ACo shall invite the cognizant contzact auditor and contracting offices having a significant interest to participate $2 r$ develoging a Government objective and in the negotlations. Upon completion of negotiations the AC0 shall prepare a price negotiation memorandum (PNM) (see 15-808) and forward coples of the PNM and FPRA to the cognizant auditor and to 111 contracting offices that are known to be affected by the FPRA. A Certificate of current Cost or Pracing Data shall not be required at this time (see 15. $804-4$ ( g$)$ ).
(c) The FPRA shall provide specific terms and conditiors covering explration, application, and data requirenents for systematic monitoring to assure the validity of the rates. The agreement shall provide for cancellation at the option of either party and shali requare the contractor to submit to the ACO and to the cogrizant contract audizor any sagnifscant change in cost or pricing data.
(d) offerors are required (see $15-804-4$ (g)) to describe any FPRA's in each specific pricing proposal to which the rates apply and identify the latest cost or prionng data already submitted in accordance with the agreement. All data submitted in connetion with the agreement, updated as necessary, form a part of the total data that the offeror certifies to be accurate, complete, and current at the time of agreement on price for an inltial contract or for a contract modification.
(e) Contracting officers should use FPRA rates as bases for pricing all contracts, modifications, and other contractual actions to be performed during the period covered by the agreement, unless the Aco determines that changed conditions have invalidated part or all of the agreement. Conditions that may affect the agreement's validity shall be promptly reported to the aco.
(1) If the Aco decermines that the agreement 15 still valid, the ACO shall notify the indivadual or agency that reported the changed conditions.
(2) If the Aco determines that a changed conilition has invaludated the agreement, the Aco shali notify all interested parties of the extent of its effect and initiate revision of the agreement.
(f) when an FPRA has been Invalldated, the contractor, Aco, and contracting officer shall reflect the changed condition in proposals, cost analyses, and negotiations, fending revision of the agrement.

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15.810 should-cost analysis.
(a) Should-cost analysis is a spectalized form of cost analysis employing an integrated team of government contracting, contract adminlstration, pricing, andit, and engineeting representatives. It differs from regular cost analysis in its depth, in the fact that it is conducted at the contractor's plant, and in the extent to which the Government identifies and challenges inefficiencies in the contractor's mangement and operations rather than merely challenging certann proposed costs. The purpose of shouldcost analysis is to (1) identify uneconomical or inefficient practices in the contractor's management ond operations, (2) guantify their impact on cost in order to develop a realistic price objective for negotration, and (3) lead to both short- and long-range 1 mprovenents in the contractor's economy and efficiency.

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15.810 shoulu-cost analysis.
(a) Should-cost analysis is a specialized form of cost analysis emplognng an integrated team of Government contracting, contract admanistration, pricing, audit, and engineering representatives. It differs from regular cost analysus in its depth, in the fact that it is conducted at the contractor's plant, and in the extent to which the Government identifies and challenges inefficiencies in the contractor"s management and operations rather than merely challenging certann proposed costs. The furpose of shoulc. cost analysis 15 to (1) identify uneconomical or snefficient Eractices in the contractor's management and operations, (2) quantify their impact on cost in order to develop a
realistac price objective for negotiation, and (3) lead to toth short- and long-range improvements in the contractor's econcmy and efficiency.

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(b) A should-cost analysis should be considered, particularly in the case of a major system acquisition (see part 34). Wher-"
(1) Some initial production has already taken place;
(2) The contract will be avarded on a sole-source basis;
(3) There are future fear production requirements for substantial quantities of like items;
(4) The items being acgured have bistory of increasing casts:
(5) The york is sufficently defined to permit an effective analysis and major changes ace unlikely:
(6) Sufficient time is available to plan and conduct the should-cost analysis adequately; and
(7) Personnel with the required skills are apailable or can be assigned for the daretion of the shoula-cost analysis.
(c) When should-cost analysis is planned, the contracting officer should state this fact (i) in the acquisition plan (see Sabpart 7.11 and (2) in the solicitation.
(d) The contracting officer should decide which elenents of the contractor's operation have the greatest potential for cost savings and assign the available personnel tesonrces accordingly. While the particular elements to be analped are a function of the contract work task, elements such as manufacturing, pricing and accounting, managemert and organization, and subcontract and vendor management are normally revieved in a shouid-cost analysis.
(e) In acquisitions for which a should-cost analysis is zonducted, formal audit reports, field pricing reports, or cecmical analysis reports (see 15. 805) are required only to the extent that they contribute to the combined team gosition. the contracting officer shall consider the findings and recommendations of the should-cost analysis then negotiating the contract price. After completing the regotiation, the contracting officer shall provide the administrative contracting officer a cegort of any identified uneconomical or inefficient practices, fogether \#ith a report of correction or disposition agreements zeacked ulth the contractor.
(b) A should-cost analysis should be considered carticularly in the case of a major system acquasition (see Part 34): When--
(1) Some initial production has already taken place;
(2) Tne contract wlll be awarded on a sole-source basis;
(3) Thefe are future year production requarements for substantial quantities of like xtems:
(4) The items being acquired have a history of increasing costs;
(5) The work 15 sufficiently defined to permit an effective analysis and major changes are uninkely;
(6) Sufficient tume is available to plan and conduct the should-cost analysis adequately; and
(7) Personnel with the required skills are avallable or can be asslgned for the duration of the should-cost analysis.
(c) When a should-cost analysus is planned, the contracting officer should state this fact (i) in the acquisation plan (see subpart 7, 1) and (2) in the solicitation.
(d) The contracting officer should decide which elements of the contractor's operation have the greatest potential for cost savings and assign the available personnel resources accordingly. While the particular elements to be analyzed are function of the contract work task, elements such as manufactuxing, procing and accounting, management and organization, and subcontract and vendor managenent are normally reviewed in a should-cost analysis.
(e) In acquisitions for which a should-cost analysis is conducted, formal audit reports, field pricing reports, or technical analysis reports (see 15.805 ) are required only to the extent that they contribute to the combined team cosition. The contracting officer shall consider the findings and recommendations of the should-cost analysis when negotiating the contract price. After completing the negotiation, the contracting officer shall provide the admunistrative contracting officer a report of any identified uneconomical or inefficient practices, together with a report of correction or disposition agreements reachee with the contractor.


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Cost or Pricing Data
52.215-21 Price Reduction for Defective cost or Pricing Data.

As prescribed 1n 15.804-8(a), insert the following clause in all negotiated contracts that exceed $\$ 100,000$ when entered into, unless the contract $1 s$ exempt from the requirement for certified cost or pricing data under 15.804-3(a) or (g) or this requirement has been waived under 15,804-3(1). Insert the clause also in negotiated contracts (a) of a lesser amount when the contractor is required to aubmit certified cost or pricing data or (b) for which partial cost or pricing data were obtained under
15.804-5(c).

## PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA (DATE)

(a) If any price. including profit or feg. negotiated in connection with this contract, or any cost reimbursable onder this contract, was ancreased by any signaficant amount bocause (1) the Contractor or a subcontractor furnished cost or pricing data that were not complete, accurate, and current as certified in its Certificate of Current cost or Pricing bata, (2) a subcontractor or prospective subcontractor furmished the Contractor cost or pricing data that were not complete, accurate, and current as certified in the Contractor's Certificate of Current cost or pricing Data, or (3) any of these parties furnished data of any deacription that were not accurate, the price or cost shall be reduced accordingly and the contract shall be modified to reflect the reduction.
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52. 215-22 Price Reduction for Defectave cost or pricing
Data.

As prescribed in $15.804-8(\mathrm{a})$, wher contracting by negotiation, insert the following wher contracting by and contracts when it is contemplatelause in solicitations uncertified cost or pricing data wall be cont certified or 15.804-2 and $15.804-5$ ):

PRICE REDUGTION FOR DEFECTIVE COST OR PRICING DATA (DATE)
(a) If any price, ineluding profit or fee, negotiated in connection with this contract, or any cost rembursable under thas contract, was increased by any significant anount because (1) the Contractor or a subcontractor furnisiod cose or pricing data that were not complete, accurate, and curcent as certified in ats Certificate of Current Cost or Pricing Data, (2) a subcontractor or prospective subcontractor furnashed the contractor cost or pricing data that were not complete, accurate, and current as certified Dathe contractor's Certificate of Curfent cost or Pricing Data, or (3) any of these parties furnished data of any description that were not accurate, the price or cost shall be reduced accordingly and the contract shall be modified to reflect the reduction.

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(b) Any reduction 18 the contract price undef paragraph (a) above due to defective data from a prospective subcontractor that was not subsequentiy awarded the subcontract shali be immited to the amount, plus applicable overhead and profit markup, by which (I) the actual subcontract or (2) the actual cost to the contractor, if there was no subcontract, was less than the prospective subcontract cost estimate submitted by the contractor; provided, that the actual subcontract price was not itself affected by defective cost or pricing data.
(End of clause)
(R 7-104.29(a) 1970 JAN)
(R1-3.814-1(a))
(o) Any reduction in the contract prace under paragraph (a) above due to defective data from a prospective subcontractor that was not subsequently awarded the subcontract shall be ilmited to the amount, plus applicable overhead and profit markup, by which (1) the actual subcontract or (2) the actual cost to the Contractor, if there was no subcontract, was less than the prospective subcontract cost estinate submitted by the contractor, provided, that tne actual subeontract price was not itself affected by defective cost or pricing data.
(End of clause)
(R 7-104.29(a) 1970 JAN)
(R 1-3.814-1(a))

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52．215－22 Price Reduction for Defectuve Cost or Pricing Data－Modifications

A prescribed in $15,804-6(b)$ ，insert the following clause in ali negotated contracts over $\$ 100,000$ that do not include the clause at $52.215-21$ ，unless the requirement for
ita inclusion in a contract with foreign government or agency of that government has been waived by the head of the contracting activity．

## PRICE REDUCTION FOR DERECTIVE COST OR PRICING DATA－HODIFICATIONS（DATE）

（a）Thas clause shall become operative only for any modification to this contract involving aggregate incretses and／or decreases in costs，plus applicable profita，of more than $\$ 100,000$ ．except that this clause does not apply to ary modification for which the price 1s－－
（1）Based on adequate price competation；
（2）Based on established catalog or market prices of comercial items sold in substantial quantities to the general public：or
（3）Set by law or regulation．
（b）If any price，including profit or fee，negotiated in connection with any modification under this clause，or any cost reimbursable under this contract，was increased by any significant amount because（1）the Contractor or a subcontractor furnished cost of pricing data that were not complete，accurate，and current as certified in its Certificate of Current cost or Pricing Data，（2）a subcontractor or prospective subcontractor furnished the Contractor cost or pricing data that were not complete． accurate，and current as certified in the Contractor＂s Certificate of Current Cost or Pricing Data，or（3）any of these parties furnished data of any description that were not accurate，the price or cost thall be reduced accordingly and the contract shall be modified to reflect the reduction． This fight to a price reduction is limited to that resulting from defects in data relating to modifications for which this clause becomes operative under paragraph（a）above．
（c）Any reduction in the contract price under paragraph （b）above fue to defective data from a prospective subcontractor that was not subsequently awarded the subcontract shall be limated to the amount，plus applicable overhead and profit markup．by which（1）the actual subcontract or，（2）the actual cost to the contractor，if there was no subcontract，was less than the prospective subcontcact cost estimate submitted by the contractor； provided，that the actual subcontract price was not itself affected by defective cost or pricing data．
（End of clause）
（ $R 7-104.29(\mathrm{~b}) 1970$ JAN）
（R 1－3．814－1（b））


R5／15－23／DE／／15．804－8\｛b）／／I／／Price Requction for Defect $2 v e$ cost of Pricing Datar－Modifications
＊／A

52． $215-23$ Price geduction for Defective Cost or Pricing Data－－Modifications．
As prescribed in 15．604－8（b）when contracting by negotiation，insert the following clause in solicitations and contracts when（a）it is contemplated that certified or uncertified cost or pizcirg data will be required（see 15．804－2 and 15．804－5）for the pricing of contract modifications，and（b）the clause prescribed in 15．804－8（a） has not been included．If the contract amount is expected to be $\$ 500,000$ or less，the contracting officer shali feduce the dollar amounts specified in the clause，as appropriate．

## PRICE REDUCTION EOR DEFECTIVE COST OR PRICING

 DATA－MODIEICATIONS（DATE）（a）Thas clause shall become operative only for ony modification to this contract invoiving a pricing adjustment expected to exceed $\$ 500,000$ ，except that this clause does not apply to any rodification for which the price is－－
（1）Based on adequate price competition；
（2）Based on established catalog or market prices of comarcial 2 tems sold in substantial quantities to the general public；or
（3）Set by law of regulation．
（b）If any price，including profit or fee，negotiated in connection with any modification under this ciause，or any cost reimbursable under this contract，was increased by any significant amount because（1）the contractor or a subcontractor furnished cost or prieing data that were not complete，aceurate，and curfent as certified in its Certificate of Current cost or Pricing Data，（2）a subcontractor or prospective subcontractor fuxnished the Contractor cost or pricing data that were not complete， accurate，and curcent as certified in the contractor＇s Certificate of Curtent Cost or Pricing Data，or（3）any of these parties furmished data of any description that were not accurate，the price or cost shall be reduced accordin3ly and the contract shall be modieled to reflect the reduction This rignt to a price reduction is limited to that resulting from defects in data relating to modifications for whith this clause becomes operative under paragraph（a）above．
（c）Any reduction in the contract price under paragraph （b）above due to defective data from a prospective subcontractor that was not subsefuently awarded the subcontract shall be inmited to the anount．plus applicable overhead and profit markup，by which（1）the actual jubcontract or $\{2$ ）the actual cost to the Contractor，if there was no subcontract，was less than the prospective subcontract cost estimate submitted by the contractor； provided，that the actual subcontract price was not itself affected by defective cost or pracing data
（End of clause）
（R 7－104．29（a） 1970 JAN$)$
（ R 1－3 814－1（b））


## 4. PHASE I FAR

c5/15-23/Mb//15.804-8(c)//1//Subcontractor Cost or Pricing Data

- /A
52.215-23 Subcontractor Cost or Pricing Data.

As prescribed in 15.804-8(c), insert the following clause in ali negotiated contracts that exceed $\$ 100,000$ when entered into, unless the contract 15 exempt from the requirement for certified cost or pricing data under 15.804-3(a) or ( 9 ) or this requirement has been waived under 15.804-3(1). The clause may also be included. with appropriate reductions in the dollar amounts, in negotiated contracts of a lesser amount when the contractor was required to subint certified cost or pricing data.

## SUBCONTRACTOR COST OR PEICING DATA (DATE)

(a) Before awarding any subcontract expected to exceed $\$ 100,000$ when entered into, or before pricing any subcontract modification involving aggregate increases and or decreases in costs, plus applicable profits, expected to exceed $\$ 100,000$, the Contractor shall regure the subcontractor to summt cost or pricing data (actually or by specific identification in writing), unless the price is=-

## (1) Based on adequate price competition:

(2) Based on established catalog or market praces of commercial items sold in substantial quantities to the general public: or

## (3) Set by law or regulation.

(b) The Contractor shall require the subcontractor to certify in substantially the form prescribed in Subsection $15.804-4$ of the Federal Acquisition Regulation (FAR) that. to the best of 1 ts knowledge and belief, the data submitted under paragraph (a) above were afcurate, complete, and current as of the date of agreement on the negotiated price of the subcontract or subcontract modification.
(c) In each subcontract that exceeds $\$ 100,000$ when entered into. the contractor shall insert elther--
(1) The substance of this clause, including this paragraph (c). if paragraph (a) above reguires submission of cost or pricing data for the subeontract; or
(2) The substance of the clause at FAR 52.215-24 Subcontractor Cost or Pricing Data-Modifications.
(End of clause)
(R 7-104.42(a) 1970 JAN)
(R1-3.814-3(a))

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5. REVISED FAR

R5/15-24/DE//15.804-8(C)//I//Subcontractor Cost or Priciag
Data
*/A
52.215-24 Subeontractor Cost or pricing data.

As prescribed in $15.804-8(c)$. insert the following clause in solicitations and contracts when the clause prescribed in 15. $8004=8$ (a) 15 included. If the contract amount is expected to be $\$ 500,000$ or less, the contracting officer shall reduce the dollar amounts specified in the clause, as appropriate-

## SUBCONTRACTOR COST OR PRICING DATA (DATE)

(a) Before awarding any subcontract expected to exceed $\$ 500,000$ when entered into, or before pricing any subcontract modification involving a pricing adjustment expected to exceed $\$ 500,000$, the Contractor shall require the subcontrector to subint cost ox pracing data factually or by specific identification in witing), unless the price 15~-
(1) Based on adequate price competation;
(2) Based on established catalog or market orices of commercial itens sold in substantial quantities to the general public; or
(3) Set by law or regulation.
(b) The Contractor shall require the subcontractor to certify in substantially the form prescriaed 10 Subsection 15.804-4 of the Federal Acquisition Regulation (FAR) that, to the best of its knowledye and belref, tne data subntted under paragraph (a) above were accurate, complete, anj current as of the date of agreement on the negotiated prace of the subcontract or subcontract modification.
(c) In each subcontract that exceeds $\$ 500,000$ when entered into, the Contractor shall insert elther-
(1) The substance of this clause, ltcluding this paragraph (c), if paragraph (a) above requires submission of cost or prieing data for the subcontract, or
(2) The substance of the clause at EAP 52.215-25, Subcontractor Cost or Pexeing Data-Modifications
(End of clause)
(R 7-104.42(a) 1970 JAW)
(R 1-3.814-3(a))

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C5/15-24/MM//15.804-8(d)//I//Subcontractor Cost or Pricina Data-Nocifucations

52.215-24 Subcontractor Cost or Pricing Data--Modifications.

As prescribed in 15.804-8(d), insert the following ciause in ali negotiated contracts over $\$ 100,000$ that do not include the clause at $52.215-23$, unless the reguirement for its inclusion in a contract with a foresgn government or agency of that government has been waived by the head of the contracting activaty.

SUBCONTRACTOR COST OR PRICING DATA--MODIFICATIONS (DATE)
(a) the requirements of paragraphs (b) and (c) of this clause shall (1) become operative only for any modification to this contract involving aggregate increases and/or decreases in costs, plus applicable profits, expected to exceed $\$ 100,000$ and (2) be limited to guch modifictitions.
(b) Before awarding any subcontract expected to exceed $\$ 100,000$ when entered into, or pricing any subcontract modification anvolying aggregate increases and or decreases in costs, plus applicable profits, expected to exceed $\$ 100,000$, the Contractor shall require the subcontractor to submit cost or pricing data (actuelly or by specific identification in writing), uniess the price is-*

## (1) Based on adequate price competition:

(2) Based on established catalog or market prices of commercial items sold in substantadi quantities to the general public: or
(3) Set by law or regulation.
(c) The Contractor shall requare the subcontractor to certify in ubstantlally the form prescribed in subsection $15.804 \times 4$ of the Federal Acoulsition Regulation (FAR) that. to the best of its knowledge and belief, the data submatted under paragraph (b) above were accurate, complete, and current as of the date of agreement on the negotiated prace of the subcontract or subcontract modification.
(d) The Contractor shall ansert the substance of thas clause, 1 ncluding thas paragraph (d), in each subcontract that exceeds $\$ 100,000$ when entered into.
(End of clause)
( $\mathrm{R} 7-104.42(\mathrm{~b}) 1970$ JAN)
( R 1-3.814-3(b))
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52.215-25 Subcontractor Cost or Pricing Data--Modifications.

As prescrabed in 15.804-8(d), insert the following clause in solicitations and contracts when the clause preseribed in 15. 804-8 (b) is incIuded. If the contract amount 15 expected to be $\$ 500,000$ or less. the contracting officer shall reduce the dollar amounts specified in the clause, as appropriate.

SUBCONTRACTOA COST OR PRICING DATA--MODIFICATIONS(DATE)
(a) The requirements of paragraphs (b) and (c) of this clause shall (1) become operative only for any modification to this contrast involving a pricing adjustr. it expected to exceed $\$ 500,000$ and (2) be damited to such modifications.
(b) Before awarinng any subcontract expected to exceed $\$ 500,000$ when entered into, or pricing any subcontract modification involving a pricing adjustment expected to exceed $\$ 500,000$, the Contractor shall require the subcontractor to submit cost or pricing data factually or by specific identifieation in writing), unless the prace ism-
(1) Based on adeguate price competation;
(2) Based on established catalog or market prices of comercial items sold in substantial guantities to the general puolic: or
(3) Set by law or regulation.
(c) The Contractor shall regure the subcontractor to certify in substantially the form prescribed in Subsection 15.604-4 of the Federal Acquisition Requalation (FAR) that, to the best of its knowledge and belief, the data submitted under paragraph (b) above were accurate, complete, and cursent as of the date of agreenent on the negotaated prace of the subcontraet or subcontract modification.
(d) Tne Contractor shall insert the substance of thas clause, including thas paragraph (d), in each subcortract that exceeds $\$ 500,000$ when entered into.
(End of elauge)
(R 7-104.42(b) 1970 JAN)
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ddang $154804-3$ (e) (4) and (5).




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SUBPART 15.9--PREAWARS AND POSTAWARD NOTIFICATIONS, PROTESTS, AND MISTAKES

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SUBPART 15.10--PREAWARD AND POSTAWARD NOTIFICATIONS, PROTESTS, AND MISTAKES
15.1001 Notifications to offeror.
15.1002 Debriefing of unsuccessful offeror.
15.1003 Protests against award.
15.1004 Discovery of mistakes.

SUBPART 15.10--PREAWARD AND POSTAWARD NOTIFICATIONS, PROTESTS, AND MISTAKES

### 15.1001 Notifications to offeror.

(a) General. The contracting officer shall notify each offeror whose proposal it determined to be unacceptable or whose offer is not selected for award, unless disclosure might prejudice the Government "s interest. However, notice is not required if the contract is for-
(1) Subsistence:
(2) Personal or professional services (see 15.204);
(3) Services of educational institutions (see 15.205): 1
(4) Supplies or servos purchased and used outside the United States (see 15.206); or
(5) Supplies or services for which only foreign firms have been solicited.
(b) Preward notices, (1) When the proposal evaluationperiod for a solicitation estimated at over $\$ 10,00026$ expected to exceed 30 days, or when a limited number of offeror have been selected as being within the competitive range (see 15.609), the contracting officer, upon determining that a proposal is unacceptable, shall promptly notify the offeror. The notice shall at least state (i) $2 n$ general terms the basis for the determination and (12) that a revision of the proposal will not be considered.


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| 5.901 (b) |  |  |  |
| (2) In a small husiness set-aside (see 19. XXX ), upon |  |  |  |
| completion of neqotiations and determanations of responsibility, but prior to award, the contracting officer |  |  |  |
|  |  |  |  |
| Bhall 1 nform each unsuccesgful offeror in writing of thename and location of the apparent successiul offeror. The |  |  |  |
|  |  |  |  |
| notice thall blso state that (i) the Government will not |  |  |  |
| consider subsequent revisions of the unsuccessful proposal |  |  |  |
| and (ii) no response ts reguired unless basis existis to |  |  |  |
|  |  |  |  |
| succes解ul offeror. the notice is not reguired under the circumptances described in 15.901 (a) or when the contracting |  |  |  |
|  |  |  |  |
| officer determines in writing that the uraency of the |  |  |  |
| requirement necessitates award whthout delay. |  |  |  |

### 5.901 (b)

(2) In a small business set-aside (see $19 . \mathrm{XXX}$ ), upon responsibility, but prior to award. the contracting officer Bhall inform each unsuccessful offeror in writing of the name and location of the apparent successful offeror. The notice hall also state that (i) the Government will not consider subsequent revisions of the unsuccessful proposal challenge the small businetz size status of the apporently succesfal offeror. the notice is not reguired under the officer determines in writing that the uraency of the requirement necessitates award whthout delay.

### 15.3001 fh

(2) In a small business set-aside (see Subpart 19.5), upon completion of negotiations and determinations of
responsibility, but prior to award, the contracting ofexcer shall inform each unsuccetsful offeror in writing of the name and location of the apparent successful offeror. The notice shall also कtate that (1) the Government will not consider subsequent revisions of the unsuccessful proposal and (li) no response $2 s$ required unless a basis exists to challenge the small business size status of the apparentiy tucceftful offeror. The notice 38 not required under the circumstances described in paragraph (a) above or when the contracting officer detemmines in writing that the urgency of the requirement necestitates award without delay.

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(c) Postaward notices.
(1) Promptly after award of contracts resulting from solicitations over $\$ 10,000$, the contracting officer shall notify unsuccessful offerors in writing, unless preaward notice was given under $15.901(\mathrm{~b})$. The notice shall include--
(2) The number of firms solicited;

151001
(c) Postaward notices. (1) Promptly after award of contracts resulting from solicitations over $\$ 10,000$, the contracting officer shall notify unsuccessful offerors in writing, unless preaward notice was given under paragraph (b) above. The notice shall include-
(1) The number of offerors solicited;

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(ii) The number of proposals received:
(iii) The name and address of each offeror receiving an award:
(iv) The items, quantities, and unit prices of each award (if the number of items or other factors makes listing unit prices impracticable, only the total contract price need be furnished): and
(v) In general terms, the reason the offeror's proposal was not accepted, unless the price information in (iv) above readily revels the reason. In no event shall an offeror" colt breakdown, profit, overhead rates, trade secrets, manufacturing processes and techniques, or other confidential business information be disclosed to any other offeror.
15.1001 (c) (1) 5, REVISED FAR
(12) The number of proposals received
(211) The name and address of each offeror receiving an aware:
(Iv) The items, quantities, and unit prices of each award (if the number of items or other factors makes listing unit prices impracticable, only the total contract price need be furnished): and
(v) In general terms, the reason the offeror's proposal was not accepted, unless, the price information in (iv) above readily reveals the reason. In no event shall an offeror's cost breakdown, profit, overhead rates, trade secrets, manufacturing processes and techniques, or other confidential business information be disclosed to any other offeror.
(2) Upon request, the contracting officer shall also furnish the information described in $15.901(c)(1)(i)$ throw oh (iv) to the successful offeror.
(3) Upon request and subject to the excentions in 15.901(a). contracting officers shall furnish the information described in $15.901(c)(1)(i)$ through (v) to unsuccessful offeror in solicitations of $\$ 10,000$ or less.
(2) Upon request, the contracting officer shall also furnish the information described in 15.1001 (c)(1) (i) through (iv) above to the successful offeror
(3) Upon request and subject to the exceptions in 15.1001(a). the contracting officer shall furnish the information described in $15.1001(c)(1)(1)$ through (v) above to unsuccessful offerors in solicitations of $\$ 10,000$ or less.


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15.902 Debriefing of unsuccessful offerors.
(a) When a contract is awarded on basis other than price ( aee Subpart 15.6), unsuccessful offerors, upon their written request, shall be debriefed ond furnished the basis for the selection decision and contract award.

## 5. REVISED FAR

15.1002 Debraefing of unsuccessful offeriors.
(a) When a contract 18 awarded on a basis other than price (see Subpart 15.6), unsuccessful offerors, upon their written request, shall be debriefed and furmished the basis for the selection decision and contract award.
(D) Debriefing information shall include the Government"s eviluation of the alignificent weak or deficient factors in the proposal: however, point-by-point comparisons with other offerors' proposals shall not be made. Debriefings shall not reveal-
(I) Trade secrets;
(2) Privileged or confidential manufacturing processes and cechniques:
(3) Commercial and fznancial information that is privileged of confidential, including cost breakdowns, profit, indirect cost rates, and similar information; or
(b) Debriffing information shall include the Government's evaluation of the significant weak or deficient factors in the proposaly however, point-by-point comparisons with other offerors' proposals shall not be made. Debriefing shall not reveal the relative merits or technical standing of competitors or the evaluation scoring. Horeover, debriefing Bhall not reveal any anformation that is not releadable under the Freedom of Information Actif for example-
(1) Trade secrets;
(2) Privileged or confidential manufacturina processes anc techniques: and
(3) Comuercial and financial information that 15 privileged ar confidential, including cost breakdowns, profit, indirect cost rates, and similar information.

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3.902 4. FHASE I FAR 151002 5. REVISED FAR
(c) The contracting officer shall include ia summary of the lebriefing in the contract file.
15.903 Protests against award.

Protests against award in neqotiated acquisitions shall be reated substantialiy the same at in formal advertising (see 4.407-8).
(c) The contracting officer shali anclude summary of the debriefang in the contract file.
15. 1003 Protests aga2net award.

Protests against award in negotiated acquisitizons shall be treated substantially the same as in formal advertising (see 14.407-8).

### 15.1004 Dascovery of mistakes.

For treatment of mistakes an an offeror's propasal that are discovered before award, see 15.607. Histakes in a contractor's proposal that are disclosed after award shall be processed in accordance with $14.406-4$.



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## PHASE ITFAR

15.213
（d）Standardization solucitation provision．Upon the approval of the chief of the contracting office．the contracting officer ray insert the provision at 52．215－3． Notice of Possable standardization，which is preseribed in 15．407，in solicitations for supplies that，subseguentiy maght be standardazed for the applications specifued in 15．213（b）（1）．

## 15．301 Definition．

＂Determination and findings＂（DsF）means written approval by an authorized official by statute or regulation as prereguisite contracting actions．The＂determanation＂ decision supported by the＂fandings．＂The statement of fact or rationale essential determination and must cover each reguire＊＊ or regulation．

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（ Rhecril）
15.213
（a）Approval for using standardization solzeytation provision The contracting officer shall obtain the approval of the chief of the contracting office before using the plovision at 52 215－4，stotice of Possible Standardization（see 15．213（c）and 15．407（b））．

15． 301
Determanation and fandings＂（DuF）metans a special form of written approwal ty an authorized official that is required by statute or regupation as a prerequasite to taking certain contracting aetipn＂？The＂determination＂is a conclusion or decision tupported ${ }^{3}$ 省 the＂findings．＂The findings are statement of fact or rationale essential to support the determination and matat cover each reguirement of the statute or regulation．
${ }^{4}-$

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## PHASE IIFPR

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PART 4--ADHINISTRATIVE NATIERS

SUBPART 4.1--CONTRACT EXEEUTION
Contracting officer's signature.
Contractor's sugnature.
Contract clause.
SUBPART 4.2--CONTRACT DISTRIBUTIDN
4.201 Procedures.
4.202 Agency distribution requirements.
i4. 102 Contractor's signature.
(a) Indivaduals. A contract with an individual shall be signed by that mindividual. $A$ contract indth alual indigudual aling business as a farm shall be signe h by topt infirudual. and the sagnature shali be followed by the individuti"s typed, हtamped, or printed name and the words:|"an individual doing business ds ........................................... [ingert name of farm].

### 4.103 Contract clause.


The eontracting officer shall insert the elause ent 52.204-1. Approval of Contract. in thosebtintracts *ifor which ayency procedures fequire written approval at a aevil above that of the contracting officer.

**/
52.204-1 Aypzoval of Contract.
*
As prescribed in 4.103, insert the following clause in those contracts for which agency procedures require wiritten approval at a level above that of the contracting officex;

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4.101 Contracting officer's signature.
4.202 Contractor's signature.
4.103 Contract clause.

SUBPART 4.2-CONTRACT DISTRIBUTION
4.201 Procedures.
4.202 Agency distribution requirements.
4.102 contractor's signature.
(a) Individuals. A contract with an individual shall be EIgned by that individual. A contract with an indivadual doing businesp as a firm thali be signed by that individual, and the signature shall be followed by the individual's typed, stamped, or printed name and the words ", an Endxyidual doing businest as ................................. finsert name of firml.
4.103 Centract clause.

The contracting officer shali insert the clause at 52.204-1, Approval of Contract, in solicitationa and contracts when ageney procedures require wratten approval of the contract at a level above that of the contracting afficer.

R5/04-01/wC//4.103//I//Approval of Contract **/A
52.204-1 Approval of contract.

As prescribed in 4.103, insert the following clause in solicitations and contracts when agency procedures require written approval of the contract at a level above that of the contractang offrcer:

R5/04-01/wCe//4.103//-//Approval of contract **/HIOT
 ritie Unowhented proppopald
 Nate 1-28-83

Drafter


PHASE ITPAR

TABLE OF CONA ENTS
SURPART 15.5--UNSOLICITED PROPOSALS
SUBPART 15.5--UNSOLICITED PROPOSALS


FAR Entity 4 anopanx $x 5.7$
Control No./Page No.
 C| $5-21 / 0001 / / 15.708 / / 1 / / C h a n g e s$ or Additions to Make-or-Buy * $/ \mathrm{BCDEFG}$

- Hogram-Alternate I
 categorization is selected for one or morin items of significant value in e fixed-price incenpipelcontract bd a the following paragraph (d) to the basic chastise:

S/15-21/RC02//15.708//1//Changes or Additions to Make-or-Bus /BCDEFC

Program--Alternate II
11
Iternate y 1 (DATE). If b less economical make" or "buy" begorization is selected for one or more items of ignificant value in a cost-plus-incentive-fee contract, add he following paragraph (d) to the basic clause:

## $15.706(d)$

(4) The contractor's consideration of the competence. ability, experience, and capacity available in other firms. especially small business, final disadvantaged business, or labor surplus area concerns.

### 15.708 contract clause.

The contracting officer shall insert the clause at 52.215-21, Change f of Additions to Mate-or-Buy Program, in solicitations and contracts when it is contemplated that a make-or-buy program will be incorporated in the contract. If a less economical "rake" or "buy" categorization is selected for one or more items of significant value, the contracting officer shall use the clause with (a) its Alternate I, if a fixed-price incentive contract is contemplated, or (b) its Alternate II, if a cost-plus-incentive-fee contract in contemplated.

R5/25-21/RC//15.708//I/fChanges or Additions to Hake-or-Buy Program

- /BCDEFG
52.215-21 Changes or Addition e to Moke-or-Buy Program.

As prescribed in 25.708, insert the following clause in solicitations and contracts when it is contemplated that a make-or-buy program will be incorporated in the contract:

CHANGES OR ADDITIONS TO MAKE-OR-BUY PROGRAM (DATE)
R5/15-2l/RC01//25.708//x/ /Changes or Additions to Make-orBuy Progran--Alternate I */BCDEFG

Alternate 1 (DATE). If a less economical make" or "buy" categorization is selected for one or more item of significant value when a fixed-price incentive eontrolet is contemplated, add the following paragraph (d) to the basic clause:

R5/15-2J/HC 02//15 708//1//Changes or Additions to lint e-orBuy Prograth- -hicurnate 11 - /adders

Alqurnate il (D APE). If a jess economical "moke" or "buy" categorization 15 selected for one or more items of sagnaficant value when cost-plus-ancentave-fee contract is contemplated, add the following fatingrigh (d) to the dispose clause:


15.400
15.401
5.402
15.403
5.404
15.405
$15.405-1$
$15.405-2$
15.406
$15.406-1$
$55.406-2$
$5.406-3$
$5.406-4$
$5.406-5$
5.407
15.408
5.409
5.410
5.411
5.412
15.413
5.414

Scope of subpart.
Applacability.
General.
Solicitation nalling lists.
Presolicitation notices and conferences.
solicatations for information or planhing purposes.
general.
Solicitation prowsion.
preparing requests for proposals (infetz) and

Uniform contract formet $-\frac{p}{p}$

Part II-- Contract ciauses.
Part III--Documents, exhibits
attachnents.
Part IV-Nepresentations and instinct ons.
Solicitation provisiont.
Issuing solicitations.
Pre-proposal conferences.
Amendment of solicatations prior to closing date. Recelpt of proposils and quotations.
late proposals, quotations, and modifisationeti
Disclosure und use of information befdre award Forms.

### 5.401 Applicabz1ity.

 ontracts, except--
5.405-2 Solicitation provision.

The contracting officer shail insert on the face of cach olucitation $2 s$ sued for information or planning purposes the rovision at 52-215-3. Solucitation for Information or lanniny Purposes.
5. 406-2 (a)
(2) Prepare RFO's on Standard Form 18, Request for Quotations ( $53 . \mathrm{XXX}$ ). of on agency forms providang for section $A$ of the uniform contract format.

## REVISED FAR

SUEPART 15.4--SOLICITATION AND RECFIPT OF PROPOSALS AND QUOTATIONS
15.400 15.401 15.402 $+5.403$ 15.404 15.405
15.405-1
15.405-2
15.406
15.406-1
15.406-2
$15.406-3$
$15.406-4$
15.406-5
15.407
15.408
15.409
15.410
15.411
15.412
15.413
15.414

Scope of. subpart.
Applucabyluty-
General.
Solicitation mailing lists.
Presolucitation notices eno conlerences.
Solicitations for information or plannine purposes.
General.
Solicutation provision-
Preparing requests for proposels (RPP's) and requests for quotations (RFQ's).
Unaform contrsct format *
Part $I$--The Schedule.
Part II-Contract elauses.
Part III-Documents, exhibits, and other attachments.
Part IM--Representations and instructions.
solicitation provisions.
Fssung solimertations.
Pre-proposal conferences.
Anenoment of solicitations prior to closing eate. Necelpt of proposals and quotations.
Late proposals, quotztions, and modificataons. Disclosure and use of information hefore award. Forms.
15.401 Applicability.

Thas subpart applies to solicutations 1 ssued when contractang by negotiation, except--
15.405-2 Solıcitation provisıon.

The contracting officer shali insert on the face of each solicitation (other than those excluded by 15.401) issued for information or planning purposes the provision at 52.215-3. Solic2tation for Information or Planning Purposes.
$15,406-2(a)$
(2) Prepare RFO's on Standard Form 18. Request for Quotations (53. XXX). Agencies may overprint the SF 18 to provide for Section $A$ of the uniform contract format.

Control No./Page No.
$\rightarrow\left(\beta_{1}-\ln -\alpha\right) \delta$


## Phase IIFAR

## 15 sock Port ill-Contiget cluusis

Ellison 1 Contract clauses The contractane officer shill include in this sicition the clauses required by law or by this regulation and any additional clauses expected to be included in any resulting contract. if these clauses are not regulled in any other section of the uniform contract format. See Part 52, Solicitation Provisions and Contract clauses.
15. $406-5$
(b) Section L, Instructions, conditions, and I fort ha this section bicztation required elsewhere to guide offeror in strut proposals or quotations. Prospective offer it may be instructed to submit technical propolis. parts to meet agency requirements. The sever should provide for separation of technical pricing data. The instructions may specify, organization of proposal or quotation partan administrative. (2) management. (3) technic es f is as (1) or pricing data.

### 15.407 Solicitation provisions.

(a) "All solicitations," as used in this all requests for proposals (RFP*s) and ait quotations ( $\mathrm{KQQ}^{+5 \text { ) other ing }}$ ) plating puriosen owner than those for natenften or provision used with planning purposes.
(b) In accordance with $15.213(0)$, the contracting officer may, upon the approval of the chief of the contracting office. insert the provision at 52.215-4. Notice of possible standardization, $1 \pi$ all solicitations for supplies that -ubsequently might the standardized for applications specified in $15.213(b)(1)$.
(c) The contracting officer shall insert in all
solicitations the provisions at--
(5) 52.219-9, Submission of Offers or Quotations:
(d) The contracting officer shall insert in all RFP's the provisions at--

## REVISED FAR <br> (PL II)

### 15.406-3 Part II--Contract Clauses.

Section $I$, Contract clauses. The contracting officer shall include in this section the clauses required by law or by this regulation and any additional clauses expected to be included in any resulting contract, if these clauses are not required in any other section of the uniform contract format. Any alteration pertaining to the contract shall be included in this section as part of the clause at 52.252-4, Alterations in Contract. See Part 52, Solicitation Provisions and Contract clauses.

