

To: OSD Public Affairs

From: Defense Acquisition Regulation Staff

Attached are public comments received in response to publication of a proposed rule for the Part 15 Rewrite, FAR Case 95-029. The proposed rule was published in the Federal Register on May 14, 1997 (62 FR 26639). Please make these comments available to the general public in your reading room.

Questions regarding this project may be directed to the case manager, Melissa Rider, at 602-0131.

Thank you.

RR

882

Commentor Matrix
 FAR Case 95-029
 Proposed Rule, May 14, 1997

| Comment Number | Respondent | Date |
|----------------|--|---------------|
| 295-029-1 | SETA | May 22, 1997 |
| 295-029-2 | Department of Energy | May 27, 1997 |
| 295-029-3 | Government Sales Consultants, Inc. | May 28, 1997 |
| 295-029-4 | Logicon | May 19, 1997 |
| 295-029-5 | Jennings Wong/Dept of Interior | May 29, 1997 |
| 295-029-6 | D. Holmes/Army Redstone Arsenal | May 23, 1997 |
| 295-029-7 | GSA-PP | June 17, 1997 |
| 295-029-8 | GSA/CAK | June 20, 1997 |
| 295-029-9 | Department of Energy | June 20, 1997 |
| 295-029-10 | Dept of the Treasury Bureau of Engraving and Printing | June 19, 1997 |
| 295-029-11 | Solloway and Associates | June 19, 1997 |
| 295-029-12 | Denise Nolet | June 26, 1997 |
| 295-029-13 | GAO | June 26, 1997 |
| 295-029-14 | Dept of the Treasury | July 1, 1997 |
| 295-029-15 | US Nuclear Regulatory Commission | July 3, 1997 |
| 295-029-16 | John Battan/Jaycor | July 8, 1997 |
| 295-029-17 | Joe Ely/ Navy | July 2, 1997 |
| 295-029-18 | HHS | July 10, 1997 |
| 295-029-19 | SBA | July 11, 1997 |
| 295-029-20 | SAF | July 11, 1997 |
| 295-029-21 | DCAA/Parametric Cost Estimating | July 11, 1997 |
| 295-029-22 | Riskin, CPCM | No date |
| 295-029-23 | IRS | July 11, 1997 |
| 295-029-24 | Sequent | July 11, 1997 |
| 295-029-25 | NASA | July 11, 1997 |
| 295-029-26 | USAID | July 10, 1997 |
| 295-029-27 | DoDEA | July 09, 1997 |
| 295-029-28 | Federal Bar Association | July 11, 1997 |
| 295-029-29 | DoD/Navy | July 10, 1997 |
| 295-029-30 | DoD/IG | July 14, 1997 |
| 295-029-31 | HHGFAA | July 14, 1997 |
| 295-029-32 | DoD/Army | July 14, 1997 |
| 295-029-33 | Daniel Damanaskis | July 14, 1997 |
| 295-029-34 | D. Dennis | July 14, 1997 |
| 295-029-35 | CCIA | July 14, 1997 |
| 295-029-36 | AGC | July 14, 1997 |

882

| | | |
|------------|---|---------------|
| 295-029-37 | GSA/OIG | July 14, 1997 |
| 295-029-38 | EPA | July 11, 1997 |
| 295-029-39 | Newport News Shipbuilding | July 14, 1997 |
| 295-029-40 | DLA | July 14, 1997 |
| 295-029-41 | MCR | July 14, 1997 |
| 295-029-42 | CODSIA | July 14, 1997 |
| 295-029-43 | Multi Association of Small Business Task Force | July 14, 1997 |
| 295-029-44 | Linda H. Smith | July 14, 1997 |
| 295-029-45 | DoD/AR | July 15, 1997 |
| 295-029-46 | DISA | July 14, 1997 |
| 295-029-47 | Northrup Grumman | July 14, 1997 |
| 295-029-48 | EDS | July 14, 1997 |
| 295-029-49 | NASBP | July 14, 1997 |
| 295-029-50 | Dept of Transportation | July 14, 1997 |
| 295-029-51 | Small Business Roundtable | July 14, 1997 |
| 295-029-52 | Alliant Tech Systems | July 14, 1997 |
| 295-029-53 | Chamber of Commerce | July 14, 1997 |
| 295-029-54 | ABA | July 14, 1997 |
| 295-029-55 | DoD/Army | July 10, 1997 |
| 295-029-56 | Thomas L. Riddle | July 10, 1997 |
| 295-029-57 | Christopher Beck/ Navy | July 8, 1997 |
| 295-029-58 | DLA (MMPPP) | July 14, 1997 |
| 295-029-59 | Commander, Naval Air Systems Command | July 15, 1997 |
| 295-029-60 | OMB | July 11, 1997 |
| 295-029-61 | Defense Personnel Support Center | July 15, 1997 |
| 295-029-62 | DLA | July 11, 1997 |
| 295-029-63 | NASA | July 11, 1997 |
| 295-029-64 | DoD/Navy | July 14, 1997 |
| 295-029-65 | SBA | July 16, 1997 |
| 295-029-66 | Army TACOM | July 15, 1997 |
| 295-029-67 | American Consulting Engineers Council | July 14, 1997 |
| 295-029-68 | DDP | July 14, 1997 |
| 295-029-69 | Nathan Tash | July 17, 1997 |
| 295-029-70 | Dept of Commerce | July 17, 1997 |
| 295-029-71 | NAMC | July 17, 1997 |
| 295-029-72 | Small Business Legislative Council | July 14, 1997 |
| 295-029-73 | ASA, Inc. | July 14, 1997 |
| 295-029-74 | Dept of State | July 14, 1997 |
| 295-029-75 | DCAA | July 21, 1997 |
| 295-029-76 | Air Force/ 11th Wing | July 16, 1997 |
| 295-029-77 | Veterans Affairs | July 16, 1997 |



U.S. GENERAL SERVICES ADMINISTRATION
Office of Governmentwide Policy

JUL 14 1997

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

FROM: *for* 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.

| <u>Response Number</u> | <u>Date Received</u> | <u>Comment Date</u> | <u>Commenter</u> |
|------------------------|----------------------|---------------------|------------------------------------|
| 95-029-1 | 05/22/97 | 05/22/97 | SETA |
| 95-029-2 | 05/27/97 | 05/27/97 | DOE |
| 95-029-3 | 05/28/97 | 05/28/97 | Government Sales Consultants, Inc. |
| 95-029-4 | 05/28/97 | 05/19/97 | LOGICON |
| 95-029-5 | 05/29/97 | 05/29/97 | DOI |
| 95-029-6 | 06/09/97 | 05/23/97 | Department of Army (AMSMI-AC) |
| 95-029-7 | 06/17/97 | 06/17/97 | Jerry Zaffos |
| 95-029-8 | 06/20/97 | 06/20/97 | Barbara Williams |
| 95-029-9 | 06/24/97 | 06/20/97 | DOE - Ed Lovett |
| 95-029-10 | 06/24/97 | 06/19/97 | Department of Treasury |
| 95-029-11 | 06/24/97 | 06/19/97 | Solloway & Associates |

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

| <u>Response Number</u> | <u>Date Received</u> | <u>Comment Date</u> | <u>Commenter</u> |
|------------------------|----------------------|---------------------|--|
| 95-029-12 | 06/26/97 | 06/21/97 | Denise Nolet |
| 95-029-13 | 06/30/97 | 06/26/97 | GAO |
| 95-029-14 | 07/07/97 | 07/01/97 | Department of Treasury Robert A. Welch |
| 95-029-15 | 07/08/97 | 07/03/97 | Mary Lynn Scott |
| 95-029-16 | 07/08/97 | 07/08/97 | John Battan |
| 95-029-17 | 07/10/97 | 07/02/97 | Joe Ely |
| 95-029-18 | 07/11/97 | 07/10/97 | HHS |
| 95-029-19 | 07/11/97 | 07/11/97 | SBA |
| 95-029-20 | 07/11/97 | 07/11/97 | DOD/Air Force |
| 95-029-21 | 07/11/97 | 07/09/97 | Parametric Cost Estimating |
| 95-029-22 | 07/11/978 | No Date | Albert Riskin, CPCM |
| 95-029-23 | 07/11/97 | 07/11/97 | IRS |
| 95-029-24 | 07/14/97 | 07/11/97 | Sequent |
| 95-029-25 | 07/14/97 | 07/10/97 | NASA |
| 95-029-26 | 07/14/97 | 07/09/97 | USAID |
| 95-029-27 | 07/14/97 | 07/14/97 | DoDEA |
| 95-029-28 | 07/14/97 | 07/11/97 | Federal Bar Association |
| 95-029-29 | 07/14/97 | 07/10/97 | DoD/Navy |
| 95-029-30 | 07/14/97 | 07/14/97 | DoD/IG |
| 95-029-31 | 07/14/97 | 07/14/97 | HHGFAA |
| 95-029-32 | 07/14/97 | 07/14/97 | DoD/Army |
| 95-029-33 | 07/14/97 | 07/14/97 | Daniel Damanskis |

| <u>Response Number</u> | <u>Date Received</u> | <u>Comment Date</u> | <u>Commenter</u> |
|------------------------|----------------------|---------------------|------------------------------|
| 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 |
| 95-029-41 | 07/14/97 | 07/14/97 | MCR |

Attachments



U.S. GENERAL SERVICES ADMINISTRATION
Office of Governmentwide Policy

JUL 15 1997

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

FROM:

Sharon A. Kiser
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.

| <u>Response Number</u> | <u>Date Received</u> | <u>Comment Date</u> | <u>Commenter</u> |
|----------------------------|----------------------|---------------------|---|
| 95-029-42 | 07/14/97 | 07/14/97 | CODSIA |
| 95-029-43 | 07/14/97 | 07/14/97 | Multi Association of Small Business Task Force |
| 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 Information 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 | Small Business Round Table |
| 95-029-52 | 07/15/97 | 07/14/97 | Alliant Tech Systems |

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



| <u>Response Number</u> | <u>Date Received</u> | <u>Comment Date</u> | <u>Commenter</u> |
|----------------------------|----------------------|---------------------|------------------------------|
| 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 |
| 95-029-56 | 07/15/97 | 07/10/97 | Thomas L. Riddle |
| 95-029-57 | 07/15/97 | 07/08/97 | Christopher H. Beck/ Navy |
| 95-029-58 | 07/15/97 | 07/14/97 | DLA (MMPPP) |

Attachments

05/22/1997 11:53

7038218030

SETA CORPORATION

PAGE 02

95-029-1


SETA6862 Elm Street
McLean, VA 22101-3833Telephone: (703) 821-8178
Facsimile: (703) 821-8274Ranvir K. Trehan
President

22 May 1997

General Services Administration
FAR Secretariat (MVRS)
1800 F Street, NW
Room 4037
Washington, DC 20405

Re: FAR Case 95-029

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 it 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 business 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

MAY 22 1997



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

The Department of Energy (DOE) strongly supports paragraph 15.406(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.

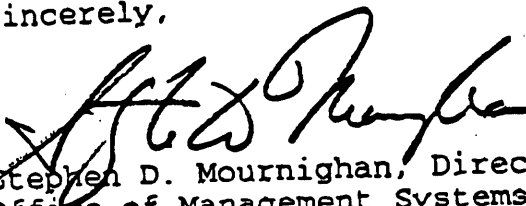
We examined our recent competitive awards to determine if award was made to other than one of the top three firms in order to determine if any competitor would be harmed by small competitive ranges. First we sampled our most recently awarded competitive negotiated contracts valued at over \$5 million. 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 unrestricted, over \$100,000 awarded to small businesses during FY 1996 and the first quarter of FY 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.