## :5. 406-5

(b) Section L, Instructions, conditions, and notices to offeror or gutters. Insert in this section solicitation provisions and other information and instructions not required elsewhere to guide offeror or quoters in preparing proposals or quotations. Any alteration pertaining to the solicitation shall be included in this section as part of the provision at 52.752-3. Alterations in Solicitation. Prospective offerors or quoters may be instructed to submit technical proposals in severable parts to meet agency requirements. The severable parts should provide for separation of technical and coot or pricing data. The instructions may specify further organization of proposal or quotation parts, such as (1) administrative, (2) management, (3) technical. and (4) cost or pricing data.
15.407 Solicitation provisions.
(a) "Solicitations," as used in this section, means requests for proposals (RFP's) and requests for quotations ( $\mathrm{RFO}{ }^{*}$ 8) other than those excluded by 15.401 and those for information or planning purposes. See 15.n05-2 for the solicitation provision used with solicitations for information of planning purposes.
15.407
(b) The contracting officer may, upon the approval of the chief of the contracting office (see 15.213 (d)), insert the provision at 52,215-4, Notice of Possible Standardization, in solicitations for supplies that subsequently might be standardized for applications specified in 15.213(b)(1).
(c) The contracting officer shall insert in solicitations the provisions at--
(5) 52.215-9. Submission of Offers or Quotations:
(d) The contracting officer shall insert in RFP's the provisions at--

## PHASE DIERR

.5 .467
(e, The contracting officer shall insert the provision at 52.215-17, Telesraphac Proposals or Quotations, in all solicitations that aulioraze telegraphic proposals or yuotations.
(f) The contracting officer shall insert the ntracta 52.215-18, order of Precedence, in all solicitydisons to wiach the uniform contract format applies.
(g) The contractang officer shall anscrt the wounsion at
 are not 2 ssued on $5 F 33$ except those (2) for te fruction work of (2) 10 which the Government specifies acceptance period.
(h) The contracting officer shall insert the 52.215-20. Place of Performance. in all solict thosc in which the place of performance it $\mathrm{gp}_{\mathrm{p}}$ covernamet.

## 7-

## =15.414 Forms:

S1.andara form 26 ( SF 2tit * usect, as appropriate, in commection with neg acguisitions.

2/15-03/EU//15.405-2//L//Solxcrtation for Ir */A

52.215-3 Solicitation for Information or Planning Purposes.

As prescribed in $15.405-2$, $2 n s e r t$ the following provision Fon the face of each solicitation $25 s$ ued for anformation or - planning purposes:

SOLICITATION FOR INFOREATION OR PLAHHING PURPOSES (DATE)

## REVISED EAR <br> $(O)$

## 15407

(e) The contractang officer shall insert the provision at 52 215-17. Telegraphic Proposals or Ouotations, in solzextations that authorize telegraphat proposals or quotations.
(f) The contracting officer shall insert the provision at 52.215-18, Order of Precedence, in solicitations to which the unaform contract format applies.
(g) The contracting officer shall Insert the provision at 52.215-19. Period for Acceptance of Offer, in RFP's that are not $2 s$ sued on SF 33 except those (1) for construction work or (2) in whach the Government specafies manimum acceptance period.
(h) The contracting officer shall insert the provision at 52.215-20. Place of Performance. in solicitations except those in whach the place of performmee is specified by the Government.

### 15.414 Forms.

(a) Standard Fortm 33 (SF 33), Solicitation, offer, and Award (see 53-301-33), shall be wsed in connection with negotiated acquisitions when it appears advantageous to kegin negotiations by soliciting written offers whose written acceptance by the Governwent wil create a binding contract without further action. hward may be pade using the Award portion of SP 33.
(b) Standard Form 26 (SF 26). Awardfcontract (see 53.301-26). shall be used when entering into negotiated contracts when the signature of both parties on a singie document is appropriate, uniess-
(1) The contract is entered into by means of Standard Form 33:
(2) The contract is for the construction, alteration or repair of buildings, bridges, roads, or other real property;
(3) The acquisition is one for which the FAR prescribes -special contract forms; or
(4) Use of a purchase order is appropriate.

R2/15-03/EQ//15.405-2//L//Solicıtation for Information or Planning Purposes */A
R2/15-03/EQR//15.405-2//-//Solzeltation for Information or */HIO Planning Purposes 52.215-3 Solicitation for Information or Planning Purposes

As prescribed in 15.405-2, 2nsert the following provision on the face of each solicitation (other than those excluded by 15.401) issued for information or plannang purposes:

SOLICITATION FOR INFORMATION OR PLANNING PURPOSES (DATE)



## PHASE IIFAR

R3/15-04/Eu//15.407(b)//L//Notace of Possible sinncardization */ER
52.215-4 Notice of Possible Standardization.

In accordance with $15.213(d)$, and as prescribed in
15.407 (b). upon the approval of the chief of the contracting office, the following provision may be insert in all
requests for proposals and requests for quot $i$ ins, other
than those for information or planning purposes, for supplies that subsequently might be standardised for the applications specified in $15.2 \mathrm{j} 3(\mathrm{~b})(1)$ :

NOTICE OF POSSIBLE STANDARDIZATION

R2/25-05/EL//15.407(C)(1)//L//Solacitation */BCDEFGJKLh)PRS
52.215-5 Solicitation Definitions.

As prescribed 15.407(c)(1), insert the for an all requests for proposals and requests $f_{5}$, other than those for information or planning i
ing provision ghotstions roses:

*/ BCDLF'GJKLNPRS

52.215-6 Type of Business Organization.

As prescribed in 15.407(c)(2), insert the towing lowing provision 17 all requests for proposals and requests for quotations other than those for information of planning purposes:

48
TYPE OF BUSINESS ORGANIZATION (BATE)

R2/15-07/EU//15-407(c)(3)//L//Unnecessarily clalhorate
*/HCDEFGJKLAPKS
Proposals or Quotata

52-215-7 Unnecessarily Elaborate Proposals or Quotations.
As prescribed in $15.407(5)(3)$. insert the following provision in all requests for proposals and requests for quotations other than those for information or planning purposes :

UNNECESSARILY ELABORATE PROPOSALS OR QUOTATIONS (DATE)
( REVISED FAR

R3/15-04/FO//15 407(b)//L//Notice of Possible Standardization */COR
52.215-4 Notice of Possible Standardization.

As prescribed in $15.407(\mathrm{~b})$. upon the approval of chief of the contracting office (see $15.213(\mathrm{~d})$ ), the following provision may be inserted in requests for proposals and requests for quotations. other that those excluded by 15.401 and those for 1 formation or planning purposes. for supplies that subsequently might be standardized for the applications specified in 15.213(b)(1):

> NOTICE OF POSSIBLE STANDARDIZATION (DATE)

R2/15-05/E0//15 407(C)(1)//L//Solacitation Definitions */HBCDEFGJKLMPRS
R2/15-05/EOe//15.407(c)(1)//-//Solucatatıon Definitions */BIO
52.215-5 Solicitation Definitions.

As prescribed $15.407(c)(1)$, insert the following provision in requests for proposals and requests for quotations other than those excluded by 15.401 and those for information or planning purposes:

## SOLICITATION DEFINITIONS (DATE)

R2/15-06/EQ//15.407(c)(2)//K//Type of Business Organization * */ABCDEFGJKLMPRS

R2/15-06/E@e//15.407(c)(2)//-//Type of Business Orgnarzation */HI
52.215-6 Type of Business Organization.

As prescribed in $15.407(c)(2)$, insert the following provision in requests for proposals and requests for quotations other than those excluded by 15401 and those for information or planning purposes:

TYPE OF BUSINESS ORGANIZATION (DATE)
R2/15-07/EQ//15 407(c)(3)//L//Unnecessaraly Elaborate Proposals or Quotations
*/ABCDEFGJKLMPRS
R2/15-07/EO@//15.407(c)(3)//-//Unnecessaraly Elaborate Proposals or quotations

- /BIO
52.215-7 Unnecessarily Elaborate Proposals or Quotations.
 provision in requests for proposals and requests for quotations other than those excluded by 15401 and those for information or planning purposes:

UNNECESSARILY ELABORATE PROPOSALS OR QUOTATIONS (DATE)

## PHASE ITFAR

F2/15-08/L0//15.407(e)(4)//L//Ac)nowlecgment of Amendients to */IsCDEFGJALK,FRS Solucritirans
52.215-8 Acknowledgraent of Amendments to Eolzcitations.

As prescribed in 15:407(c)(4), insert the following provision in all reguests for proposale and requests for guotations other than those for information or plannine purposes:

ACKNOLLLEDGRENT OF AHENDIENTS TO SOLICITATIOXS (DATE)

R2/15-09/Eu//15.407(c)(5)//L//Submission of offers or
-/HCDEFGJKLHPhS
52.215-9 Submission of Offers or Quotations.

As prescribed in $15.407(c)(5)$, insert the following
provision in all requeste for proposals an resiones for guotations other than those for information ogtuanning purposes:

SUBMISSION OF OFFERS OR QUOTATIONS

*/HCUEFGJKLAPRS
odaficetions

52.215-10 Late Submissions, Modifacations, andiththawale of Proposals or Quotations.

As preseribed in $15.407(\mathrm{c})(6)$, insert the following
provision in ali requests for proposals and regerests for quotacions other than those for information or glanning purposes:

As prescribed in $15407(c)(7)$. ansert the following provasion in all requests for proposals and requests for guotations other thon those for anformation or planning puxposes:

R2/15-n8/と0//15 407(c)(4)//L//hcrnowledoment of Amendinents To Solucitatuons

- /ancdefgurelipRS

R2/15-08/EQR//15.407(c)(4)//-///ichnowledgment of Amendments to Solucitations
*/BIO
52.215-8 Acknowledoment of Amendments to Solicatations.

As prescribed an 15.407 (c)(4), insert the following provision in requests for proposals and requests for evotations other than those excluded by 15,401 and those for information or planning purposes:

## ACKNONLEDGMENT OF ANENDI ENTS TO SOLJCITATIONS (DATE)

R2/15-09/EO//15.407(c)(5)//L//Subsassion of offers or Ovotations
*/ARCDEFGJKLMPRS
R2/15-09/EqE//15.407(c)(5)//-//Submission of Offers or Quotat */H10
52.215-9 Submission of Offers or Quotations.

As prescribed in 15.407 (e)(5), ansert the followng
provision in requests for proposals and request for
quotations other than those excluded by 15.401 and those for information or planning purposes:

## SUBMISSION OF OFFERS OR QUOTAYIONS (DATE)

R2/15-10/EQ//15.407(c)(6)//L//Late Submissions,
Modifications, and Withdrawale of Proposals or Ouotations */ABCDEFGJKLMPRS
R2/15-10/EOe//15.407(c)(6)//-//Late Submistions,
Modifications, and Withdrawals of Proposal or Quotitions
*/HIO
52.215-10 Late Submissions, Modifications, and withdrawals of Proposals or Quotations.

As prescribed in $15.407(c)(6)$, insert the following proyision in reguests for proposals and reguests for quotations other than those excluded by 15.401 and those for information or planning purposes:
52.215-11 Authorized Negotiators.

As prescribed in $15.407(c)(6)$, insert the following provision in requests for proposals and requesta for quotations other than those excluded by 15.401 and those for information or planning purposes:

 Drafter Date $1-28-83$

## PHASE DEAR

R2／15－12／1u／／15 407\｛ci（8）／／L／／kestriction on unsejoturg and ＊／LCLLKGJKLIPRS the use of Data

52．215－12 Restriction on Disclosure and the Use of Data．
As $r^{\text {reseribed in } 15.407(c)(8) \text { ，insert the following }}$ provision in all requests for proposals and request e for quotations other than those for information or planning purposes：

RESTRICTION ON DISCLOSURE AND USE OF DATA GATE：
R2／15－13／LO／／15．407（d）（1）／／L／／Preparation of offers ＊／BCDEFGJKLHPRS

52．215－13 Preparation of offers．
Ap prescribed in 15．407（a）（1），Insert the folaniong provision in all requests for proposals：
$\div \quad$ PkEPARATIOH OF OFFERS（DATE）

R2／15－14／EU／／15．407（d）（2）／／L／／Explanation to Pi ＊／BCDEFGJKLMPRS

52．215－14 Explanation to Prospective offeror
As prescribed in $15.407(a)(2)$ ，insert the provision in all requests for proposals：
$\because$ EXPLANATION TO PROSPECTIVE OFFEROR（DATE

52／15－15／Eu／／15－407（d）（3）／／L／／Faslure To Submit offer ＊／HCDEFGVKLNPRS
52．215－15 failure to submit offer．
As＇prescribed in 15,407 （a）（ 3 ）．Insert the following
provision in all requests for proposals：

FAILURE TO SUBMIT OFFER（DATE）

## －REVISED FAR <br> CKM－TAR $I T$

R2／15－12／E0／／J5 407（c）（B）／／i／／Restrxction on Disclosure and Use of data
＊／hacdefguklriprs
R2／1S－12／t06／／15 407（c）（B）／／－／／Restriction on Disclosure and Use of Data
＊／bIO
52．215－12 Restriction on Disclosure and Use of Data．
As prescribed in $15.407(c\}(8)$ ．insert the following provision in requests for proposals and requests for quotations other than those excluded by 15.401 and those for information or planning purposes：

R2／15－13／EO／／15．407（d）（1）／／L／／Preparation of Offer． ＊／ABCDEFGJKLAPRS
R2／15－13／EOQ／／15．407（C）（1）／／－／／Preparation of offer p ＊／bIO
52．215－13 Preparation of Offer㪯．
As prescribed $2 n 15.407(a)(1)$ ．insert the following provision in requests for proposals other than those excluded by 15.401 ：

## PREPARATION OF OFFERS（DATE）

R2／15－14／EO／／15．407（d）（2）／／L／／Explanation to Prospective Offer ＊／ABCDEFGJKEMPRS
R2／15－14／Loe／／15．407（d）（2）／／－／／Explanation to Prospective of fe ＊／HID

52．215－14 Explanation to Prospective offerors．
As prescribed in $15.407(\mathrm{~d})(2)$ ，insert the following provision in requests for proposals other than those excluded by 15．404：

EXPLANATION TO PROSPECTIVE OFFEROR（DATE）

R2／15－15／10／／15．407（d）（3）／／L／／Failure To Submit Offer ＊／ABCDEFGJKLNPRS
R2／15－15／FOe／／15．407（d）（3）／／－／／Falure to Sublime Offer ＊／110
52．215－15 Failure to submit offer．
As prescribed in $15.407(6)(3)$ ， $1 n s e r t$ the following provision in requests for proposals other than those excluded by 15．401：
－FAILURE TO SUBMIT OFFER（DATE）


## PHASE ITPAR

R2/15-16/EU//15 407(d)(4)//L//Contract iward -/yCUEFGJKLMPRS
52.215-16 Controet Award.

As prescribed in $15.407(a)(4)$, insert the following provision in all requests for proposals:

> CONTRACT AWARD (DATE)

R2/15-17/EU//15.407(e)//L//Telegraphac proposals or puotations R2/15-17/E0//15.407(e)//L//Telegraphac Proposals or Ouotatint */LCDEFGJKLIPRS
52.215-17 Telegraphic Fropospls or Ouotations.

As prescribed in 15,407(e). insert the followfet provisson in all request for proposali or requests for freperions. other than those for anformation or planning ptsigles, that tuthorize telegraphic proposals or quotations:

TELEGKAPBIC PROPOSALS OR QUOTATIONS (DATEG
(22/15-)8/E, //15.407(1)//L//Grder of Precedence
*/BCDEFGJKLAPRS
52.215-18 Order of Precedence.

As prescribed in $\mathbf{~} 5.407(f)$, insert the folloffin provsision
fn all requests for proposais, and in all requater for quotations, to which the undform contract formet pplien, other than those for information or planning pouptoses:

## ORDER OF PRECEDENCE (DATE)

R2/15-19/EU//15.407(g)//h//period for hcceptance of Offer **/UCULFGJKLIPRS
52.215-19 Period for Acceptance of offer.

As prescribed in $15.407(\mathrm{~g})$, ansert the following provision in all reguests for proposals, tlat are not issued on SF 33 except those (a) for construction work or (b) in which the Goverinuent specifies a minimum acceptance period:
$\div$
PLRIOD FUR ACCEPTANCE OF OFFER (DATE)
*/ABCDEFGJKLYPRS
R2/15-17/EOe//15.407(e)//-//Teleqraphic Proposdels or ovotatar */ H IO
52.215-17 Telegraphic Proposals or Quotationg.

As prescribed an $15.407(e)$, insert the following provision in requests for proposels or reauest, for quotations, other than those excluded by 15.401 and those for information or planning purposes, that authorize telegraphic proposis or evotations:

## TELEGRAPHIC PROPOSALS OR OUOTATIONS (DATE)

R2/15-18/EQ//15.407(f)//L//Order of Precedence */ABCDEFGJKLMPRS
52.215-18 Order of Piecedence.

As prescribed in $15.407(f)$. insert the followina provision in all tequests for proposalt, and in all requests for guotations, to which the uniform contract formet applies, other than those excluded by 15.401 and those for information or planning purposes:

> ORDER OF PRECEDENCE (DATE)

R2/15-19/EQ//15.407(g)//A//Perıod for Acceptance of offer **/2BCDEFGJKLAPRS
R2/15-19/EOf//15.407(g)//-//Perioc for Arceptance of Offer **/H10
52.215-19 Period for Acceptance of Offer.

As prescribed in $15.407(\mathrm{~g})$, insert the following provision in requests for proposals (other than those excluded by 15.401) that are not issued on SF 33 except those (a) for construetion work or (b) in whach the Government specifaes a minimum acceptance period:

 Drafter Suncminn $\qquad$ —_ Note $1-28-6.3$

## PHASE ITFAR

R2/15-20/EQ//15.407(h)//K//Place of performance **/ECDLTGJKinw'Rs
52.215-20 Place of Performance.

As prescribed in $15.407(\mathrm{~h})$. Insert the following provision in all requests for proposals, and in all requests for quotations, other than those for information or planning purposes, except those in which the place of performance is speciexed by the Government:

PLACE OF PERFORMANCE (DATE)


## REVISED FAR <br> ( $\mathrm{P}_{\text {h wace }}$ )

R. $115-20 / \mathrm{FO} / / 15.407(\mathrm{~h}) / / \mathrm{K} / / \mathrm{Pl}$ ace of Performance

+2/15-20/FOQ//25.407(h)//-//P)ace of Performance * $/ \mathrm{HIOT}$
52.215-20 Place of Performance.

As prescribed in $15.407(\mathrm{~h})$, insert the following provision in requests for proposals, and in requests for quotations, other than those excluded by 15.401 and those for information or planning purposes, except those in which the place of performance is specified by the Government:
$-$
PLACE OF PERFORMANCE (DATE)


## PHASE ETPAR

ThBLE OF CUNTELATS
SUBPRKT 15．9－－PROFIT

15．904 Solicitation provision and contract cilautro
The contracting officer shsil insert the provianon at 52．215－30．Facilities Capital Cost of Moneyr and the elause at 52－215－32．Waiver of Facilities Capital cost af Honey：in a11 solseithtions that will result in－contract rabject．to the cost principles for contracte with commerciai．


 contracting officer thali axclude the ciaptet


15．905－1 Contractor efforts Thi：factar onatum路地he work and the resources 章equired tif．the $\xrightarrow{2}$
（b）Contract cost risk．（13 This finctor mam degree of costr responsability and associated

## 52．215－30 FBeilitues Capital Cost of Money．

As prescribed in 15．904，insert the yollow all solacitations that will tesult in contrec the cost principles for contiacts with commer organizations，Subpart 32．2i！

## FACILITIES CAPITAL COST OF MONEY（Dite）．

Faczlities capital costu of money will be on flowable cost under the contemplated contract，but only if 3ite proppective contractor elect；to clam it below：－If the prospective contractor elects to elajm this cost，the Wasy of Facilitaes Capital Cost of Money will be exchraed from the contract．if the prospective contractor－dopport elect to Fialm thi cost，the contract will include tik Naiver of Facilities Capital Cost of Money．

The prospective contractor héref̀y／／elecp／＿／does not elect to elaim facilities capital cost of mofey as an ellowable cost under the contract．
（End of provision）
（NH）

## （REVISED FAR

SUBPART 15．9－－PROFIT

## 15．904 Solicitation provision and contract clause．

The contracting officer shall insert the clause at 52．215－ 30．Facilnties eapital cost of money，in solicitations and contracts when it is contemplated that the contract will be subject to the cost principlet for contracts with conmercial organmations（see Subpart 31．2）．

15．905－1
（a）Contractor effort．Thin factor measure the complexity of the work ind the reseurces required of the prospective contractor for contract performance．Greater proilit opportunity should be provided under contrict： requiring a high degree of professional and managerial skill end to prospective contractors whose skills，facilities，and technical assetf can be expecter to lend to efficient ana economical eontract performance．subfactore（1）through（4） Forlowing shall be considered in determining contractor eftint，but they may be modified in mpecific altuations to eccempodate difierences in the categoriet used by protpective contractors for listing costes

35， 105
（（b）Contract cost ilak．＂（1）This factor measures the degree of cost responsibility and associated risk that the

R2／15－30／MM／15．904／／K／／Facilities Capital Cost of Money ＊$/$／BCEFGJMPO
R2／15－30／MNe／／15．904／／－／／Facilities Capital Cost of Meney 52－215－30 Facalities Capitai＇
52－215－30 Facylities Capital＇Coat of Money．
TAs prescrabed in 15 904，insert the following clause $1 n$ solicitations and contracts when it 15 contemplated that the contract will be subject the cost prinelples for contracts wath commerelal organizations．Subpart 31．2：

## FACILITIES CAPITAL COST OF MONEY（DATE）

（a）Facilities capital cost of money will be an allowable cost under the contract if the offeror，when submitting the offer，indicates $2 n$ paragraph（c）below，thet the offeror intends to claim such cost as an allowable cost under the contract．．
（b）Facilities capital coist of money will not be an a 20 wable cost under the contract．and the right to clain such cost as an allowable cost under the contract is waived． if the offeror，when aubmitting the offer－

FAR Entity Lwhant 15,9 control No./Page No. Tht-z (Rueseven A) Iに


## PHASE IIFAR

| 52.215-31 Waiver of Facilities Capital cost of Money. <br> As prescribed in 15.904 , insert the following clause in <br>  the cost principles for contracts with comburcin 1 organizations, Subpart 31.2. If, however, in fining in the provision at $52.215-30$, the contractor eleete to elain exclude this clave from the resulting contract.解 HAIVER OF FACILITIES CAPITAL COST OF NONEY (DATE) <br> The Contractor is aware thet facilitie eapitfal cost of poney is an allowable cost but waives the right to claim it under thit contract. <br> (xina of clavse\} <br>  | ( ${ }^{\text {REVISED PAR }}$ (II) <br> (1) Indicates in paragraph (c) below that the offeror does not elect to clamm such cost as an allowable cost under the contract: or <br> (2) Does not indicate in paragraph (c) below whether or not the offeror elects to clam such cost as an alloweble cost under the contract. <br> (c) The offeror hereby /// elects /// does not elect to clajul facilities capital cost of money as an allowable cost cost under the contract. <br> (End of clavse) ( NM ) |
| :---: | :---: |
|  |  |

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## PHASE IIFAR

15305 Funtote cjuras．
Js jof－i Figuranation of Records elause
（a）Thas subsection amplements 10 v．s C． $2313(\mathrm{~b}$ ）and（c） and 41 U S．C． $254(\mathrm{c}$ ）．
（b）The contracting offacer shall 2 nsert the clave at 52：215－1．Examination of Records by Comptrolder Generat，in all negotiated contracts，including those avarded 氟hropgh final business restricted advertising．except－－ i－
（1）Small purchases（not exceeding $\$ 10,000$ ；setepire 23）；
（2）Contracts for utalaty servaces at rates nob exípeang those established to epply unifounly to the publiti，納，waby applucable reasonable connection charge：or
（3）Contracts with foreign contractors for， agency head authorizes omission under Subpare，
（c）In connection with admunatration of research and development contracte with noapit
 thie－Comptroiler General does not reguire orith documentation of transportation costs fexclutis

 small business restricted advertising，except id purchases（not exceeding $\$ 10,000$ ；see fart 13）．（17 contracts for utility services ot rates not exceefing those established to apply uniformly to the public．plus any opplicable reasonable connection charge，or（c）cfitracts with foreign contractors for which the agency theab ${ }^{\text {娄 }}$
suthorizes omission under subpart 25．9：
EALAINATION OF RECORDS BY COMPTROLLER GENERAL（DATE）a

## REVISED FAR <br> （QLOD

15．106 Contract elauses．
15 106－1 Examanation of Records clause
（a）Thas suosection 2 mplements 10 U S．C $2313(b)$ and（c） and 41 U S．C． $254(\mathrm{c})$ ．
（b）When contracting by negotiation（including small business restricted advertising），the contracting officer shail insert the clause at 52 215－1．Examination of Records by Comptroller General．in solicitations and contracts． except when－－
（1）Making small purchases（not exceeding $\$ 10,000$ ：see Part 13）；
（2）Contracting for utility services at rates not exceeding those established to apply uniformiy to the public．Plus any applicable reasonable connection charge：ō
（3）Haking contract with foreign contractors for which the agency head authorizes omission under Subpart 25．9．
（c）

R5／15－01／Mm／／15．106－1（b）／／I／／Examination of secords by Comptroller General ＊／A
R5／15－01／Maf／15．106－1（b）／／－／／Examination or Records by Comptrolley General
＊／HIO
52．215－1 Examination of Records by Comptroller General．
As prescribed in 15．106－2（b），when contracting by negotiation（including small businest restricted advertising）：insert the following clause in solicitations and contracts except when（a）making small purehases（nat exceeding $\$ 10,000$ ；see Part 13）．（b）contracting for utility servaces at rates not exceeding those established to apply uniformiy to the public，plus any applicable reasonable connection charge，or（c）making contracts with foreign contractors for which the agency head authorizes omission under Subpart 25．9：

DISPOSITION CODES
A - Accepted $C$ - Nut accepted
$M$ - Accepted but modified $D$ - Major policy change -- deferred to the FAR Co:rcil
$\left[\begin{array}{ll} \\ \sim\end{array}\right.$
A - Accepted
C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the far Council
COMMENT



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- DISPOSITION CODES
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    A - Accepted \(C\) - Not accepted
    $M$ - Accepted but modified $D$ - Major policy
M - Accepted but modified D - Major policy change -- deferred to the FAR Council

## COMMENT

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FAR 4. 102 (a) revised to relocate miajla ci en comma

FAR 4.103 repriced to-brina charevepresckiptinno


FAR $52.20 \frac{7}{-1}($ surisedito $(a)$ correct clares head i io)
a wool (b) ding chaw se preface it "t


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A - Lccepted C - Not accepted
M - Accepted but modified D - Major policy change -- deferred to the FAR Council
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M - Accepted but modified D - Major policy change -- deferred to the fAR Council

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(hcswnemernerne Ane.
A - Accepted $C$ - Not accepted
$M$ - Accepted but modified D - Major policy change - deferred to the FAR Council



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\(\therefore\) - Accepted C - Not accepted
- Accepted but modified D - Major policy change -- deferred to the Ear Council
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5. \#1-






## : isposition codes

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\therefore- Accepted C - Not accepted
O - Accepted but modified D - Major policy change -- deferred to the far Council
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A -Accepted but modified

A - Accepted
C - Not accepted
$M$ - Accepted but modified $D$ - Major policy change - deferred to the FAR Council
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$\therefore 2.215-30$ rimernto com-
 so aoxiselimei: otter 52.215-31.

DISPOSITION CODES

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A - Accepted C - Not accepted
    M - Accepted but modified D - Major policy change -- deferred to the FAR Council
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52.215-31 in defetern. De has heren abz-2burate 52.215-30.




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A - Accepted C - Not accepted
    M - Accepted but modified D - Major policy change -- deferred to the Far Council
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Note 1-28.83


### 15.301 Definition.

"Determination and findings" (D\&F) means a special form of written approval by an authorized official that is required contracting actions ration as a prerequisite to taking certain contracting actions. The "determination" is a conclusion or decision supported by the "findings." The findings are statements of fact or rationale essential to support the determination and must cover each requirement of the statute ar regulation.

## REVISED FAR

( $\mathrm{BL}+\infty+I T$ )

### 15.213

(d) Approval for using standardization solicitation provision. The contracting officer shall obtain the approval of the chief of the contracting office before using the provision at 52.215-4, Notice of Possible Standardization (see $15.213(c)$ and $15.407(b))$.
15. 301
"Determination and findings" (D\&F) means a special form of written approval by an authorized official that is required by statute or regulation as a prerequisite to taking certain contracting actions. The "determination" is a conclusion or decision supported by the "findings." The findings are statements of fact or rationale essential to support the or regulation and must cover each requirement of the statute


phase IIfar
table of contents
SUBPART 15.5--UNSOLICITED PROPOSALS
SUBPART 15.5--UNSOLICITED PROPOSALS





| Fin rintity delganeo Title zfercitatien Drafter Quen․․ | $54+15.10$ contiol no. Praye no. $201=3(12, A, A)$ !-vecipot of proposalo y gerrtatima rle- : Date $1-28-83$ |
| :---: | :---: |
| PHASE ITFAR <br> 15.46 .7 <br> (e) The contracting officer shall insert the provision at 52.215-17. Telegraphic Proposals or Ouotations, in all solicitations that authrorize telegraphic proposals or guotations. <br> (f) The contracting officer shall insert the provision at 52.215-18, Order of Precedence, in all solicitations to firich the uniform contract format applies. | $(\text { REVISED FAR }$ |
|  | 15.407 |
|  | (e) The contracting officer shall insert the provjsion at 13.215-17, Teligeraphic Projnsals or Ouotations, in isoliritations that authorize telegraphic proposals or (quotations. |
|  | (f) The contracting officer shall insert the provision at 52.215-18, Order of Precedence, in solicitations to which the uniform contract format applies. |
| (g) ilhe contracting oflecer shall inscrt the provision at | ( $52 . \mathrm{g})$ The contracting officer shall insert the provision at |
| are not issued on $5 F 33$ except those (l) for construction work or (2) in which the Government specifies a minimum acceptance period. | 52. 215-19. Period for Acceptance of Offer, in RFP's that a not issued on SF 33 except those ( 1 ) for construction work or (2) in which the Government specifies a minimum acceptance period. |
| (h) The contracting officer shall insert the provision at 52.215-20, place of Performance, in all solicitations except | (h) The contracting officer shall insert the provision at 52.215-20, Place of Performance, in solicitations except |
| those in which the place of performance is specified by the Government. | those in which the place of performance is specified by the Government. |
| 1 \% \% |  |
| 15.414 Forms | 15.414 Forms_ |
| Sinmara furbi 26 (SF 26). N:erd/Contracts, and Standard Forni 33 (SF 33), Solicitation, offer and Mard, are to be used, as appropriate, in connertion with negotiated acquisitions. | (a) Standard Form 33 (SF 33), Solicitation, offer, and Award (see 53.301-33), shall be used in connection with negotiated acquisitions when it appears advantageous to tegin negotiations by soliciting written offers whose witten acceptance by the Government will create a binding contract without further action. Award may be made using the Award portion of SF $33-$ <br> (b) Standard Form 26 (SF 26), Award/Contract (see 53-301-26). shall be used when entering into negotiated contracts when the signature of both parties on a single document is appropriate, unless-- <br> (1) The contract is entered into by means of Standard form 33: |
|  | (2) The contract is for the construction, alteration, or repair of buildings, bridges, roads, or other real property: <br> (3) The acquisition is one for which the FAR prescribes -special contract forms; or |
|  | (4) Use of a purchase order is appropriate |
| R2/15-03/EO//15.405-2//L//Solicitation for Information or */A Plannino Purpost | R2/15-03/EO//15.405-2//L//Solicitation for Information or |
|  | Planing Purpuses */A |
|  | R2/15-03/EQe//15.405-2//-//Solicitation for Information or */HIO Planning Purposes |
| 52.215-3 Solicitation for Information or Planning Purposes. <br> As prescribed in 15.405-2, insert the following provision on the face of each solicilation issued for information or planning purposes: | 52.215-3 Solicitation for Information or Planning Purposes |
|  | As prescribed in 15.405-2, insert the following provision on the face of each solicitation (other than those excluded by 15.401 ) issued for information or planning purposes: |
| SOLICITATION FOR infornation or plamining purposes (dATE) | SOLICITATION FOR information or planning purposes (date) |
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122/15-12/1u//15.407(c)(B)//L//iustriction on luiscloxus ams */ichefgJkbinRs the vac of Dita
52.215-12 Restriction on Disclosure and the Use of Data.

As prescribed in $15.407(c)(8)$, insert the following provision in all requests for proposals and requests for quotations other than those for information or planning purposes:

RESTRICTICN ON DISCLOSURE AND USE OF DATA (DLTE)

R2/15-13/LU//15.407(d)(1)//L//Preparation of Offers */BCDEFGJKLI:PRS
52.215-13 Preparation of Offers.

As prescribed in $15.407(d)(1)$, insert the following provision in all requests for proposals:

PhEPARATIOL OF OFFERS (DATE)

R2/15-14/Eu//15.407(d)(2)//L//Explanation to Prospective */BCDEFGJKLMPRS
52.215-14 Explanation to Prospective offerors.

As prescribed in 15.407(d)(2), insert the following provision in all requests for proposals:
$\div$ EXPLANATION TO PROSPECTIVE OFFERORS (DATE)

If2/15-15/EL//15.407(d)(3)//L//Failure To Submit offer - BCDEFGJKLMPRS
52.215-15 Failure to Submit Offer.

As prescribed in $15.407(d)(3)$, insert the following provision in all reguests for proposals:

FAILURE TO SUBMIT OFFER (DATE)
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2/15-12/E:O//15.407(c)(8)//1.//Restriction on Disclocure and 15 c of Data
/ / AFCDEFGJMLIBRS
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/ / H 10
;2.215-12 Restriction on Disclosure and Use of Data.
As prescribed in $15.407(c)(8)$. insert the following srovision in requests for proposals and requests for zuotations other than those excluded by 15.401 and those for information or planning purposes:

R2/15-13/EQ//15.407(d)(1)//L//Preparation of Offers
*/ABCDEFGJKLMPRS
R2/15-13/EQP//15.407(d)(1)//-//Preparation of offers */HIO
52.215-13 Preparation of Offers.

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\begin{aligned}
& \text { As prescribed in } 15.407(d)(1) \text {, insert the following } \\
& \text { provision in requests for proposals other than those } \\
& \text { excluded by } 15.401 \text { : } \\
& \text { PREPARATION OF OFFERS (DATE) } \\
& \text { R2/15-14/EQ//15.407(d)(2)//L//Explanation to Prospective offero } \\
& \text { */ABCDEFGJKLMPRS } \\
& \text { R2/15-14/EOR//15.407(d)(2)//-//Explanation to Prospective offer } \\
& \text { */HIO } \\
& 52.215-14 \text { Explanation to Prospective Offerors. }
\end{aligned}
$$

As prescribed in $15.407(d)(2)$, insert the following provision in requests for proposals other than those excluded by 15.404:

EXPLANATION TO PROSPECTIVE OFFERORS (DATE)

R2/15-15/100//15.407(d)(3)//L//Failure To Submit Offer */ABCDEFGJKLNPRS

R2/15-15/FOe//15.407(d)(3)//-//Faijure to Submit Offer */1310
52.215-15 Failure to Submit offer.

As prescribed in $15.407(d)(3)$. insert the following provision in requests for proposals other than those excluded by 15.401:
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FAILURE TO SUBMIT OFFER (DATE)

| far entity $=$ Lhipanto Title Sueicitat Drafter $\square$ | 15.49-15.10 Control wo. Mage No. - 20t $\rightarrow 7($ Priackin $A) 13$ <br>  <br> Dite 1-28-83 |
| :---: | :---: |
| PHASE IIPAR $\begin{aligned} & \text { R2/15-16/Eu//15.407(d)(4)//L//Contract jward } \\ & \text { */BChtrGJKhips } \end{aligned}$ | ```(RgVISED FAR k2/15-16/EO//:5.407(0)(4)//l//Contract Award * /imethrcumbupras p2/15-16/fo(8//15.407(d)(4)//-//Contract Avard */1110``` |
| 52.215-16 Contract Award. <br> As prescribed in $15.407(d)(4)$, insert the following provision in all requests for proposals: <br> CONTRACT AKARD (DATE) | 52.215-16 Contract iward. <br> As prescribed in $15.407(\mathrm{~d})(4)$, insert the following provision in reguests for proposals other than thuse rexcIuded by 15.401: |
| R2/15-17/Eu//15.407(e)//L//Telegraphic proposals or Quotationsh/15-17/EO//15.407(e)//L//Telegraphic Proposals or Ouotations */BCDEFGJKLHPRS <br> */arcdefgjklmprs |  |
| 52.215-17 Telegraphic proposals or Quotations. <br> As prescribed in $15.407(e)$, insert the following provision in-all requests for proposals or requests for quotations, other than those for information or planning purposes, that authorize telegraphic proposals or quotations: <br> teleghaphic propusals or quotations (date) | (52.215-17 Telegraphic Proposals or Quotations. <br> As prescribed in $15.407(e)$, insert the following provision in requests for proposals or reavests for ouotations, other than those excluded by 15.401 and those for information or planning purposes, that authorize telegraphic proposals or zuotations: <br> TELEGRAPHIC PROPOSALS OR QUOTATIONS (DATE) |
| k2/25-18/E2//15.407(f)//L//Order of Precedence */bCDEFGJKlapRS | R2/15-18/EQ//15.407(E)//L//Order of Precedence <br> */abcdefguklmprs |
| 52.215-18 order of Precedence. <br> As prescribed in $15.407(f)$, insert the following provision in all reguests for proposals, and in all requestla for quotations, to which the uniform contract format ppplies, other than those for information or plaming purposes: <br> order of precedence (Date) . | r2.215-18 order of Fiecedence. <br> As prescribed in $15.407(f)$, insert the following movision in all requests for proposals, and in all requests for quotations. to which the uniform contract format applies. other than those excluded by 15.401 and those for information or planning purposes: <br> ORDER OF PRECEDENCE (DATE) |
| R2/25-19/EQ//25.407(g)//N//period for ncceptance of offer **/hchergjkliprs | $\begin{aligned} & \text { R2/15-19/EQ//15.407(g)//A//Period for Acceptance of Offer } \\ & \text { **/FBCDEFGJKLAPRS } \\ & \text { R2/15-19/EOR//15.407(g)//-//Period for Arceptance of offer } \\ & \text { **/HIO } \end{aligned}$ |
| 52.215-19 Period for Acceptance of Offer. <br> As prescribed in $15.407(\mathrm{~g})$, insert the following provision in all requests for proposals, that are not issued on SF 33 except those (a) for construction work or (b) in which the Government specifies a minimum acceptance period: | 52.215-19 Period for Accegtance of Offer. <br> As prescribed in $15.407(\mathrm{~g})$, insert the following provision in requests for proposals (other than those excluded by 15.401) that are not issued on SF 33 except those (a) for construction work or (b) in which the Government specifies a minimum acceptance period: |
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f2/15-20/FQe//15.407(h)//-//Place of Performance
: $/ 1 / 1$ OT
52.215-20 place of Performance.

As prescribed in $15.407(h)$. insert the following provision in requests for proposals, and in requests for duotations, other than those excluded by 15.401 and those for
information or planning purposes, except those in which the flace of performance is specified by the Govermment: $\stackrel{+}{\text { F }}$

PLACE OF PERFORI:ANCE (DATE)

| FAR Entity $=$ LingpanTitle $\qquad$ <br> Crafict Drafter | 5 |
| :---: | :---: |
| PHASE LIfAR <br> ThBE OF Cuntemes <br> SUBPMAT 15.3-pKOFIT <br> 15.904 Solicitation provision and contract clause. <br> The contracting officer shall insert the provision at 52. 215-30. Facilities Capital Cost of Money, and the clause at 52.215-31, kaiver of Farilities Capital Cost of Moncy, in all solicitations that will result in contracts subject to the cost principles for contracts with commercial. <br> organizations (see Subpart 31.2). If, however, in filling in this provision, 52.215-30, the contractor elects to claim facilities capital cost of money as an allowable cosst, the contracting officer shall exclude the clause, $52,215-31$, from the resulting contract. <br> 15.905-1 <br> (a) Contractor effort. This factor measures the complexity of the work and the resources tiequired of the prospective | REVISFD FAR <br> (RACCR IT) <br> SUBPART 15.9--TROFIT <br> 15.904 Solicitation provision and contract clause. <br> The contracting officer shall insert the clause at 52.21530. Facilities Capital Cost of Money, in solicitations and contracts when it is contemplated that the contract will he subject to the cost principles for contracts with comuercial organizatinns (see Subpart 31.2). <br> $15.905-1$ <br> (a) Contractor effort. This factor measures the complexity of the work and the resources required of the prospective contractor for contract performance. Greater profit opportunity should be provided under contracts reguiring a high degree of professional and managerial skill and to prospective contractors whose skills, facilities, and technical assets can be expected to lead to efficient ana economical contract performanre. Subfactors (1) through (4) following shall be considered in determining contractor fffort, but they may be modiried in specific situations to accommodate differences in the categories used by prospective contractors for listing costs: |
| 15.905-1 <br> (b) Contract cost risk. (1) This factor measures the degree of cost responsibility and associated risk that the | $15.905-1$ <br> (b) Contract cost risk. (1) This factor measures the degree of cost responsibility and associated risk that the |
| 52.215-30 Facilities Capital Cost of Money. <br> As prescribed in 15.904, insert the following provision in ali solicitations that will result in contracts subject to the cost principles for contracts with commercial organizations. Subpart 31.2: <br> FACILITIES CAPITAL COST OF MONEY (DATE) <br> Facilities capital cost of money will be an allowable cost under the contemplated contract, but only if the prospective controw tor elects to claim it below. If the prospective contractor elects to claim this cost, the waiver of Facilities Capital Cost of Money will be excluded from the contract. if the prospective contractor does not elect to claim this cost, the contract will include the waiver of Facilities Capital Cost of Money. <br> The prospective contractor hereby $/ /$ elects / / does not elect to claim facilities capital cost of money as an allowable cost under the contract. | R2/15-30/MM/15.904//K//Eacilities Capital Cost of Money * */RCEFGJMPQ <br> R2/15-30/MM@//15.904//-//Facilities Capital Cost of ricmey $* / 1310$ <br> 52.215-30 Facilities Capital Cost of Money. <br> - As prescribed in 15.904 . insert the following clause in solicitations and contracts when it is cuntemplated that the contract will be subject the cost principles for contracts with commercial organizations, Subpart 31.2: <br> FACILITIES CAPITAL COST OF MONEY (DATE) <br> (a) Faciljties capital cost of money will be an allowoble cost under the contract if the offeror, when submitting the' offer, indicates in paragraph (c) below, that the offeror intends to claim such cost as an allowable cost under the contract. <br> (b) Facilities capital cost of money will not be an allowable cost under the contract, and the right to elaim such cost as an allowable cost under the contract is wajved. if the offeror, when submitting the offer-- |




FEDERAL ACQUISITION REGULATION (FAR)
PART 15 - CONTRACTING BY NEGOTIATION Subparts 15.1 - General Requirements; 15.2 - Negotiation Authorities; and 15.3 Determination and Findings

Comments Due - October 31, 1978

## Column 2 Codes

V DAR and FPR language identical (verbatim).
AV Language almost verbatim (only minor grammatical or sequential variances between DAR and FPR).

SS Language substantially the same, with no substantive difference between DAR and FPR treatment

D Corresponding language in DAR and FPR different in intent or effect.

NAE No DAR equivalent for FPR coverage.
NFE No FPR equivalent for DAR coverage.

## Column 2 or 4 Codes

OS To be omitted from FAR (recommend including in agency implementing or supplementing publications).

OU To be omitted from FAR as unnecessary.
MR Material to be relocated in FAR (cite new location).

## Column 4 Codes

$R \quad$ Current DAR/FPR language substantially rewritten to conform to OFPP guidelines.

NM New material not in DAR or FPR.
BA Basically DAR language.
BF Basically FPR language.
AF Combination of DAR and FPR language.




## 3.



(Continued from previous page)
(1) ASPA was araendeci in 1962 by P.L. 87-653. Sec. (a) of P. $\frac{1 .}{} . \overline{7}-653$ amended 10 0.5.C. $2304(a)$ to read: by this chaptex shail be nade by formal advertising in all casos in which the use of such method fs feasible and practicable under the existinc conditions and circumstances. head of an agency, subject to the recuirements for determinations and finaings in section 2310 , may negotiate such a purchase or contract, if ......"
(1884) Guotation from legislative history SSenate Report No. cong., 2nd Session, 1962, Vol. 2, p. 2476 (underlining added for emphasis):
*hat the BizI does.
Expresses Preference for formal Advertising
The legislative history of existing procurement law shows a congressional intent that the nilitary departments use
formal advertising in all procurements in which this could reasondbly be expected to give satisfactory results adthough circtimstancesmight exist that would be sufficient to authorize negotiation under one or more of the 17 exceptions. While the Armed Services procurement Regulation provides that formal advertising shall be used whenever this
method is feasible and practicable under existing conditions and circumstances, there is not comparakle provision in law. Section (a) of the bill would place in law a statement of preference for formal advertisins."
(3) 15.102 seeks to give meaning to "Eeasible and practiहatle" consistent with congressicral intent as reflected in Iegislatave histozy.
3. $\frac{F F E}{1} \frac{1-3.101(b)(2)}{\text { in }}$ inct Included in $15.104(\mathrm{~b})$. ASPR coverage
 stmintically oreferable FPR formulatici on the ror renerences to other topics are not ircorporatec nere because they are assigned for coverace elsetinere in EAR As follows: small
business procedures fpart 19 ) cost/pricing data \{Subpart 15.3): discussions with offerors (swopart 15. 6).



## MR/ASP

(a) The production of important new sechnical or apecialized miltury suppies generafly involves development, exiluation, and inutial production phases. Exanpples of tuch supplies are tanks, radar, gulded missiles, atreraft, rockets, and equipment of similar complexity; major components of such equipment an the
tore oins: and any iteran of technical or specialized nature necemary for the ute, mainternance or operation of such equippmant. Contracting officers thall avoid wherever practionbic, apuadiag imitial production contracte for supplion until completion of the development and evaluation phases. At the time of placing the Initisl production contract, it is essential that the Government be completely free to welact the contractor as the best interest of the Oovermment may dictate. In the placement and administration of research or development contracts, no commit ments shall be made to contractors with respect to obtainng subvequent production contracts Procurements for initial productoon quantity of an itom shall not be inuased unul he tem has been approved for tervice use uniesy prior approva
has been obtained. When juxtified by zpecial crecumatances, procurementa of procuction quantitief un tevance of spproval for service une may be authorized for the Depsuments of the Amy and Air Force by Hetde of the Procuring Activity, and for the Department of the Navy by the appropriste authority wet forth it SECNAV Instruction 3900.30 and 3960.2 (b) in connaction with the foregoing it may be in the bent intertat of the
Oovernment that the initial production contract for tecinical and apecialized uppplles be phaced with the contractor responwible for the development of the desig for such suppties. Accordingly, it is exsential that, in placing such initial produc Lion contractr, an analyzs be made of the inportance to be wathehed to the fol
lowng condiderations:
(i) Extensive
put to most effective use in production by the resenrch and davelop ment contractor for any of the following rensons.
(A) A need for sdaptation of the newly developed equipment for amaty manufacture, and for introductom of advanced produs.
ion methods, togethet with a significant interrelationahip
etween the despgn engmeerng and production engineering
which will yield beat results from the standipoint of performance. reliabiltyy and producebility: or
(B) The substantial time and money which woutd be required for another contegctor to indoctrante and train has engineering staff have been emplayed, thereby adding to production lead tume. ii) Continuins impoyement of the equipment concurtent with prod tion which can be most effectively ascomplished by a sungle contrac. sot beceuse of the advantages of unified responsidulty and slons coordination of improved desugn features with production procesces snd equipment.
) Substantiaif time and effort which have been arrendy expended by the development contractor in developini a prototype
(iv) es adetanled manufacturing, proceis, and ansembly draw drawings. ef detailed manufacturing, process, and assembly drawings, with
rights to use tor procurement purposes at the emrleat possible date for compecitive reprocurement purposes by placing production en gineering contracte and the firal production contract with the developer (sec (d) below)

1. DAR/ASPR 3-108: This coverage should be relocated, since it relates to systems accuisition, planning, and source selection. Alerts furbished to Panels $C$ and $A$.


## DAR/ASPR 3-109:

(a) The use of an abstract of proposal fits best with the verace on source selection policies and procedures ibpart 15.6). Alert to panel A.
(b) DaR 3-109 states that DAR 1-308 requires an ceift. dar 1-30a, coverinc file accumentation, does not ecifically cover abstracts of proposals.
 Enemerated in Fhe various sections to which they specificgily then $2 n$ the various sections to which they specifically
relate. Accordingly, since these various dar sections will be consicered in cirafting the corresponding section of the FAr, enumeration of these factors is here omitted as unnecessary.

3. EPR $1-3,104$ : Relocated for coverage in Subpart 15.4,
Solicitationt of proposals and quotations. Panel 0 self-alexted.
l. FpR $\frac{1-3.103(a)}{\text { redund }} \frac{\text { (c) }: ~ T h e s e ~ s e c t i o n s ~ r e p r e s e n t ~}{\text { coverage }}$ of Acquisition Actions, and are accorcinclis onitted at thi point in the yrak.



1. 15.2 - Subpart 1. 15.2-Subpart title changer to

FARPO, DOD, DRATT
rerrect intent, i.e., explanation of the statutory
3-201.2 Application.
(a) Tie authority-of this paragraph 3-201 shall be used only to the extent determined by the Assistant Secretary of Defense fInstallations and Logistics) to be necessary in the public interest, and then only in accordance with Departmen-
al procedurss consistent with thus pararaph 3 - 201 procedures consistent with thas pararaphaph 3-201.
(b) For the duration of the national emergeney declared pursuant to Pteof Defense (Instatlations and Laged December 16. 1950, the Assistant Secretary procurements may be made purssang to the authority of 10 US.C. 2304 (allowing
(i) procurements made in keeping widh (A) labor surplus set-aside programs (including, when no other negotiating authority is appropriate and the use of formal adverising if not feasible and practicable under the existang conditions and circumstances, the placement of onracs for the total or any part of the requirements set-aside ions of no: mimed by awards made in accordance with the prove (B) disaster area programs;
(ii) properar are prame.
(A) ather unilateral determinations for sel and busin
B) aner unitateral determinations for set-asides, or (unilateral or joint) which are not filled requirements set aside noss concerns, when no other negoluing suthriwy is ap propriate and the use of formal advertising is not feasible and practicable (see 1-706.7): and
(iii) procurements entered into pussuant to the Balance of Payments Restricted Advertising method of procurement (3ee 6-806.2).
3-201.3 Limitation. The authority of this paragraph 3-20I shall not be used when negotiation is zuthorized by the provisions of $3-206$ except that, in the preference to any other authority in this Part 2 (see $1-706.2$ and $1-804.4$ ). The athority of this parazraph shall not be to negotiate a reatonable price with a low aponsible small buslness bidder whose bid has been determined by the comirselint oficer to be an unreasonable bid under Small Business Restricted Adyertising iolved and the requirement procured on an unrestricted basis by the use of formal
advertising or where with existing regulationt


1. $15.201(a)-275(a)-$ Statutory lanjuage is paraphased, using the maximum input of statute language. 2.
priorities of anthorted from nat to (1) astablish atamiard
(oncouraged hy Fedoral procurnmant nata Center); (2) provice consistent trentmant uniar smail Fusinoss Restxicted Advertising.
2. FPR $1-3.201$ (c) (2) FPR material repeats sma/Gov't
acrutisition agencleg agreement detnils in Small Business
covernge (proposed FA ( assumes it will stay in s. s. coverage
3. The National Emergencies Act (PL 940412)
does not apply to $41 \mathrm{U}, \mathrm{SoC} .252$ or $10 \mathrm{U}, \mathrm{S} . \mathrm{C} .2304(\mathrm{a})(1)$.


4. $15.202(b)-$ "Supplies", as defined menns "property."
5. 15.2n2(b) - Hilitary oxamples deloted; DoD-unigue.

6. I5. $2 n 3(c)$ - DAR/ASPR linits this use to "joint clasa
set-asides. "The more inclusiva $F P R$ "joint get-asides" is
adopted for FAR.
7. FPR 1-3.204(b) - Language not included in Far as not applicable.
[^26]| DAR/ASTR | Code | FPR | code | FAR |
| :---: | :---: | :---: | :---: | :---: |
| 3-205 Services of Educational Institutions. <br> 3-205.1 futhority. Pursumnt to the authorlity of 10 U.S.C. 2304(a)(3). purchases and contracts may be negotiated $i f=$ <br> "for any service by a univarsity, college, or othar educational institution". | AV | (103.205 Servien of educatornl intion tulions. <br> Purnuant to the authonty of nectloa <br>  <br>  "for any service to be rendered by any tidiverats, collefe, or other eductilonal tratituston." | AF | 15.205 Services of educational institutions. <br> (a) Authority. <br> (1) Citation: 10 U.S.C. 2304(a)(5) or 41 U.S.C. $252(\mathrm{c})(5)$ (see 15.200 ). |
| 3-205.2 Application, The following tre itustraive of circumstances with respect to whech the authority of this paragraph 3-205 may be used: <br> ( ${ }^{(1)}$ educational or voeational training zervicts to be rendered by any university, college, of other educational institution in connection with the training and education of perconnel, and for necessary material, services, and supplies furnished by any such institution in connection therewith. | AV | (A) Apprifotion. The fonowing mis to which this sulherity many be wed: <br> (1) Eaucazarnal or vocztionit trilings slity, coilege, or othar odutellonst irsth. und turcution of perionnti, une tor necessary material, sericies, and aupples furniaked by any sien ruswition in conarction therewith |  | (2) Purchases and contracts may be negotiated for any sery ce to be rendered by any university, college, or athor educational institution. <br> (b) Application. The following fllugtrate examples of services by a úniversity, coliege, or other educetional institution that may be contracted for under these authorities: |
| (ii) experimental, developmental, or research work (includang services, icsts, and reports necessary or mexdenal thereto) to be conducted by any univessity, college, or other educational instutution, and reports furnished in consetion therewith; or <br> (iii) analyses, studies, of reports (statistical or otherwise) to be condueted by any university, college, or other educational institution. |  | (2) Fipperimental, developmental, or resentch wark, (including bervices, tests end reports necessary or inclidental thertio) to be sondueled by any unive7: atis, college, or other educational insth. tutton: and reports turabhed in connection therewith. <br> 13) Analyshas, studien, or reporta (titatisticed of otherwhe) to be conducted of prepared by any undveratty, college. or other educational institution. |  | (1) Educational or vocational training services rendered in connection with the training and education of personngi, and for related necessary material, services, and supplies. <br> (2) Experimental, cevelopmental, or research hork (ineluding services, tests, and reports necessary or fncidental thereto), and related reports. <br> (3) Analyses, studies, or reports. |
| 3-205.3 Limutation. Except as authorized in 22-902(b), the authority of this paragraph 3-205 shall not be used when negatiation is authorized by the proviaion of 3-203 or 3-206 | NFLE | $\because$ | 8 | (c) Eimitations. Except as authorized for Educational Service hgreaments (see Subpart 36.x), these authoritifs shall not be used when hegotiation is authorized for purchases of $\$ 10,000$ or less (15.203) or for purchases outside the United States (15.206). |
| 3-206 Purtinses Outside the United States. <br> 3-206.1 Authority. Purauant to 10 US.C. 2304(a)(6) purchases and contratels may be atgotiated if - <br> "for property or services to be procured and used outside the <br> United States. and its Terntories? possomions and Puerto Rico.] | 55 | 3-3.206 Furchases ousalda the Untred <br> Pucsuant to the nuthority of seetion 302 (c) (5) of the Act 661 U.a.c. 252 (c) (a)), Purchanaz and contracta may be "the supplas or tervitess are to be pro cured and used outside the limits of the United siater and lta possersions. | $A F$ | 15.206 Purchases outside the United States. <br> (a) Authority. <br> (1) Citation: 10 U.S.C. $2304(a)(6)$ or 41 U.S.C. $252(c)(6)($ see 15,200$)$. <br> (2) Purchases and contracts may be negotiated if the |
| 3-206.2 Applicathon. The authority of this paragraph 3-206 shall be used orly for the procurement of - <br> (i) supplies to be (A) shipped from, (B) delivered, and (C) used, or <br> (ii) services to be performed outside of the United States, its possessions and Puerco Rico, mespective of the place of negutiation of execution of the consract When the euthority of this paragraph is availa. bif for the negotiation of a contract, no other negotiating authority shall be used. nor thall formal advenising be used. | 53 | This authortyy theil be used only for Whe procurtment of property or det from sources outsicte and ured outcide the Hemis of the United siates and tir pose semitons. wheh as property or zervices Inchiding conatruction fer oyertens inpersonnel. |  | supplifes or services are to be acquired and used cutside the United States, its possessions, territories, and Puerto Rico. <br> (b) Appilcation. These authorities shall be used only for acquisition of supplifes or services which are actwally purchased from sources outside and used cutside the limits of the United States and its possessions, such as supplites or services (including construction) for overseas installations or for the use of oversezs personnel. |
|  |  |  | BA | (c) Limitations. When thess authorities are avallable for the negotiation of a contract, no other negotiation authority shall be used, nor shall formal advertising be used. |

T. $15.2 n 6(c)$ The use of formal advertising outsicle the the fact that the U.S. is not the soverēign at the anclude lack of understanding of formal advertising procelures by foreign contractors, and language harriern, Inciuting the difilcultios of heing able to discuss the forgirements and their intent.

| MA/ ASPR | Code | 1PE | code | FAR |
| :---: | :---: | :---: | :---: | :---: |
| 3-207 Medicines or Medical Suppltes. <br> 3-207.1 Authority Pursume to 10 U.S.C. 2304(a)(7), purchases and conracts may be negotiated it- <br> "for medicine or medtcal supplies". | 55 | (1-3.202 Meditintn or medical mupplies. <br> Purauant to the authority of section $302(\mathrm{c})$ (7) of the Aet ( 41 U $8 . \mathrm{C}$. 252 (e) (T1), purchases and contracts miky be neqotiated without sormal advertinin if "for medicines or medlcal procertv." | AF | 15.207 Medicines or medieal supplies, <br> (a) Authority. <br> (1) Citation: 10 U.S.C. 2304\{a)(7) or 41 U.S.C. $252(\mathrm{c})(7)$ (see 15.200 ). |
| 3-207.2 Appication. The authority of this paragraph 3-207 shatl be used only when the following two requirements have been satisfied- <br> (i) such supplies are peculiar to the fiefid of medicine, ineluding techatical equipment such as surgical instruments, aurgical and orthopedse appliances, X-ray supples and equipment, and the like, but not including prosthetic equipments and <br> (ii) whenever it is determined to be practicable, such advance publicity as is considered suitable whth regard to the supplies involved and other relevant considerations shall be given for a period of at least 15 days before making a purchase of or contratt for aupplites or setvices, under this authority of this paragraph 3-207, for more than $\$ 10,000$. | $\begin{gathered} s s \\ \\ -N F E \\ (11) \end{gathered}$ | (a) Applieation. This authorlty shall be used only for such supplies ex sry peculiar to the fild of meacine is surgi- ine technitel equipment, zuch is and instrumento. tureicel and arthopedte sppliances, X-ray supplies and equipment. and the like. |  | (2) Purchases and contracts may be negotiated for medleines or medical supplies. <br> (b) Application. These authorities shall be used only for supplies that are peculiar to the rield or medicine, fincluding technical equipment such as surgical and orthopedio appliances, X-ray suppiles and equipment, and the like, but not including prosthetic equipment. <br> (c) Limitations. |
| 3-207.3 Limitation. Every contract negoriated undef the authority of this paragraph 3-207 shatit be aceompanied with the determination and findinge justifying its use, signed by the contracting oficer and prepared in aceordance with the requirements of Part 3 of this Section III. The authority of this paragraph 3-207 shall not be used when negotiation is authonzed by the provisions of 3-203 of 3-206. | 55 | b) Eimiftations. (i) Every contract netotimed under this authority mist be mupported by a determanation and finging: prepared in eccordance with Subpart 1-3.3 and siened by the enatracting (a) <br> (7) Whenevet the probable cost of property to be purohased by neg otiathon under this authority will exeed $\$ 10,000$. suituble adyance publictry of the proposed purchase shall be given rar a period The requirement of "sistable advance. pubilicity" shall be deemed to be complited with if elrcuiation of notice of intent to engaged in the manutacture andfor sfite of the produets invoived, ineluding qualiInterest in seling such producter to the Goverament. When deslithble pubficat tion of the inkention to negotiate throuph newspapers or other simllar media myy be used to supplement efr- culatization. | $B A$ $A F$ $A F$ | (1) Every contract negotiated under these authorities shall be supported by a determination and findings justifying their use and signed by the contracting officer (see 15. $3 \times x$ ). These outhorities shall not be used when negotiation is authorized for purchases of $\$ 10,000$ or less (15.203), or for purchases outside the United states (15.206). <br> (2) Whenever it is determined, to be practicable, suitable advance publicity shall be given regarding the supplies involved and other relevant considerations for a peried of at least 15 days before contracting under this authority. <br> 15.208 Supplies purchased for authorized resale. <br> (a) Authority. <br> (1) Citation: 10 U.S.C. $2304(\mathrm{a})(8)$ or 44 U.S.C. $252(\mathrm{c})(\mathrm{B})$ (see 15.200). |
| 3-208 Supplies Purchased for Authorized Resale. <br> 3-20. 2 duthotity. Pursuant to 10 USC. 2304(a)(8), purchases and contracts may be negotiated if- <br> "for property for authorized resale". | 55 | 1 1us,20日 Property purchased for anthorized reatit. <br> Pursuznt to the authority of section $302(\mathrm{c})(\mathrm{t})$ of the Aet t41 © $8 \mathrm{C} .252(\mathrm{ct}$ (B), purchasen and contracts may be netotiated without formal advertiantit if "for property purchased tor suthorized | $(2)$ | (2) Purchases and contracts may be negotiatèd for supplies purchased for authorized resale. <br> (b) Agplication. These authorities shall be used only for purchases for resale through commissaries or other similar facilities. Orainarily these purchases will involve only brand name or proprietary articles required by customers of |
| 3-208.2 Application. <br> (a) The authority of this paragraph 3-208 shall be used only for purciases for resale, where approposated_funds are inyolved, and ordinarily onty for purchases of articles with brand names or of a proprietary nature which a aelling ectivity beleves or finds to be desited ot preferted by it patrons. <br> (b) Whenever it is determmed to be practicable, such advance publicity at is constdered suitable with regard to the supples involved and other retevant considerationt atall be given for a period of at teast 15 days before making a purchase of or contract for supplies or services, under the authority of this parthpraph 3-208, for more than $\$ 10,000$. | $\left\lvert\, \begin{aligned} & \text { SS } \\ & \text { HNFE } \end{aligned}\right.$ | (a) Appitation. Thit Euthorlty mall be ured only tor purchases for resale throurh commassaries or other zimpliar facllites, and ordinarlly only for pur- chaset ot mates with brand names or chasen of articles with brand names or of a proprietary nature ats required of patrons of the selung setfyities. |  | the selling activities. |
| 1. 15.207 (b) - Prosthetic equipment is not considered medical supply. Veterans Administration is authorined to negotiate for prosthetics under 38 U.S.C. 5013. |  |  |  |  |
| Fin system (1,103) stated only appropriated funds are apnicable. |  |  |  |  |



| ASPR | code |  | de | FAR |
| :---: | :---: | :---: | :---: | :---: |
| (iii) when bids have been solicited pursuant to the requirementr of Section Il, and no responsive bid (a responsive bid is any bid whith conforms to the estential requirements of the solioitation) has been received from a responsible bidder. Gor when step one of two-step formal advertising results in no acceptable technicat proposal or only one acceptable technical proposai, ] | NFE | (3) When blds nave deen sollicted purauant to the requiremenes of Part $1-2$. and no resporaive bid has been recelved from a responsible bleder, | $\begin{aligned} & A F \\ & B A \\ & i . \end{aligned}$ | (3) When bids have been solicited using formal advertising (see Part 14), and no responsive bid has been received from a responsible bidder, or step one of two-step formal advertising results in no or only one acceptable technical proposal. |
| (ty) when bids have been solicited pursuant to the requirements of Sectron JI, and the responsive bid or bids do not cover the quantitasive requirements of the solicitation of bids, in which case negotation is permitted for the remaning requrements of the solicitation of bids; |  | (9) When bids have beer solleited putsuant to the requirements of Part 1-2 and the responalve bld or bids do not cover the quantitative requirements of the invitition for bides, in whith case. negotiation th permilted for the remati1ng fequirements. |  | (4) When bids have been solicited using formal advertising (see Part 14), and the responsive bid or bids do not cover the quantitative requirements of the invitation for bids, in which ease negotiation is permitted for the remaining requitrements. |
| (v) when the contemplated procuretnent is for olectric power or entegy, gas (natural or manufictured), water, or other utility services or when the contemplated procurement is for constraction of a part of a utility syssem and $n$ would not be practreable to allow 2 contractor other than the wulty company aself io work upon the systen. |  | (5) When the contempiated procurement is lor flecticic power of energy, zat (naturnl or manufetured), water, or othet utlity serviceas or when the con- templated procurement is for sonstruction of a part of a utility eystem and it would not be practieable to allow a oen+ tratior other than the utiuty company tuselif to work upon the system, |  | (5) When acquiring electric power or energy, gas (natural or manufactured), water, or cther utility services or when the contemplated contract is for construction of a part of a utility system, and it would not be practicable to allow a contractor other than the utility company itself to work upon the system. |
| (vi) when the contemplated procurement is for training film, motion picssure productions, or manuserpts, |  | (6) When the contempiated procurement is ioz eraminate then. motion pleture productions, or manuscripts. |  | (6) When acquiring training film, motion ploture production, or manuseripts. |
| (vis) when the contemplated procurement is for technical nonpersonal services in connection with the assembly, installation, of servicing (or the instrustoon of personnel therein) of equipment of a highly technical or specialized nature, |  | (7) When the concemplated yrocurement is for technical nompersonal servlees in connection with the essembly. installation, or bervicint (or the instruction of personacl therein) of equiprient of a heniy teohntion or apectatined naturt. |  | (7) When acquiring technical nonpersonal services involving the assembly, installation, or servicing (or instruction with respect to them) of equipment of a highly technical or specialized nature. |
| (wiij) when the contemplated procurement is for studies or surveys ather than those which may be negousted under 3-205 or 3-211; |  | (9) When the contemplater brocurement if for studies or surveys other than those which may be merotated under <br>  1-3 21. |  | (8) When aequiping studtes or surveys ocher than for services of educational institutions $(15.205)$ or for experimental, develogmental, or research work (15.211). <br> (9) When acquiring construction maintenance, repairs, alterations, or inspection, and the exact nature or amount of the work to be done is not known. |
| (ix) when the contemplated procutement miolves conkrtuction. mainterance, reparra, alterations or tnspection, in coanection with any one of which the exact nature or amount of the work to be dont is not known: | NFE | (9) When the conternpiated procurement involves malntenance, repair, alterstien, or inspection and the exact nature or amount of the work to be doxe in not krown | (2) | (10) When acquiring stevedoring, terminal, warehousting, or switching services, and either the rates are established by law or regulation or are so numerous or complex that it is |
| ( $x$ ) when the contemplated procurcment is for stevedonng, terminal, wasahousitht, of zwniching servious, and when eithar the rates are established by law or regulation, or the fates ase so numerous or complex that it is impracticable to set them forth in the specticic: thons of formal solucitation of bids. |  | (10) When the contemplated procurement is for stevedoring, terminil, waretrousing, or switching services, and when ether the rates are established by ian or rexulation, or the rates sre so numer- out or cormplex that it is impractieable to ate them forth in the specifictions of - format invitation for bids. |  | impracticable to set them forth in the specifications of an invitation for bids. <br> (1t) When aoquiring oommeroial transportation, inciuding services for the operation of Government-owned vehicles, vessels, or airoraft and time, space, thip, and voyage charters, except-for transportation services furnished by |
| (xi) when the contemplated procurament is for commercal transportation. including tme, space, trip, and voyage charters, except for such tranaportation services at are furnished by common carriers (for which negotiation is authorized unifer 3-217, and Section 321 of the Transportation Act of 1940,49 U.S.C 65), and including zervices for the operation of Government-owned veheles, veisela or aireraft, |  | 111) When the contemplated procurement to for ocmmsrelat tranaportaHon. taciuding time. spate, trip, and voyage eharters, except ior mumh erank common carriers for which netotation is authorized under i 1-3 215 and section 321 of the Transportation Act of 1940 . 49 U.S.C. 65, the inciuding services for the operntion of Government-cwned vehictes. vezsels. or aireraft. |  | common carriers ffor which negotiation is authorized under 15, 215, and Section 321 of the Transportation Act of 1940, 49 U.S.C. 55). |

1. $15.210(b)(3)-D R / A S P R$ guidance on two-step adopted.
GSA alerted $5 / 23 / 78$.
```
2. 15. \(210(b)(9)-\) FpR does not include "construction," negotiation of construction contracts. "Construction" adopted for FAR.
```



1. $15.210(\mathrm{~b})(16)$ - Incluted on guidance from FARpo Panel B
that facilities contracts will be covered in the FAR.

2. 



1. $15+211(0)$ Proposed FAR includee the Auतitional
Iimitations of phr/ASPR.
ditations of nuras.
2. RAR/ASPR 3-211. 4 - Records and Reports should be onittal and included in agoncy inplementation, ns requiret by
stntute.

3. 15-212(c) - noD policy has been extended to all agencies with the intent of establishing unifom and restricted use these authorities.


4. 15.225 (b) (2) (iv) - Whiln this is peculiar to the Military. induded as an example.

| (viii) standardization wilt enhance mithary mission capabilty; <br> (ix) sawngs in training personnel or procurng icchnical hiterature whacerve; <br> (x) standardization will adversely affect existing coordinated mulizary specificatons and standards; <br> (xi) the current design of the apecifled make and model to be standardized has been changed from the derign of equpment of the came make and model now in the supply system, and whether requirement exists for design changes of a scope which would negate the benefits contemplated from this standardization action. and <br> (xii) in cases when military mission capabilty is net ovarndrag, the anticspated benefits and/or cost savings from standardization will equal ar exceed the expected benefits andor cost cavings which would be obtained through unrestricted competition. <br> (d) In arnying at determinations to standardize under the autherity of thrs paragtaph 3-213, the originating Department shall consult with other user Departments as applicable, in oyder to insure the full benefit of the action. <br> (e) The period of standardization, not to exceed 6 years, shall be commensurate with the useful hife of the property proposed for standardizatuon and the anticipated rate of change in desyg and interchangeabinty of components Actions taken undet the authonty of this paragraph 3-213 shall be recorded and revewed by the originating Department at a Ievel deskgnated by the approving authority, at jenst onet every two years to determine whether the standardization should be continued, revised, or canceled. The redesign or redesignation of a model which has been standardized will not require revision or cancellation of standardixation approval if interchangeability of parts of the new model with those of the model standardized is not affected in any sienificam respeet | SS <br> NAE (i.) | (v) Postible asying in training per* torras. <br> (w) Whether the stenciardization will adversely affect existing specifiantiona and standards. <br> (wid) The tegrae to which the current design of the speriffed make end model has been changed frcm the destgn of already in the supply system. <br> (3) Standerdization epproval under this authority shall be for a stated partod of time which bears a reasonable relationship to the life of the equtpment, <br> (c) Itsiffication. ( 1 ) Ma arrivis at a deterculatition that standardization of eculpment and interchangeability of tis parts are mpeassary in the publit interest. such standardization mast be in iact fully Justified as genuinely "necessary in that it merely be generaily desirabio. Nor is en arbtifary or perfunctory conclusion sumelent Facts musi clearly thow the compeling rebsom why it is necestary, es for example: <br> (i) Gubstential sayngs possible throukh standerdization estimbted annual saykass to be findicated when possibie). <br> (4) Mindmizing putential breaidown of a specifically identined service or function which might endanger life. property or the orderly conduct of vital Government functions <br> (2) The term "in special situations" precuudes application of the suthorfy to senerally prevalites or generalized conditions. Tha law achermes that it will bo necassary to employ the authority ondy under mrusual or abmormal conditions. (a) The term "parituilar localwea hat reference to remote lecause of playsacal distance from Iarge pretropoiltan areas, but remote trom ayallable stocka |  | (viil) Whether standardization will enhance agenoy mission capability. <br> (ix) Possible savings in training personnel or in acquiring technical literature. <br> (x) Whether the standardization will adversely affect existing specifications and standards. <br> (xi) The degree to which the current design or the specified make and model has been changed from the design of the equipment of the supply system. <br> (xii) In cases when agency mission capability is not overriding, whether the anticipated benefits and/or cost savings from standardization will equal or exceed the expected benefits andfor cost savings that would be obtained through unrestricted competition. <br> (4) In arriving at a determination to standardize under these authorities, the originating agenoy shall consult with other user agencies, if appropriate, in order to insure the full benefit of the action. <br> (5) Standardization approval under these authorities shall be for a stated period of time that bears a reasonable relationship to the life of the equiprent. Agency procedures shall prowide for periodic reviews to determine whether the standardization should be continued, revised. or cancelled. |
| :---: | :---: | :---: | :---: | :---: |

1. FPR 2+3.213(c) --Justification is onitted as adritional Examples, Material might be included in subordinato agenoy

2. $\frac{F P R}{i n c l i n i o n} \frac{-3.213(e)}{i n}$ shihardinate agency requintions.

|  | $\begin{gathered} \text { code } \\ \text { NAE } \end{gathered}$ |  | $\frac{\text { code }}{00}$ | EAR |
| :---: | :---: | :---: | :---: | :---: |

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[^27]



DAR/ASPR
3-216 Purchases In the Interest of National Defense or Indusirial Moblife
3-216.1 Authority. Pursuant to 10 U.S.C. 2304(a)(16), purchaset and conभacts may be negordated If-
"he [the Secretary] determinet that ( $A$ ) it is in the interest of national defense to have a plant, mine, or other facility, or a producer, manufacturer, or other supplier, available for furnishing property or services in case of a natuonal emergency; or ( $B$ ) the interest of industrisl moblization in case of such an emer. gency, or the intertsi of naticnal defense in maintainimg actuve engimetring, research, and development. would otherwise be subserved".

3-216.7 Applicolion. The authorty of this paragraph 3-216 may be used to onplement plans and programs developed under the dizection of the Secretary to for essential mithary suppres and sere whes. The following are examples of situations when use of this authonty should be consudered:
(i) When procurement by negotiation is necessary to keep vital facilitiss or suppliers in busmess: or to make them ayaifiable un the evept of a national emergency;
(ii) when procurement by negotiation with selected tupplitr is necessary to 1 rain them in the farnishing of critical supplits or services, to prevent the loss of their ability and employee skills, or to maintain actuve engineering, research, and development
work; or work; or
(iii) when procurement by negotiation is necessary to maintain properly balanced sourete of supply for meating the requirtments of procurement programs in the interest of industrial mobilization; (When the quantify required is substantially iarger than The quantily which muly be awarded in order to meet the objeclectives will ordinarlly be procured by formal advertising of by neqotiation under antother negotiation exception.)
(iv) when procurement by negotiation is necessary to lemit competition for current proeuremonts of selected supplies or services which are approved for production planning uncer the Industrial Preparedness Program only to planned producers with whom in. dustial preparedness agreements for those items exist; or to preparedness agreements;

## Code

FPR

FAR
15. 217 Purchases in the interest of national defense or
industrial mobilfzation.
(a) Authority.
(1) Citation: 10 U.S.C. $2304(a)(16)$ U.s.c. 252(o) contains no comparabl negotiation authority (see 15.200).
(2) Purchases and contracts may be negotiated if the head of the agency determines that ( 1 ) it is in the interest of national defense to have a plant, mine, or other facility, or a producer, manufacturer, or other supplier avallable for emergency; or (2) the znterest of industrial national case of such an emergency, or the interest of national development would othisering, and
(b) Application. Imis authority may be used to implement plans and programs developed under the direction of the agency head to provide an industrial mobilization base that can meet production requirements for essential military
supplifes and services. The following illustrate situation supplifes and services. The following illustrate situation
when use of this authority should be considered:
(1) When necessary to keep vital facilittes or suppliers in business; or to
(2) When it is necessary to train a selected supplier in the furnishing of eritical supplies or services, to prevent
the loss of a supplieris ability and empioyees: skilis, or the loss of a supplieris ability and employees skills, or to maintain active engineering, research, and development work
(3) When necessary to maintain properly balanced sources of supply for meeting the requirements of acquisition prograns in the interest of industrial mooilization
the quantity required is substantially larger than the quantity that must be awarded in order to meet the objectives of this authority, that portion not required to meet such objectives will ordinarily be acquired by rormal advertising or by negotiation under another negotiation authority).
(4) When necessary to limit competition for current acquisition of selected supplies or services approved for production planning under the Industrial Preparednes Program to planned producers with whom industrial preparedness agreements for those items exist; or to limit award to offerors who agree to enter into industelal preparedness agreements.


1. DAN/ASPR 3-216.4 - Records and Reports should be oraittal 1. $\frac{\text { DAT/ASPR }}{\text { Included }}$ In $\frac{216.4}{\text { agency }}$ implementation, as required my statute.


2. DAR/ASPR 3-301(b) -- Covered in 15.301.





3. DAR/ASPR $3-305$ Generally incluced in 15.300 . The

4. DAR/ASPR 3-306(a) -- Covored in 15.305 and 15.307.

5. DAR/ASPR 3-308 - Covered in 15.308 , except that the
period of retention is formulated to follow the language of
10 v.s.c. $2310(\mathrm{~b})$ and 41 U. $0 . \mathrm{C} .257$ ( c$)$, i.e., mat least 8
years ...... ${ }^{\frac{\pi}{2}}(\mathrm{~b})$ and 41 U.S.C. $257(\mathrm{c})$, 1.e.. "at least 8

Coverace in 3.7. Recoras Retention.
6. 