95-029-2

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,



Stephen D. Mournighan, Director
Office of Management Systems
(Competition Advocate)

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 7.4 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 8.4 deals with the process of buying from a GSA schedule. It is inadequate 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, 8.4 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 Chevs, which is hardly the intent and certainly not competition.

3 Even worse is RFQs from FAR 15 are being used to establish BPAs (FAR 13.2 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 days, and in one case three hours, response time. Something needs to be fixed in FAR 8, 13 and 15 to fix this abuse.

4 The rewrite of FAR 15 allows unfettered abuse of the process by poorly trained COs or biased COs. It will 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.

5 The intent to eliminate BAFOs completely forgets the reason we, at GSA in 1972, stopped allowing late bids. Fraud, ladies and gentlemen! Allowing late bids is an open invitation 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.

95-09-3

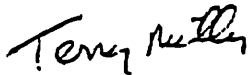
6 Perhaps the worst problem I see, so far, is the complete elimination of the old FAR 15.402(b), preventing a vendor being given advance knowledge of government requirements. Did I miss this in the new FAR or did you forget to put it in? Is advance knowledge now okay because it is common in the commercial 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 ill 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 proper competition to arrive at that point.

7 Finally, we desperately need a section to provide buyers guidance on choice among a plethora of previously awarded GWACs, schedules, IDIQs, etc. FAR 17.207 is simply not adequate today.

Sincerely,



Terry Miller
President

TM/tk
Enclosure

FAR PART 15 REWRITE
A.K.A
AGENCY DISCRETION AT ITS WORST

Presented by:

THOMAS K. DAVID

McMahon, David & Brody
Attorneys At Law
8221 Old Courthouse Road
Suite 107
Vienna, VA 22182

(703) 903-0334

STATUS OF RE-WRITE

FAR COUNCIL TASKED GOVERNMENT AND INDUSTRY COMMITTEE IN JANUARY 1996 TO RE-WRITE FAR 15.

FIRST PHASE (SOURCE SELECTION AND EVALUATION) RELEASED FOR COMMENT IN SEPTEMBER 1996.

COMMENTS WERE NUMEROUS AND HIGHLY CRITICAL

HIGHLIGHTS/LOWLIGHTS INCLUDE:

- DISCRETIONARY COMPETITIVE RANGE DETERMINATIONS
- FEWER DISCUSSIONS WITH OFFERORS
- MORE COMMUNICATIONS WITH OFFERORS
- BAFOS ARE ALMOST EXTINGUISHED (REVISIONS INSTEAD)
- ALLOWS LATE PROPOSALS
- AND MUCH, MUCH MORE!

SECOND PHASE TO COVER PRICING SECTIONS. (15.7, 15.8 AND 15.9)

SCHEDULED FOR RELEASE IN 1997

COMPETITIVE RANGE DETERMINATIONS - 15.406
MORE DISCRETION FOR THE GOVERNMENT

- A. AGENCY ALLOWED TO RESTRICT COMPETITIVE RANGE IN ADVANCE OF RFP ISSUANCE! NO PRE RFP RESTRICTIONS.
 - I. RESTRICTIONS DUE TO "RESOURCES AVAILABLE" TO AGENCY AND "EFFICIENCY"
 - II. DOES NOT COMPLY WITH FARA WHICH REQUIRES "GREATEST NUMBER" OF OFFERORS TO BE INCLUDED IN COMPETITIVE RANGE.
 - III. DOES NOT COMPLY WITH CICA REQUIREMENT TO "MAXIMIZE COMPETITION"
- B. AGENCY ALLOWED TO LIMIT FIELD TO PROPOSALS WITH "MOST HIGHLY RATED" OF AWARD
 - I. FARA MANDATES "GREATEST NUMBER" THAT ARE "RATED MOST HIGHLY"
 - II. PRE-AWARD DEBRIEF FOR OFFERORS NOT IN COMPETITIVE RANGE (NOT REQUIRED AND INFORMATION IS LIMITED!)

COMMUNICATION ARE "IN"
DISCUSSIONS ARE "OUT"

- A. COMMUNICATIONS WITH OFFERORS ENCOURAGED
 - I. HELPS GOVERNMENT'S ABILITY TO AWARD ON INITIAL PROPOSALS (TO ENHANCE GOVERNMENT UNDERSTANDING)
 - II. OFFEROR ALLOWED TO RESOLVE AMBIGUITIES OR OTHER 'CONCERNS'
15.406 (i)(3)
Extra credit - can negotiate excess performance up or down
Does not have to be in writing
- B. LEGAL CHALLENGES AWAIT
 - I. AGENCY ALLOWED TO CHOOSE OFFERORS WHO WILL BE ALLOWED TO COMMUNICATE
 - II. COMMUNICATIONS DONT NEED TO BE IN WRITING (WHERE'S THE PROOF?)
 - III. PAST PERFORMANCE DISCUSSED ONLY IF PREVIOUS OPPORTUNITY TO DISCUSS INFORMATION had not BEEN PROVIDED TO OFFEROR.

BYE-BYE BAFOS
15.409

- A. "SELECT" OFFERORS ARE ALLOWED TO MAKE "REVISIONS" TO THEIR PROPOSALS
 - I. "REVISION" DEFINED AS A "CHANGE TO PROPOSAL AS A RESULT OF DISCUSSIONS"
 - II. ALL COMPETITIVE RANGE OFFERORS WILL BE ALLOWED TO MAKE MULTIPLE REVISIONS
- B. NO LIMIT ON THE NUMBER OF "REVISIONS" ALLOWED
- C. WILL BE A COMMON CUT-OFF DATE
- D. AUCTIONING AND TECHNICALLY LEVELING AWAIT
- E. OPPORTUNITY FOR FAVORITISM