PART 15 - CONTRACTING BY NEGOTIATION Section 15.106 - Examination of Records

Comments Due May 30, 1979

Column 2 Codes
V DAR and FPR language identical (verbatim).
AV Language almost verbatim (only minor grammatical or sequential variances between DAR and FPR).

SS Language substantially the same, with no substantive difference between DAR and FPR treatment.

D Corresponding language in DAR and FPR different in intent or effect.

NAE No DAR equivalent for FPR coverage.
NFE No FPR equivalent for DAR coverage.

Column 2 or 4 Codes
OS To be omitted from $F A R$ (recommend including in agency implementing or supplementing publications).

OU To be omitted from FAR as unnecessary.
MR Material to be relocated in FAR (cite new location).

## Column 4 Codes

R Current DAR/FPR language substantially rewritten to conform to OFPP guidelines.

NM New material not in DAR or FPR.
BA Basically DAR language.
BF Basically FPR language.
AF Combination of DAR and FPR language.






## Column 2 Codes

$V$ DAR and FPR language identical (verbatim).
AV Language almost verbatim (only minor grammatical or sequential variances between DAR and FPR).

SS Language substantially the same, with no substantive difference between DAR and FPR treatment.

D Corresponding language in DAR and FPR different in intent or effect.

NAE No DAR equivalent for $F P R$ coverage.
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Column 4 Codes
$\mathrm{R} \quad$ Current $\mathrm{DAR} / \mathrm{FPR}$ language substantially rewritten to conform to OFPP guidelines.

NM New material not in DAR or FPR.
BA Basically DAR language.
BF Basically FPR language.
$A F \quad$ Combination of $D A R$ and $F P R$ language.


| 1. DEFENSE ACQUISITION REGULATION (DAR/ASPR) <br> 7-104.4 1 Awdi by Depaefitirnt of Defensc. <br> (a) Insert the following clavie in all contracts (except those entered into by formal advertising which are not expected to exceed 5100,000 ). <br> (This material is repeated from page 1 ) <br> AUDIT 日 DEFARTMENT OF DEFENSE (1978 AUG) <br> (b) Cernerat The Comirscting Officer of his reprexentativat thall hows the oucht and intpectron nghis described in the applicahle paragsaphi (b), (c) and (d) kelow <br> (b) Exammaition of Costs if thas is a cost rembursement type, incentave, torne and matensta, labor houf, of patef redeterrmintle contract. or any combinanon thereof, the Conmamor ahbll <br>  <br>  tuent to rentapt preperly all diveth ard indireet cotle of whatever nature ciaimed to have been incurred and anticizated to be inewred for the performance of thus coniract. Such right of examme than shail incivde inspection at all reasonable tumes of the Conuracion' plants, ar men para thefedr, as may be engeged in the performance of thas contract. <br> (c) Cosi or Prining Dota If the Contractor submited eost or procing dole in connection whith the procing of this sontract or any chonge or modificanon the relo. unless weh pricing whes baced oa <br>  [aneial guanuties to the general publie, of pheet tel by law el rigulation, ituc Comiracting Officer or hil representatives who ate employees of the Unated Staks Coverament shall have the nght wo enartint all bookn, records, decuments and other dala of the Comeracior selatid to the negotige <br>  the the neeurshy, completencas and curtency of the cort or pricme data submatied Addiumaly. in the cace of pheing eny change or modifiction erecting $\$ 100.000$ to formaly adverused comtraets, the Comptroler Ceneral of the Unined States or his teprestinatives who we employere of <br>  docurtentis meceasary to permit sdequite evalualion of the edat or prising date submilicd, along With the computisuons and profererons wied therews |  | 3. FEDERAL PROCUREMENT <br> 11-3.814-2 Audti and rec orde. <br> (a) The follownt cilatus zhall be included in ant consfacte, both formany tile the contriset cleuse in elther 1-3. $814-7(\mathrm{n})$ ) ${ }^{\text {of }}$ (6) and may be wed to delemmine the nilowabilly of cosis un- <br> (This material is repeated from page 1) <br> 1a) Garcral the contracting Omger of his represtatetiven thati have the usit and peregturna (bla (c) mit (d) betow, <br> (b) Examishotion of conts it thit is a <br>  Herminsbe fortrotb, of ay comblnatlon ther contraeting che ear or hil reprotititativet <br>  ortis, dobumenta, mad alher evidence and teकownint procedupes and pricticet, anmetiont copte of whateret molure chatmed to haft pota incurred sui anticipited to be incurred <br>  at all rabonsble timen of the Gontractor" planta. or such parta thereaf, an mify be en- <br> 4 <br> (e) Cowt or pretin data If the ConiracTor eubmilted conf of prifing data in cenc <br>  ores pryping orat butid on matquete prlet compebtion. ertablithed cesciog or maritet pricen of compareini iterns cald in anbsuma at by law or wequitibnt the Contrictung <br>  <br>  cecaris, documentr and other deta af the Contractot zelaldi to the mrgatintion, prieof moditicetion, for the pheppet of avilust <br>  Addikoanaly, lo the este of priclat any changr or modidcation enctodin <br>  <br>  <br>  to all documents neoensity to prralit ade: quate araluation of the cost or priding dith projemtloni whed thereti: |  | 5. FEDERAD ACOUISITION REGULATION (FAR) <br> 52. 215-2 Audit. <br> As orescribed in 15, 106m2, insert the following clatse in all neqotiated contracts exceps small purchases under part 13: <br> AUDIT (DATE) <br> (a) Examynation of costs. If this is a cost - <br> reimbursement, incentive, time-anjonaterials, labor-hour, or price-redeterninable contract, or any combingtion of these, the Contzactor shall maintain-*and the contracting peficex or a representative aball have the right to examune and audit--books, records, documents, and other evidence and accounting procedures and practices, sufficient to reflect properly a 11 costs clamed to have been incurred or anticipated to be incurred in performing this contract. This riaht of examination shall include inspection at all reasonable times of the contractor"s plants. or parts of them, enqaqed in performing the contract. <br> (b) Cost of pricing data. If the Contractor has submitted cost or pricing data in connection with pricing thia contract or any modification to this contract, unless the pricing was based on adezuate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law of requlation, the contracting officer of a representative who is an employee of the Government shall have the ritht to examine and audit all books, recorss, documents, and other data of the contractor finclualng computations and projectionsl related to neqotiating, pricing, or performing the contract or modufication, in order to dvaluate the accuracy, completeness, ant eurreney of the cost or pricing data. In the case of pricing any madification over $\$ 100,000$ to formally advertised contracts, the Comptroller General of the United states or a representative who is an employee of the Government ahall have the same riqhts. The right of examination shall extend to all documents necessary to permit adequate evaluation of the coat or prieing data submitted. |
| :---: | :---: | :---: | :---: | :---: |
| COMMENTARY: |  |  |  |  |



FEDERAL ACQUISITION REGULATION (FAR)
PART 15 - CONTRACTING BY NEGOTIATION
Subpart 15.4 - SOLICITATION AND RECEIPT
OF PROPOSALS AND QUOTATIONS

* Subpart 15.9 - Preaward and postaward

NOTIFICATIONS, PROTESTS, AND MISTAKES

Comments Due June 20, 1980

* charged luring Phase II to 15.10


## Column 2 Codes

V DAR and FPR language identical (verbatim).
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BA Basically DAR language.
BF Basically FPR language.
AF Combination of DAR and FPR language.



|  |  |  | \% ${ }_{\text {code }}^{\text {R }}$ | 5. Pegeral acquisition regulation (far) <br> fb) Contracting officers shall furnssh identical information concerning a proposed acgulsition to al <br> prospective contraotors, government personnel ghall not provide the advantaqe of advance knowledge concezning a provide the advantage of advance knowiedge concezning future soilcitation to any prospective concraetor. <br> (c) Except for solicitations for information or plaming purposes (see subparagraph (e) (1) below and 15 . 405 ) contrating officers shall solicit proposals or quatations only when there is definite intention to award a contract. Subpart 7.3 provifies additional instructions for solicitations involving cost comparisons hetween Government and contractor performance. <br> (d) A proposal recoived in response to an rfp is an offer that can beaccepted by the Government to create a bindint <br>  normally issus Rep's when they constider it reasonable to expect pxospective contractors to respond with offers, Ruan though they anticipate neqotiations after secelpt of of fers. An hfp shall not be used for a solicitation for finformation or planning purposes. (e) a quotation received in response to an rio is not an offer and cannot be accepted by the Government to ereate a bindifg conkract. It is informationsi in character and requres subsequent bilateral action of the parties to form a contract. An Rro may (h) The Government doos not intend to award a contract on delivery, or other market intornation for planning purposes (seq 15.405): or (2) Due to the nature of the requirement, the Gowarnmont antlicipates that prospective contractors cannot respond with offers but son respond with quotations preilminary to extensive negotiations. |
| :---: | :---: | :---: | :---: | :---: |
| f. column follows the bar orde ortracts are adfed for ease of cotreaponding Column 5 covecage. |  | forexio |  |  |


| 1. DEFENSE ACOUISITION REGULATION (DAR/ASDRL <br> EXTAMCT FRCT 3-501(d) <br>  <br>  <br>  ancent of the Gowerposent Einetiphes of such citcurasiances mar inclate thow lates in 3-8027 <br> in addition to ofthet applocable <br>  twits zhove shall inclutde sexume at the choumazantes which <br>  <br>  <br>  nuwbicf (ace 20-202) panided the phoptetive soutcei Should the <br>  <br>  delay and justily $3 \times$ and lissed upan the suat solicfistion <br>  <br>  <br>  <br>  <br>  olferan <br> EXTHACY FRON 3-503.1 <br>  <br>  <br> - Extrateran 3-io6 - - <br> 3-106 Fiecestulation Notices end Cualerences. <br> 3- bob.i Comeral Thin Parl describes a plocedure which may be used at a <br>  soticiation and response would be sulestantial for bath the Governumen and induatry This procsdere is detigned to <br> detelup nemares for presutaticat, premih <br>  tion of the supplies or sewires involven. <br> pramit prospective offeress to subtur <br>  <br>  <br> and 10 enjlian (Eintiact cont दiuted on next page) |  | 3. FEDERAL PROCUREMENT EEGULATLOXS (EPA) <br> EXTHCT TKGA :-3. $102(\mathrm{c}$ ) Requatso for prodor kls atuat be <br>  <br>  <br>  ergueses art *isthoritizd $\qquad$ <br> EXTKACT FTOM 1-3.8020 <br> (b) Sefictiom af puoppeflue suracea getection of quipinteg gouices for rolletia. proparide thourt be intted feria in sumcrent humberi of compeleat poionitid. <br>  <br>  ucetibed hy 1t-2 को thould bo whed whept epproprinte $\qquad$ | 4. R <br> BA <br> (1.) <br> BA | 5. FEDERAL ACQUISITION REGULATION (FARI <br> (t) Oral golteftations are athorleed for perishable subtistence. An oral wolicitation mary miso be used when ptocessing written sollcitation would delay the acquisition of supplies of services to the detriment of the Government, Use of an oral solicitatlon does not relleve the contracty ing officer Erom complyling with other requifements of thia regulation. In addition ta other applicabie documentation requirements fsee Sulipart f.1;, doctimentation of oral solleftakions ghajl tnelude- <br> (a) A jurtiflcation for we of an oral solictiations <br> (2) Item desciftion, quantity, and dellyery scheckies <br> (3) Sources moticited, Including the date, time, name of Individual contacted. and prices quotedi and <br> (4) The solicitation musher provided to the prospective contrietors. <br> 15.463 Solfeftation malling lists. <br> Conkrocting offlces shall estabilsh, maintatim, and use liats of potential sourcea in accordance whel 14.20 s. <br> \$5.404 Fresolteltation notices and conferences. <br> (a) General. Piesolfcleation notices and conferences may be used as prelliminary stepy in negotlated agotigitions in order to-- <br> (1) Develop or Identify Interested sourcesy <br> (2) Request preliminary Information bases on a general description of the supplles or services \{nvolverit <br> (3) Explatu conpllcated specitheatlous and sequirements to interested firmsinn. <br> (4) Ald prospective contractors In later submitting proposals without undue expenditure of effort, time, and money. |
| :---: | :---: | :---: | :---: | :---: |
| COMMENTAMY: <br> 1. PMe 14.205 wifl bo cotitiod wol rather than "giders malling lists". |  | illing lists" |  | 4 |




| 12 |
| :--- | :--- | :--- |


| Fart I-The Schedula <br> Section $A$ - Contract form. <br> (s) for requeotia for proposals, wither Standerd form 73, Part 1 (Golicitatifon, offex, and Aused and Acknowledgement of Ampusionta) or formp pteseribed by Departmental zequise ions. Instructions for <br> (11) Hor requeste fur quotalions, either sp is (Requesr for quacationa) of forras pacseribed by Deprartmunkal regulat ions. 1nstruations for tilitag out $5 F 18$ grootations is for informitional or planoing pur- <br>  the faca of the request; <br>  <br>  <br>  <br> nare and addretes of isoulng acesvity, chanels for subatssion of proposalfquotation, focation, fineluditg roou pind belliding mimber where proposala, quotationk, ineluding a hand-carficd proposal ot <br> (i) date of lefuntef <br> (C) eloning dase and lime: <br> (D) number of pages; <br> (E) requiatition of other purchase authority. <br>  <br>  SF is thequest for Quolations) is used, insert ${ }^{2}$ requirement for incliasion of "councry" ab part of puoter's fofferor'f nddresty $\qquad$ <br> EXTPACT PROH 3-501(b)(3) SRCTION K <br> (w) where $5 \bar{F} 33$ (solicitation, offar, and Ausid) it not used, a statemeat that prospective oflesora/ quoters कhould indicate la the offictiguotation the sddrest is differcit Iras inat le wailea, if worl offerex/quoter. (Cowntacting offlcera whill tuciude this iaformation ta all resultian contracts that ate Servicen kegionnl otflce); | 3. FEDERAI, PHOCUALAENT REGULATIONS TERI <br> - iximeraray - <br> nrpuest for Quolsinons ishisnd sid <br>  <br>  <br>  UREftia) $\qquad$ 10000 <br>  <br>  qualathen byesitra | Cos. | 5. federnl acgulsition regulation trapl <br> 15.406-z Part I-.The Schedule. <br> The contracting officer shall prepare the contract schedule as follows: <br> (a) Section A. Sollcitation/contract form- <br> (1) Prepare requests for proposals on Standard form 33, Solfeltation, offer, and award. $(53, x \times x)$, uniess otherwise permited by this regulation. The first paye of the SF 33 is the tirst page of the solicitation and includes section $A$ of thic uniform contract format. <br> (2) Prephre requests for quotations un Standadd Futin 18, kequest for Quotations $\{53 . \times \times x\}$, or on agmey forms providing tor section $A$ of the undform contract formak. <br> (3) When refther SF 33 nor SF 18 is usad, faclude the followling on the Elist pege of the sollettatlant <br> (1) Namio, addtess, and locetion of issuing activity, lacliding row and builiting where proposals or quotations must be submited. <br> (if) Solleitation number. <br> (ifi) Date of istuance. <br> (iv) ciosing date and time. <br> (v) Number of pages. <br> (vi) Requisition or other purchase authority. <br> (vit) Brtef deceription of ltem or eervices <br> (vist) Nequifement for the offaror or quoter to provide Its name and complete Address, Including street, city, county, stake, and $Z$ if code. <br> (ix) A statement that offerors on quoters should laclude In khe ofter or quotation the address to which payment should the natheant. if that adilress is different from that shown tot the "offeror or quater. |
| :---: | :---: | :---: | :---: |
| 1. The standara Form 33 (5F 33 la a part package submitted with coyorage of subpart standard form 16 (5f al cill be a part of sabmittal of Part 13, Small Purchasea. |  |  |  |




| 1. DEFENSE ACQUISTTION REGULATION SDAR/ASPR) <br> (xfx) whan the propaced contract it to requite the contractor to prepase production progrese reporting ta accardance with the clause in 7-104.51, the contrate sehedule chall contain instructions as prascribed in $25-202 \mathrm{t}^{\prime}$ add if the contrace is expected to be $\$ 500,000$ or more <br> ( CO ) If the contrace is expected to by $\$ 500,000$ or more, include che ciause in $x-104.78$ (Geographic Dratribution) of Defense Subcontract Dollars). <br> Part IL-Ceneral Provisiona <br> Siction 1 - General Provisions. <br> (1) such general contract provisions (eontract clauses) as are required by law or by hila kegulation; <br> (ii) such adilitional genersh provisions fcontract clauseat as way be spplicable to the contract; <br> (1i1) such alterations in contract provigions an are approprlate. <br> Part IT1-List of Documencs. Exhibita. <br> and Other Attaclumente <br> Section J-List of Documents, Exhibits, and Other Attachuents <br> (1) Here list sil of the docupents, *xhibits, and other <br>  name. dote, and number of pake: for each document: give rype sod tsuntifier (for examples. "Exhshit A"), narse a and number of pages fox each exhibit, apptidix, ar other attochagnc (for exaraple, work frequency schedulas, work stakaments, spacifications, special requixements, or other dacumente too lengthy to be conveniently uristen futa the request for propasil or request for quotzetiong prapery. <br> Part iv-General Instructions <br> SECHON $X$ - Representations, Certifications, and other Statements of offeror. <br> (i) whenl neither SF 18 nor 5 F 33 ss used, the foilowing shall be faciuded in this fection X: <br> The ofterorfhuotar repressats and certifies as pare of his propasal/4watatime that: (Check or complete ell applicable boxes or blocke.) <br> (A) Smatl business <br> He is, 7 It not a suall busineas concern. $A$ stall burinese concern for the purpose of Governownt contracting to eoncernt theluding gis afliliates, which fe independentiy, owned and <br>  wacter, and can further qualify under the crituria concerning number of ewibeyees, averape gunual receipti, of ofher crituria, as prescribed by the Smali businese adaimstration. (See Code |  | 3. Federal procurement REGULATIONS (PPR) | Code ${ }_{\text {cod }}$ | 5. FEDERAL ACQUISITION REGULATION (FAR) <br> 15.406-3 Part 1f--Contract clauses. <br> Section If Contract clauses. The contracting offteer shan include in this section the clauses required by law or by this regulation and any additional clauzes expected to apply to any resulting contract, if these clauses are not required in any other bection of the uniform conerace tormat. <br> 15.406-4 Part III--Documents, exhibits, and other attachments. <br> Section $J_{c}$ List of documents, exhibits, and other actachments. The contracting officer shall inst the title, date, and number of pages for wach attached document. <br> 15.406-5 Part IV-Representations and instructions. <br> The contractinq ofeicer shall prepare the representations and Instructions as Eollows: <br> (a) Section $K_{\text {f }}$ Representations, certiffcarions, and other statements of offerors of quotere include in this gection those solf citation proulsions that require representations, certifications, or the submission of other information by offerors or quoters. |
| :---: | :---: | :---: | :---: | :---: |
| COMUENTRARY: <br> 1. See Hote a on paye e. <br> 2. See Hote a on page 0 . | $\begin{gathered} \text { sise } \\ \text { wisy } \\ \text { bing } \\ \text { bec } \end{gathered}$ | heading mcontract claus to prouide for contract chan from solicitation HRumed An cwa twouthiny | ns | $\qquad$ |


| 1. DEFRNSE ACQUIEITIOM REGULATION (DAR/ASERL <br>  <br>  <br>  <br>  <br> (8) Mroority nuspurss amtupass <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br> ibo to of, the euppliez offered. <br> (D) cerificication of motraderit puce neterhination <br>  <br> (11) whes : sequect for groposale fore other chine sr 33 is <br>  <br> (a) tyre or musiness dacamization <br>  <br>  <br>  <br> (b) sur hierich cemimichte <br> Ihe oflerog/quop er maftby carisillem that each <br>  | 3. FEDERAL PROCUREMENT | ${ }^{4}$ | 3. EEDERAL ACOUYSYTION REOULATLON (FAR) |  |
| :---: | :---: | :---: | :---: | :---: |
| COyHEATARY: <br> 1. 8* note 2 on page (. |  |  |  | 12 |

1. DEPENSE ACQUISITION REGULATION (DAR/ASPR)
have been songidered to have bere mined pro~
duced, oo meaufectured out tide the Danted
States.
Excluded Ead Projucte excrused Ead Produc
Country of or igin


whare SE 33 (Solicitatica, Offer, and huard) is not
uses, a stateaent thas prospective of ferors) quoter: shoulld findicate fin the affer/quotation the

 to be ajuinistered by o Defenso Contruct Adminiatre-

unlesm exaupted by 12-803 from inclusion of
Equal opportumity clause, the provisionz in
Equal oppartumity clause, the
$7-2003.14(b)(b)$. (2), and (3)
(vid) che ellause in 7-2003.13 shall be included ta

(vifi) :

the infended ploce of performance, including the
tr teet address, and the nanas and sddrasses of ounat
and aperatox of producing facilitics, 15 other than offeror or queter, whan it is reasoratiy anticipated that *uch facillt
if the contrace 18 for the Military hesiatance Program, the cextificate io 7-2003.50;
(x) if the contract is a supply or sirvice contract pursuant to the balance of payanis Progras, the certificate in 7-2003.52;
(xi) er requeve that propppetive of feror* or quotery state inyoives the scquisitionge, the contract performanco snydives rench sequatsittion of covernment product lon
snd Testricted by patent or other rishte (ate 13-307(b)): the provisioa in $7-2003.66$;
(xin) the pepropriate reansporation soliciteinod provishons az required by 2 -201 (a) section $K$ (x) through (xiv); (A) In accordznc: with 3-1203(n), intert the provietion (B) in 7 2003.67(a);

7-2003.67(b); with 1-1204, fosert the provisiop in
(f) sccardance with 3-1213(a), finerte the provisto ) 7 2003.67(c):
(xy) any reguicement for royilty information to be furniched
(v1) When weifher Sy 33 (Solicitater $9-110(\mathrm{~s})$ );
SF is (Requast for Quotatitona) tis uged, incert raquifrenent for foclusion of "councriy" an part of quatar'sfofforor's addreus;






| 1. DEFENSE ACOUISITION REGULATION (DAR/ASPR) <br> (Ax) direstlons for oblaizten copiet of miny docurnents, such as plant <br>  any, to to made for drauings and specifications fee $16.4013(\mathrm{c})(\mathrm{haf})(2)(9) \mathrm{A}) ;$ <br> (xxi) Reserved; <br> ( $x \times i$ i) desciption of information zequifed to suppost proposed prites <br>  price information) (we Section III, Part \$, Section ix, Pat 1, and Seetion XXIIH: <br>  <br> (xsiv) requited representations afgationg sinall businest stams <br> ( $\mathrm{x} \times \mathrm{v}$ ) excepl when ewniver hat been granted (bee 18-110) prior to solfoltation, it the relleltation coatalm one or more litems subject to shaturory cost Batilitom, the Ean Eimifation provision the 1-2003 37: <br> (xxvi) provisions fir peiformance of work by sontraction, wee $18-104$ and $2-201(b)(\times \times 2 i) ;$ <br>  where not providedia a puctinvilifion molice (ace 11-20S); <br> (xaviin) the provision in 7-2003,40; $\qquad$ <br> (fxix) if the cantract is to bec conditioned on the araiabality of fandis, a chear statetnant of suk corndition (see 1-318); <br>  or by this Regutation; <br> ( $x \times \mathrm{xi}$ ) Reseived; <br>  cernt, the following plovision will le plared an the fuce of the ad Elizalion formor on a cover shect: <br>  <br>  <br>  тeleptione arica comie, number, and extentiont; <br> (Exilv) Requesu for Propmalis which wifi itsult in the placement al cated or. <br>  contalat the ciowse in 3-2003 22: <br>  tetephone numbere of pers raik sulhorited to conduct actolistianst; <br> (axnvi) if the contical it pursuant ta the halance of Payments Frogiam, the <br>  <br>  <br> (Exuwti) uniess exemped by 12-10S fram finluzion of the Equal Oproarturity claute-- <br> (A) oa the face pazz or cover sheet of the solicitation, these nources: <br>  TUNITY CLAUEE Which may apply to tidg coniract risilibig <br>  <br> - wote the cfalifichikin of honsegrigatrd fach fies in this <br>  <br>  <br>  <br>  <br> (b) the epplicable provition be $7-2001$ 14(b). (c), and (d) ; <br>  |  | 3. FEDERAL PROCUREMENT EEGULTIONS TFPRI $-15.407(b)(3) \text { AnO } 52.215-6$ <br> 1 <br> AND $52.215-10$ | Codo | 5. EEDERAL ACQUISITION REGULATION (FAR) |  |
| :---: | :---: | :---: | :---: | :---: | :---: |
| COMEENTARY: <br> 1. See Not 1 on page 8. <br> 3. See Note 2 on page 16. |  |  |  |  | 18 |






| 1. DEFEASE ACQUISITION REGULATION (DAR/ASPE) <br> (0) When it is considefed necessary to issue an amendment to a request for proposats of efequest for quotations. the period at time remaining before closing and the need for extending thus period by pustponing the time set for closing minut be considered. Where only a shont time terazins before the lime tet for closing. considectation shauid be given to notifying offerorn or quotert of as exterision of time by telegram or telephone Such notification should be confinmed in the amendment. <br> (c) Any information given to a prospective ofleror or quater concerning a request for proposals or request for quotations shall be fumished promptly 10 all other prospective offerors or quoters as an amendmant to the iequent, whether or not a pre-proposal conference is held, it sueh information is nccessary to offerong or guoters in submiltinz proposals or quotations on the request, or ty the lack of such information would be prejudicial to uninformed offerors or quoters. No award shatl be made on a exquest for proposal) untess fuch amendment thereto hat beert issued in sufficient lime to perinit prospective offerors to consider such infonmation in autmofterg ar mudifying their proposile. <br> 3-506 Late Proposals and Modifications of Pruposals. <br> (a) This paragraph does not apply to simplified small parchases made purswant to Section III, Pant 6. <br> (b) Ofterars are responsible for subinitiong proposals and modifications of proposals, inclucting final modificatione st the conclustion of negotiotiont, wo as to reach the designated Goverancont office on time Proposals and modification of proposals received in the office designated in the request for proposits ather the exact time specified ate "late" and shall be considered only if tie circumstances outined in the provision in $7-20024$ are applicable Unless a specific tume for receipt of proposais is stated in the request Lor proposals, the time for receipl shall be the time for normal close of business of the office designated for receipt of proposalto on the date proposals are dar | NFES | 3. FEDERAL PROCUREMENT REGUTATIONS (FPR) <br> ETABCTENOM <br>  patala <br> (a) Xesept as provided ta it $^{1-3}$ taj2-8, The following peovition reyarding the receipt and conaficeration of proponalk tax swird thith are secelved alter the exnos: Hrop set for recelpt in the requast for proposaln thatl be placed in encli luct tation: <br> FPR provision, Lace Prom posals, Hodsfications of Proposals, and Hichdirawals* of Proposeln, has not been spread-sheeted hers. <br> (b) Proponity and mpdificutions of proposais fetplved in the ontce destrastide oxact request for propossils stiter the exact anme spechazd ard late proposkit I the clreannstatices set forth in that provision in $\\|$ 1-I an $2-1(\mathrm{a})$, above, are <br> Extruct contd. next page | $\frac{\text { code }}{\text { cod }}$ <br> BA <br> NM <br> ( $\mathrm{K}, \mathrm{D}$ | 5. FEDERAL ACOUTSITTON TEGULATION (EAR) <br> (b) The pontracting offlcez shall determine if the ejosing date needs to be changed when anending a solicitation. If the time ayallable before closing is Insufficitent, prospective offerozs or quoters shall be notifiad by telegram or telephone of an extension of the closing date, and the notification shall be confirmed in the amendment. The contracting officer shall not award a contract unless any amendment to a request for proposals has been issued in sufficient time to be considered by prospectlve offerors. <br> (c) Any Intormation given to a prospective offeror or quoter shall be furnished promptly to all other prospective offerors of quoters as a solicitation apmondment if (i) the information is necessary in submiteting proposals or quotations of (2) the lack of such infozmation would be prejudicial to prospectlve offerof or guoter. <br> 15.411 Recelpt of proposals and quotatlons. <br> (a) The procedures for recefpt and handiling of proposals and quotations in negotiated acquisittons should be similar to the recedpt and saleguarding of bids in formal advertising isee 14.401). Proposals and quotations shall be marked with the date and time of receipt. <br> (b) Atter recefpt, proposals and quotations shall be safeguarded from unanthorized disclosure. Classified proposals and quotations shall be handled in accociance with agency regulations. <br> 15.412 Late proposals, quotations, and modifications. <br> (a) Madification, *s usod in this section, means a modification of a proposal or quotation, including a final modification in cesponse to the contracting offlear*s request for "best and flnal" offers. The term does not include normal revistons of offers or quotations made during the conduct of negotiations by offerors of quoters selected for discussion. <br> (b) Offerors or quoters are responsible for submitting affers of guotatlons, and any modifications to them, so as to teach the covernment office designated in the solleftation on time. Unless the solicitation states a specific titae, the time for receipt is the normal close of business of the designated Government office on the date that proposals of quotations ars due. <br> (c) Proposale or quotations, and modifications to them, that are received in the designated Government office after the exact time specified are *late" and shall be consldered only if (1) they are recelved before award is made, and (2) the circumstances, including acceptable evidence of date of mafilng or receipt at the Government installation, meet the specific requirements of the provision at 52.215-9. |
| :---: | :---: | :---: | :---: | :---: |
| COMMENTARY: <br> 1. Although DAA 3-506 mentions only proposals, DAR 7-20 and DD Form 1707 requite the use of the late proposal provision in cequests for quotations. PAR 15.412 has written to reflect this requlrement. | been |  |  | 23 |


| 1. pefense acqursition heculation (Dar/aspri) <br> (c) When a late papposal or madiJisation of proposal is necrived and hat cicar froin aradabic information that it cannol be corsidesed tor awasd, the Connot be conslidered (sec also 3-506ic)). Sucl notice nerd not be givea where the propost contract is to be 3 wadded wilhit a fow days and notice pursuant to 3-508.3 would sufice Iloweres, when a late proposal or modification of paposat is trapinitted hy sesisiered or certived mail and in ecceived belort <br>  din offeror thall be promptly rocificed andstantially in accordance with the nouce <br>  <br>  <br> (4) The nofnal sevisions of proposila by afferoms selected for discussion dur* Ing the unal conduct of negotiations with weh offerors wie not to be eansitered as late proposals or fifie modifications to proposals. <br> (e) Late propotials and modificalont of propossis which we not camidered <br>  <br> (i) The following thall, if avaitable, be focluted th the purchase office filca wh respert to earh late propussal un ancilification of propotal. <br> (i) the date of anaility, fing, or delvery, tit the cate may be; <br> (a) the dats nod hour of recelpt: <br> (iin) whether or not considercd for ward, and <br> (Iv) the wimpper ar other evidence fif contidered for awast. |  |  | (cose | 5. EEDERAL ACQuISITION REGULATIO (FAR) <br> (d) when a lake propasal, quatation, or modification fs roanlved and he is olisar from avollioble informatton that cannot be considered for award, the contracting officer shall promptly notify the offeror or quoter that it was recolved late and will not be considered. The notice need <br>  would sutfica. <br> (a) When a tate proposal, quotation, or modification is transmited by rogisterad or certifited mati nud is recelved berare award but it is not clear trom avallable information <br>  proposats or quotat lops and, If neecessoty. to tolographto proposilis or quotations. <br> (t) Late proposals, quotations, and modiflcations that are not consideted thall be held unopenad, unlass opened for identification, until ofter award and then retalned with other unsuccesseul proposals or quotations. <br> (9) The following shall, if avallable, be included in the or rodification: <br> (1) The date of mallifig, flishg, or delluery. <br> (1) The date and hour of receipe. <br> (11i) Whether or not considered for award, <br> (if) The envelope, wrapper, or other evidence of date of |
| :---: | :---: | :---: | :---: | :---: |
| comematary: |  |  |  | 24 |



|  |  |  | s. | 5. reveral acouisition regulation (far) |  |
| :---: | :---: | :---: | :---: | :---: | :---: |
| COMMENTARY: <br> 1. Sea Not. 1 on pags 24. |  |  |  |  | 26 |


| 1. DEPENSE ACQUISITION REGULATTON (DAR/ASPR) <br> 3-507 Trenturny of Procurement Intormailoas. 3-507.1 Restrictions on Duscloure and Usi of Data in Propasalt and Quotra tiane. (s) A propozail, whether sollicited or unablicited, may include data, wich wa <br>  for any purpore other than evaluation of the propusal. if an offeror wishes so to returict hit proposat, be thall mark be tito page with the following kegend: $\qquad$ <br>  <br>  <br>  <br> The offefor shatl mark each sheet of data which be wishes to setrict with the fol- towing legend. $\qquad$ $\qquad$ wy proposal merely pecause it or the data wimitted with u is so marked. Thase ponioni of the proposat snd data which suc wo manked (except for anformation which is nimo obcained from another source without restiction) shall be used only to svaluate the propesil and ahall not be disclosed outside the Government disclose the data of the ofteror to whom the contract is to be awarded, for par* poser outher thas to eyaluate the propecti, the coturact showid to provide. (See <br>  data) (b) Proposels or quolations of ubbontractons which are included as part of a <br>  ing such a kgend mayy be olberwise subject to rekase under the terms of the noted, howcref, that absent a scyurat fut such iccurds or data pursuapt to the statutory provisions, and the subsequent determinasion of releaseability, the <br>  purwant to 1-108 and related S2-102.1(x) and S2-501. (e) See Part 9 of Section IV for further provisions wieh respect to unvolicised |  | 3. FEDERAL PROCUREMENT REGULATIONS (FPR | ${ }^{\text {code }}$ | 5. EEDERLA Acoutstion regulation (fab) |
| :---: | :---: | :---: | :---: | :---: |
| COMMENTARY: <br> 1. Restriction on the diteclosure and use of data in unsolicitad progosals is covered in 15,509. |  |  |  |  |





|  |  | 5. FEDERAL ACQUISITION REGULATION (FAR) <br> 52,215-4 Solicitation Definitiona. <br> In accordance with $15.407(\mathrm{~b})(1)$. insert the following <br> SOLYCITATION DEFINITYONS (DATE) <br> "Advertised," for purposea of thiz solicitation, tneluces mall business reftricted advertising and other typea of restricted advertising. <br> "offer" means "bid" in formal advertising and "proposal" in megotiation. <br> "Solicitation" means an invitation for bide (IFB) in formal advertísing and a request for proposale (RPP) or a request for quotationa (RFQ) in negotiation. $\begin{gathered} \text { (End of provision) } \\ \text { (R SF 33A, Para } 2,1978 \text { JAN) } \end{gathered}$ <br> 52.215-5 Type of Business Oxganization. <br> In accordance with $15.407(b)(2)$, ineert the following <br> TYPE OF EUSINESS ORGANIZATION (DATE) <br> The offeror or quoter, by checking the applicable box, represente that it operatea to $/$ an individual, represente that it operatea as $/$ an individual, partnership, corporation corporation incorporated under the law of the state of <br> (End of provision) <br> (AV SF33 1977 MAR) <br> 52.215-6 Unnecessarizy Elaborata Proposals or Quctations. <br> In accordance with $15,407(b)(3)$, insert the following <br> UNNECESSARILY ELABORATE PROPGSALS OR OUOTATIONS (DATE) <br> Unnecestarily laborate brochures or other presentationa beyond those sufficient to present complete and effective rosponia solicitation are not desired and may be contrued an an indication of the offeror's or quoter a lack of cost conaciousnesa, Elaborate art work, expensive paper adda are nelther noctesary nor wansed. <br> (End of proytaion) |
| :---: | :---: | :---: |
| COMMENTARY: <br> 1. This is one of several solicitation provisions ourrently 52 ngluded on SF 33/33A but not in the DAR or FPR. Suhpart solicitation provisions and contract elauces. |  <br>  | citation propisons that <br> the tarm quotation or <br> a provisions to he used |



\begin{tabular}{|c|c|c|c|c|}
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1. DEFENSE ACQUISITLON REGULATION (DAR/ASPR) \\
7-2002.4 Late Proposats The following prowision shall be included in all negolated so fictanons other than tha first wep of two-step tormal advertming, in (The following provision coplaces parayrapins 7 end 解 Standard Forms 22 end 33A ? \\
Late propisals. hodhtcations of phoposals and withiok wals of PROPOSAIS ( 1979 MAR) \\
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$R$ \& | 5. FEDRRAL ACQUISITION REGULATION (PAR) |
| :--- |
| $52.215-9$ Lave Submisaions, Hodifications, and Witharawale of proposaly or Ouotations. |
| In accordance with $15.407(b)(6)$, inaert the following provision in all solicitationa: |
| LATE SUBMISSIONS, MODIFICATIONS, AND WITHDRAWALS OF phoposals or ohotations (date) |
| (a) Any proposal or quatation recelived at the office deesignated th the aolicitation after the exact time specified for receipt will not be considered unless it is received before award is made and it-- |
| (1) Was sont by registored or certified mail not later than the fifth calendar day before the date specified for roceift of offers le.g., an offor submitted in rasponae to a sollicitation cequiring recaipt of offera by the 20th of the month must have been mafled by the 15th): |
| (2) Was gent by mail (or telegram if authorized) and it is determined by the Government that the late receipt was due solely to mishandifig by the Government after recelpt at the Government inataliation or Government inataliations or |
| (3) Is the only proposal or quotation received. |
| (b) Any modification of a proposdi or quotation, except a modification resuIting from the Contracting officer" $s$ samo raqueft for "best and finai" offer, fa subject to the same conditions ais in mubparagraphe (a)(i) and (2) above. |
| (c). A modification reaulting from the contracting the time and date specified in the request will not be considered unless received before awasa and the late recelpt in due solely to mishandifing by the Government after recelpt athe Governcaent Installation. |
| (d) The enty acceptable vidonce to estabilah the date of mailing of a late proposal, quotation, pr modification sent elther by registered or cortified mail it the U.s. or Canadian Postal Service postmark on the wrapper or on the orlginal receipt from the U.S. Of Canadian poatal service. quotation, or modification shall be processed as if mailed Late. "Postrark" moans apinted, etmpped, of otherwise placed impreseion (excluaive of a postage meter machine impression that is readilyidentifiable without further action an having been supplied and ain on the date of malijing. Theretore, offerors or quoters should request the postal clerks to place a hand cancollation bull'gerye postmark on | <br>

\hline - Commentary: \& \& \& \& 33 <br>
\hline
\end{tabular}



| extrict pras ${ }^{2}$ 33A <br> - LaYe fromoshis, mopifications of proposuls, and <br>  <br>  <br>  <br>  <br> alition hef hit ent peppoul reatved. <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  |  |  | $\begin{gathered} 4 . \dot{c} \\ \hline \operatorname{cosede} \end{gathered}$ | 5. pederal acouisttoo regulation (far) |  |
| :---: | :---: | :---: | :---: | :---: | :---: |
| Commentary |  |  |  |  | 35 |


| 1. DEFENSE ACOIISITION REGULATION (DAR/ASPR) <br> EXTAACT FROH 3-501(b)K(iv) <br> (vi) a statement requettog the prospective offeroz or quoter to War lise <br>  negoriations, <br> EXTRACT ERAC 3-501(b) L(xaly) <br> (aswin) inatucuions regarding the marking of thsolmation which is not to be disclosed to the public or utied by the Govemment for any purpose other that the evalumion of she propoants or quonsionf fre 3-5071): <br> EXTKACT FREM 3-501.1 <br>  Hiprts <br> (i) A propersl, whether solleited or unolicited, may isclude data, wich at techatical desigh of concept ar firancial and managetacni phan. which the offeror does not went disclosed to the public for any purpore or used by the Government for any purpose ather then evalustion of the propacti. If an aticror withes to wo restret hit proparal, he chall mank the tifle papt with the fullowion fitend <br>  $\qquad$ - , man mot them <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br> The offerot shatl matk each sheet of dala which he wistete to teblict with the foltowing leyend <br>  ( 104 DFC | NFE | 3. FEDERAL PHOCUREMENT BECULATHONS (BPR) <br>  <br>  want disclused Ior eny purpose other 1) 粗 frylutitan of the proporsid it the <br>  mank the titis pase withe the follew ins f+ement Fit onc Drwateves vo Dax <br> That dels ahol get br threlose euxation <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  onting latend: <br>  Hem trapoun | code $R$ | 5. FEDERAL ACQUISITION REGULATION (GAR) <br> 52,215-10 Authorized Regotiators. <br> In accordance with 15,407(b)(7). insert the following provision in all molicitationat <br> AUTHORITED NEGOTIATORS (DATE) <br> The offeror or quoter represente that the following permone are athorixed to negotiate on ite behalf with the Govermant in connection with this acquisition: Clify namee. titlag and telephone numbere of the authorlegd negotintorn]. <br> (End of provithinn) <br> (R 3-50I (b) Sock (iv)) <br> 52.215-11 Reptriction on piacloauze and Ust of Data. <br> In accordance with $15.407(b)(8)$, ineert the following provicion in all aolleitetions: <br> RESTRICTION ON DISCLOSURE RND USE OF DATA (DATE) <br> offercre or quoter who fnclude in their proposal or quotations data that they do not want diaclowed to the publit for any purpose of wad by tho obvernmant macept for evaluation purpotot, thall-- <br> (a) Hark the titie page with the following legend, <br> "this proposal or quozation includea data that thall not be disclosed outaide the Government and ahall not be duplicated, ueed, of diseloand-In whole or in part--for any purpoae other than to evaluate thi proposis or quotation. If; however, controct is awarded to this offefor or quoter as cosult of--or in connection with- the ubmission of this data. the Government shall have the right to duplicate, use, or dinctose the data to the axtent provided in the resuating contract. Thia restriction does not linit the Government'a right to use information contained in thin dota if it is obtained from another cource vithout restrletion. The data subject to this restriction are contained in shete finaert numbers or other Identification of <br>  <br> (b) Mark each sheet of data it wishes to regtrict with the following legend: <br> "Use of disclusute of tota contained on thite sheet le aubject to the reatriction on the titlo page of this proposal of quotation." $\begin{gathered} \text { (End of provision) } \\ \text { (8 } 3-501 \text { (it) } \sec 1(x \times f v) \end{gathered}$ |
| :---: | :---: | :---: | :---: | :---: |
| COMMENTARY: <br> 1. The DAR coverage applifet to solicited and unsolic proposals. The FPR covarage it limited to unsolicited proposals. Unsoliciced proposal coverage 16 provided subpart 15.5. |  |  |  | 36 |


| 1. DEFENSE ACQUISITION REGULATION (DAR/ASPR) <br> Extract prot Sy 33A <br>  <br>  <br> 2 <br>  <br>  <br> Now wix mix <br> Mommonemz <br>  <br>  <br>  | $\begin{gathered} \text { cod } \\ \text { cod } \end{gathered}$ | 3. $\frac{\text { PEDRRL }}{\text { PRocumement }}$ | (1.) | 5. federal acquisition regulation (far) <br> 52.215-12 Preparation of offers. <br> In accordance with $15,407(b)(9)$, insert the following provision in all requests for proposaly: <br> preparation of offers (Date) <br> Cal Offerors are expected to examine the drawings, spacifications, schedule, and all inatructions. Faime co do so will be at the offeror'e risk. <br> do so will be at the offeror'e risk. (D) Each offeror shall furnish the tnfortation required by the aclicitation. The offeror thall aton the offer and <br> the aolicitation. The offeror thall algn the offer and print or type ita name on the schedule and each continuation aheet on which it praken an entry. Eraaures or other changes <br>  <br> Bigned by an agent shall be accompanied by evidence of that aqent's authority, unlese that evidence has heon proviously furnished to the issuing office. <br> (c) $o$ ang ofice <br> (c) For each ttera offered, oifezors ahall (i) show the unit price, incuuing packing unless otherwisy specified, and (2) enter the totai price and price, including packing unless otherwise specified, and Schedule. In che totai price in the Annount colurn of the an extended price, the unit price wlil be presumed to bo correct, subject, however, to correction to the same extent and in the same, manner as any other and in the same manner as any other mistake. <br> (d) offers for supplien or services other than those spocitied will not be considered unless authorized by the solicitation. aolicitation. $\qquad$ <br> (a) Offerors must state a definite time for delivery of upplies or for performance of services. unless otherwise suppliea or for performance of specified in the solicitation. <br> (f) Time, if stated as a number of days, wall include Saturdays, Sundays, and nolidays. $\begin{gathered} \text { (End of provision) } \\ \text { (R SF } 33 \mathrm{~A}, \text { Para 2, } 1978 \text { JAN) } \end{gathered}$ |
| :---: | :---: | :---: | :---: | :---: |
| COMMENTARY: |  |  |  | 37 |











Sin






## Column 2 Codes

$V \quad D A R$ and $F P R$ language identical (verbatim).
AV Language almost verbatim (only minor grammatical or sequential variances between DAR and FPR).