A FEW MORE GREAT IDEAS

- A. LATE PROPOSALS ARE ALLOWED IF "IN BEST INTERESTS OF GOVERNMENT"**
 - I. MAY BE APPLIED TO SELECT OFFERORS**
- B. DATE OF AWARD NOT RELEASED TO UNSUCCESSFUL OFFERORS**
 - I. COULD PREJUDICE SUBSEQUENT PROTEST**
- C. GOVERNMENT COST ESTIMATES RELEASABLE (TO EVERYONE!)**
- D. PAST PERFORMANCE ADVERSE INFORMATION CAN REBUT AND REBUTTAL WILL BE CONSIDERED BY GOVERNMENT**
 - I. MUST DEFINE NEUTRAL INFORMATION - NO EFFECT ON RATING BUT COULD AFFECT YOUR RANKING.**
- E. ORAL PROPOSALS ENCOURAGED (FINALLY A GOOD IDEA!) 15.103 - BUT OPEN TO ABUSE**



Comptroller General
of the United States

Washington, D.C. 20548

Decision

92-1 CPD 702

Matter of: Komatsu Dresser Company
File: B-246121
Date: February 19, 1992

Matthew S. Simchak, Esq., Ropes & Gray, for the protester.
William A. Roberts, III, Esq., Howrey & Simon, for
Caterpillar, Inc., and Gerald J. Cardon, for Melroe Company,
interested parties.
Stuart Young, Esq., General Services Administration, for the
agency.
Scott H. Riback, Esq., and John M. Melody, Esq., Office of
the General Counsel, GAO, participated in preparation of the
decision.

DIGEST

1. Protest against terms of "open season" amendment to earlier General Services Administration solicitation for multiple award, Federal Supply Schedule contract is timely where filed prior to the time set for receipt of initial proposals under the amendment; as the amendment includes new requirements and solicits offers from all interested firms, it is tantamount to new solicitation for purposes of protesting its terms.
2. "Requote arrangements" clause in Federal Supply Schedule (FSS) solicitation is inconsistent with Competition in Contracting Act requirement for full and open competition, and thus is improper, since it provides for limited competition exclusively among FSS vendors for supplies in excess of maximum order limitations instead of permitting all interested firms to compete.
3. Protest of agency's determination as to appropriate federal supply classification (FSC) for certain items is denied where record shows that agency's classification is reasonable; fact that items could also be classified under other FSCs is not, in itself, sufficient basis to disturb agency determination.

DECISION

Komatsu Dresser Company protests the terms of request for proposals (RFP) No. FCAS-S3-3810-1-N-10-8-91, issued by the General Services Administration (GSA) to allow an open season for adding vendors to its multiple award Federal

FEB-20-1992 10:16 FROM GAO OGC/PROCUREMENT-LAW TO

95010583 P.03

Supply Schedule (FSS) for road clearing and cleaning equipment. Komatsu argues that (1) the solicitation's requote provisions improperly preclude full and open competition; and (2) GSA improperly has expanded the types of equipment vendors may offer under one of the solicitation's special item numbers (SIN) and improperly raised the maximum order limitations (MOL) applicable to this SIN.

We sustain the protest in part and deny it in part.

The solicitation, issued September 3, 1991, is an amendment to the basic FSS solicitation, RFP No. FCAS-S3-3810-N-4-10-90, issued in March 1990. The basic RFP was issued to obtain vendors for a variety of street cleaning and clearing equipment under the FSS, and contemplated the award of multiple contracts for similar equipment. Offerors were required to submit firm, fixed unit prices for an indefinite quantity of each line item for a 5-year period from 1990 to 1995. The current RFP contemplates the award of similar contracts to additional vendors for the remainder of the original 5-year period. Initial offers under the open season amendment were due on October 8.

Both the basic solicitation and the open season amendment contain three provisions that are the subject of Komatsu's protest. First, the solicitations contain MOLs limiting the dollar value of orders placed under the contracts; any given order under the contract cannot exceed \$150,000, and the value of supplies ordered under the various SINs¹ cannot exceed \$50,000, \$75,000 or \$100,000, the applicable MOL increasing as offered discounts increase. (To determine the MOL for each SIN, the agency negotiates separately with each vendor, setting the MOL higher in return for the vendors' offering of relatively higher per-unit price discounts.)

Second, the solicitations contain a "requote arrangements" clause providing that only vendors included on the FSS may compete for user agency requirements that exceed the largest MOL available from any vendor. Under the requote arrangements clause, vendors are required to quote unit prices which are at least as advantageous as the unit prices available under the schedule and may offer additional discounts for purposes of the requote. Additionally, vendors may only offer the exact products originally contracted for under the SIN and may not substitute

¹The solicitation contains a total of 11 SINs, each one representing a discrete grouping of equipment. For example, SIN No. 271-102 is for vehicular mounting winches and SIN No. 271-103 is for rider-operated street and parking area sweepers.

alternate products. After conducting a requote competition, the user agency awards a delivery order to the successful vendor under that vendor's FSS contract.

Finally, the solicitations define SIN No. 271-109, for road clearing and cleaning equipment, as including "scarifiers; beach cleaners; backhoes; front-end loaders; excavators; tractor, wheeled (20 horsepower or greater); industrial trailers for construction equipment; etc."

TIMELINESS

As a preliminary matter, GSA argues that the protest is untimely because all of the provisions Komatsu challenges were included in the 1990 basic solicitation. According to GSA, Komatsu was required to protest prior to the closing date for the receipt of proposals under the basic solicitation, and its protest filed prior to the closing date for the current solicitation is untimely. Alternatively, GSA argues that since the provisions were included in 25 contract awards under the basic solicitation, Komatsu should have diligently pursued the information contained in those contracts in order to object to those terms in a reasonably prompt manner.

We disagree with GSA. The open season amendment was issued, GSA explains, "to allow new offerors the opportunity to obtain contracts under the existing schedule," so that "participation under the schedule remains open to all responsible sources." Given this purpose, we view the amendment as tantamount to a FSS solicitation for new offerors. Just as a potential offeror on any current solicitation is not precluded from protesting its terms prior to the initial closing merely because the same objectionable terms appeared in prior solicitations or contracts, we do not think that offerors invited to compete under the amendment here are precluded from challenging the terms of the amendment prior to the deadline for submission of offers under the amendment. In other words, we see no reason why the terms of the amendment, which establish the contract terms to which these new offerors will be bound, should not be subject to protest under the same rules applicable to any other solicitation terms.