Language substantially the same, with no substantive difference between DAR and FPR treatment.

D Corresponding. language in $D A R$ and $F P R$ different in intent or effect.

NAE No DAR equivalent for FPR coverage.
NFE No FPR equivalent for DAR coverage.

Column 2 or 4 Codes
OS To be omitted from FAR (recommend including in agency implementing or supplementing publications).

OU To be omitted from FAR as unnecessary.
MR Material to be relocated in FAR, (cite new location).

Column 4 Codes
$R \quad$ Current DAR/FPR language substantially rewritten to conform to OFPP guidelines.

NM New material not in DAR or FPR.
BA Basically DAR language.
BF Basically FPR language.
$A F \quad$ Combination of $\overline{D A R}$ and $F P R$ language.


| 1. DEFENSE ACOUISITION REGULATION (DAR/ASPR) <br> SPECIAL TYPES AND METHODS OF PROCUREMENT <br> Parl 9-Unsalicited Proposals <br> 4-900 Scope of Part. This Pant seis forth policies and procedises concernang the recciph, evaluation, and acceptance of intokcited propisals <br> 4-901 Genersl. The misolicited proposal is valunble means by which unique or innovative methods or approaches which have ofiginated or developed outide the Government can be made available to Government agencies for use in the accomplishment of their missoons $t$ is oftered the the that the Governmens wifl enter into a contract with the offerof for (i) research on or dicuelop. ment of, the methods, approsches, or ideas it emmatns, of (i) the conduct of the activity or services or the detivery of the items it proposes. It should tot he merely an advance proposal for a specific agency tequitement which wotid normally be procured by competitive methods An unsolicited proposal should be prepared independent of Government supervision. It often represents a substantial invextment of tane and effort by the offeror ft should present the proposed work in sufficient detatl to allow a driermination that Corernment support could the wonthwile and that the proposed work could cnhance, beneflit, and/or provide valuable infut to an agoncy's racearch ond development mission or to some other area of agency responsibihly. <br> 4.902 Pollicy. It is the policy of the Gipernment to foster and encourage the submission of unsoltited proposals <br> 4-903 Agency Frogram Direction and Operation. Each agency atall adopt and publibh palacies and procedures which will encourage the submission of ansolicited proposals relating to the agency's mission. Such policies and procedures shall te consistent with the requirements of this Part 9. They shatl be developed with an objective to eliminate destraints which discourage the generation and aceeptance of innovative ideas through unsolicited proposals. |  | 3. FEDERAL RROCUREMENT <br> Sibpart 1-4.9-Unsolicitat Pronossis <br>  <br> This subpart scts forth pollciex and Droctdurts conceypling the recelpt. evaluation, atsd kcopthance of unions- clted proposhls <br> 5 1-1.901 Cimeral. <br> The monsoltetted moposal is a valusble hichna by which undque or himoorative or fifinated or developed outside the fiave erimest cats be made avaltable to Gov* ernmint akencies for ure it whe nrom pishment of thetr misjuns it is offered in the foope that the Government will ethler into a cantrnct with the ofreror for tis) serearch on or depelopment of thitis, or aby the contuct or the fctivity or stryisss or the drivery of the jems ft "rice proposit for a spechuc akency fequicement which would rormatly be procurta by competiture methoda. An undeltened proposal should be rrepared in dependent of Governmant superyision ment ol teme end eñort by the offeror it should present the prcposed work in sumbient detan to oltow de determmation be worthwinle and that the sroposted work copld entiance, benert, \#ndior protich ard development mission or to sompe other area of agency responsibility <br> 6 I-4 902 Policy. <br> It is the polley of the Govemiment to soster and encotyage the aubmistion of misoliedt教 proposhis <br> 8 1-4,90s Akency bragram dircitotr <br> Each agency shall adopt and pubtish policles and precedures which will encourege the subviskiont of unsoliciled propespis relating to the agency't ings. be conslatent with the requirements of thls Subpart $1-4,9$ They shall be dtrestraints which discourage the fenefothon and acceptance or finovathe todas tirough unsolleted proposals | Coda  <br> Cod  <br>   <br> $A R$  <br> 1  <br> $A M$  <br> $A M$  | 5. FEDERAL ACQUISITION REGUIATION (FAR) <br> SUBPART T5.5-OUNSOLICITED PKOPOSALS <br> 15.500 scope of subpart. <br> This subpart prescribes policies and procedures for submission, receipt, evalustion, ant acceptance of unsolicited proposals. <br> 15.501 Definitions. <br> The following definitions apply to this subpart: <br> "मdvertisıng material" means material designe to acyuaint the Government with a prospective contractoris present products or potential capabilities, or to determine the Government's intexert in buying such products. <br> "Commeretal product offer" moan an oifer of a oommercial product usually sold to the general public and which the vendor wishes to tee intraduced in the Government "s supply system as an alternate or replacement for an exisining supply item. <br> "Contribution" means a concept, suggestion, or idea presented to the Government for its use with no Indication that the source 1 neends to devote any further effort to it on the Government's behalf. <br> "Coordinating office" means a point of contact established within the aqency to coordinate the receipt, evaluation, and disposition of unsolicited proposals* <br> "Proytam Research and Development Announcement \{PRDA\}" means an announcement in the form of a general solicitation for proposals in areas of science and technology base research and development of interest to the issuing agency. <br> *Technical correspondence" means written requeste for information reqarding Government interest in research areas. submissions of research descriptions, prepropasal explorations, or other written technical inquiries. <br> "Unsolicited proposal" means a written offer to perform a task or effort subinitted to the Government by an offerox without solicitation by the Government and with the objective of obtaining a contract. <br> $\$ 5.502$ yolicy. <br> Aqencies shall encourage the submission of unsolicited proposals and avoid organizational or regulatory constraints that may anhibit generation and accoptance of innovative ideas from uxospective contractors. |
| :---: | :---: | :---: | :---: | :---: |
| COMMENTARY: ${ }^{\text {(1) }}$ MR ETOM FPR 1-4.904. |  |  |  |  |




1. DEFENSE ACQUISITION REGULATION (DAR/ASPr)

4-906 Content of Unsalictfed Proposals, Unsolicited proposais should contain the following information in order 10 permit consideration in an objectlye and timely manner,
(a) Aasic In.

This includer
(i) the name and address of the offeror (if an organization, indicate type, 8 . profit, nonprofil, educational, smatll business):
(ii) rames and telephone numbers of the offeror's technical and hasines personnel who may
(iii) identulication of any proprietary data which the offeror intents to be used by tie agency unfy fon evaluation purpunes (bee 4-913);
(iv) names of any other Federat, State, bocal agencies, or other pantie: recciving the proposal andfor funding the proposed eflors or activity: v) date of submissiont and
vi) signature of s rezponsible olficing or authorized representative of the organization or person authorized to contractually obligate the or ganization.
b) Tectinital Information. This ineludes:
(i) a concise thte and an abstract (approximately 200 wouds) of the
proposed effort;
(ii) a reasonably tomplete discussion stating the objectives of the effor or activisy, the method of approach and extent of effort to be employed, the nature and extent of the anticipated results, and the msnner in which the work will help to suppert accomplishment of the giency's miksion;
(iiil) the names and brief brographical information of the offerof's key personnel (including afternales, if desired) who would be involved and
(iv) the sype of suppon, it any, the offeror requesis of the akency, \& 8 follites, equipment, materials, or personnel resourees.

5. FEDERAL ACOUISITION REGULATION (FAR) 15.505 Content of unsolicited proposals.

Unsolicited proposals should contain the following nformation to permit consideration in an objective and timely manner:
(a) pasic information includina--
(1) ofteror's name and address and eype of orgenization; . G. profic, nonprofit, educational, tmall business:
(2) Names and telephone numbcre of technical and tusinfess personnel to be contacted for evaluation or negotiation puyposes:
(3) Identity of proprietary data to be used only for valuation purposes:
(4) Names of other Federal. State, local açenctes, or rties receiving the proposal or funding the proposed effort:
(5) Date of submission; and
(6) Signature of a person authorized to represent ans contractually obliqate the organization.
(b) Technical information includinq--
(i) Concise title and abstract (approximately 200 words) of the proposed effort;
(2) A reasonably complete discussion stating the of jectives of the effort or activity, the method of approach and extent of effort to be employed, the nature and extent of the anticipated resuits, and the manner in which the wor will help to supkort accomplishment of the agency's mission
(3) Names and biographical information on the offeror's kev personnel who would be involved, includimy diternates; key
and
(4) Irpe of support needed from the agency; e.g. acilities, equipment, materiale, or personnel resources


## 1. DEEENSE ACQUISITION REGUATION (DAR/ASPR)

(a) Unsolicted presposals shall be acknowitadged as soon as possible by the office which hat been assigned the coordination responstiblity (see 4-908), and processed in an expedrious mannes.
(b) Prior 50 msiking a comprehensive evaluation of an unsolictited proposal the coordinaturg office (sec $4-90 B$ ) shaill determine that the document.
(i) consams sufficent technical and cust unformation to permit a menangigut evaluation, und
(11) has been approved by a iesponsible official or authoriced representa. tive of the organization submintiag the proposal, or a petson aubhorzed to contractuatly obligate the organizdion.
(c) If the document does not meet the requirements in paraydaph (b) above. The offeror shall be given the opportunity to provide the reguired data. A comprehensive evaluation or th unsolicited proposal need not be made if the proposal is not within the purvicw of the mission of the dgency (also see 4-9i2(a)). In suct cusez, the subnater shall be fusnished a proapt reply, stateng how the document is being inserprtied by the agency, he rearata sormat evaing ohe shath not deny reconsideration of a thaty and approprataly revied or supplemented proposul which is responsive to such an matial agency determination.
(d) Compreliensive exaluations shatl be cuordinated by the organizational entity designated in accordunce with 4-908. Each unsolicited proposal that ss circulated for a comprehenstue eveluation whith the agency shat have atached or imprinted a legend denifying it as an unsolicited proposal, and stating that in shall be used only for puppores of craluation (sec $6-9: 3$ (c)) In cyaluating on unsolicited proposal, eg
criterin, the following
(i) unique, monovative, of mernotious melhods, approaches, or tdeas which have originated with of are assembled together by the offeror that are contained in the proposed effort or actwrity:
(i1) overall scientific, iechnteal, or socio-economis merus of the proposed affort or activily,
(iii) poiential contribution which the propored effort is expected to make to the agency's specific entsyon, if pursued ht this tume;

| $\begin{gathered} 2 . \\ \text { cods } \end{gathered}$ | 3. FEERERAL PROCUREMENT | ${ }^{4 .}$ |
| :---: | :---: | :---: |
|  |  | $\begin{gathered} A \\ 1 \\ A F \\ 1 \end{gathered}$ |
| AV |  | $\begin{gathered} \text { NM } \\ \text { AF } \\ \\ \\ \\ \\ \\ \end{gathered}$ |

## 5. EEDERAL ACOUISITION REGULATION (FAR)

15.506-1 Recelpt and initial review.
(a) Before initiating a comprehensive evaluation, the gency contact point shall determine if the unsolicited proposal--
(1) Contains sufficient technical and cost information:
(2) Has been approved by a responsible official or other (a contractually obligate the representative authorized to
(3) Complies wath the marking requirements of 15,509
(b) If the proposal meets these requirements, the contact pint shall promptly acinowledge and process the proposal. an opportunity to submit the required data.
(c) Aqencles are not required tó perform comprehensive valuations of unsoifcited proposals not related to thei miselons. in such casea the agency cotac how the agency romptiv xeply nterprets the proposal. Why it fo not being evaluated,
15.505-2 Evaluation.
(a) Comprethensive evaluations shall be coorainated by the qency contact point, who shall attach or imprint on each msolicited propogal ciyculated for evaluation the legen required by 15.509 (d) When performing a comprehensive valuation of an unsolicited proposal, evaluators shal consider the following tactors, in addition to any others appropriate for the particular proposal:
(i) Unique, innovative, or meritoricus methods, approaches, or ldean originated or asfembled by the offeror.
(2) Jverall scientific, technical, cost reduction, or sociomeconomic merits of the proposal.
(3) Potential contribution of the effort to the agency's specific mission.

i. DEFENSE ACQuISITION REGULTION (DAR/ASPRI

4-911 Prohibitlons. Agencles shall not permit all or any part of an unsolicuted proposal to be used as the basias, or portion of, a solicilation, of in negotiation. With other frms unless the pfferor th notlited of and agrees to the intended use. or idea which it sould have used hind the unsolictued proposif not been submised With retpect to data (xee 4-913(a)) sendered in an unsolicited proposal, disclo. sure of information which coneeras or reiales to trade secrets, processes, oparn. tions, syle of work, of apparatus, and other matters may result in the imposition of a criminal penality pursuant to the provisions of 18 U S C 1905.

4-912 Interazency Coorditation. When at is delermined that a mertionious moliculed proposal is not related to the mission of the secipient agency or may gency may identify for the offerof other autacies whose trissions bear a relationthap to the subject matet of the uneolicated proposal

## 4-913 Linfled Use of Dute.

(a) The cubmatier of an unsoliciacd proposal may mark th with a legend such toposal. If a proposal is wo marked, the terme of the legend shall be comphed with

| $\begin{gathered} 2 \\ \operatorname{cod} 0 \\ \hline \end{gathered}$ | 3. pederal procurement REGULATTONG (FPR) | $\begin{gathered} \text { 4. } \\ \text { coce } \end{gathered}$ |
| :---: | :---: | :---: |
| $A^{\prime /}$ |  | ! |
|  |  Whiten tis determing datat mextiont. uns unguitled proposel lin not telated to <br>  Tteciplent azence mey didemity for the ot- <br>  |  |
|  | fl-4.913 Liantied use of dza. cile An unsoliciled proposal masy thyant disciosed tor ariz purpuase olher <br>  tion on his unsoljeited propuski) he shan mark the utie page with the following legend: $\qquad$ <br>  <br>  <br>  <br>  <br>  <br>  <br> The offeror tiso thall merlicech shect Which he wishe <br>  | $B F$ |

5. FEDERAL ACQUISITION REGULATION (FAR)
15.508 Protitacions.
(a) Goverrinert personnel shall not use any data, concept, idma of atner paxt of an unsolicited proposal as tre basis, or part ar thr oassis, tor a solicstation or ir negotsatzons with any other Earm. Howevot, this prohitition. does riot proclude using any dara, concept, or thea avallable to the Government rrom other sources without restriction.
(t) Sovernuent personnel shall not diselose restrictively maiked informatiol ( Efte 15.509 ) included in an unsolicite ${ }^{3}$ proyosal. The disclocure of euch informaticn concerning trade secrets. processef, ope rations, style of work may result ander 18 unde 190 ,
15.509 L1HLEA USE उE data.
(a) An urisolicized proposal may anclude Sata that the offeror dots not wart cisclosed for any purpose other than evaluation, th the offeroz wishes to restrict the proposal, the title pave nuof te marked with the following legend

## USE FND DISCLOSURE OF DATA

Tis data shall not be aisciosed outside the Government and shall not de duplicated, ueed, or disclosed in whole or in part for any purpoee otrer that to evaluate the proposal; provided, tnat if a contract is awarded to this offeror as a or br conrecrion. Wien. the tumabsion 2 thio dar the Government snall have the right to duplicatge use, of disclose the data to rbe extent provided in the contract. Thie restriceson does not limit the Government's right to usf information contained in the data source without restriction. The data sutject to this rearxaction is coritained in ghoets

(b) rhe ofiezar srall aleo mark each restricted ahett with the following legend:

Use or dasclusure of proposal data is subject to the restriction on tree titie paqe of tnis Proposal.

| 1. DEfense acquisition reculation (dar/aspr) <br> (b) If the contractung officet recelves an unsolicted pruposal marked with a more festricied legend than that provided in 3 - 507 (a), then he shall ingme diateIy feturn the proposal to the submutter with a tetler statugg that the proposal cannot be consideted because tit in inpracticathe for the Covernment to comply with the legend fand potaning out specificaliy why this is so), but that the proposal wit legend proveded in 3-507,1(n). <br> (c) Except as provided in paragraghs (d) or (c) below, the coordinating of fice (see $4-908$ ) shall place a cover sheet on the proposal of the proposal shall be otherwise clearly marked as follows unless the offeror gives aclear wrthen indicathen that he does not with to impose any resuictions on the disclosure or use of the dula contained in the proposal. <br> unsolictreo proposal <br> use of data limited <br>  <br>  <br>  <br>  <br>  <br>  <br>  |  | (2. <br> coode | 3. $\frac{\text { FEDERAL PROCUREMENT }}{\text { REGULATIONS (FPR) }}$ | C. ${ }_{\text {A. }}$ | 5. FEDERAL ACQUISITION REGULATION (FAR) <br>  |
| :---: | :---: | :---: | :---: | :---: | :---: |
|  |  | D ${ }^{\text {D }}$ | (b) An unsoltcited proposal shain ue <br>  Thetd in payajraph of of theror stall be inforined that the Tho oficicror sinal be considered bicsume It is fmpracticalue for the Goverinitent to coinphy with the legend goxever, be powis witi be considered $4 f$ it 15 returb yntied with thre tegend provided if pira(c) Exceph as pruytied th parueraphs (d) wis (*) betlow, the coordilating of. sheet on the proposin or the proposst shim be detcrwise cieary marked <br>  <br>  ргоровsal. $\qquad$ Hax er Data Lumato <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br> The notce in this parazraph (c) is manner of handlung uisolcicited provosats Whideh will be campaltbla with the protiute of the notise tr hile paragraph (c) shat nos be med by the covernment to arccord) nor tw improperly dery access tie document where an obligation is imposed on the wency by the Froedom of Informa* tert whith the prospocifve aferof considers to be trade secrets and ccmmercial <br>  the ofleror upon submission to the Gov- <br>  | (1) | (c) The coordinating office shall return to the offeror any unsolicited proposal marked with a different legend than that provided in 15,509 (a). The return letter will state that the proposal cannot be considered because it is impracticakle for the governmert to comply with the legend and that the agency will consider the proposal if it is reaubmatted with the proper legend. <br> (a) The coordinating office shall place a cover theet or, the propisal or clearly mark it as follows, unless the offeror elearly ztates in writing that no restrictions afe imposed on the dssclosure or use of the data contained in the proposal: <br> UNSOLICITED EROPOSAL <br> USE OF DATA LIMITED <br> All Government personnel must exercise EXTREME CARE to insure that the antormation $2 n$ this proposal is not disclosed outside the Government and is HOT DUPLICATED. USED OR OISCLDSED in whole of in part tor any purpose other than evaluation of che proposal, without the written permission of the offerox. If a contract is awarded on the basic of this proposal, the terms of the contract shall control diaclosure and use. <br> This notice does not limit the government's right to use information contained in the proposal if it is obtainable from another source without restriction. <br> This is a Government notice, and shall not by itself be construed to impose any liability upon the Government or Government personnel for disclosure or use of data contained in this proposal. |
| (1) The DAR requares return of a proposal "narked with a more restrictive legend and the FPR specifies a "different legend." The DAR approach was not used because it 18 not readily determinable if a legend 2 E "more or less restricted" without some in-depth evaluation. The PPR approach was adopted because the evaluator can immediately determine if the leqend is the same of different. |  |  |  |  | 10 |



## Column 2 Codes

V DAR and FPR language identical (verbatim).
$A V$ Language almost verbatim (only minor grammatical or sequential variances between $D A R$ and $F P R$ ).

SS Language substantially the same, with no substantive difference between DAR and FPR treatment.

D Corresponding language in $D A R$ and $F P R$ different in intent or effect.

NAE NO DAR equivalent for FPR coverage.
NFE No FPR equivalent for DAR coverage.

## Column 2 or 4 Codes

OS TO be omitted from FAR (recommend including in agency implementing or supplementing publications).

OU To be omitted from FAR as unnecessary.
MR Material to be relocated in FAR (cite new location).

## Column 4 Codes

R Current $D A R / F P R$ language substantially rewritten to conform to OFPP guidelines.

NM New material not in DAR or FPR.
BA Basically DAR language.
3F Basically FPR language.
$A F$ Combination of $D A R$ and $F P R$ language.






| 1. DEFENSE ACQUISITTON REGULATION (DAR/ASPR) <br> 3-30S Wrillen and Orel Discussions. <br> 3-805.1 Genteal. Written or oral discussions shall be conducted uth all responsible orterors uho submit proposals within a compettive range, except that This requirement need not be appled to procurements: <br> (1) of $\$ 10,000$ or kess; <br> (ii) in which prices of rates are fixed by law or jegulation, <br> (in) in which date of delivery will not permit diseussion. <br> (iv) of the sel-aside portion of partial set-aside or by small business restricted advertising, or <br> (v) in which it ean be clearly demurntrated from the existence of adecuate competition or accurate prior cost experience with the product or service that asceptance of the mosi tavorable initiat proposal without discussion would result in a fair and reasonable price, provided however that the solicitation notifted all offerers of the possibility that award might be made without discussion, and proyided that such anard is in fact made without any stitten or oral ditcussion with any offeros. <br> SEE 3-805.4(c), PAGE 10. <br> SEE 3-805.3(C), PAGE $8^{\prime}$. <br> SEE 3-805. 3 (d), $P A G \in P$. |  | 3. $\frac{\text { FEDERAL PROCUREMENT }}{\text { REGULSTIONS } \text { EPR }^{2}}$ <br> 1. 3.80 E- -1 <br> (a) After recelpt of initial proposali, Written or oral discusstions shall be con- ducted whit all responslole offrors who subuitited proposals aithin e compet.- tive ranye. price and other fators con- sldered. except that ints tegulrement need not neeesserily be applfed to <br>  (9) Proesyements in which-rater of prices are tixed by ta or terulations. (3) Erocurements in phich time of <br>  <br>  <br>  <br>  for proposels contzins a notice to gil offerors of the possbility thet award may be mate without ciscusstom of proposaly fecelved and, hence, fhat proposals should be submittedintatil on the most farorable terms, from price end tects- <br>  <br>  shard without further explorgion ard discuston prlor to anara Also, when the proposal most advantageous to the ocvarnment thvotvet a material deparsideration shall be aluen to offerine the An opportuntly to submit new proposisis on a techntcal bests nhich to comparsble to that of the mast advantageous pro- potai. Proerdes, That this cen be done without resezsing to the onher grms any <br>  $\qquad$ |  | 5. FEDERAL ACQUISITION REGULATION (FAR) <br> SEE $15.610(2), P A G \leqslant 14$. <br> SEE 15.606(C), PAGE 10. <br> SEE $15.610(d)(3)$, PAGE 16 <br> SEE 15. 6/I (a) AND (B), PAEE $/ 6$. |
| :---: | :---: | :---: | :---: | :---: |
| COMMENTARY: |  |  |  |  |



| 1. DEFENSE ACOUISITION REGULATION (DAR/ASPR) | $\begin{gathered} 2 \\ \cos ^{2} \\ \hline \end{gathered}$ | 3. FEDERAL PROCUREMENT REGULATIONS (FPR) | code | 5. FEDERAL ACQUISITION REGULATION (EAR) |
| :---: | :---: | :---: | :---: | :---: |
| 3-805.3 Dascussions Hith Offerars. <br> (a) All offerors selected to panicipate in discussions shall be advised of den. ciences in their proposals and shall be offersd a reasonable opportunity to cortect or resolve the defficiencies and to submit such price or cost. Technical or other revisions to their proposals that may result from the discussions. A deficienO is defined as that par of an offeror's proposal which would not satisfy the Oovernment's requirements | $1$ | SEE 1-3.804, PAGE 15 | $\left.\right\|_{1} 1$ | SEE 15.610 (C), PAGE 15. |
| (b) Oseuszions shall not disclose the strengathe or weakhosses of compctary offerers, or disclose any information from an offeror's proposal which would enabie another oferor to improve his proposal as a result thereof. | $N F E \mid$ |  | $\left.\right\|^{m R}$ | SEE 15.610 (1) (1) and ( 2 ), PAGE 15. |
| (c) Aucton techalques are stroctly prohbited, an exarsple would be indicatWhg to an offeror a price which must be met to obiain turther consideration, or informing him that his price is not low in relation to naother offeror On the other hand, it is permissible to intorm an offeror that his prite is consicered by the Goverment to be too high. | 55 | SEE 1-3.805-1 (b). PAEE 6. |  | SEE 15.610 (d)(3) PAGE 16. |
| (d) At the conclusion of discussions, a firal, common cut-of date which at: lows a reasonable opportunty for submission of written "best and find"" offers thall be established and all remanining participants so notitied. If oral notification is given, it shall be confirmed in writing The notufiction shall include information to the effect that (i) discussions have been concluded, (iu) offerors are being given an opportunity to subma 2 "best and final" offer and fiins if any such med Ification is summited $u$ must be reccued ty the dale and wie spectifed and modinication is submitted in must be Modications of Proposals provision of the solchistion (sut see 4-107). | $55$ | SEE $1-3.805-1 / 6)$, PAGE 6. | $m$ | SEE 15.6/1 $(\mathrm{d}) \mathrm{MD}(\mathrm{B})$, PAGE 16. |
| COMMENTARX: |  |  |  |  |


| 1. DEEENSE ACOUISITION REGULATION (DAR/ASPR) <br> 3-805.4 Changes in Government Requiremeats <br> (a) When, either before or anter receipt of proposals, changes occur in the Government's requirements of a decision is made to relax, increase or otherwise modify the seope of the wark or statement of requirements, such change or modification shall be made in wniting as an amendment to the solichation. When time is of the essence, oral advce of changes may be given (f (1) the changes involved are not complex in nature, (ii) a record is made of the oral adruce given. (iii) all firms to be notified (see (b) below) are notifitd as near to the same time as feasible, preferably the same day, and (iv) the oral advise is promply confirmed by the writen amendment. <br> (b) The stage in the procurement sycle at which the charges ocour and the magnitude of the changes shall govem which firms should be notried of the changer If proposals are not yet due, the amendment should normally be sent to all firms solicited if the time for receipt of proposals has passed but proposals bave not yet been evaluated, the amendment should normally be sent onfy to the respondang offerors If the competitive range has been established, only those offerors within the comperitive range should be sent the amendment. However, no matter what stage the procurement is in, if a change or modrication is so substanpial as to warrant complete revision of a solicitation, the original should be canceled and a new solicitation assued. hath fases, the new solictation should be issued to all firms originally sclecited, any frms added to the original mailing list and any other qualified firmis. |  | 3. FEDERAL PROCUREMENT REGULATIONS SERT $1-3.805-1$ <br> (d) When, durtng nezotrations, $x$ nebthantse change occurs in the Ooxicri$r \in t=h e d$ to rellax, increase, or ottictive motify tha seoge of the vori or state. Fient of recuirements, such change or en Rmentment to the Jequest for prow gosals, shd \& copy shatl be furnished to each proxpective eontrector Oral ad rice of change or modificetion may be given if (i) the ehenges involved are not comblex 1 n meture, (2) an prospective contractors are potifed stmataneously (preferably by a meeting with the contracting oficer) and (3) ment is made of the orai aduce given In sweh instances, however. the orsi Revlet should be promptly follated by a writien tmendment verilying such gral advice previously given The disseminntion of orad adrice of chsinges or modificelant curing Individtua) negothation ensslons hourd be avolded untess preteded, accompanied. or innardiately folloted by proposhla embedymine to the resuest for modincations |  | 5. EEDERAL ACQUISITION REGULATION (FAR) <br> 15.606 Changes in Government requirements. <br> (a) When, eather before or after recelpt of proposals, the Government changes, relaxes, increases, or otherwise nodifies its requirements, the contracting officer shall issue a written amendment to the solicatation. When time is of the essence, oral advice of changes may be given if the changes involved are not complex and all firms to be notıfied (see paragraph (b), below) are notified as near to the same time as possible. The contracting officer shall make a record of the oral advice and promptly confirm the oral advice in writing (see 15.410). <br> (b) In deciding which firms to notify of a change, the contracting officer shall consider the stage in the acquisition cycle at which the change occurs and the magnitude of the change, as follows: <br> (1) If proposals are not yet due, the amendment shall be sent to all firms that have recerved a solicitation. <br> (2) If the time for recerpt of proposals has passed but proposals have not yet been evaluated, the amendment should normally be sent only to the responding offerors. <br> (3) If the competitive range isee $15.609(a)$ ) has been established, only those offerors withan the competitave range shall recelve the amendment. <br> (4) If a chance is so substantial that it warrants complete revision of a solicitation, the contracting officer shall cancel the original solicitation and issue a new one, regardless of the stage of the acquisition. The new solicitation shall be issued to all firms or minally sollcited and to any ficms added to the original list. |
| :---: | :---: | :---: | :---: | :---: |
| COMMENTARY: |  |  |  |  |



1. DEFENSE ACQUISITION REGULATION (DAR/ASPR)

3-86s. 5 Distlosure of Mistakes Before Award.
(s) Contracting officers shall examine all proposals (or quotations) for minot informalties or irregularites and mistakes as defined in $2-405$ and 2-406, respece. tively.
(b) Minor informalities or irregularities and apparent elefical mistakies shall be resolved substentially as prescribed in 2-40S and 2-406 2, respectively, and communications with offerors required to resolve such maters shall not be con-
sidered ducustions within the meaning of this paragraph $3-80 \mathrm{~s}$. However. if the resulting clarification prejucices the interest of other offerors, ay ard may not be made without discussions with all offerors within the competitive range
(c) Other mistakes in proposals shall be called to the offeror;s attention as pecfically 85 practicable without disclosing information of the type discussed in mistake resolved, in the conduct of written or oral discussions.
(d) it it is contemplated that award win te made without distussions (sec 1-805.1), then the following procedures thatl be followed
(1) If the contracting officer suspects a mistake, he shall advise the offeror and request verfication if the ofreror vermies his propossat, award may be miade. Thus procedure shat not be condered duscustions within the meaning of thas
(2) If an offeror alleges a mastake it hus proposat, the constracting officer shat advise hian zhat he may withdraw his proposat or seek correction in acecordance with (3) betow
(3) If an offeror requests permission to correct a mistake in hus proposal, a determination permiting the correction may be made, provided both the existence of the mistake and the proposal actually intended are established by clear such correction shall not be consideted discussions wituin the meaning of this paragraph 3-805. If, however, establishing the mistake and the intended proposal requires reference to documents, worksheels, or other data outsice the solicitation and the proposal, then the correction of such a mistate nazy be accomplished
onty though the conduct of discussions with offerors in accordance with this only though the conduct of discussions with offerors in accordance with this paragrsph 3-805. If the above determination cannot be made, and the contracs. ing officer still contemplates award withour discussions, the offeror shall be given the opportunity 10 withdraw or to verify his proposal.
(c) Authuity to naake the deternination reg
delegated to the Head of a Procuring Activity with authonty to redtegate to the Chef of the Purchasing Office Each desernination shall hase the priog setiew of kgal counsel.
3. FEDERAL PROCUREMENT REGILATTONS [FPR)
5. FEDERAL ACQUISITION REGULATION (FAR)
15.607 Disclosure of mıstakes before award.
(a) Contracting officers shall examine all proposals for
(a) Contracting officers shall examine all proposals for minor informaities or itegularities and apparent cler
mistakes (see 14.405 and 14,406 ). Commacation with offerors to resolve these matters is clarification, not discussion within the meaning of i5.610. However, if the resuling commumation prejudices the interest of other offerors, the contracting officer shall not make award range.
(b) Except ats indicated in paragraph (c), below, mistake not covered in paragraph (a), above, are usually resolved during discussion (see 15.610).
(c) When award without discussion is contemplated, the contracting ofEtcer shall comply with the following procedure:
(1) If a mistake in a proposal is suspected, the contraction. verification If the offecor verifies its proposal, award
(2) If an offeror alleges a mastake in its proposal, the contracting officer shall advise the offeror that it may sithdraw the proposal or seek corcection in accordance with subparagraph (3), below.
(3) If an offeror requests permission to correct a mistax in its proposal, the agency head (or designee not below the evel of chief of the contracting offace) may make a written determination permitting the correction, provided, that (i) both the existence of the mistake and the proposa actence antended are established by clear and convincing evidence rom the solicitation and the proposai and
(4) If the determination under subparagraph (3), above, cannot he made, and the contracting off the offeror shall be iven a final opportunity to withdraw or to verify its proposal.
(5) verification, withdrewal, or correction under ubparagraphs (1) through (4), above, 25 not considered iscussion whthin the meaning of 15.610 . If, however, correction of a mistake requires reference to documents, worksteets, or other data outside the solicitation and proposal in ordion or both, the mistake may be corrected only through discussions under 15.610 .



1. DEFENSE ACQUYSITTION REGULATION \{DAR/ASPR)

PAR REPEATEO
3-805 Writhn ond Orat Dlscussions.
3-805.1 General. Wrater or oral discussions shall be conducted with all responsible offerors who submit proposais within a competithe fange. except that thss fequitement need not be apphed to procutements
(1) of 510,000 or less.
(ia) is which date of delivery will not permin discussion.
(IV) of the sef-aside portion of partal set-aside of by small Dusigess restricted adrertising, or
(v) in which it can be clearly demonstrated from the existence of adequate competition or acsutate priof cost expertence with the
product of service that acceptance of the most favorabie fnuma product of service that acceptance of the most favorable inural
proposal without discussion would result in a fatr and reasonable proposal without discussion would result in a fatr and reasonable
price, provided however that the wolicitation notfied all offerons of price, provided however that the wicitation notitied all of arons of
uhe possibility that awatd malght be made without discussion, and provided that such award is in fact made withoul any writien or oral discussion with any efferor.

SEE 3-805.4(c), PAGE 10.
(SEE 3-805./, ABOYE.)