The applicable rule under our Bid Protest Regulations provides that protests based upon alleged improprieties apparent on the face of a solicitation must be filed no later than the time set for receipt of proposals. 4 C.F.R. § 21.2(a)(1), as amended by 56 Fed. Reg. 3759 (1991). Because Komatsu's protest of the terms of the amendment was received prior to the deadline for receipt of offers it is timely. See Syva Co.--Recon., B-218359.2, May 6, 1985, 85-1 CPD ¶ 503 (protest against terms of amendment issued under

earlier RFP timely because amendment effectively called for supplies or services to satisfy new agency requirements).

REQUOTE

Komatsu argues that the requote arrangements clause impermissibly limits the field of competitors in acquisitions exceeding the MOL to FSS vendors. According to Komatsu, requirements in excess of the MOL should be open to competition by any interested firms, including those such as Komatsu that do not participate in the multiple award schedule (MAS) program. The protester argues that GSA's attempt to limit the competition by means of the requote clause violates the Competition in Contracting Act of 1984 (CICA), under which all responsible sources generally must be afforded an opportunity to submit competitive bids or proposals. 41 U.S.C. § 403(6) (1988).

GSA maintains that the requote arrangements clause is consistent with CICA, noting that CICA, 41 U.S.C. § 259(b)(3), specifically states that the MAS program satisfies the Act's requirements for full and open competition, provided that (1) all responsible sources have been afforded an opportunity to compete, and (2) the contracts or delivery orders placed under the MAS result in the lowest overall cost alternative for the government. GSA asserts that the first proviso is met by the requote provision since all responsible sources are permitted to compete to become FSS vendors during either the basic solicitation or open seasons such as the one here, and thus can compete on requotes. GSA asserts that the requote process also will result in the lowest overall cost to the government, satisfying the second proviso, because offers must be at or below the vendors' lowest FSS prices, and orders may only be placed if more than one FSS contractor can be expected to compete for the requirement.

We do not agree that the requote provisions satisfy the requirements of CICA relating to the MAS program. The MAS program authority under CICA was intended to enable user agencies to acquire small quantities of commercially available goods and services with minimal administrative burdens. See H.R. Conf. Rep. No 861, 98th Cong. 2d Sess. 423, reprinted in 1984 U.S. Code Cong. Admin. News 2111. As we have noted in the past, the purpose of placing an MOL clause in an FSS contract is to enable the government to explore the possibilities of securing lower prices for larger quantities exceeding the MOL. Kavouras, Inc., B-220058.2, B-220058.3, Feb. 11, 1986, 86-1 CPD ¶ 148. Consistent with this purpose, the government may not place an order, and an FSS vendor may not accept one, where it

FEB-20-1992 10:18 FROM GAO OGC/PROCUREMENT-LAW TO

95010583 P.06

exceeds the MOL stated in the contract. Id.; Federal Property Management Regulations (FPMR), 41 C.F.R. § 101-26.401-4(c)(1) (1990). It follows that an FSS solicitation represents a competition for quantities up to the advertised MOL, not quantities in excess of the MOL.

Under the requote provisions in issue, award can be made to a FSS vendor for quantities in excess of the MOL despite the fact that the competition was not conducted on the basis of those larger quantities. As a result, requote competitions under these provisions would satisfy neither of the CICA provisos cited above. First, competition among firms--such as Komatsu--that did not desire to compete for a FSS contract would be precluded, so there would be an absence of full and open competition for the requirements. Second, awards under the requote procedures would not necessarily result in the lowest cost to the government; requotes would only assure the lowest cost available from schedule vendors.

GSA maintains that it is necessary to require firms to compete for MOL quantities as FSS vendors as a condition to being eligible to compete for larger orders in excess of the MOL to assure that there will be adequate competition for the MOL quantities. Absent such a "package approach," GSA asserts, contractors would compete only for the larger orders.

A package approach coupling large quantity, high dollar value requirements with small quantity, low dollar value requirements may be used where the agency's needs and the requirement's procurement history made it less desirable to acquire the two quantities separately. For example, in IVAC Corp., 67 Comp. Gen. 531 (1988), 88-2 CPD ¶ 75, we found the agency's use of a package approach unobjectionable because (1) the two combined items--intravenous solutions and intravenous administration sets--had to be compatible and therefore had to be acquired from a single manufacturer; and (2) the agency demonstrated that significant savings would result.

GSA has not demonstrated that a package approach is warranted here. While it may well be that a requote procedure would be appropriate where it is necessary to secure sources to meet the agency's needs, there has been no showing that this is the case. GSA has furnished nothing evidencing a lack of competition for MOL quantities in the past, and there is nothing else in the record that supports such a conclusion. Komatsu states that it does not desire to compete for the MOL quantities--indeed, this is the reason for its protest--but one firm's business decision is not sufficient to establish a lack of adequate competition. As GSA has noted, some 25 vendors currently hold MAS contracts under this FSC group of commodities.

FEB-20-1992 10:19 FROM GAO OGC/PROCUREMENT-LAW TO

95010583 P.07

GSA maintains that the requote procedure is beneficial to the government, and thus should be permitted, because the commerciality of the products available under the MAS ensures that products acquired under a requote competition will have a broader functional application than products acquired under a separate solicitation with its own narrow specifications. According to GSA, buyer agencies that acquire products under the MAS will have available the contractor's entire line of accessories and attachments for the product and will thereby be able to broaden the utility of the item purchased. GSA also maintains that the conduct of a requote acquisition further benefits the government because of the savings of administrative costs that would be incurred in conducting a separate acquisition.

GSA's arguments are unpersuasive. There is no statutory or regulatory basis for ignoring CICA's competition and low price requirements for the MAS program--which we have found are not satisfied by the requote procedures--based upon a general allegation that this will facilitate obtaining equipment with desirable features. Agencies may not justify avoiding competition requirements with unsupported assertions that administrative savings may result. See Richard M. Milburn High School, B-244933, Nov. 27, 1991, 91-2 CPD ¶ 496; 53 Comp. Gen. 209 (1973). As a practical matter, it is unclear why GSA could not obtain the commerciality and flexibility of use it desires by fashioning a specification that requires a commercial product (indeed, FAR part 11 imposes an obligation on agencies to acquire commercial products whenever such products will adequately fulfill the agency's needs), or otherwise describes the equipment in a manner similar to that in the FSS.

We conclude that the requote provisions in the RFP do not satisfy the CICA competition requirements and therefore sustain this aspect of the protest.

AMENDMENT OF SIN 271-109

Komatsu argues that GSA has improperly amended one of the SINS in the solicitation that describes the type of equipment that may be offered. The solicitation, which calls generally for Federal Supply Classification (FSC) Group 38 commodities, includes FSC 3825, "Road Clearing and Cleaning Equipment," and solicits offers for five SINS falling under FSC 3825. One of those five, SIN 271-109, "Other Road Clearing and Cleaning Equipment," is the subject of Komatsu's argument. According to Komatsu, GSA has improperly added nine heavy construction items to the list

of commodities acceptable under SIN 271-109,¹ because each of the items is already properly classified under another FSC code.² Komatsu maintains that acquiring the same goods or services under more than one FSC code violates the FPMR provisions relating to the cataloging of federal supply items, which require items to be described under one four-digit FSC class. See FPMR, 41 C.F.R. § 101-30.201(b) (1) and (b) (2); Federal Catalog System Policy Manual, GSA-FSS-4130.2-M, § 331.04(a). Komatsu concludes that the nine additional heavy construction items should be removed from the RFP.

According to GSA, these items have long been contracted for under SIN 271-109, and have been described using generic names such as "backhoes" in order to apprise offerors that multiple-application equipment that is suitable for use in street cleaning and clearing will be considered by the agency for inclusion under SIN 271-109. GSA notes that many equipment manufacturers produce a base machine bearing a generic name that can be modified using various attachments, some of which will render the machine suitable for the applications contemplated under FSC 3825 and SIN 271-109. For example, GSA states that one of the current contractors under this SIN supplies an item described as a "multiple tool carrier/wheeled articulated loader." This basic machine has 16 possible attachments, some of which allow the machine to perform street cleaning and clearing functions. According to GSA, it has attempted to list some of the possible types of machines which, when properly equipped, will be acceptable under SIN 271-109. GSA notes that the commerciality and versatility of these machines will result in cost savings to the user agencies, which can simply buy additional attachments when new needs arise.

The determination of the appropriate FSC for an item is within the discretion of the procuring activity, utilizing the available guidance provided by the FPMR and the various

¹The protester specifically objects to the inclusion under SIN 271-109 of the following items: wheeled articulated front-end loaders, tracked front-end loaders, tracked front-end loaders/backhoes, compaction/roller equipment, wheeled excavators, tracked excavators, trenching equipment, graders and cranes. This listing is derived from a July 3 presolicitation notice, issued by GSA, rather than the solicitation itself.

²For example, FSC code 3810 includes cutting edges, ditchers, graders, loaders, scrapers, special type earth and rock hauling trucks and trailers and structural components of these items such as bodies, cabs, and frames.

FEB-20-1992 10:20 FROM GAO OGC/PROCUREMENT-LAW TO

95010583 P.09

cataloging policy manuals, Hung Myung (USA) Lt., Inc;
Containertechnik Hamburg GmbH & Co., B-244686 et al.,
 Nov. 7, 1991, 71 Comp. Gen. _____, 91-2 CPD ¶ 434; we will not
 disturb an agency's determination in this regard unless it
 lacks a reasonable basis. Id. Although in some
 circumstances there may be no question as to the appropriate
 classification for a particular item, some items may
 appropriately be classified under more than one FSC category
 and we will not overturn such classifications simply because
 a category other than the one selected might also have been
 chosen. Cincinnati Milacron Mktg. Co., B-237619, Feb. 27,
 1990, 90-1 CPD ¶ 241.

We find that GSA's inclusion of the nine items under FSC
 3825 was reasonable. We are persuaded by GSA's explanation
 regarding the multiple-use nature of these items. The
 record shows that many of these items, while bearing generic
 names such as "front-end loaders," in fact are suitable for
 performing a wide variety of operations, some of which are
 clearly encompassed by the equipment described in FSC 3825.
 For example, machines that may be generically described as
 articulated front-end loaders are suited for the performance
 of snow removal or street sweeping and cleaning when the
 appropriate attachments are utilized. While we recognize
 that this equipment properly can be classified under another
 FSC category, we think it also reasonably can be included
 under the category here. This being the case, we have no
 basis to conclude that GSA's classification of the items was
 improper. Cincinnati Milacron Mktg. Co., supra.⁴

MISCELLANEOUS

Komatsu alleges for the first time in its comments on the
 agency report that the description of acceptable items under
 SIN 271-109 is ambiguous because it is indefinite. Komatsu
 asserts that this alleged ambiguity became apparent only
 when it received the agency's report and understood the
 agency's position regarding the description of acceptable
 items under SIN 271-109. This argument is untimely. GSA's
 interpretation of acceptable items under SIN 271-109 as
 including what Komatsu describes as heavy construction

⁴Komatsu alleges that the agency has improperly raised the
 MOLs for this acquisition--from \$100,000 to \$150,000 per
 order and from \$30,000, \$40,000 or \$50,000 to \$50,000,
 \$75,000, or \$100,000 per SIN--to facilitate the acquisition
 of the additional items of heavy-construction equipment that
 it argues have been improperly included under this
 solicitation. Given our conclusion above that there is
 nothing improper in the equipment included in the
 solicitation, this argument is without merit.