COMMENTARY:
5. See also NASA PR 3.804-3(b) (5)(1) and Okaw Industries nc. B-197306, Septenber 29, 1980, 80-2 CPD 228, zt paqe
the requirement for meaningful discussions needed to satisty
orimarily for detormination by the contracting agency,
judgment will not be disturbed unless it is without a whose ceasonable basis.").






| 1. DEFENSE ACQUISITTON REGUEATION (DAR/ASPR) <br>  <br>  $4-107.3$ ox $4-1074$ they way, hovver, be wise tax <br>  thon belaw. kequifitiont for which there proctdures ref not whei sheli follow the proceduras of 3-805. <br>  ecqusestions xisckz <br> ) snvplye the explotation of fermulation <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br> (1v) bave An ontliated value of i*** than <br> -107. 4 Naiver. witiver of the <br>  of defanxe sy=tsme sinisnited <br>  cions. vaiver shati be granted in accordance vith Devartazntal fistruction*: <br>  following proceduress <br>  <br>  <br>  contractual source for the propqu*d sequisition, cyates performance eriterint <br> (3) A notificntion that any propanala which oonmitmenta or unrealieticaliy jow in cost of prife <br>  comprehend thit complexity and riski ot the propored <br>  <br> (6) $x$ fchedule of plannad nource solection fox the subminion of both tectinteni and cast/pitce propo4.la. $\qquad$ of neparate twehmiext and cost/price froposelm. <br> (6) Reguirenents for the techniczi, propons <br>  <br>  <br> Which iliurtrate the ingert of thesu trada-offt.? In <br>  <br>  ont+ra production. |  | 3. FEDERAL PROCUREMENT REGULATIONS (EPR) |  | 5. FEDERAL ACOUISTITON REGULATION TFARY |
| :---: | :---: | :---: | :---: | :---: |
| COMMENTARY: |  |  |  |  |



| 1. DEFENSE ACOUISITION REGULATION (DAR/ASPR) $4-107.5(\mathrm{c})$, <br>  <br>  <br>  <br>  <br>  included in the competitive range initialiy. <br> (d) $\frac{\text { Step Thxte - Copmen Cut-0gi: }}{\text { [1] }}$ comion cut-off ditefor <br>  <br>  $\qquad$ Ehanged facorforetwd in the fupporting dataposal mist broulde of financial conditions that brought sbout iny ehange. <br>  shati got be fifposad for addftiosai proposiff gryeviciout opproveltse twchafezl of cort propoditu uichour the pryar <br>  <br> (4) Tinal dutailet negotixtionz lealing to <br>  offrox for final tontrict negetistions. $\frac{\text { Negotifiens }}{\text { ili }}$ <br>  <br> complete evaiustion of all faceors in cesordine dueted with caraful fegart fof 申ieuxity procidurix and good Dutinof: Ex*etien. <br> (2) Based upon the offeror'y 1stert total <br>  finsi netoefzions leading to e difintive contrict. This doez not preclude nadecting most thith on* <br>  <br>  nical or schedule commitmonts or uncealistically low <br>  <br>  of the proposel. grated deciaion, involuing consbaeration of technical 4FEtonch, capabilizy, manag\#pint, design to coft, <br>  | 2. code <br> HFE | 3. EEDERAL PROCUREMENT REGULATIONS (FPR) | code <br> 05 <br> SEE <br> FCOT. <br> Note <br> (2月) <br> Ps, 19. | 5. FEDERAL ACOUISITION REGULATION (FAR) |
| :---: | :---: | :---: | :---: | :---: |
| COMMENTARY: |  |  |  |  |



PART 15-CONTRACTING BY NEGOTIATION


Subpart 15.7 - MAKE-OR-BUY PROGRAMS

Comments Due May 16, 1980

Column 2 Codes
$\checkmark \quad D A R$ and $F P R$ language identical (verbatim).
AV Language almost verbatim (only minor grammatical or sequential variances between $D A R$ and $F P R$ ).

SS Language substantially the same, with no substantive difference between DAR and FPR treatment.

D Corresponding language in DAR and FPR different in intent or effect.

NAE No DAR equivalent for $F P R$ coverage.
NFE No FPR equivalent for DAR coverage.

## Column 2 or 4 Codes

OS To be omitted from FAR (recommend including in agency implementing or supplementing publications).

OU To be omitted from FAR as unnecessary.
MR Material to be relocated in FAR (cite new location).

## Column 4 Codes

R Current DAR/FPR language substantially rewritten to conform to OFPP guidelines.

NM New material not in DAR or FPR.
BA Basically DAR language.
BF Basically FPR language.
AF Combination of DAR and FPR language.




| (b) Regardless of the type of contract contemplated, information with respect to prospective contractors' make-or-buy programs abal be required in all negotiated procuraments excrpt: <br> (i) when a proposed contraci has a total estimated value of less than \$1.000.000, unless the contracting officer apecifically determines that such information in appropriate; <br> (ii) in research and development contracts, unleas the contract in for prototypes or hardware and it can reasonably be anticipated that argnilleant follow-on quantities of the product will be procured: <br> (iil) when the contracting officer determines that the price is based on adequate price competition, or established catalog or market prices of commerchal iteras sold in substantial quantities to the general pubiic, or on prices set by taw or regulation; or <br> (iv) when the contracting officst delermines that the work is not complex. <br> (c) Information with respect to make-or-byy programs and the program required to be included in any contract (see 3-902.4) shall be confined to items which, becaue of theiz complexity, quantity, or eist or because their production requires addutional facilities, nomally would requre company management review of the make-ordbuy decision. As a general guideline, the make or buy programs should not include items or work efforts cosing less than $1 \%$ of the total estimated contract price of 3500,000 , whichever in lest Raw materials and off. the-shelf itcms shall not be included. | 3. FEDERAL PROCURENENT <br> 1-3.902-1 (cont.) $\qquad$ (b) (1) Whare the neturs of the pro- <br>  tre or is othersur prosram to approphithe prospective contractor thall be ret bu" prosram. worther with sismelent ror evaluation of zueh furteryin in atmer of (1) $1-3.002+1$ is are periment <br> (2) At the time a request for prohail request potenttel muppliers to furr. negotitted procurameats exceptian other$10 \rightarrow 3.502-1 \mathrm{bs}$. (3) A "make-or-bus" broyram will not hemanfed when an propowd corntrat 1.000.000 unjest the cantracting ofincer mex propren is :ppropristo <br> (4) Researich and dicvelopment sonthacts art exernp frox the provisiony of antuchistiod that fliligy-an oumatitles of <br> (5) A "mize-orabuy" procrame will not <br>  <br> (0) The occtrector will be informed <br>  cerve of thatr eompliextry, quantity, oopt or requlrematit for additional Covernment fectillites, bormalis would require conpany mintitement revibew of the or "olf-the-altert" Items will zot bits coryurated in a "make-0r-buy" procrann unless thetr potential inapact on wach their inclundon necessary. | Code ${ }_{\text {code }}$ | 5. FEDERAL ACQUISITYON REGULATION (FAR) <br> 15.703 Acquisitions requiring make-or-buy programs. <br> (a) Contracting officers shall reguire prospective contractors to submit make-or-buy programs for all negotiated acquisitions with an estimated value of $\$ 1$ million or more, except when the proposed contract-- <br> (1) Is for research or development not reguiring prototypes or hardware, and no significant follow-on production is anticipated; <br> (2) Is to be awarded on the basis of adequate psice competition, prices set by jay or regulation, or established catalog or market prices of comnercial items sold in substantial quantities to the general public; of <br> (3) Involves only york that the contracting officer determines is not complex. <br> (b) Contracting officers may require prospective contiactors to submit make-or-buy programs for negotiated acquisitions with an estimated value under $\$ 1$ million only if the contracting officer (1) determines that the information is necessary and (2) docments the reasons in the contract file. <br> 15.704 Items and work included. <br> The information required from a frospective contractor in a make-or-buy program shall be confined to those major items or vorix efforts that woula normaliy require company management review of the make-or-bay agcision because they are complex, costly, needed in large quantities, or require adational facilities to produce. Ray materials and off-the-shelf items shall not be included, unless their potential umpact on contract cost or schedule is critical. Hake-or-buy programs should not normally fnclude items or york efforts estimated to cost less than (a) 1 percent of the total estimated contract price or (b) any minimum dollar amount set by the agency, whichever is less. |
| :---: | :---: | :---: | :---: |
| COMMENTARY: <br> 1. Consistent with the goal of reducing paperwork and to avoid unneccessacy submissions and evaiuations of make-cFbuy programs, FAR 15.703 (b) has been rewritten from Dar 3$902.2(b)$ (i) to more actively discourage reguifemente for make-or-buy programs for acguisitions under $\$ 1$ million. |  |  |  |








15.807 Prenegotiation objectives.
(a) The process of determining prenegotiation objectives helps the contracting officer judge the overall reasonableness of proposed prices and negotiate a fair and reasonable price or cost and fee. In setting the prenegotiation objectives, the contracting officer shall analyze the offeror's proposal, taking into account the field pricing report, the audit, the technical evaluations, and other pertinent data such as independent Government cost estimates and price histories.
(b) When a contract or modification involves price negotiation, the contracting officer shall write a prenegotiation objectives memorandum. The scope and depth of the memorandum should be directly related to the dollar value, importance, and complexity of the proposed contract or modification. When cost analysis is required under 15. $805=1$, the prenegotiation objectives memorandum shall include (1) the pertinent issues to be negotiated, (2). maximum and minimum cost objectives and (3) profit or fee objectives (see 15.806-3).
(c) A profit or fee objective is directly affected by the Government's cost objective and proposed pricing arrangement. Because the profit or fee is only one of several interrelated variables, the contracting officer shall not agree on a profit or fee without concurrent agreement on cost and type of contract. Specific agreement on the exact values or weightswassigned to individual profit factors (see $15.806-4$ ) is not required and should not be attempted.
15.806 Profit.
15.806-1 General.
15.806-2 Agency responsibilities.
15.806-3 Contracting officer responsibilities.
15.806-4 Structured approach to profit analysis.
15.806-5 Weighted-guidelines example.

### 15.806-1 General.

(a) It is in the Government's interest to offer contractors profit opportunities sufficient to (1) stimulate efficient contract performance, (2) attract the best capabilities of qualified large and small business concerns to Government contracts, and (3) maintain a viable industrial base.
(b) During contract performance, contractors may incur costs, such as interest, that the Government does not recognize as allowable. In addition, actual costs may vary from estimated costs, particularly in high-technology, complex work. Therefore, earned profit may differ from negotiated profit or fee. In the long term, earned profit from Government contracts must be comparable with return from other investment opportunities involving similar risks.
(c) Both the Government and contractors should be concerned with profit as a motivator of efficient and effective contract performance. Negotiation of extremely low profits, use of historical averages, or automatic application of predetermined percentages to total estimated costs do not provide proper motivation for contract performance. Negotiations aimed merely at reducing prices by reducing profit, without proper recognition of the function of profit, are not in the Government's best interest.
(d) Structured approaches for determining profit or fee objectives provide a discipline for consideration of all relevant factors. They shall be used whenever practical to fit the profit or fee objective to the circumstances of the particular contract.-
15.806-2 Agency responsibilities.:
(a) Each agency shall develop a structured approach for determining the profit or fee portion of the Government prenegotiation objective in acquisitions for which 15.805-1 requires cost analysis. Each agency's approach shall contain the minimum elements at 15.806-4 (a) $: \cdots$ In determining the total composition-of its approach, the agency shall. consider its mission and the market environment from which it draws its sources of supplies and services.: The agency's implementation of its approach may include specific exemptions for situations in which mandatory use would be clearly inappropriate. Instead of independently establishing its own procedures, an agency may adopt another agency's procedures.
(b) The structured approach an agency adopts shall allow the tailoring of profit on an individual contract to fit the particular circumstances of that contract. Regardless of the result achieved using a structured approach, agencies shall not require acceptance of an overall profit or fee objective higher than that proposed.by the prospective contractor. Agencies shall not establish or imply administrative ceilings on profit or fee.
(c) Agencies that recognize facilities capital cost of money as an allowable cost shall ensure that their structured approach specifically takes this imputed cost into account when calculating the profit or fee objective. When an agency allows facilities capital cost of money and the proposed contract is exempt from use of the structured approach, the agency shall require that an amount equal to the amount of the imputed cost, if any, included in the prenegotiation cost objective be deducted from the prenegotiation objective for profit or fee. (See 31.205-46 for the allowability of facilities capital cost of money.)
(d) Each agency shall (1) accumulate and analyze data on proposed, objective, and negotiated profits or fees and costs in order to ascertain whether or not its structured. approach is stimulating contractors to more efficient contract performance and (2) make any necessary changes in its approach, in accordance with Subpart 1.3.
15.806-3 Contracting officer responsibilities.
(a) When the price negotiation is not based on cost analysis (see 15.805-1), contracting officers are not required to analyze profit.
(b) When the price negotiation is based on cost analysis, contracting officers shall analyze profit using their agency's structured approach; except as specifically exempted by the agency under 15:806-2 (a). . When not-using a-s structured approach, = contracting officers shall, as a minimum, consider the factors in 15.806-4 (a) in developing profit or fee objectives.
(c) Contracting officers shall use the Government cost objective amounts, rather than the prospective contractor's. proposed amounts, as the basis for calculating the profit or fee objectives. The amounts for the separate-factors should be totaled to determine the Government profit or fee objective. The percentage relationship between profit or fee and cost may then be computed; if necessary, to determine compliance with statutory or regulatory limitations.
(d) The contracting officer shall not negotiate a profit or fee that exceeds any statutory or regulatory limitations.

The following limitations are imposed by 10 U.S.C. 2306 (d) and 41 U.S.C. 254 (b) on cost-plus-fixed-fee contracts and by this regulation on cost-plus-incentive-fee and cost-plus-award-fee contracts:
(1) For experimental, developmental, or research work--the fee shall not exceed 15 percent of the contract's estimated
(2) For architect-engineer services for public works or utilities--the estimated cost and fee of the architectengineer services contract shall not exceed 6 percent of the fees.
(3) For other contracts--the fee shall not exceed 10 percent of the contract's estimated cost, excluding fee.
(e) contracting officers shall allow offerors to subinit details of their profit proposals, but shall not require them to do so.
(f) If a change or modification (1) calls for essentially the same type of work as the basic contract and (2) is of relatively small dollar value compared to the total contract value, the contracting officer may omit application of the agency's structured approach and use the same profit rate used on the basic contract.

### 15.806-4 Structured approach to profit analysis.

(a) Minimum elements. Each agency shall include the factors outlined in subparagraphs (1) through (3) below, as a minimum, in its structured approach to profit analysis:
(1) Contractor effort. This factor measures the complexity of the work and the resources required prospective contractor for effective Greater profit opportunity should be contract performance: ..................... contracts requiring a high degree of provided under managerial skill and to prospective cofossional and managerial skill and to prospective contractors whose skills, facilities, and technical assets will lead to effective contract performance. Subfactors (i) through (iv) effort, but thall be considered in determining contractor -accommodate differences indified in specific situations to prospective contractors for the categories used.by
(i) Material acquisition. This subfactor measures the managerial and technical effort needed to obtain the required purchased parts and material, subcontracted items, and special tooling. Considerations include. (A) the complexity of the items required. (B) the number of purchas orders and subcontracts to be awarded and administered; (C)
whether established sources are available or new or second sources must be developed, and (D) whether material will be obtained through routine purchase orders or through detailed subcontracts requiring development of complex specifications. Profit consideration should correspond to the managerial and technical effort. involved.
(ii) Conversion direct labor. This subfactor measures the contribution of direct engineering, manufacturing, and other labor to converting the raw materials, data, and subcontracted items into the contract items. Considerations include the diversity of engineering, scientific, and manufacturing labor skills required, the prospective contractor's ability to meet these requirements precisely, and the amount and quality of supervision and coordination needed to perform the contract task.
(iii) Conversion-related indirect costs. This subfactor measures how much the indirect costs contribute to contract performance. The allocable labor elements should be given the profit consideration they would receive if treated as direct labor. The other elements of indirect cost should be evaluated to determine whether they are routine expenses (such as utilities, maintenance, and depreciation) meriting lesser profit consideration or instead are elements contributing significantly to the proposed contract.
(iv) General mangement. This subfactor measures the prospective contractor's other indirect costs and general and administrative (G\&A) expense, their composition, and how much they contribute to contract performance. Considerations include (A) how labor in the overhead pools. would be treated if it were direct labor, (B) whether elements within the pools are routine expenses (such as utilities, maintenance, and depreciation) or instead are elements contributing significantly to the proposed. contract, and (C) whether the elements require routine as opposed to unusual managerial effort and attention:
(2) Contract cost risk. This factor measures the degree $\therefore \therefore$ of cost responsibility and associated risk that the prospective contractor will assume (i) as a result of the contract type contemplated and (ii) considering the reliability of the cost estimate in relation to the complexity of the contract task. Determination of contract............... type should be closely related to the risks involved intimely, cost-effective, and efficient performance.-. This - .... : : factor should compensate contractors for assuming greater . cost risks. The contractor assumes the greatest cost risk in a closely priced firm-fixed-price contract, under which-s it agrees to perform the task correctly; on time, and at a predetermined price. The contractor assumes the least risk in a cost-plus-fixed-fee contract, under which it agrees only to use its best efforts to perform the task, for which
it is to be reimbursed for actual costs. In evaluating assumption of cost risk, agencies shall, except in unusual circumstances, treat time-and-materials, labor-hour, and level-of-effort contracts as cost-plus-fixed-fee contracts.
(3) Federal socioeconomic programs. This factor measures the degree of support given by the prospective contractor to Federal socioeconomic programs, such as those involving small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, labor surplus areas, and energy conservation.
(b) Additional factors. An agency may include additional factors in its structured approach. Examples are as follows:
(1) Facilities. This factor, which may be a negative as well as a positive consideration, measures the amount of contractor-financed investment in the facilities requixed for the contemplated contract. Subfactors include consideration of the facilities' age, undepreciated value, cost-effectiveness, general or special purpose, and remaining life compared with the length of the contemplated program, as well as any special contract provisions that will affect the contractor's risk.
(2) Cost-control accomplishments. This factor allows additional profit opportunities to a prospective contractor that has demonstrated improvements in productivity or other cost-reduction accomplishmentsuresulting in lower costs to the Government. For example, the factor may be a special "productivity reward" to mitigate the loss of profit opportunity on follow-on contracts when costs on earlier contracts are reduced as a result of productivity gains or other cost-avoidance measures.
(3) Independent development:- This factor rewards contractors that, without Government financial assistance, develop items having potential Government applications. The. $\therefore$ contracting officer may reward the prospective contractor with additional profit for independent development if the $=$ a Government (i) has not already paid for it as an independent research and development cost allocated to other Government contracts and. (ii) will not recognize it as an allowable.....: cost under the contract being negotiated (see 31.205-6):

### 15.806-5 Weighted-guidelines example,

The following example is a general description of one possible structured approach to profit analysis using $\quad \cdots \quad, \quad, \quad$ weighted guidelines. This weighted-guidelines example. . . includes all the minimum elements at 15.-806-4 (a). Agencies may add additional factors designed to make the approach
responsive to the agency's mission and to the environment from which the agency draws its suppliers:

| WEIGHTED-GUIDELINES PROFIT/FEE OBJECTIVE |  |  |  |  |
| :---: | :---: | :---: | :---: | :---: |
| 1. CONTRACTOR EFFORT |  |  |  |  |
| COST CATEGORY | GOVERNMENT'S COST OBJECTIVE <br> a | WEIGHT RANGE b | ASSIGNED WEIGHT c | WEIGHTEX PROFIT/FEE (Col. $a \times c$ ) d |
| Material Acquisition Purchased Parts | \$ | ( ) \% to ()\% | 8 | \$ |
| Subcontracted Items |  | ( ) \% to ( ) \% | \% |  |
| Other Materials |  | () \% to () \% | \% |  |
| Engr. Dixect Labor |  | ( ) \% to ( ) \% | 8 |  |
| Engr. Indirect costs |  | ( ) \% to ( ) \% | \% |  |
| Mfg. Direct Labor |  | ( ) \% to ( ) \% | $\%$ |  |
| Mfg. Indirect Costs |  | ( )\% to (1) | \% |  |
| Other costs |  |  | \% |  |
|  |  |  | 3 |  |
|  | , |  | \% |  |
|  |  |  | 8 |  |
|  |  |  | \% |  |
| General Management |  | ( ) \% to ( $) \%$ | $\%$ |  |
| toral | \$? | 'xxyxxxxxyxxxx | xxxxxxxxxxxxxx | \$ |
| 2. | OTHER FACTORS |  | . $-\cdots$ | Xxxxxxixxxxxix |
|  | MFASUREMENT BASE | WEIGHT R RANGE | $\begin{gathered} \text { ASSIGNED WEIGHT } \\ c \\ \hline \end{gathered}$ | $\begin{aligned} & \text { WEIGHTED PROFIT/FEE } \\ & \quad(\text { Col. } \mathrm{a} \times \mathrm{c}) \mathrm{d} \\ & \hline \end{aligned}$ |
| A. Cost Risk | \$ | ( ) \% to ( ) \% | 8 | \$ |
| B. Socioeconomic Programs | \$ | ( ) \% to ( ) \% | 8 |  |
| C. (Additional Factor) | \$ | ( ) \% to ( )\% | 8 |  |
| D. (Additional Factor) :-: | \$ $\quad=\quad \vdots=$ | ( ) \% to ( ) \% | 8 | $=$ |
| $3 . \quad \therefore$ TOTAL | IT/FEE OBJECTIVE (Su | of col. ${ }^{\text {d) }}$ - |  | \$ |

(a) In Part 1, Contractor Effort, the agency provides the specific percentage weight ranges in column 1.b for each cost category. The contracting officer selects a specific percentage weight (column 1.c) from within the available range and applies it to the Government's cost objective (column 1.a) for that cost category:
(b) The agency identifies and lists additional factors, if any, to be considered in Part 2, Other Factors, and provides an appropriate weight range (column 2.b) and measurement base (column 2.a) for each factor in part 2. The contracting officer selects a specific weight (column 2.c) from within the available range and applies it to the measurement base for that factor.
(c) After the contracting officer calculates the dollar amount of profit for each item in Part 1, Contractor Effort, these amounts (column 1.d) are totaled and added to the dollar amounts assigned for Part 2 (column 2.d) to arrive at the profit or fee prenegotiation objective (column 3.d).
31.205-46 Facilities capital cost of money.
(a) Facilities capital cost of money is an imputed cost determined by applying a cost of money rate to facilities capital employed in support of Government contracts. A cost of money rate is derived from a common source and uniformly imputed to all contractors. Capitai employed is determined without regard to whether its source is equity or borrowed capital. The resulting cost of money is not a form of interest on borrowings.
(b) Facilities capital cost of money is allowable only when--
(1) The agency has promulgated a cost principle specifically allowing it;
(2) The contracting officer has incorporated the agency's cost principle into the contract;
(3) The contractor's capital investment is measured and allocated in accordance with cost Accounting Standard (CAS) 414, Cost of Money as an Element of the cost of Facilities Capital; and
(4) The contractor maintains adequate records to demonstrate compliance with CAS 414.
(c) The facilities capital cost of money need not be entered on the contractor's books of account. However, the contractor shall (1) make a memorandum entry of the cost and (2) maintain, in a manner that permits audit and verification, all relevant schedules, cost data, and other data necessary to support the entry fully.
(d) Facilities capital cost of money that is (1) allowable under paragraph (b) above and (2) calculated, allocated, and documented in accordance with this cost principle: shall bean "incurred cost" for reimbursement purposes under applicable cost-reimbursement contracts and for progress payment purposes under fixed-price contracts.
(e) When facilities capital cost of money is allowable under paragraph (b) above but the offeror does not-identify or propose the cost in its proposal, no such cost will be allowed under the resulting contract:-...... =-

FEDERAL ACQUISITION REGULATION (FAR)

PART 15 - CONTRACTING BY NEGOTIATION

Subpart 15.8 - Price Negotiation

Comments Due February 17, 1982

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Column 2 Codes
    V DAR and FPR language identical (verbatim).
    AV Language almost verbatim (only minor grammatical
        or sequential variances between DAR and FPR).
    SS Language substantially the same, with no substantive
        difference between DAR and FPR treatment.
    D Corresponding language in DAR and FPR different in
        intent or effect.
NAE No DAR equivalent for FPR coverage.
NFE NO FPR equivalent for DAR coverage.
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## Column 2 or 4 Codes

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OS To be omitted from FAR (recommend including in agency implementing or supplementing publications).
OU To be omitted from FAR as unnecessary.
MR Material to be relocated in FAR (cite new location).
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## Column 4 Codes

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R Current DAR/FPR language substantially rewritten to conform to OFPP guidelines.
NM New material not in DAR or FPR.
BA Basically DAR language.
BF Basically FPR language.
AF Combination of DAR and FPR language.
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| 1. PEFENSE ACQUISITION REGULATION (DAB/ASPR) <br> 3-809 Comaract Audih as a Praing Aid .. ..... ... . . .... ..... <br> 3-810 Exchatge of faformation .... <br> 3-8, I Fecord of Price Nigothinon <br> 3-812 Dispmation of Post Aurad Audits. <br> 3. 813 Pieproduction and Startup and Ohher Nonecurring Costs ...... <br>  <br> 3-815 Capital Invescrant tocettsves. <br> 7-104.2s Price Reduction for Defrctive Cost of Priting Daw <br> 7-104.42 5ubrontracter Cost of Pricsing Data, <br> 1-337 Showld Cost ..... ......... .................... . ...... ...... .......... |  | 3. FEDERAL PROCUREMENT REGULATTONS FPRI <br>  <br>  Sun |  | SUEPART 15.8--PRICE NEGCTIATION <br> table of contents <br> 15.800 <br> 15.801 <br> 15. 802 <br> 15.803 <br> 15.804 <br> 15.804-9 <br> $15.804-2$ $15.804-3$ <br> 15. 804-4 <br> 15.804-5 <br> $15.804-1$ <br> 15.804-8 <br> 15.805 <br> 15. $895-1$ <br> $15.805-2$ <br> 15.805-3 <br> $15.805-4$ $15.805-5$ <br> 15. 806 <br> 15.807 <br> 15. 808 <br> 15.809 <br> 15.810 <br> 15.641 <br> Scope of subpart. <br> Definitions. <br> policy. <br> General. <br> ces or pricing aata. feneral. <br> hequiring centifica coot or prieing data. Exemptions from or walver of submasion <br> of certified cost or gricin data. Certificate of Curzent Cost ox Pricing Data. procedurai reqqiremencs. <br> jefective cost of pricing data. <br> proposal analysis. <br> General. <br> Price analysis. <br> tecmical analysas. <br> Audit report and field pelcing report. subcontract pricing considerations, prenegotiation objectives. <br> Price misgotiation memorandm. <br> forward pricing rate agreenenta. <br> Estimating systems. |
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|  | $v$ |  | MR |  |
|  | N $*$ \% |  | OLC | 15.803 |
| hatl nol, however, transfer his own responsibilties to them. Thus, determination He fetponsibility of the contracting officer. | $v$ |  | 1 |  <br>  <br>  |
| ( and su 3-80t.2(d, p.7) |  |  | 1 | objective. The contracting officer is fegiconsiple for xerchsang the reguisite judgment and is solely responsible for the final pricing decision. mhe recommendations and counsel of contributing specaalists, including auditors, are lnclude comments in the price negotiation memorancuan when not adopted. |
|  | NFE |  | me. | (Lee 15.8108a, p. 9.9 |
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| 1. DEFENSE ACOUISITION REGULATION (DAR/ASPR) <br> The advice and assistance of the price analystinegotiator should always be obtamed when complex pricing lechniques are indinated, including the ure of com tract types involving the shilfut baldnetag of price, cost and performance ineertuve amtagements the price negonation. <br> In many instances, he will be in the best patition to conduct <br> 3-kof.5 Responsimitsy of Fiche Pricong Support Persuntat. <br> (d) Futd fracity Supporl. Fucld pricing suppori involves analysis of the con. tractor's price propesal by any or all of the fiets ieshanest and profcssional spechatsts meluding, but not lumited to, the Plant RapiACO, conlract pudibor, price <br>  pating support. Therefore the PCO shall send all requests for field pricing support to the cognizant field contract administration activity, generally, the Ptant Olfcer (ACO) for DCAS(DSA). Howevet, there shall be no consiraints on the hanes of commumeation with the PCOFACO and contrast auditor interface <br> (b) Ficld Pricing Reperts on Comaract Frice Propasals. <br> (1) Prior to negotiation of a contratt of modification resultang from a propostat in exess of 5100,000 for firm fixed price and fixed price with provision for econonse price adjustoent, fixed price redeterminable (prospective), theand materials, or labor hour type of concract, interin and finsi price redetermination and settlewent of incentive types; $\$ 250,000$ for fixed price incentive. cost plus incentive tee or Eixed price redeterminabla (retroscifve) type of contract; oz $\$ 500,000$ for cost refmbursement, coet sharing, cent piug \#ward fan, or cost plus If fixed fee type of concrack, when the price is bsed on cost or pricing data ( $3-807,3$ ) subitted by the contractor, the contracting offifield pricing report (which usually inciudes an audit reyiew by the concract audit acrivity), |  | 3. FEDERAL PROCUREMENT REGULATEOSS KEB/ <br> $1-3.801 .3(b)(2)$ <br> dis conolicartini and rantualite the <br>  in ecanyderation of. but not lind ped to. <br>  <br>  <br>  ablenest of seted and spothete factors kesin mombers knowiodet of production gutity wontroi, Fngineering ind minv: facturlns proclises and tedminues and <br>  krice-hore" fovertment ptoperty <br>  1o the prective pit the fpective prospec; tive contriethe. $(\sec 1-3.801-3(6 \times 2), p .8)$ <br>  prite prop ani (i) The emiretine the contrect sudit xututy in exor. Sence wity hit preysen thitait nefrtiat inn of $A T y$ contrsect or modirl. extes of tip <br>  when the price ts onsed in cas or pric. <br>  prowa atilamed cosis of satizetim. <br>  <br>  montrie upeth farmp. 7\%) |  | $\begin{aligned} & (\text { See } 15.8051(a, p .84) \\ & (\text { See } 15.801, p .2) \\ & (\text { See } 15.805-5(a)(3), p .87) \\ & (\text { See } 15.805-5(c), p .88) \end{aligned}$ <br> (See 15.805-5 (a), p. 87) |
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| Commentary; 11. cetanis of cost malysis age coverea at 15.gas-3. <br> 12. The turfoholig ware changed ly DAC 76-26 tuech 15 <br>  <br>  |  |  |  |  |






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| 1. DEFENSE ACQUISITION REGULATION (DAR/ASPR) | $\begin{gathered} 2 \\ \cos \theta \end{gathered}$ |  | Code | 5. FEDERAL ACQUISITION REGULATION (FAR) |
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|  | 1 |  <br>  <br>  | ML | i 6, 15.803(d), p.5, ink.t $15.808(a)(7), p .92$ |
|  | $v$ |  <br>  metaling. | 18 | $\therefore$ Air $15.305(1 \times 1, p .84)$ |
|  <br> (9) Duting the courte of the examination, the Plont RepiACO and the avditor thall each confer with the conttactor to fully understard the baass for each item in the coniractor's propossil and to remove Eny dowist st to the valditity ynd eccuracy of their conclusions and findinge. Before tuch discusionat are conpancies noted in their examinations involvine coall of pricing data as defined under $3-807.3(\mathrm{c})$. | ${ }^{D}$ |  | $00^{17}$ |  |
| 17. The fiejref of discussion necessary among the tco, duditor, and contractor in order to achseys an adequate und $\because$ sstanang of the proposal ie a mattex of judgment and frofessionalism and net not pe regulaten. |  |  |  |  |


| 1. DEFENSE ACQUISITTON REGULATION (DAR/ASPR) $3.8015(6)$ <br> (10) The auditot, as part of his report, shall sel forth the bass and method used by the contractor in preparing his proposal. Also, the report shatl clearly tdentify the contractor's ortgnai proposal and anl swbsequent witten formal subtdentify the contractor's orgmai proposal and adi subsequent witten formal tub- mussons to the contracting officer or to the audior by which cost or pricing data was furnished or idenufed by the contractor (zee $3-6073(d))$ In addution, cosst or prictry data not submatred by the contractor but otherwise coming to the audrtor which have a significant effect on the proposed cost or price shall also be described in the mivisory audre report. If the audicor conaders that the cost or pricung data submitted by the contractor are not nccurate, complete and current, or that coss represeniations are unłupported, this informatoon will be made known in his audit report. When the resulting overall effect of those deficieneses on the proposed cuat ow prica is of such magnitude that the usefulness of the cobstractor's proposal is considerably umpaited as a basis for negotation, the contractwithout delay. The above $1 s$ nor intended wo relieve the conuractor of his obligztoan to submit accurate, comphiate and current cost or pricing datia <br> (if) Repors of technical snalycir and review should be futnithed to the audior at the cartiest possible date and at least five days prior to the due date of findinge in the audit report (for exumple, the necessary compuations of dolliw smounts arsing from changes in proposed kinds and quantities of materals, libior tours, etc ) fin the event the technical analyzes sere not zvaikabic on what be made known to the Plans Rep/ACO so that commenta may be incerporated in mitaubmission to the PCO. If technical analyses are received later by the audator, be shail issue a suppiementaf report if the staus of the negotiatuon is such shat a report would serve a useful purpose. The onginal of alt technical reports recrived by the auditor shall be made a parf of the audit report submited to the Plant RepiACO. <br> (12) If in the opinion of the PCO, Plant Rep/ACO, or auditor, the ravew of a prime suntractor's propomal iequinas furtior review of subconiraciors cor estimated at the subcontractors plants (ufter due considerfity coordinated with the Plant RepiACO having cognizance of the prime contractor before being initated. It a review is required of a subcontract propoatal. the prime Plant copy to the subcontract suditor. In the event a lower tiet wbeontrect proposal requires review, the requoat thould be coordinated in sequence with the Plank includta any audiz tports thall be forwarded by the wibcontract Plant Rep/ACO to the prine Plant Rep/ACO wih an information copy to the prime ay- <br>  | An ${ }_{\text {code }}$ |  |  | 5. FEDERAL ACOUYSITION REGULATYON (FAR) <br>  <br> $(\operatorname{sic} 15.805-3(e), 080)$ <br>  <br>  <br> (ix A.s.en-5(i) for 89) |
| :---: | :---: | :---: | :---: | :---: |
| COMMENTARY: |  |  |  |  |



I. DEPENSEACQUTSITIOS REGURTION (DAR/ASPRI,

| 1. DEFENSE ACQUISITION REGULATION (DAR/ASPR) |  | code <br> 1 <br> . $\cdots$ | 5. FEDERAL ACQUISITION REGULATION (FAR) |  |
| :---: | :---: | :---: | :---: | :---: |
| Commentary |  |  |  | 20 |