FEB-20-1992 10:21 FROM GAO OGC/PROCUREMENT-LAW TO

95010583 P.10

equipment was evident from the solicitation's description of acceptable items under that SIN and was made still more explicit in the July 3 presolicitation notice. Consequently, if Komatsu considered the specification indefinite, it should have raised the matter in its initial protest. 4 C.F.R. § 21.2(a)(1), as amended by 56 Fed. Reg. 3759 (1991).

RECOMMENDATION

By letter of today to the Administrator of General Services, we are recommending that the solicitation be amended to eliminate the requote arrangements clause. We also find Komatsu to be entitled to those costs of filing and pursuing its bid protest, including attorneys' fees, related to its protest on the requote arrangements clause. 4 C.F.R. § 21.6(d)(1); Interface Flooring, 65 Comp. Gen. 597 (1987), 87-2 CPD ¶ 106.

The protest is sustained in part and denied in part.

for Milton J. Fowler
Comptroller General
of the United States

95-029-4

LOGICON

Logicon, Inc.
3701 Skypark Drive
Torrance, California
90505-4794

Tel: 310 373-0220
FAX: 310 373-0844

A/C 97 126
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.

N. Roy Easton, Jr., Ph.D.
Director of Accounting Controls

MAY 28 1997

95-029-5

Author: Jennings Wong at -IOS
 Date: 5/29/97 2:00 PM
 Priority: Normal
 TO: 95-298@www.gsa.gov at -INTERNET
 BCC: Jennings Wong
 TO: goidel.eunsook@epamail.epa.gov at -INTERNET
 TO: tanya.sadler@hq.doe.gov at -INTERNET
 CC: richard.klimkos@hq.doe.gov at -INTERNET
 CC: Kenneth Naser at -IOSPEP
 CC: John Moresko
 Subject: FAR CASE 95-029 - Comments

----- Message Contents -----

Comments on the proposed rule published in FR May 14, 1997, (pages 26640 - 26682) follows:

1) FAR 15.302 Policy should be expanded to provide clear and concise coverage addressing the receipt of unsolicited proposals submitted pursuant to Section 155 of the Energy Policy Act of 1992 and 10 CFR Part 436. It is unclear and difficult to distinguish whether FAR or DOE regulations prevail. FAR coverage and 10 CFR Part 436 are not in agreement. This issue should be resolved and not remain subject to interpretation.

*and Planning Program
 Fed. Energy Management
 10 CFR 436.33 (b) (1) excluded 15.502 etc
 15.506-2 (2)(1)
 15.507 (2), (6), (8)
 (4) (3)
 deleted unrec'd
 re: gov't
 sole source how
 custom*

2) The proposed FAR 15.404 "Evaluation factors and subfactors" has eliminated coverage of "environmental objectives prescribed in Executive 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) policy change which rescinds existing requirements currently contained in FAR 15.605(b) (1) (iv).

The above issues should be coordinated with 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.

*Co 12473
 Sec 401
 902-10 FAR
 implemented in
 FAR 48-27 20 24
 92-2024
 interior rule*

Author: mic14 MMDF2 Mail System <mmdf@mic14.redstone.army.mil> at INTERNET
 Date: 5/23/97 12:16 PM
 Priority: Normal
 TO: DHOLMES at ACQUIS1_PO
 Subject: Failed mail (msg.ac12682)

95-029-6

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>... User unknown'

Your message follows:

Received: from michp758.redstone.army.mil by mic14.redstone.army.mil id ac12682;
 23 May 97 12:14 CDT
 Received: from [136.205.13.9] by michp758.redstone.army.mil id aal9072;
 23 May 97 12:13 CDT
 Received: from ccMail by clsmtp.redstone.army.mil
 (IMA Internet Exchange 2.1 Enterprise) id 0003551D; Pri, 23 May 97 12:12:40
 -0500
 Date: Fri, 23 May 1997 12:02:12 -0500
 Message-ID: <0003551D.3272@ccsmtp.redstone.army.mil>
 Return-receipt-to: DHOLMES <DHOLMES@ccsmtp.redstone.army.mil>
 From: DHOLMES <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 OF303 (OR SF33), SECTION B COMPLETED WITH OFFERED PRICES AND A COMPLETED SECTION K. BUYING ACTIVITIES SHOULD 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, MANAGEMENT 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.

*rcud
6-9-97*

95-029-7

Author: Jerry Zaffos at GSA-PP (202) 208-6071 L.Ft m.m.j. 6/18 9:00
Date: 6/17/97 4:39 PM
Priority: Normal
TO: Ralph DeStefano at GSA-V, Jerry Olson at GSA-V
CC: Sharon Roach at GSA-PE
Subject: Part 15 Rewrite

I offer the following comments:

Phase II
7.105(b) (5)
1

Recommend deletion as this requirement seems unnecessary and burdensome. The contracting officer need only have assurances from budget people that funds are or will be available at the time of award. In PBS, Project managers, not contracting officers, normally handle budget issues.

Phase I
14.404-1(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".

*This section can limit if
the contractor to be
responsible by
the...*

2
Phase II
15.506-3

The documentation should reflect the complexity of the negotiations and should not have to conform to a prescribed format.

3

for each new, revised, or extended interagency report:

(iv) Attach to each Standard Form 360, a justification statement (signed by the official who requested the report) describing the need for the report;

(v) Explain how the reporting costs shown on Standard Form 360 were derived;

(vi) Make supporting documentation for cost estimates available for GSA review;

(vii) Submit to GSA and OMB (see 5 CFR part 1320) simultaneously for approval, interagency reports that collect information from Federal agencies and from either the public or State or local governments;

(viii) Notify GSA and responding agencies when an interagency report is no longer needed; and

(ix) Send requests for GSA approval and notifications regarding interagency reports to: General Services Administration, Strategic IT Analysis Division, (MKS), 18th and F Streets, NW., Washington, DC 20405.