1. DEFENSE ACQUTSITRON REGULATION (DAR/ASPR)
2. DEEPSE ACQUISITION REGULATION (DAR/ASPR)





| 1. DEFENSE ACQUISITION REGULATION (DAR/ASPR) $=\frac{g_{1} i .1}{}$ <br> (b) Evaluation ard Pasenk of thdividual Contrarss Each contrect shall be <br>  prohrowion nether prevents the nesotiation of moirect conts and other raten apphemble to several contracts nor prohibits FPRA's appleable to several comsracts <br> (c) Spectica Contingenties When a contract is to metude a provision for ad- <br>  the contract pree should not include any amount on account of such conumgen- cy ey <br> (d) Requirement for Price of Cont Amafyas, Some form of price or cost thalyis is requited in connection with every negolited procurcacm action. The the particular procurement and priem nituation Coni analysts shall be performed when cost or pricing data afe requared to be submitted. The extent of cont analy, Sis should be that mocessary to asturt reasonabionost of the pricing retulh, taking anatysis shatl be used in all other instances to decemine the reasomabieness of the proposed contract price. Normally, a tound constusion af to value eannot be apuce atrived at by cont analyas should be cotroborated through prise analysif technoques cekniquc* | AV ${ }_{\text {code }}$ |  |  |  |
| :---: | :---: | :---: | :---: | :---: |
| COMmentary: |  |  |  |  |



| 1. DEEENSE ACOUTSITION REGULATYON (DAR/ASPR) | code | 3. FEDERAL PROCUREMENT | ${ }_{\text {cose }}^{\text {code }}$ | 5. Emeral acoutsition regulation (FAB) |
| :---: | :---: | :---: | :---: | :---: |
| $\left(4\right.$ 3 $3-807.7(6) p^{0.54)}$ | SS |  | MR | (1ee 15,804.36d, 37 37, and (0).p.39) |
| (Ber $3.807 .7(6) /(4) 4, p .56)$ | ss |  | MR | (Lee 15.804-3(c)(1), p. 377 |
| (dee 3-801.7(b)(2)6., .56 ) | Av |  | Me | (Ler 15.804-3(c)(21). ${ }^{37}$ |
| (Sae 3-807.7(0)(2)c.,p, 50) | AV |  | MR | (4ea $15.804-3(c \times 3) . p .38)$ |
| (Sue 3-807.7(b)(2)d.(i), p. 56) | SS |  | MR | (See 15.804-3(c)(t) p. 38 ) |
| (dee 3-807.7(b)(2) e.,pi 57) | SS |  | MR. | (Lee 15.804-3(c)(5), p, 38) |
| commentarys |  |  |  |  |



| 1. DEFEMSE ACOUSSITIOM REGULATION (DAR/ASPR) $(\operatorname{den} 3.867 .1(a)(2), 4,38)$ | $\begin{gathered} 2 \\ \text { code } \\ \text { iv } \end{gathered}$ | 3. FEDERAL PROCUREMENT 13.3072 <br>  <br>  propoast prott of the todlediut prot valumitel | $\begin{aligned} & \text { code } \\ & \text { cill } \end{aligned}$ | 5. FEDERAL ACQUISITION REGULATION (FAR) |
| :---: | :---: | :---: | :---: | :---: |
| 3-807.2 Price Analysus and Coss Anatysus Technquar. <br> (a) Prsee anslyns thay be accomplished on varrous way meludins' <br> (1) the comparson of the price quotations subraitted. <br> (2) the compaftion of prior quatalions and contract prices with curremt quotations for the wame or atmilar and-isme fto provide a suitable bassif for contpaptson, appropriate allowances mast be made for differencet in such fatots at <br>  production efficiency: ti muat aloo be tecognazed that such comparison may not detect in unreasonabie current quotation unless the reasonableness of the proor proces was estabilshed and uniess changes in the general level of busmess and prices have been comadered). <br> (3) the use of parametric felatonthip memsurements or rough yardsticki (such as dollart per pound, per horscopower, or other unats), to pount up apparent efoss inconststencies which should be subjected to greater priciag mquify, <br> (4) the comparison of prucet set forth in publthed price lists wsued on : competitive basks, publuhed market prices of commodtives and similar udicia. together with discount or tebate arrangements, and <br> (5) the comparison of proposed prices with estamatel of cost undependenily developed by the Government <br> (the 3.807. $1(4 \times 3)$, 426 ) | AV |  <br>  Tist Ibe cemprtan of priar woin: <br>  manartive mate propitic mownancit <br>  furniphef moterfels, find prperteness irends at tropertersent is pruduction efoeioncift th must also be recogrized ind <br>  <br>  <br>  <br>  <br>  thy onp comperivon of pricer ort competittve tasha, publidhed therkel blebs, tofether with slacount or ribyl <br>  (7) That comberion ef probita ently develeped by permonnel withta tht ta) Frif chatryid seemenques shoutd be and to eupport or ningple. <br> (3) Tast analysit (1) Cost maryats <br>  tppiled Gx projectins tran the dace is <br>  <br>  - | MR <br>  <br> MR |  |
| COMMENTARY: |  |  |  |  |



| 1. DEEENSE ACQUISITION REGULATION (DAR/ASPR) |  | 3. FEDERAL PROCUREMENT REGUZATIOKS (FPR) <br> 1-3.807-2 <br> (d) Ansned Soticut Procurcmont <br>  edition) wall isured by the Dupartmeat of Drimene is penjuberon will the Dofigne Acquitition Regulatlos (DAR) <br>  pripest, ASPM Na. 1 contains inetructional muteritl that is boped oo poliopen equasind to the DAR (locronity <br>  application of pricine polliciae to pricing problems. Nepa of the anderint <br>  tralining Pipponer <br> excepliotat the DAPic. with nume contruct prictut and pegotistion Accorifingily ASFM Na. 1 Ly prageribed guidenot puxposes. flowevers, it io not to be ornaldared directive, and reforeacts. and reguiatione firould be tratide as utictly Inlormetional [I] Caphen of ASPM <br> Copar AnM Na 1 (siock Na prom-c00-0uzs the superintany be perchased Ationtion Mall Lint Sectioe, US. Wavammat Pinding Off |  | 5. FEDERAL ACQUISITION REGULATION (FAR) <br> 15.804 Cost ar بrtering data. <br> 15.804-1 3eneral. <br> (a) Cost or pricing Aata surmitted bf ar offeror or oontructor fiable thi soverimerit to perfon cost dnal fols and ultzmately viole the Javernment and the contractor to nogotzaze fair anh rasonable yices. Cortractors an subcontractors may ke requires to summit rost or oricing <br>  uncertitied (see 15.804-5). <br> (b) The Armai services Procarement Regilation Yanazi for Contract Pricina (ASPM No. if was issudd th the zepartment of Defense to qusge pricing anj negotiating uersonnia, it provides detailed discussions and examplea afplung pricing policies to jricing problens. ASPY No, 12 preocrabed for use for instruction and professional qui innce. sowever, it is not directive, and its references to 2 oistinamt ot <br>  informatronal oniy. Coples of 4 Spy mo. 1 (Stoct yo. job-000-00221-51 may we yurclasea frofr the iv armeten itnt of bocuments, Attn: hal List ssetior, 11.5. Fovernment prantare office, wash1ngton, of 20402. |
| :---: | :---: | :---: | :---: | :---: |
| 30. This provides a sumary introduction to the subject of cost or fricing diata. |  |  |  |  |


| 1. DERENSE ACQUISITION REGULATION (DAR/ASPR) <br> 3-807.3 Ruquitrement for Cand or Pring Daza <br> (s) When mppropriate, the contrachint officer thall requite the contractor to submis. cither actually or by specific identification in wruing, con of pricins dats in wupport of hil propotal. The contrating offiser also thall require the contractor, in circumstancet specified in (b) below, to certify, using the certificate set forth in $3-807.6$, that the coti or pricing dain aubmbited are acfurste, complete. and current. Cont or prictig diat shall noil be req̧uiced merely in anticepation of post-award review of the contract. <br> (b) Cost of pricing data are required an part of a proposal leading to, and certhication to required prion to: <br> (i) the award of any negotiated contract (except for unpriced actions wuch as Ietuer coniracts) expected to oxceed \$ 100,006 in amount <br> (a) the pricing of any modification to any formatity advertined or pegotianted contract whether or not coet or pricing data were zequired in connection with the initial pricing of the consract what the modification involves *sgregate increasen and/or daerastal the costy plus spplienble profitu expected to excerd $\$ 100,000$ (For examplic. the requirement spplier to $=\$ 30,000$ modification fesulung from a reduction of $\$ 70,000$ and an increace of $\$ 40,000$ or anoliter example, when the modification results in no charge in contract price becture there if an thereave of 5200.000 and a reduction of $\$ 200,000$. However, this requirement shall net apply when unselazed and enparstoty proed ehangex for wheh eont or pricing date would not be requiced are included in the same modrication for adminsatrative convanience.); <br> (if) the ward of may negothated contrict not expected to exceed $\$ 100.000$ ha amount, or *hy contrat moazitiention not expected to exceed $\$ 100,000$ in monat to may sontract whether or not cont ar pricing dita were required in connection with the falual pricions of cumatances wirtent such wewon: | S ${ }^{\text {codes }}$ c | 3. FEDERAL PROCUREMENT REGUEATYOMS (FPR) <br>  <br>  <br>  <br>  <br>  <br>  4 fopreplteshen sto to eortily, br the <br>  <br>  Hever and current prict tot Fourkit, apor(\#) The sotind of any netollated eon <br>  <br>  <br>  <br>  alatid pricing of the coatrial. Whes the <br>  <br>  <br>  <br>  <br>  Fort priae bocitite there is aty tocremse <br>  <br>  istu wonld mat be whitrod tre finchated <br>  $(\text { Lee } 1-3.8073(0), p, 35)$ |  | 5. FEDERAL ACQUASITION RECULATION (EAR) <br>  <br> (a) When mandatory, no fare any of the actions in subparagrauns (h) throght (4) to excopt when the hatver of exemptins in $15.804-3$ helon aboly, the contracting officer shall raure a contractor or prospective contractor to sumat and to have any subecontractoz or wrost, ct $2 v e$ supcontractor submit teither actually or ny specitic sjentif cation in writing! cost or cricing data in support of $2 t s$ proposal ant a certificate of its knowledge and belief, thesf data wete accurat f. complete, and carient as of the aste of firial airermeat on Erice (ses 15.804-4): <br> (11) The award of ary nesotiatet contract fisceut for unpriced setions such as letter contracts expectes to exceed $\$ 100,000$. <br> (2) The muaifycation of any formally advertised or negotrated contract iwhether or not cost of bricang data were initiably rajured\} when th moilfication involy increases and/or Jecreases 2 n costs plus rofits expeetez to angregate mure than $\$ 100,000$ (for example. the reflizenpic applies to a $\$ 30,000$ moditication resulthig Erom a reduction of $\$ 70,000 \mathrm{an}^{3}$ an mityeasiv of $\$ 40,000$. has refuirement does not snply when unrelated and sepazat -iy priced changes for wheh cost or pricang data would not otherwise be <br>  satue modsfration. <br> (3) The award of a subcontract at any tuer, if the contractor and each tigher tier sulcontractor have been required to furmish certified cost or priring latu, when the suboontraet as qxpseted to excsed $\$ 140,000$. <br> (4) The morification of any surcontrict coveraf Dy subparagraph (3) immediately above, when the aggrefate yrice exceed $\$ 100,000$. |
| :---: | :---: | :---: | :---: | :---: |
| COMMENTARY: 31. This material was remititen to fo <br> 8.1. 87-653 more closely. <br> 32. This point is adequately coveref |  | hordang of $-2 \text { (b). }$ |  | $3$ |



| 1. DEFENSE ACQUISITION REGULATION (DAR/ASPR) <br> 3-807. 3 <br> (e) Whet it if antictpated from the outset that there will be adequate prios compection, cont or prisima data shall not be requetied regardien of the dollar smount involved <br> If, ather cost or pricang dase were inmully requesied and reccived. it in detromimed that adetuate price competition dows anist. the date need not be certifled <br> As a general rule, cosi of pacine data thould aot be reguested when it has been determined that proposad prices art, or are baved on, <br>  tiluca to the tenorni public of are priets set by haw or refuletion <br> When, howewes, <br> dicapte the exiztence of an extablizhed catalog of market prich of commereial frems wold in tubstuntial quantities to the genetel public. the contracting officer finde that the price at not reneonible and supports such findurg by an enumeration of the facta upon which it in baxed, cost ar pricint datr may be requelted if necasunry to enablith a reasonnble prieet provided, that wach finding in approved by the Chuef of the Purchasing Othice. <br> (1) When economic price adjuatment provisons are included in competitive procuromenti, se\% ;-404 3(s). |  | 3. FEDERAL PROCUREMENT <br> [1.3.807 REGULATIONS (FPR) <br> $-3.807-3$ <br>  <br>  be irouerined tersrdies of Uhe doliur smoust ispatived <br>  Wen 14 him beet tetarraing that pron <br>  <br>  <br>  <br>  (1) Whert, iemptht the waringnear ot <br>  Wher, the contutetids ollocr findy that suen hindins ty en enumeraivod of the beta ropn Fhich is in bued orot en <br>  atril if any, miove the ecmirasting odicaf. material flocated from P. 47 <br> Uset-3.801.3(6), pa35, and (p) aboue) | code MR | 5. FEDERAL ACQUISITION REGULATION (FAR) <br> See $15.804-3(a) 6 e l o w)$ <br> (Len $15.804-4(e), 0.42)$ <br> (Lu 15.904-31a) bolow <br> (Set 15.804-3(c)(8), p. 38. <br> 15.804-3 Exemptions from or walver of submission of certified cost or pricing data. <br> (a) General. Except under the circumstances in subparagraph (c) (8) below, the contracting officer shall not require submission of certified cost or pricing data when the contracting officer determines that prices are-- <br> (1) Based on adequate price competition (see paragraph (b) below; <br> (2) Based on established catalug or market prices of commercial items sold in substantial quantities to the general public (see paragraph (c) below; or <br> (3) Set by law or regulation (see paragraph (d) below. |
| :---: | :---: | :---: | :---: | :---: |
| 33. This materiad applies oniy to e or market prices. It will not he co the material that applies solely to |  | ftaon for catalog ith the rast of emption. |  | $36$ |















| 1. DEFENSE ACQUZSITION REGULATYON (DAR/ASPR) <br> 3-107.6 Cmiduasie of Current Cost or Prielny Date. <br> (a) When a Cersticate of Cursens Cont or Priaing Date is requared, she curt tificute wh forth below manll be included in the contract fite stong with the memotandum of the negotixtion, see 3-\$11. The comirator thall be required so submut only one cernsfeate wheh ahall be wbmitred as soch an pracucrible atier afretment is resched on the contract or moditiention price. <br> centivents of cumbent cort on maciag pata. $\qquad$ <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br> (b) Betsute the cerruficele pertains to "cost or pricing data," it does not make representations at to the tecuracy of the contractor's judgment on the entmuted portion of future cosis of projections. In dons, however, apply to the dath upon which the contracsor": Judgment is based. This distinction between foct and judgreent shoubd bcectemily unbertived. <br> (c) Whenevet a Certficate of Current Con of Pricing Dath is requrred. the applicable clause in $7-104.29$ ahall be meluded in the contract. <br> (d) Athough Cosi ar Prang Data were requested in the solictation. a CerHfremba of Current Cost or Prking Data chall not be requested in connection with the awisd of any contract of any dofler value where the price megotiated is basud <br>  or texulation. | (\%ode |  | (code ${ }^{4}$ | 5. EEDERAL ACQUISITION REGUEATION (EAR) <br>  (wetr, 104.4(s, p.4又) |
| :---: | :---: | :---: | :---: | :---: |
| commemtary: |  |  |  |  |




\begin{tabular}{|c|c|c|c|c|}
\hline \begin{tabular}{l}
1. DEFENSE ACOUISITION REGULATION (DAR/ASPR) \\
(Sec 3-807. H(b), pp.t4 and 45)
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\begin{gathered}
2 . \\
\text { coode }
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3. FEDERAL PROCUREMEAT REGOLHYDNS (EPR) \\
(Sen (-3.807.3(a)(2)pp.44 and 4(3)
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code \\
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\end{tabular} \& \begin{tabular}{l}
15.804-6 \\
5. FEDERAL ACQUISITION REGULATION (FARI \\
(1) When the prospective contractor :as generality commide Wrth gubcintract cost or prieing fata feymirements,
contracting off fetr may, in excertioral cases, pxuse failure to do so for particulax sutcontrarts and smard the yrimf contract. Each such *xeuss, unlosa 11 matej to allowing afititional tire, rejuires apriowit by the chief of the contzacting offices. Yor eacn sulcoritract invalvei, the contractor,rematns orligated to oftain yrospective subcontractor cose ox prientig gata tefore act hal award of that qubconeract. For esch such subcontrict, the contracting offices shail-- \\
(1) Allow diditional time for sukmission of fata up to the date of agratment upon tiat prime contract wrice; \\
(2) Withasan tie requizement it data suhmitted are adequate to suppust the 8ubeontract sot imate; \\
(3) keserve the subcontract item sor tarure priciny; \\
(4) Constifs another cortrace typ: or \\
(5) make other arrangemantes to grovade on adezuare basis tor price agreement.
\end{tabular} \\
\hline \begin{tabular}{l}
3-807.9 Adrquale Pricy Comperilion, Catalog of Market Prikes and Prikes Set by Law or Resulation. Fot tho purpose of paragraphs \(3 \mathrm{meco7} .7\) and \(15-209.22(*)\). the terms "adequsto price competition". "estublithed antaloy or matkel priese of commetcial hems told in subataition atantities to the genaral pubits", and "pricm general suidelines. \\
(a) Adequete Price Compatiton. \\
(11 Frice sompetition extas if offors we solithed and ti) is feast two responible oftererm, (ii) who can spliafy the requifements, (fit) indepensealy contend for a contract tot be awanded to the rocponative and reaponalble offeror sutmiting the lowent evaluated price, (iv) by subatitiog priced offers responivie to the expretsed requirements of the solicitetion.
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1-9.8007-1 \\
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(matriaf ruputra frompo.25) \\
[ \(7-3.807-7(6)\) \\
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 (materal repuated from p.3g)
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$M R$ \& $($ Ses $15.8043(6), p .37)$ <br>
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\end{tabular}



| 1. DEEENSE ACQUISITION REGULAYTON (DAR/ASPR) <br> 3-807.7 <br>  Buri Oustantles to the Gertrat Pumbie. <br>  <br>  Hempt, oold in subxantial quanthigs, to the general public. Applization of thiu Ex- <br>  und $\boldsymbol{s}$ price muit moas at those conditions. <br> (2) The rollowing ertierin should be applied to determans whecther wn tiem falla wathen the scope of this exemption: <br>  vender, to cilibor pabluhed of otherwica wwifible far inspection by customers. <br>  number of buyct constiusting the zenere) public. <br>  *hich can be wbsantiated from sources indupendent of the manufacturor er ven. dor. <br>  poset, and 15 sold or traded tin the course of conducting normal buviness apera. 3ons <br> "Solt in Substantial Quantities." <br> (1) Commercial hems meet this criterion when the fecte or circump. Mances tuppor a reationsbie conclunion that he quanilibes regifor the supptice of services. Nominal quanititist, wech as models. <br>  subbiantai quanitites if they are cuitomarily provided by the <br>  cipaly fot the purpacse of providing wevet servecos. Therc mutil be <br>  | (coci |  | Mr |  |
| :---: | :---: | :---: | :---: | :---: |
| COMENTARY: |  |  |  |  |


| 1. DEFENSE ACOUSEITION REGULATION (DAR/ASPR) <br> $3 \cdot 807.7(6) / 2) d$. <br> (ii) DD Form 633-7. "Cleim for Exrenptian from Submannon of Corr Whed Cost or Proing Data,", stlabliuhes thite entegerien of when: Category A - sales to the U. S. Goverament or to conimetom for U. S. Govesnment ase; Category B - wise to the zencrai public at catiog prees, and, Cutegory C. malas to the general publoe at oher that entalog price Although subseaptial quantity cannol be defined precisely, sales to the general publie nommally are regarded as subbantial if sil ike following anioria are met-Catego- <br>  sales totat 7ST or more of the teith of Catozory 3 and $C$ nien it Category and $C$ nales total lews than 3 sfer of the toun of Casetory A. B, and C sales, or Cusejory B shite are less than 53\% of the lofal of Cauegory B and C sules. the contracting of <br>  an analywis before zmalint an examption <br> - "The Generat Public." An item meets thic criserion when is is sold(i) to other than the Governomt (inciuding FMS); (ii) to other chan affilistes of the aeller or (iili) for ent use by other than the Goveriwent (including FMS). <br> (3) A price may be considered to be "based on" extablished catalog or market price: of comme rosint uemb sold the subhanalal quantites to the gerecat publie if the nem being putchased is sufficiensly simitar to sueh o commecrual inetin to permit the difference between th jubulited withous resen to cost anslysi <br> In additiont, cost or procing dare may be requested. if necessary. where there hi such ह dispanty benween the quantity bena procured and the quantry for when there is tuch a catalot or market price that preing cannot reasomably be aceongithed by somparmen ithe 1 wo <br> Where an nem <br>  <br>  price of the laster, any ecquirement for cost of proing data ahould be thinated to That petianing to the differences between the iteme if the lemation is consitunt with ascusug reawnableneu of the pricing retuk. <br> If determuning exempions, $11 *$ <br> the item under consuderation that must meet the rast. The whamate objestive to to <br>  dedequate afencos for procing hems differentiy from catalof of matket proces |  | 3. FEDERAL PROCUREMENT REGULKHYONS (FPR) <br> 1.3.907-1(b)(2) <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  Fhill |  | 5. FEDERAL ACQUISITION REGULATION (PAR) <br> (See 15.804.3(f)(2).p.39) <br> (Ser $15.804 .3(c)(5), p .38)$ <br> (See 15.804-3(c) 16$), p, 38)$ <br> (See $15 ; 804-3(c)$, .37) <br> (her 15.80\%-3t(c)(7) p. 38) |
| :---: | :---: | :---: | :---: | :---: |
| 39. The requirements for similarity exclanned at $15,804-3$ (c) on page 37. |  | ely |  |  |





| 1. DEFENSE ACOUSSITION REGULATION (DAR/ASPR) <br> 3.8078 <br> (e) The DD Forth 633 requrges atferers to deseribe, in their procuramemt proposals, any lorward pricing zate agreenemt When the FPRA is ured, offerons are required to identify the latest cont or procing data slroady subritted in accordance with the rate agreement. All data submatied in connection with the FPRA, updatifd as nccossary, torm a par of the sotal data that the contractor cer. thics to be accurate, complete and content or contract modifietion. <br> ( $i$ ) Indwect costo com monly knowa at oworhead are defined and described in 15-203. Conteria for treatment and application of indirect oonts to tontracts are tho set forth in 13-203. To assure * reatonable approxumation and allocation of <br>  necuon with negotsition of constacts and thall not, undew auntorated by the head of a procuring activity, seek preferentil) overhead ratel. If there in any question <br>  not avasiable, the nefotator should normally awail hrmatif of the advisory services of the cognizant Department of Defente auditor an consonance with 3-n09. <br> 3-807.9 Subcontract Protan: Considerations. <br> (a) Gentral <br> (I) Subcontroct colts and prieng arrangements are significant elements to <br>  tration. <br> (2) Baste tetponsiblity reaty with the prime eontractor for decisions to make or buy, for sefection of subcontractort. for subcontract prices, and for wabcontciet performance The contracting officer who is responable for negotiatung the contract proce with the prone coptractor most have wiequate knowiedge of these elements as they affect pame contract prices <br> (b) Subconiracting Consuderetiont. Contrmeten' "mahs-pe-buy" programb and proponed subcontracts must be revicwed in accordance with Part 9 of this Section and with seevan XXill Informshon from there reviews should be used in craluabing subcontract costa when negotiating prome contenct prices The coatrastune officer, when approprinte, should recure from the contracior information concerning <br> (i) the pume comiractor ${ }^{\text {² }}$ purchasing practuces; and <br> (if) the prinoipal componante to be cubcontranted and the prospective or actual ulbcontractors, facluding (A) the \#xitet of competition obtatped or to be obumined, (8) the basit for the subeontraer costs included in the contrati pricint proposel (DD Form 633), (C) may contractor cost of price anmiysar of subconirnct proposals, inciudins Whe eosk or preing data submined by zubconiractors, (D) the prising trrangement contemp contrest supervicion. |  | 3. FEDERAL PROCUREMENT REGULAMIONS (FPR) |  | 5. FEDERAL ACQUISITION REGULATION (FAR) $\left(\text { Lu } 15, x_{i}:=(f)_{2} f^{\prime} \cdot x_{6}\right.$ |
| :---: | :---: | :---: | :---: | :---: |
| COMHENTARY: <br> 40. The details of DAS and $F P R$ source material are not fncluded at $15.905-3$ ( 5 ) because make-ox-buy froqrams are fully covered in Subpaxt 15.7. |  |  |  |  |


| 1. DEFENSE ACQUIETTION REGUEATION (DAR/ASPR) <br> 3.807 .9 <br> (e) Review of Subconitract Costa in o Prime Contractar Proposal. <br> (1) The PCO is recponelate for the reesonsblenest of the prome sontrout price which includes satisflying himbilf as to the rettombiteres of the subeontrot conto insluded in the prime contract prose. Field pricing uuppor from the Plant Repiaco cognazant of the prime contractor if generally requred in determining rezwonabieness of the prime conaract price. In some insamces, ti may be necesur. ry to obtain field pretsy support of proposed subeontracts. On the basit of a request from the PCO and/or advice from members of the field prising team, the aCO cotnizent of tho prime tonifatior may raquett fiefd pricing suyport form the ACO cognizant of the prospestive whbontractor. These estions will be taker in accordense with 3-801.5 <br> (2) If the prome contraciof's antyan it not considered adequate, the ACO wil teiurn the anabrif package to the contrector tor re-accomplahmeat undeatiniz aceas of inadcquacy in thas cane, that prime conturctas will eecomptialk or caute the sccomptuhment of the additional raviaw and ranubrat the packege to the ACO. <br> (3) If the PCO/ACO betlevat that a fubcontrect at any tier fequire fisid <br>  ns done by ibe phme contractor, he may request wolh action. Thus request may be made slong with the iniusia requast for field pricing mupport of the primat or subrequently. This generally will be done only when: <br> (i) Shere is a builnam relationutip batwean the primes contractor and aubcontractor not conducive to independence and objectuvity, at in the case of a partat-wbildiary or what prime and wbeontricting roles of the eompanuss are frequenty reveried, or <br> (ii) the contractor is wile source and the eubcontract cous represens a wubsumtial par af the prime contractor conss; or <br> (4i) the prime contractor was denied accest to the wibeontractor's recorati; ur <br> (iv) the PCO determanten that, becauke of factort ouch an the magniude of the proposed subeontract prike, subenitree or mubcontracis at anty tiet ate critical to a fully fetribed analywe of the prime coniraes propocil. The purpose to to sutivfy the PCO. notwithstanding the <br>  protere ressonable. |  | 3. FEDERAL PROCURZMENTA <br>  <br>  subcontretion knaytar of the <br>  <br>  ares of ingeecusey of revicier <br>  complusment of tha coditaral wriew <br>  <br> (a) If tore prime of higher-tier nubecos- <br>  <br>  perfarminoct of the limited edditional no- <br>  cer bity the prime or higher-ter oub- <br>  <br>  <br> 16) There Pray vo titner tarantang when <br>  <br>  plete trvew and antuichon of a oub <br>  <br>  <br>  tho Cortroment so perform trif eoss- <br>  betwety the pramy contratior pid mbo eantracint Hith y nol zondicive bo int of a parred and aubeldiart. or sben the pantes art fubeontrictiny rale of <br> (ti) The eumuracior in a sole anores and the nutrontractoz caits represent a aisb (rmitioul apoletod form o 4 4 ) |  | 5. FEDERAL ACOUISITION REGULATION (FAR) <br> $(20415.805=1 \div 5,00)$ <br> (Lu 15.iob(a), , a. 90$)$ <br>  |  |
| :---: | :---: | :---: | :---: | :---: | :---: |
| COMMENTARY: |  |  |  |  |  |




| 1. DEFENSE ACOUISITION REGULATION (DAR/ASPR) $\left(x^{3} 2.80710(6), p 67\right)$ | $\begin{gathered} 2 . \\ \text { code } \end{gathered}$ | 3. FEDERAL PROCGREMENA EEGULATIONS (EPB) $\text { (Lue }+3.1075-(1,)+6 z$ | Code <br> i, H | 5. FEDERAL ACQUISITION REGULATION (PAR) <br> 15.804-7 3infective cost or pricing mata. <br>  <br>  <br>  of the prospective contyactor, whet nity the to thic attentaur. <br>  <br>  making sataffactory allouzce tor tof limonrect fita. If <br>  |
| :---: | :---: | :---: | :---: | :---: |
| 3-807:10 Defective Cost or Pricing Data. <br> (a) When any price to the Governsent must be negotiatad largely on the basit of cost of pricing datis whmitied by the consactor, the data must be foew bate, complete and current and ha appropnate cases so certifiod by the contractor of subeontracter. J such centifitd cost or pricing data are subnequently found th centicate, the Government is entubed to an adfustment of the negoluted price, unctuding profft or fee, to anclude eny signulicamt zum by whith the priee wat isereased beeture of the defective data The claves in 7-104.29 ave the Govern. ment an enforcesble contract dight to a price adjustment, that it, wa reduetion ta the price to what it would have beth if the ensiffictof hat oubmitted accurate, complate and cuttent daza. <br> They aleo zuve the Covernment in right to a price adJusiment for defects in cont or pricing data womitued by a prospective or acturd <br>  folowing. | $\pm$ |  | : |  <br>  tinal agreentent ohs bice giveri on the contractorts or sutcontractor critificaty of Curfirt Coft ax pxirma data, <br>  has incraasac recause of the detectivat lata. Fhas fentitloment is ansiren by maliding in the contraze one of the clandes prescrited uh 15. Aus-s and snt torth it 52.215-21 why -22. Tfa ciauses give the Guvaname the right <br>  <br>  <br>  |
| COMMENTARY: |  |  |  |  |


| 3. DEFENBE ACOUISITION REGGLATION (DAR/ASPR) <br> 3.907. $10(\mathrm{c})$ thachat. <br> (1) The times when cant op pricing date war rearonably avalituble to the cese <br> Certicin dite such an overhead expensel and produetion rocords may mox be restonsbly avaliabie except of norral periodic closing datok. <br> Aluc, the datu pow <br>  <br>  becinue the volurne of tranasectiona would make the uee of any leter data tuprecsicabie. Furthermore, except wherw a shate flem 4 meed in subsumiai quantiy. the net affect of ney changea to the prikes of tweh mincor liemas would likely be iteнй <br> Closing or cut-ofl detex thouid be inciuded an a part of the date mib- <br>  the inest slostrig or sut-or datese preseding sireement on price, for whech wech data are availeble. The constacting offictri and contrastor are encourgzod to <br>  and mal ctumating tysiem. <br> Notwithanandian the forcgong, sugnificant mottert are im. portant to contracior management and to the Government and any related deth within the contraciort organization or the organization of a zubcontractior or <br>  sen. Athough ohangus in the labor bave or in prices of major materitil temt wite zenerally yignificant matiters, no hard and fast rule can be laid down simca what iu signilessl can depend wpon wuch eircumbianees as the was and nature of the procurement. <br> (2) In the sbsence of evidence to the sonsrary, the natural and probable ensequence of defective diata is an mercase in the convact priee on the amount of the defect plus related burden and profin or feet tharefore. unless there is : the conursel price should be reduced in that emount. In extablishong that the detective detz enurect an inctemer in the fontract price, the conzrecting officel is not expected to reconturuet the megouation by apeculating as to what would have bees the mental attiuden of the nazotiating parties if the correes data had been mibnuted at the time of agreement on price. | code <br> SFE <br> $V$ <br> $V$ <br> $V$ <br> $V$ <br> AV <br> AV | 3. FEDERAL PROCUREMEN <br> $1 \cdot 3.207 \cdot 5(4)$ <br>  normen periocthe cioctif then <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  <br>  |  | 15.8(4.7(b) <br> (1) The tame by which the cost or pricing data beame seasonatiy avaljable to the contractor; $(\text { Lut } 5, \therefore 24 \cdot d(C), E, 4 / 2)$ $(\therefore 15.3 .04 .4(c), \text {, } 4 / 2 \text {, curd } 1=.2 y-6 i=), 2,+19)$ <br> (ace $15.844(c), 4.42)$ <br> (2) The extent to whien the Government relies upon the defective data; and |
| :---: | :---: | :---: | :---: | :---: |
| COMMENTARY: <br> 43. This material is adequateiy cove gage 42 . |  | $15.804-4 \text { (c) on }$ |  |  |




| $3-807.10(d)$ DEFENSE ACQUISITION REGULATION (DAR/ASPR) <br> (3) Under cost reambursement type and under nill ixed.price type con tracts, except nim nxed-price snd nxed-pylee with economle price adjusiment ptovistons, increases wh payments to subcontractort due to defective subcontrat. tor cosi or pricing data will be the basit for disatlowance or nonrecognition of costs under the defective cost or prieng data clauses, beacause the Gowernment fected by the inmal agreement on prime contract price. $\qquad$ practical mattef the fesult is the same. if. the mevtased costs will be dusillowed redelerminable or incentive-Lype contracts The setion ts taken under the price reduction clauses because not only will the increased coste be disallowed or not considered as actual costs but also the fixed.fee or target profit included in the intitial price may be subject to reduction in accordance with (1) and (2) above <br> (e) in some cases, as where the defective nature of subcontractor data is only dusclosod ly Government audt, the information necescsery to support a reduction in prime contract and subcontract prices may be available only from the Government. To the extent necessary to secure a prime contract price reduction, the contracting officer shall make such information avallable, upon request, to the prime contractor or appropriate subcontractors. However, if the trade secrets or other confidential business information, it thall be made available only undar conditions that will fully proteci it from improper disclogure, as may be prestribed by the Office of the Assistant Secrelary of the Army (Research. Development and Acquission) for the Army, Chref of Naval Material (ADCNM for Contracts and Ausiness Managementif or the Navy; the Director of Contracting and Asquisition Policy, Headquarlers, USAF(AF/RDC) for the Aur Force: and the Execulive Director, Contracting, for the Defense Logristies Agency Information made available pursuant to this paragraph shal! te limited to that used an the basin for the prime contratt price teduction Cont or Pricing Dota clauses may involve subcontractort as well as the prime advance notict before making a determination to reduce the contract price under such clauses, In order to afiord the prime contractor an opportunity to take any action deemed advisable by him, particularly in connection with any subcontracts that moy be involved <br> (See 3-807. 10(d) (2), p. 68) | (cod |  | (cade | $(\text { See } 15.804 \cdot 7(f(2), p .70)$ <br> (f) If Government audit discloses defective subcontractor cost or pricing data, the information necesssary to support avaliable only from the Government. To the extent necessary to secure a prime contract price reductron, the contracting contractor or appropriate subcontractors upon request. If release of the information would compromise covernment security or disclose trade gecrets or confidential business information, the contracting ornect it from amproper aisclosure. Information made available under this paragraph shall be limited to that used as the pasis for the prime contract price xefuction. In order to siffird an opportunity lor corrective action, the contracting officer should give the prime contractor reasanable advance notice before determining to reduce the price. <br> (1) When prime contractor includes lefective <br> subcontractor lata in arriping at the price but later awards the subeontract to a lowes priced subcontractor any adjustment in the prime contract frice due to defective subcontract data $1 s$ limited to the difference between (i) the subcontract price usen ior pricing the prime contwact and (2i) the actual sukcontracted price or the actual cos subcontract prico is based are not themselves defective. |
| :---: | :---: | :---: | :---: | :---: |
| commentary: |  |  |  |  |







| 3.809 ${ }^{3}(a)$ <br>  <br>  <br>  <br>  number of trinections, we oxeminatione 15 doplh, at the divertise of the auditior. <br>  <br>  Contout thin detalt in 2 Hot. The procedury <br>  <br>  <br>  <br>  <br>  <br> (2) DCAA providen proceuremment lhiven mudion (PLA) at <br>  <br>  <br>  <br>  <br>  <br>  <br> (Len $3 \cdot 801.5(6 \times 1), 4.9)$ |  | 3. FEDERAL PROCUREMENT BEGUYATIONS" TPPEI $\text { (Sen } 1-3.809(b x(i u), p .76)$ <br> 3 <br> $1 \cdot 3.809$ <br>  <br>  <br>  <br>  <br>  $x^{5}$ <br>  <br>  <br>  <br>  moirctio in miru it he mime <br>  <br>  <br>  <br>  in mikmact |  | 5. FEDERAL ACOUISITION REGULATION (FAR) <br> (Ler 15.905.4(6), p.86, and 15.805.5(ex6).f. 88 ) <br> (Lee $15.805 \cdot 5(e)(8), p .89)$ <br> (Lu $15.805 \cdot 5$ (f0,p. $8 \dot{\text { q }}$ <br> Tiu ki80: 5(ai,f.87, |
| :---: | :---: | :---: | :---: | :---: |
|  |  | far. |  | 75 |






| 1. DEFENSE ACOUFSITION REGULATION (DAR/ASPR) 3-809(c) <br> cor: <br> (2) Under Cost-Reimbursoment Type Contrect with Cinndian Contruc. <br> (f) On contracts with the Canation Commerciel Corporation, andite are automatically arranged by the Depmetment of Dafance Production (Canads) (DDP) in accordance with agveement berween Depmermonte of the Army, Navy, and Afr Forte; Defente Supply Ajency; and Department of Defenet Production (Canwla) (twe 6-503(c)). Atdis raperts was furninhed to DDP. UpOn advter from DOP, the and forward it with Standant form 1054 (Public Vouchen) to the ACO for furthez proceming and transmital to the dirbursing oflicer. <br> (ii) On contructs phaced divecty with Cansdian firman, cullits are requested by the ACO from the Auchit Services Braseh, Comphroler of the Trensury, Department of Finamoe, Otthewa, Ontario, Canade completion of the contraer and final audil. These invoicesis, accomspritied by Standard Forw 1036 (Public Voucher) are forwarded to the ACO for further procesalng and tranamittal to the ciuburaing of- <br>  <br>  Sutpended and/or Disapproved" to the eontrictor. DCAA Form 1 will be processed in the same manpory andicated in (i) (i) above with regard to contractor appents, and zhell contain the statement - preseribed thervin wlih respect to costs disapproved. <br> (3) Responsibulties fot Pre-Award Surveys and Revowas Pre-Award wurveys of potential contrictors' compelence to perform proposed contracts shall be managed and conducted by the contract administratiou wimes. When information \&s required on the adequaty of the contractor't wecounting syatam or ite suitabilty Por adminiurntion of the proposed type of contreth, auch information stall always be obtained by the ACO from the auditor. The contract administration office shall be retponsiole for adviting the PCO on matrens conceming the contrectorit financial compercice or sredtr needr. | 2. code <br> NTE | 3. FEDERAL PROCUREMENT <br> 43.809(c) <br> EKGUTATYONS (EPRI $\hat{i}$ <br>  <br>  <br>  <br>  <br>  progoned trpe ef eoptract, ruch informe. <br>  <br>  <br>  ( | 4. Code <br> OS $\begin{gathered} 18 \\ M R \end{gathered}$ |  | 5. FEDERAL ACQOISITION REGULATION (FAR) |  |
| :---: | :---: | :---: | :---: | :---: | :---: | :---: |
| 43. This material was included at 9.1 Phase II revision of subpart 9.1 , Recp contractors. | $\begin{aligned} & -1(b) \\ & \text { sible } \end{aligned}$ | Bur ing the Prospective |  |  |  | $80$ |



| 1. $\qquad$ $3.809(c)(4)$ <br> Anong the matters to be comsidered in determaning tite acceptabihty <br> (in) A <br>  <br> ing, reviewing, kad approving eathnater; <br> (C) the source of and indirect elements of cort <br> ) the source of data used in develogitin the ent <br>  <br> to suppors the estirnate: <br> (E) management aupport of <br> mestanent support of the proptan revisw inciudias approva <br> (F) the extent of coord <br> and atimate. <br> (Lee $3-809(c)(d)(i i), p .81)$ |  |  |  | 5. TEDERAL ACOUISITION REGULATION \{FAR\} $(\text { dee } 15.81+(c), f .98)$ <br> ( 50 15.81(1) |
| :---: | :---: | :---: | :---: | :---: |
| comasmari ${ }_{\text {c }}$ |  |  |  |  |



















| 1. DEEENSE ACOULSITLON REGULATION (DAR/ASPRI <br> 3-514 Exlmated Data Prien (DD Form M23), <br>  <br>  <br> (b) When dote ofs requited to be delivered under * contract, 3-501(b) Ses- <br>  clowed in the colicurion request the offeror to unse whin portion of the cotal proce is eximated to be atributebse to the production or develapment of the <br>  refices these cost in a different manate, for the foilowing ramicnus <br> (i) diffrrancetin butinew practices is compective nituations; <br>  <br> (iv) application of common eftort bo two or more duth itemas; <br> For there and other ruxtomi, deta price entimstas thould sot bo wed for controct <br> pricang purpose withous funher analyois. <br> (e) The coniuncting officer thath nasure that the eontract doet not include : requircment for duta which the contratior han delivered or ho oblightad to deliver Offeror furnithes the certificstion requifed by phe woliekation (eee 3-501(b) Section $\mathrm{B}(\mathrm{xiv})$ and Section $\mathrm{C}(\mathrm{xxxili})$ ). However, where duplicaze data are detited, the eonarect <br> (d) tn the ease of procuremenu of $\$ 100,009$ or over, the contractina offieer, <br>  Blockt 26 of the onginas DD Form 1423 for the data tema lated thereon to efuat <br>  sexh prosuriag melivity. The delechable portion of the DD Form 1423 (Blocks 17-26) witi the enimated or adjuted prifes shall not appear in the comiract. <br>  - a uparate line hem on DD Form 1423; and the approvil or waiver ostained purnuant to $\$-501$ zhatll be wppropriatily identifad. <br>  <br> (a) Centrol. Allmough the DoD profit policy 15 nompatly suflicent encourgement to indereate continctor invesment, it is recognited hat ditustious <br>  <br>  plant equipment captal asclu as suthorized herelin (cee 1-j15). Such clave must se culored to the requirements of the undividual situavion, and thea onty atur a <br>  <br>  sequent hecal years for me planned stquithion upon which the investment deciwon wat bosed. Such claus may permit tbe Govetnment to zequire opecfic decermined by consudering a combination of invetrment incenives, income ter <br>  | wE $\qquad$ <br> NEE | 3. EEDERAL EROCUREMENT REGULATIONS (PPRI |  |  | 5. frderai hcoutsition regulation (far) |  |
| :---: | :---: | :---: | :---: | :---: | :---: | :---: |
| 57. CFPF has a propobed policy on 86555-86963). Wher that poilcy is $t$ will reconsiler what, ti anything, 58. This is no evidence of a need crocedures outsije con. | is 8 ally sata is $r$ the | (aee 45 F: F . <br>  ing helunas cu11ar. <br> is 0 : |  |  |  | $100$ |



\begin{tabular}{|c|c|c|c|c|c|c|c|}
\hline \begin{tabular}{l}
3-j/S(d) 1. DEFENSE ACQUISITION REGULATION (DAR/ASPR) \\
(2) The fiscell futhority who commisis funds to the jesultant contrate musk centify that the foltowing etions have been actomplished: \\
(i) the Approval Aushority (wee \(3-815(g K I)\) ) has approved by fiwal year the amount of costingent Covermment lisbility: \\
(ai) the Appaove: Auctiority has notified the Congrens in advance that the technque will be used on conirects for atpeetific weapon tywem of maternal proyram thement. Uniess there are unusual circumstances, this notification whit be included in the funification materiak submitted to the Congress in uupport of authorization and appropriation requetre. A copy of the sotification shall be retained in the contract file. \\
(c) Nefotiation Requirements. \\
(1) Stace this investrant inceative is predicated on the writen determins- \\
 nized is the price(t) nezoliked. \\
(2) in order for iterno of phant equipmont to be comerred, they must be nisted (nomenciature and valua) in the Capiat inveriment incentive ciause. The liems of equipment can be incorporated in the contract using etthec or botid of the following proeeduras: \\
(1) when the sxast value and momenclusure of the item of plant equipment is known at the tme of negotiations, it whand be listed in the hat velument clays at the time of the contract award. The contrector' proposal should toflect the impact on cost and other benefth to the Government that will nectue from use of the equipment in order to comply with Public Leww 87-653: \\
(in) if the exxet value and nomanclature of each havetment is not knowa at the tume of nejptiationa tad at sant be mutually agreed that edrain \\
 ditional provision to the inverment clause thould be ured. This additioner provition shall stipulate the conditions which the individual thems of plant equipnent mukt meet to be subsequenty incorporated Into the inve sement clausc and shall witublish the requirrement for the contractor to submit tinmicial amd other jublifiction mesetsaty for the contrating officer to make the determination speetined in (c) sbove. Such itemix of equipment will be insorparated inece the contract by supplemental agreement and the price revised. as appropriate, proviled: (1) they meot the contractual conditions and (8) the equipment vakue, when added to the value of previourly sorcred equipatat. will poi exceed the stated dollar ceiling. \\
(3) The hamit of the Governmenix coningent tivaluy is subjeer ro negountron Provinop thould be made lo assurne only that liablity when is sufficest to motivaly the contracter to onvext. \\
(4) Appisetion of the weighted guideltines in 3-808.4 shoutd reficet the aysumpition of rikik by the parties associated with items covered by this technique. \\
(i) Comtrectual Requiremeenis, In order to incorporate this investment incentive. a xpecial contryetual Capital lavestment clause shall be developed. Such a \\
 \\
(1) A liking of the exass nomenclature and value of exch itum of plant equipment coverned. \\
(2) A pravision for addinoms to the hating aner contrect award, if appropriate. Suct provision shall ethatish the conditions that must be meth the exezories of equipment that will be covered and the requiremeat for such additions to be incorporated by eontract madifictich. This provision showld allow for remoral of ta itcm from obverige \\
(3) Crtheris for ateernitnang when this special provision ean be invokod at well as the enteria wheth wal cancel the Goverament's conungent tiability under the elsure wuch at endotem quantify thicaholdi and performanee diter whichover
\end{tabular} \& \begin{tabular}{l}
2. Code \\
, \\

 \& \& FEDERAL PROCUREMENT EEGULATYOIS (FRD) \& 

Code <br>
San <br>
$\times 158$ <br>
$p .100$
\end{tabular} \& , \& 5. FEDERAL ACOUISITION REGULATION (FAR) \& <br>

\hline COMEETTARY: \& \& \& \& \& \& \& $$
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$$ <br>

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\end{tabular}

| $5-8 / 5(f)$ 1. DEEENSE ACOUISITTON REGULATION (DAR/ASPR) <br> (4) The dollar celling of the value of covered uems at well as the Goversment's contingent tiabihy by fiacal year. <br>  ench item woukd be acquired if tha specul provision is invoiked. <br> (6) A provison that within 30 daye of a Govemment decizion that providet : bans for the contracter to tnvoke she apecual provision, the contraeting of. ficer zhall notify the contuactor in writing that the event has deceurred and its date or oceurtence. Furcher, the provition shail require that within 90 days afur sotifisation by the consuacling ofthecr, the contrecter musp provide to the conureting <br>  Gowerament acquire. Thls liat thall not Inciude any investments which have not beve incorporated into the investment clause of the eontract priex to the contractugy officer't notiee so the contractor. <br> (7) A provikion that once the contractor requent the Government to buy any equipmant covered by the invertment clave, the Government that the right to buy way andior all other equipment covered by the elause wheither the contractor request if to do wo or not: <br> (4) A provision for deferral of Oovernment sequisition of thout nems of equipment needed for contract or prograra completiom. <br> 19) A provition that the investment clause be ecrried over to succemor contracte until the Government's responalibity to ncquite the equipment oupires. <br> (10) A provision that a supplementil anreement sisll be executed for any *quormant * cquirsd by the Governmens under this special elaute. <br> (11) A provision that at * somdition or Covernment asquiation, the equipment thull be na good opesating condition. <br> (12) Crueria for providing dispossuon insiructions should the speciml provison for espital nivesiment be exestised ldentify which party is to bear the cost of restoration, sterxge, disconnect and removal, peeking and trantportation upon removal or the squipmens. The provisions of Section XXIV ahall apply untess ine contract provides spectice exception thereto. <br> (13) A provision thas tin the event thut eposisi clawes if invoked, the fimituthon stated in 15-205.40 doez not prevent acquistion or any peyment for the covered equipment. <br> (14) A provision that this spesal clause for capital investment shall not apply th the event of contract termination for defauls. <br> (15) Provite that this invesiment cinure cap be mase approtable to subcontracs, if sppropriate bentilis, at oullmed in paragraph (b) above, ate aveilable. Provition muta be made for Cowernment approvet, ez ovtioned it paragraph (c) above, of all equipment for whet the Covernment may ssume contingent thability as well as a provision that the clevse can be invoked only as a dixect fow down from the prime's abluty to invoke the clause. <br> (16) A provision that establishes the extent to which the conuractor may wee inis equipment for other butinest. <br> (c) Admınsetration. <br> (1) Approvil for whe of this invostement incensuve for contingems habilitien must be obtained from the Secretary of the Military Depariment or the Disector or DLA Authonky up to 350 million may be delegted no lowet that the Commander, AFSC, AFLC. NMC, DARCOM. <br> (2) In the event that it becomes apparens that the contungent linbility rewulting from the use of this tectinique will become an actual oblyation, the Approval Authority shall be notified and immetine steps thall be takea to obsain <br>  the time the actual obligation materializen, to preclude a vilasion of the AntiDeticitncy Acs. | 2. code <br> NFE $\qquad$ | 3. FEDERAI PROCUREMENT REGUMATIONS (ERE) | coce ——monn | 1 | 5. FEDERAL ACQUISTMTON REGULATION (FAR) |
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| (4) The requirement for melusion of the shove ciatuse in sontracts with fotstgn goverrments or agencies thereor may be waived in exceptional cases by the Head of a Procuting Actwaty, steling ia writing his reasons for such deter. mination <br> 7-104.42 Subeonuractor Cast or Priting Data <br> (a) The followng clause shatt be interted in alt negotated comisacts expected to exceed $\$ 100,000$, execpt whete the price is bused on adequate wrice competitoon, established catalog or market prices of commercial utma sold in subnimetial ing ofticer may tnclude this clause, with appropriste reduction in the doller <br>  Cursent Cost or Pricing Data in required \{oce 3-807.3(b)(tin)) in connection with tental puring of the contract <br> (Atso see $7.10442(c), p, 6)$ <br> S1ACONY <br>  <br>  <br>  <br>  <br>  | SLE | 3. PEDERAL PROCUREMENT <br> $13814.1(0)$ RELATIONS [FPR) <br> (4) Patur on <br>  <br> (c) The requiremint for inclasion of <br>  bovernmento or agencies thereof may be has of the secaey or his dexigate aut <br>  <br>  <br>  is included in centracis in excext of <br>  <br>  <br>  <br> (Also see $1-3.512 .36,5-6$ ) <br>  (e) The Coathractor whill requiro aubocen <br>  <br>  106.000 vismo enterad ins. <br> (2) Priop to tho pricifg of any tubow <br>  <br>  <br>  <br>  |  | 5. FEDERAL ACOUISITION REGULAYION (FAR) <br> 1 <br>  and $5 \hat{2} \cdot \dot{\alpha} 15-\hat{\alpha} \alpha, 1.2)$ <br> 52.215-23 Subeortractor eost or Pricing Data- <br> As preseribed in 15.804-8(c) insert the following clause in all negotiated contracts thet exceed $\$ 100.000$ when entered into, unless the eontract is exempt from the requirement for certified cost of pricing aata under $15.804-3$ (a) or (g) or this requixement has been walved under 15.804-3(1). The clause may also be uncluded. with appropriate reductions in the dollar amounts, in negotiated contracts of a lesser amount when the contractor was required to submit certified cost or priming data. <br> SUBCONTRACTOR COST OR PRICING DATA [DATE] <br> (a) Before awarding any subcontract expected to exceed T100.00才 when entered into. or before pricang any subcontract modification involving aggregate inereasea and/or decreases in costs, plus applicabie profits, expected to exceed $\$ 100,000$, the contractor ahall require the subeontractor to submit cost ox pricing ofata factually or by specific Identification an writingl unless the price ism <br> (1) Based on adequate price competition; <br> (2) Based on established catalog or market prices of commercial items sold in substantial quantities to the general public: or <br> (3) Set by law or requlation. |
| :---: | :---: | :---: | :---: | :---: |
| 4. The Contract Disputen Act of 1978 case, whether or not it ways so in th |  | ly in any |  |  |







15.807 Prenegotiation objectives.
(a) The process of determining prenegotiation objectives helps the contracting officer judge the overall reasonableness of proposed prices and negotiate a fair and reasonable price or cost and fee. In setting the prenegotiation objectives, the contracting officer shall analyze the offeror's proposal, taking into account the field pricing report, the audit, the technical evaluations, and otfer pertinent data such as independent Government cost estimates and price histories.
(b) When a contract or modification involves price negotiation, the contracting officer shall write a prenegotiation objectives memorandum. The scope and depth of the memorandum should be directly related to the dollar value, importance, and complexity of the proposed contract or modification. When cost analysis is required under 15.805-1, the prenegotiation objectives memorandum shall include (1) the pertinent issues to be negotiated, (2). maximum and minimum cost objectives and (3) profit or fee objectives (see 15.806-3).
(c) A profit or fee objective is directly affected by the Government's cost objective and proposed pricing arrangement. Because the profit or fee is only one of several interrelated variables, the contracting officer shall not agree on a profit or fee without concurrent agreement on cost and type of contract. Specific agreement on the exact values or weights assigned to individual profit factors (see $15.806-4$ ) is not required and should not be attempted.
15.806 Profit.
15.806-1 General.
15.806-2 Agency responsibilities.
15.805-3 Contracting officer responsibilities.
45.806-4 Structured approach to profit analysis.
15.806-5 Weighted-guidelines example.

### 15.806-1 General.

(a) It is in the Government's interest to offer contractors profit opportunities sufficient to (1) stimulate efficient contract performance, (2) attract the best capabilities of qualified large and small business concerns to Government contracts, and (3) maintain a viable industrial base.
(b) During contract performance, contractors may incur costs, such as interest, that the Government does not recognize as allowable. In addition, actual costs may vary from estimated costs, particularly in high-technology, complex work. Therefore, earned profit may differ from negotiated profit or fee. In the long term, earned profit from Government contracts must be comparable with return from other investment opportunities involving similar risks.
(c) Both the Government and contractors should be concerned with profit as a motivator of efficient and effective contract performance. Negotiation of extremely low profits, use of historical averages, or automatic application of predetermined percentages to total estimated costs do not provide proper motivation for contract performance. Negotiations aimed merely at reducing prices by reducing profit, without proper recognition of the function of profit, are not in the Government's best interest.
(d) Structured approaches for determining profit or fee objectives provide a discipline for consideration of all relevant factors. They shall be used whenever practical to fit the profit or fee objective to the circumstances of the particular contract.

### 15.806-2 Agency responsibilities.

(a) Each agency shall develop a structured approach for determining the profit or fee portion of the Government prenegotiation objective in acquisitions for which 15.805-1 requires cost analysis. Each agency's approach shall contain the minimum elements at 15.806-4(a). - In determining the total composition of its approach, the agency shall consider its mission and the market environment from which it draws its sources of supplies and services: The agency's implementation of its approach may include specific exemptions for situations in which mandatory use would be clearly inappropriate. Instead of independently establishing its own procedures, an agency may adopt another agency's procedures.
(b) The structured approach an agency adopts shall allow the tailoring of profit on an individual contract to fit the particular circumstances of that contract. Regardless of the result achieved using a structured approach, agencies shall not require acceptance of an overall profit or fee objective higher than that proposed by the prospective contractor. Agencies shall not establish or imply administrative ceilings on profit or fee.
(c) Agencies that recognize facilities capital cost of money as an allowable cost shall ensure that their structured approach specifically takes this imputed cost into account when calculating the profit or fee objective. When an agency allows facilities capital cost of money and the proposed contract is exempt from use of the structured approach, the agency shall require that an amount equal to the amount of the imputed cost, if any, included in the prenegotiation cost objective be deducted from the prenegotiation objective for profit or fee. (See 31.205-46 for the allowability of facilities capital cost of money.)
(d) Each agency shall (1) accumulate and analyze data on proposed, objective, and negotiated profits or fees and costs in order to ascertain whether or not its structured* approach is stimulating contractors to more efficient contract performance and (2) make any necessary changes in its approach, in accordance with Subpart 1.3.
15.806-3 Contracting officer responsibilities.
(a) When the price negotiation is not based on cost analysis (see 15.805-1), contracting officers are not required to analyze profit.
(b) When the price negotiation is based on cost analysis, contracting officers shall analyze profit using their agency's structured approach, except as specifically exempted by the agency under 15.806-2 (a). When not using a structured approach, contracting officers shall, as a minimum, consider the factors in 15.-806-4 (a) in developing profit or fee objectives.
(c) Contracting officers shall use the Government cost objective amounts, rather than the prospective contractor's proposed amounts, as the basis for calculating the profit or fee objectives. The amounts for the separate-factors should be totaled to determine the Government profit or fee objective. The percentage relationship between profit or fee and cost may then be computed, if necessary, to determine compliance with statutory or regulatory limitations.,
(d) The contracting officer shall not negotiate a profit . Or.fee that exceeds any statutory or regulatory Iimitations.

The following limitations are imposed by 10 U．S．C． 2306 （d） and 41 U．S．C． 254 （b）on cost－plus－fixed－fee contracts and by this regulation on cost－plus－incentive－fee and cost－plus－ award－fee contracts：
（1）For experimental，developmental，or research work－－the fee shall not exceed 15 percent of the contract＇s estimated cost，excluding fee．
（2）For architect－engineer services for public works or utilities－－the estimated cost and fee of the architect－ engineer services contract shall not exceed 6 percent of the estimated cost of the public work or utility，excluding fees．
（3）For other contracts－－the fee shall not exceed 10 percent of the contract＇s estimated cost，excluding fee．
（e）Contracting officers shall allow offerors to submit details of their profit proposals，but shall not require them to do so．
（f）If a change or modification（1）calls for essentially the same type of work as the basic contract and（2）is of relatively small dollar value compared to the total contract value，the contracting officer may omit application of the agency＇s structured approach and use the same profit rate used on the basic contract．

15．806－4 structured approach to profit analysis．
（a）Minimum elements．Each agency shall include the factors outlined in subparagraphs（1）through（3）below，as a minimum，in its structured approach to profit analysis：
（1）Contractor effort．This factor measures the prospective contractor for effective contract performance： Greater profit opportunity should be provided under contracts requiring a high degree of professional and managerial skill and to prospective contractors whose skills，facilities，and technical assets will－lead to effective contract performance．Subfactors（if：through（ivfにニこ シミニミニーシ
 effort，but they may be modified in specific situations to－
 prospective contractors for listing costs：
（i）Material acquisition．This subfactor measures the $\qquad$ managerial and technical effort needed to obtain the required purchased parts and material，subcontracted items， and special tooling．Considerations include（A）the complexity of the items required，（B）the number of purchase：－－：＝＝＝ orders and subcontracts to be awarded and administered．（C）
whether established sources are available or new or second sources must be, developed, and (D) whether material will be. obtained through routine purchase orders or through detailed subcontracts requiring development of complex specifications. Profit consideration should correspond to the managerial and technical effort involved.
(ii) Conversion direct labor. This subfactor measures the contribution of direct engineering, manufacturing, and other labor to converting the raw materials, data, and subcontracted items into the contract items. Considerations include the diversity of engineering, scientific, and manufacturing labor skills required, the prospective contractor's ability to meet these requirements precisely, and the amount and quality of supervision and coordination needed to perform the contract task.
(iii) Conversion-related indirect costs. This subfactor measures how much the indirect costs contribute to contract performance. The allocable lator elements should be given the profit consideration they would receive if treated as direct labor. The other elements of indirect cost should be evaluated to determine whether they are routine expenses (such as utilities, maintenance, and depreciation) meriting lesser profit consideration or instead are elements contributing significantly to the proposed contract.
(iv) General mangement. This subfactor measures the Erospective contractor's other indirect costs and general and administrative (G\&A) expense, their composition, and how much they contribute to contract performance. Considerations include (A) how labor in the overhead pools would be treated if it were direct labor, (B) whether elements within the pools are routine expenses (such as utilities, maintenance, and depreciation) or instead are elements contributing significantly to the proposed. contract, and (C) whether the elements require routine as opposed to unusual managerial effort and attention.
(2) Contract cost risk. This factor measures the degree of cost responsibility and associated risk that the prospective contractor will assume (i) as a result of the: contract type contemplated and (ii) considering the reliability of the cost estimate in relation to-the... complexity of the contract task Determination of contract: type should be closely related to the risks involved. in. timely, cost-effective, and efficient performance. This factor should compensate contractors for assuming greater cost risks. The contractor assumes the greatest cost risk in a closely priced firm-fixed-price contract, under which it agrees to perform the task correctly, on time, and at a predetermined price. The contractor assumes Ehe least risk in a cost-plus-fixed-fee contract, under which it agrees only to use its best efforts to perform the task; for which
it is to be reimbursed for actual costs. In evaluating assumption of cost risk, agencies shall, except in unusual circumstances, treat time-and-materials, labor-hour, and level-of-effort contracts as cost-plus-fixed-fee contracts.
(3) Federal socioeconomic programs. This factor measures the degree of suprort given by the prospective contractor to Federal socioeconomic programs, such as those involving small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, labor surplus areas, and energy conservation.
(b) Additional factors. An agency may include additional factors in its structured approach. Examples are as follows:
(1) Facilities. This factor, which may be a negative as well as a positive consideration, measures the amount of contractor-financed investment in the facilities required for the contemplated contract. Subfactors include consideration of the facilities' age, undepreciated value, cost-effectiveness, general or special purpose, and remaining life corpared with the length of the contemplated program, as well is any special contract provisions that will affect the co.ltractor's risk.
(2) Cost-contro: accomplishments. This factor allows additional profit opportunities to a prospective contractor that has demonstrated improvements in productivity or other cost-reduction accomplishments resulting in lower costs to the Government. For example, the factor may be a special "productivity reward" to mitigate the loss of profit opportunity on follow-on contracts when costs on earlier contracts are reduced as a result of productivity gains or other cost-avoidance measures.
(3) Independent development. This factor rewards,
: contractors that, without Government financial assistance, develop items having potential Government applications. The contracting officer may reward the prospective contractor with additional crofit for independent development if the Government (i) has not already paid for it as an independent $=$ research and development cost allocated to other Government=
$\because$ contracts and (ii) will not recognize it as an:allowable
cost under the contract being negotiated (see:31:205=6)
15.806-5 Weighted-guidelines example.

The following example is a general description of one possible structured approach to profit analysis using weighted guidelines. This weighted-guidelines example
=includes all the minimum elements at 15.806-4 (a). Agencies

- may add additional factors designed to make the"approach :
responsive to the agency's mission and to the environment from which the agency draws its suppliers:

| WEIGHTED-GUIDEIINES PROFIT/FEE OBJECTIVE |  |  |  |  |
| :---: | :---: | :---: | :---: | :---: |
| 1. CONTRACTOR EFFORT |  |  |  |  |
| COST CATEGORY | GOVERNMENT'S CDST ORJECTIVE <br> a | height range | $\begin{gathered} \text { ASSIGNED } \\ \text { WEIGRT } \\ e \end{gathered}$ | WEIGHIED PROFIT/FEE $(\operatorname{COL} . a \times c)$ |
| Material Acquasition Purchased Parts | \$ | 1 ) to ( ) | - | \$ |
| Subcontracted Items |  | ( 14to ( ) | * |  |
| Other Materials |  | ( ) \% to ( ) | * |  |
| Engr. Direct Labor |  | ( ) : to ( ) | * |  |
| Engr. Indirect Costs |  | ( ) : to ( ) : | - |  |
| Mfg. Direct Labor |  | ( ) : to ( ) : | * |  |
| Mfg. Indirect Costs |  | ( ) : to ( ) : | * |  |
| Other Costs |  |  | 8 |  |
|  |  |  | * |  |
|  |  |  | $*$ |  |
|  |  |  | * |  |
|  |  |  | * |  |
| General Management |  | ( ) \% to ( ) \% | - |  |
| $\square$ | § 1 | 'xxx00xx00xxxx | x0x8x×0x0xxxx0x | \$ |
| 2. | OMAER factors |  | : | x00000000x00x |
|  | MTEASUREMENT BASE | WEIGET b RANGE | ASSIENED WEIGHT $-\cdot \cdot \mathrm{c}$ | $\begin{gathered} \text { WEIGHTED PROFIT/FEE } \\ \text { (CO1. } \mathrm{e} \times \mathrm{c}) \\ \hline \end{gathered}$ |
| A. Cost Risk | \$ | $\left(\right.$ ) ${ }^{\text {to }}$ ( ) 4 | - ._- . . . | \$ |
| B. Socloeconomife Programs | \$ | $\left(\right.$ ) ${ }^{\text {to }}$ ( in | - | -...... - . |
| c. CAddtional Factor) | \$ | 1 1: to ( in | - | ---.. |
| D. (Addicionil Factor) | \$ | ( ) \% to ( 1\% | $\cdots \cdots$ | $\cdots$ |
| 3. $\cdots$ - ${ }^{\text {an }}$ TOTAL | IT/FEE OBJECTIVE (Su) | or col. d) | -- | \$ |

(a) In Part 1, Contractor Effort, the agency provides the specific percentage weight ranges in column 1.b for each cost category. The contracting officer selects a specific percentage weight (column 1.c) from within the available range and applies it to the Government's cost objective (column 1.a) for that cost category.
(b) The agency identifies and lists additional factors, if any, to be considered in Part 2, other Factors, and provides an appropriate weight range (column 2.b) and measurement base (column 2.a) for each factor in Part 2. The contracting officer selects a specific weight (column 2.c) from within the available range and applies it to the measurement base for that factor.
(c) After the contracting officer calculates the dollar amount of profit for each item in Part 1, Contractor Effort, these amounts (column 1.d) are totaled and added to the dollar amounts assigned for Part 2 (column 2.d) to arrive at the profit or fee prenegotiation objective (column 3.-d).
31.205-46 Facilities capital cost of money.
(a) Facilities capital cost of money is an imputed cost determined by applying a cost of money rate to facilities capital employed in support of Government contracts. A cost of money rate is derived from a common source and uniformly imputed to all contractors. Capital employed is determined without regard to whether its source is equity or borrowed capital. The resulting cost of money is not a form of interest on borrowings.
(b) Facilities capital cost of money is allowable only when-

- (1) The agency has promulgated a cost principle specifically allowing it:
(2) The contracting officer has incorporated the agency's cost principle into the contract;
(3) The contractor's capital investment is measured and allocated in accordance with cost Accounting Standard (CAS) 414, Cost of Money as an Element of the Cost of Facilities Capital: and
(4) The contractor maintains adequate records to demonstrate compliance with CAS 414.
(c) The facilities capital cost of money need not be entered on the contractor's books of account. However, the contractor shall (1) make a memorandum entry of the cost and (2) maintain, in a manner that permits audit and verification, all relevant schedules, cost data, and other data necessary to support the entry fully.
(d) Facilities capital cost of money that is (1) allowable under paragraph (b) above and (2) calculated, allocated, and documented in accordance with this cost principle shall be an "incurred cost" for reimbursement purposes under applicable cost-reimbursement contracts and for progress payment purposes under fixed-price contracts.
(e) When facilities capital cost of money is allowable under paragraph (b) above but the offeror does not identify or propose the cost in its proposal, no such cost will be allowed under the resulting contract.


| 1. DEFENGE ACOUTEITION REGULATION (DAR/ASPR) <br> 3. 508 Information to offerors. <br> 3-508.1 Gcatral Notice shati be provided otierors in accordance with 3-508.2 and 3-508 3 below. Such notice need nat be given whare disclosure may in some way prepudise the Government's interest or where the contract is <br> (1) for subsisience. <br> (ii) negotiated pursurnt to 10 U.S.C. 2304(A)(4), (5), or (6) (sep 3-204, 3-205, or 3-2063. <br> (ia) negotuted with a foreign supplief when only foreign sources of supphes of services have been solicued. <br> 3-508.2 Pre-Award Notice of Unaeceptable Offers. <br> (a) In any procurement in excest of $\$ 10,000$ in which it appears that the pariod of evaluation of proposals is likely is exeeed 30 days or in whith a limited number of suppliers have been selected tor additional discussion (see 3-805), the contrecting officer, upon detemination that a propossl is unacceptable, shall provide prompt natice of that fact to the source submitting the proposal. Such notice need not be guen whete the proposed contract is to be awarded within a few days and nouce pursuant to $3-508,3$ below would suffice. In addition to nating that dicate, in general terms, the basis for such determination and shat advise that, suce further negotiation with him concersiag this procurement is not contemsplated, a revis:on of his proposal will not be considered. |  | 3. FEDERAL EROCURENENT <br> F Imsics Dinseralation of procurtment information. (b) Frenwigh poticea of propusai under tha follopring ipecirte conds. | 5. FEDERAL ACOUISITION REGULATION (FAR) <br> SUBPART 15.9--PREAWARD AND POSTAWARD NOTIFICATIONS, PROTESTE, AND MISTAKES <br> 25.901 Notifications to offerors. <br> (a) General. The contracting officer shall notify each. offeror whose proposal is determined to be unacceptable or whose offer is not telected for award, unlebs disclosure might prejudice the Government a interest. However, notice is not required if the contraot is for-- <br> (1) Subsistence: <br> (2) Personal or professional services (see 15,204 ) <br> (3) Sorvices of educational institutions (see 15.205), <br> (4) Supplies or aervices purchamed and used outside the United States (see 15.206); or <br> (5) Supplies or *ervices for which only foreign firma have been solicited. <br> (b) Preaward notices. <br> (1) When the proposal evaluaty period for a solicitation estimated at over $\$ 10,000$ is axected to exesed 30 days, or when immed number of offerors have been selected as being within the competitive range (see 15.609), the contracting officer, upon determination that a proposal is unacceptable, shall promptly notify the offeror, The notise shall state (i) in general terms the basis for the determination and (li) that a revision of the proposal will not be considered. |
| :---: | :---: | :---: | :---: |
| COMAENTARY: |  |  |  |

1. DEFENSE ACQUISUT W RECUE UTIDN (DAR/ASPR)
(b) tr any procurcment molerng a matl) bustress ces.astide to be pliced hrough contentronal negotiation, upun final completion of negotiations and inform each unsuccessful offeror by writen notice of the name and location of the appurently saccessfol offeror(s) Each apparently unsuccerssful offeror should be advised that any subsequent revisions of has proposal will not be constidered, since no furthef negotaxtions are contemplated, and no further contact with the sontractutg officer need be misde reqaading the mssant procurement ualess the unsuccessful oficesor has grounds to chillenge the smail business sizz saturs of the apparentiy stecessful offerorts) Thas notifieation prosedure shalt not apply to procurements exenpt by 3 508: above or to any urgent procurement acton
which the coniractug officer determanes in wrung must be awarded without delay to protect the public interest The contracting officer's determination shill be plased to the contract the
-508.3 Past-A Werd Notice so Ojferms
(a) Promprly afier mahns ant axdords in any procurement in excess of 510,000 , the contracturg officer shall give wntien nowew to the unsuccessfil of ferors that their proposals were not accepted, excerpt that such notise need nat be pison watere notice has been pros ded pursuant to 3 -508 2(a). Sueh notiee shall
include:
(i) the number of prosprecuve contractors solacied,
(ii) the number of proposals received.
(iil) the name and addrews of tach olferor recerving an award
v) the hems, quantiost and unit paces of euch awazd: provided that, where the nawberic ind the total cantorn miakes the listing of unit and
(v) un general terms, the reasons why the offercr's proposal was not accepted, except where the price information un (iv) above readily reveals wueh reason, but in no eveat will an offeror's cost breakdewn, profit, overhead rates, trade secrets, manufacturing processes and techriques, or other conidental business information be dizclosed to any other offeror.
(b) In procurements of $\$ 10,000$ or less and subject to the exceptions in -508.1 tbove, the jnformation deseribed in (a) above shall be furnished to un utesesful offerora upon reques
(c) Such intormation as is nuthorized to be released to unsuccestif offeron ursuant to (a) (i) through (iv) above may, upon nis recuest, be provided to th suceestifl offeror.

2. FEDERAL ACOUISITION REGULATION (FAR)
(2) In small huginess set-aglae (see $19 \times x \times x$ ), upon completion of negotiations and determinations of shali inform each unsuccessful offeror in writing of the name and location of the apparent successful offeror, The notice shall also state that (i) the oovernment will not consider subsequent revisiong of the unzuccessful propoonal and (ii) no response is yequired unless a basis exists to chalienge the suall business eize status of the apparentiy
successful offeror. The notice is not required under the successful offeror. The notice 1a not required under the
efrcumstances described in 15,901 (a) or when the contractina circumstances described in 15,901 (a) or when the contracting officer determines in writing that the urgency of the requirement necessitates award without delay.
(c) Postaward noticen.
(1) Promptly after award of contracts resulting from soleitation over $\$ 10,000$, the contracting officer ahal notify unsuccessful offerore in writing, unless preaward notice was given under $15.901(\mathrm{~b})$. The notice phall include-
(i) The number of firms aoilcited;
(if) The number of proposals received;
(iii) The name and addrens of each offeror receiving an award;
(iv) The items, quantities, and unit prices of each award fif the number of iteme or other factors makes limting unit prices impracticable, only the total contract price need be furnishedi) : and
(v) In general terms, the reason the offeror's proposal was not accepted, unleas the price information in (iv) above readily reveals the reason. In no event shali an offeror'* cost breakdown, profiz, ovarhead zatas, trade aterets. conidential buesesa and terng conicicntial business information be disclosed to ay other offeror.

## (2) Upon tequest, the contracting officer thall also urnish the information deseribed in $15.901(\mathrm{~s})$ (1)(i) through

 (iv) to the succespful offerox.(3) Upon request and subject to the exceptions in 901(a), contracting officers thall furnish the information cescribed in $15.901(c)(1)(1)$ through (v) to unsuccessful offerors in solicitations of $\$ 10,000$ or lesa.


## Commentary:

1. Agencies differ in debrieting before or after award For example, NASA debriefings are held preferably before award (NASA PRD 70-15).



Code $\int \frac{\text { feodral acoulsition regulation (FAR) }}{}$
2. There is a clear disifinction between submitting cost or pricing data and merely making avail-
able books, records, and ocher documents without identification. The requirement for subatsaion of abs or pricing data is met when all accurate cost or pricing date reasonably avaliable to the offeror have been subaitred, either actually or by sppcific identification, to the Contracting
officer or an authorized representative. As later fiformarion comes finto the offeror
in passession, it should be promptly Bubilitted to the Contracting Officer. The requirenent for submisston of cost or pricing data continued up to the time of final agraomant on price.
3. In $\begin{aligned} & \text { subutcting this fore, you mase include an index, appropriately referenced, of all the cost } \\ & \text { or pricing data and information accompanying or identified in the form. In addition, any furure }\end{aligned}$
 mental 1ndex.
4. By subultting this proposal, the offeror grante the Contractiab officer of rn atifhorized rep resentative the right to examine those bonk, records, documents, and ochor ouporing data will permit adequate evaluation of the proposed price. This right miay be exercised at any time prior to award.
5. As soon at practicable after final agreement on price, but prior to the gward resulting from the
proposal, the offeror ahall, under the condirions giated in far $15.804-4$, subait a Certificate of Curreat Cout of Priciag Data.
A. Nisw Contyects

${ }^{[13}$ Enter-those necessary and reasonable costs that in your judgment will properiy be incurred In the efficient performance of the contract. When any of the costs in this colump have already been incurred (e.g., under a letter contract or unpriced order). describe thes on an attached supporting schedule. When preproduction or startup costs are bignificant, ot
when specificaliy requested to do ao oy che Contracting officer, provide a fuld identifioa tion and explanation of them.
${ }^{(2)}$ Optionaln unless requited by the Contracting officer.
(3) Attach separare pages as mecessaty, mid identify in this columa the attachment in which the information supporting the specifse cost element may be found.
B. Change oiders (modifications)

(1) Includad (1) eurcant extimates of what the cost vould have been to corplete deleted work not yet performed, und (1i) fhe cost of deleted work niready performed.
(2) This te the thcurred cost of such work, actually conputed if posatble, or estimated in the contractor ${ }^{1}$ s accounting records. Attach a detailed inventory of work, materials, parta, cownonente, and hardware already purchased, manufactured, or perfofmed and deleted by the change, indicating the cost and proposed disposition of esch line iterx. Also, if you dagite to cetain theze geams or any portion of thes, indiente the umount offered
for them.





|  | code | EEOERAL ACOUSSITYON REGULATION (FARI <br> (See SF $x \times x,-p-p .2-5$ ) |  |
| :---: | :---: | :---: | :---: |
| COMMEntaris |  |  | 9 |




[^0]:    1 This expectation is based upon the summary section of the December 29, 1998 Federal Register notice. The actual regulatory text, however, appears inconsistent. Whereas 48 CFR §§ 19.703(b) and 19.1202-4(c) allow a contractor to continue to rely in good faith on the written representation of subcontractors regarding their SDB status, § 52.219-25 still requires the contractor to confirm the subcontractor's SDB status on the SBA web site. This is but a small example of the confusion generated by the SDB certification program.

[^1]:    Tel $310373-0220$

[^2]:    ${ }^{\nu}$ The Federal Bar Association is an association of attorneys who practice in various areas of law relating to the Federal Government The Government Contracts Section of the Federal Bar Association, which consists of attorneys involved in the practice of Federal procurement law, is authorized by the Constitution of the Federal Bar Association to submit pubic comments on pending legislation, regulations, and procedures relating to Federal procurement The views expressed in these comments reflect the position of the FBA's Government Contracts Section They have not been considered or ratified by the Federal Bar Association as a whole or by any Federal agency or other organization with which Section members are associated

[^3]:    Elliott B. Branch
    Executive Director
    Acquisition and business
    Management

[^4]:    ${ }^{1}$ Building the Foundation for a New Century, First Annual Report on Implementation of the Recommendations of the 1995 White House Conference on Small Business (1996) at 18, America's Small

[^5]:    Business Economy Agenda for Action, Report to the President, White House Conference on Small Business (April 1986) at 76

[^6]:    (1) Past performance information is an indreater of an offeror's ability to perform the contract The comparative assessment of past performance information 19 separate from the responsibility deternmation required under 48-CFR 9-103. The number andserenty of an offeror's problems, the effectiveness of erireetwe then, the offerer's overall-werk record, and the age and relevance past performance information-sheuld be constered at the time it is used.

[^7]:    (a) General-A-seuree selection process is considered formal when a speetfie evaluation group structure 18 established to evaluate proposals and select the sure for contract award This approach is generally used m high dollar value equations and may be used mother acquisitions as prescribed in agency regulations. The source seleotion-rganzation typreally consists of an evaluation -board, advisory eounerl, and designated sure selection authority at a management level above that the contracting office.

[^8]:    ${ }^{23}$ The proposed restriction on the right to submit revised proposals coupled with the new discretion to accept late proposals (discussed below) could result in the anomalous situation, for example, of a timely offeror being denied the opportunity to change its proposal while an untimely offeror is permitted to submit a late proposal offering technology unavailable at the time set for initial submissions

    3 If offerors in the competitive range are to be given the right to submit revised proposals, a residual question exists as to whether those revised proposals must be limited to issues raised during discussions or can address any aspect of the proposal the offeror deems appropriate If revised proposals are to be limited to issues raised during discussions, the Government may lose the opportunity to obtain the benefit of new technologies developed during the course of the procurement

[^9]:    ${ }^{4 /}$ Of course, if the FAR were amended as proposed, this basis for overturning the contracting officer's decision would no longer apply

[^10]:    - The use of "limited information" solicitations is apt to generate larger-than-normal numbers of responses because sources will not have the full information needed to determine whether they can really perform the requirement. This will result in added work that may more than offset the various work savings anticipated for the multiphase acquisition process.
    - Offeror could potentially be excluded during the initial phase of the multiphase process for reasons that would be corrected in a normal negotiated process (e.g., for failing to include certain descriptive literature). We are concerned that this would increase protests and related workloads.

[^11]:    *The FAR citation at the end of a section is a citation to the proposed FAR rule unless otherwise indicated.

[^12]:    ${ }^{\underline{y}}$ The Federal Bar Association is an association of attorneys who practice in various areas of law relating to the Federal Government The Government Contracts Section of the Federal Bar Association, which consists of attorneys involved in the practice of Federal procurement law, is authorized by the Constitution of the Federal Bar Association to submit public comments on pending legislation, regulations, and procedures relating to Federal procurement The FBA's FAR Part 15 Task Force currently consists of nine members of the FBA's Government Contracts Section Council who come from both the private and Government sectors The views expressed in these comments reflect the position of the FBA's FAR Part 15 Task Force They have not been considered or ratified by the Federal Bar Association as a whole or by any Federal agency or other organization with which Section or Task Force members are associated

[^13]:    ${ }^{2}$ As noted in its October 31 comments, the Task Force favors giving each offeror in the competitive range one opportunity to submit a revised proposal after the conclusion of discussions Proposed FAR 15 207(c) makes the submission of a revised proposal discretionary with the contracting officer, a provision which the Task Force strongly believes should be revised

[^14]:    ? commenter continued on mext page.

[^15]:    15.2/0(c)(3)commentucantinced an mext page

[^16]:    15.40G-5(c) cor. ins. woul'd on next pagc

[^17]:    

[^18]:    si8-004 in sump, Gencral,
    reevelu-tod reeveluated by the ctice of Frincl Procurement Policy. The proposed
     prone ajcitioncl infor etici c eiscuss our views of the proposed lar-
    gus.

[^19]:    1526-3021
    There is no reason for the definition of "commercisi items" in 15.804-3(c) (3) to exclude those aupplies or services for which the Government is the largest ouyer if sales are nevertheless substantial, e.g. In the case of certain food concentrates, etc.

[^20]:    4. PHASE I PAR
[^21]:    (f) Section $F_{1}$ Deliveries or performance. Specify the requirements tor time, place? कnd method of delivery or performance (see Part 12 , Contract Delivery or Performance).

[^22]:    

    ## Reviewer Summers /Cole Editor Flanigan

    
    

[^23]:    FAR Entity Title MAKE-OR-RNNORRAN: drafter $R$ CUR-I Reviewer
    15.705 Solicatation requirements.

    When prospective contractors are requared to submat proposed make-or-buy programs (see 15.703). the solicitation shail include=-

[^24]:    

[^25]:    (4) The relative merits or technical standine of competitors or the evaluation ecorina.

[^26]:    2. $15.204(\mathrm{~b})(3)-\mathrm{DAR} / \mathrm{ASR}$ ( recogndtion of possible "department" (agency) procedures is adopted to allow maximum elexibilifty.
[^27]:    . $15.214(\mathrm{c})(2)$ (iili - This condition, formorly aprlicable novernment-wide basis.