(2) This section does not apply to the following interagency reports: (However, interagency reports required by Federal agencies to respond to these reports are subject to this section.)

(i) Legislative branch reports;

(ii) Office of Management and Budget (OMB) and other Executive Office of the President reports;

(iii) Judicial branch reports required by court 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 later given a security classification by the requesting agency.

Dated: July 31, 1996.
David J. Barram,
Acting Administrator of General Services.
[FR Doc. 96-19960 Filed 8-6-96; 8:45 am]
BILLING CODE 4120-25-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 mailed 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 101-35.1) or General Services Administration, Federal Telecommunications Service (TCS), 7980 Boeing Court, 4th Floor, Vienna, VA 22182-3988 (for §§101-35.2-101-35.5).

FOR FURTHER INFORMATION CONTACT: Doris Farmer (for Part 101-35.1), GSA, Office of Policy, Planning and Evaluation, Strategic IT Analysis Division (MKS), 18th & F Streets, NW., Room 3224, Washington, DC 20405, telephone FTS/Commercial (202) 501-3194 (v) or (202) 501-0657 (td), or Internet (doris.farmer@gsa.gov) and James Cademartori (for Parts 101-35.2 through 101-35.5), GSA, Federal Telecommunications 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.cademartori@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 authority 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 12:00 midnight on August 8, 1996. The referenced FIRMR provisions that apply to government telecommunications will be maintained in the FPMR after August 7, 1996.

(2) Most of the language now contained in sections 201-20.306, 201-

21.600, 201-21.601, 201-21.602, 201-24.101, 201-24.101-1, 201-24.101-2, 201-24.101-3, 201-24.102, 201.24.106, 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 determined 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 underlying 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 society.

List of Subjects in 41 CFR Part 101-35

Archives and records, Computer technology, Telecommunications, 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.

101-35.0 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

101-35.300 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.

41002 Federal Register / Vol. 61, No. 153 / Wednesday, August 7, 1996 / Rules and Regulations

implementing agency records management programs.

(c) Issue a directive 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 originated 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) Maintains 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 originals, record copies, and envelopes), markings that are permitted on envelopes and postcards, and number of stationery styles permitted.

(g) Consider the voluntary standards contained in the Table of Standard Specifications in the FPMR, when developing agency stationery 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 timely, economical, and efficient manner;

(2) Design forms that are easy to fill-in, 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) Eliminate unnecessary reports and design necessary reports for ease of use;

(6) Provide rapid handling and accurate delivery of mail at minimum cost; and

(7) Organize agency files:

(i) 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 contains policies and procedures prescribed for the following GSA-managed programs:

(a) The Standard and Optional Forms Management Program.

(b) The Interagency Reports Management Program.

§ 101-11.201 General.

(a) The Standard and Optional Forms Management Program was developed and operated by OMB consistent with the authorities 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(e) and OMB implementation under 5 CFR 1320.16.

§ 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 Liaison Representative and Alternate, and notify GSA in writing 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 Governmentwide procedures on the mandatory use, revision, or cancellation of these forms;

(3) Sponsor Governmentwide Optional Forms when needed in two or more agencies 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 implementation, and certify that the forms comply with all applicable laws and regulations. Send approval requests to: General Services Administration, Forms Management Branch (CARM), Washington, 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 promulgates or sponsors, including exceptions, for improvement, consolidation, or cancellation;

(8) When requested by GSA and OMB, submit 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).

§ 101-11.204 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 additional guidance on the Interagency Reports Management Program.

(b) *Procedures.* (1) Each agency shall: (i) Obtain GSA approval for each new, revised, or extended interagency report, prior to implementing the report;

(ii) Designate an agency-level interagency reports liaison representative and alternate, and notify GSA in writing of such designees' names, titles, mailing addresses, and telephone numbers within 30 days of the designation or redesignation;

(iii) Use Standard Form 360, Request to Approve an Interagency Reporting Requirement, to obtain GSA approval

Office of Policy, Planning and Evaluation, Strategic IT Analysis Division (MKS), 18th & F Streets, NW., Room 3224, Washington, DC 20405, telephone FTS/Commercial (202) 501-4469 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 potential costs; has maximized the net benefits; and has chosen the alternative 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 101-11.0 General Provisions Sec.

101-11.0 Scope of part.
101-11.1 General.

Subpart 101-11.1—Agency Programs

101-11.100 Scope of subpart.
101-11.101 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 Reports Management Program.
Authority: 40 U.S.C. 486(c).

Subpart 101-11.0 General Provisions

§ 101-11.0 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 (i.e., paper, electronic, or other).

§ 101-11.1 General.

(a) Chapters 29 and 31 of title 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 maintenance 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 initial creation to their 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 agencies.

(1) The Administrator is responsible for providing guidance and assistance to Federal agencies to ensure economical and effective records management. Records management policies and guidance 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 contained in regulations in 36 CFR chapter XII and in bulletins and handbooks issued by the National Archives and Records Administration (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 maintaining an agency records management program.

§ 101-11.101 General.

Section 3102 of title 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 establish 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 contained in GSA and NARA handbooks and bulletins when establishing and

ADD

41000 Federal Register / Vol. 61, No. 153 / Wednesday, August 7, 1996 / Rules and Regulations

the Government has determined that it has or may need to practice the invention;

(2) That the invention not be assigned to any foreign-owned or controlled corporation without the written 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 substantially manufactured in the United States. The agency shall notify the employee of any conditions imposed.

(c) In the case of a determination under either paragraph (a) or (b) of this section, the agency shall promptly provide the employee with:

(1) A signed and dated statement of its determination and reasons therefor; and

(2) A copy of 37 CFR part 501.

10. Section 501.8 is amended by revising paragraphs (a) and (b), redesignating paragraphs (c) and (d) as paragraph (d) and (e), and adding new paragraph (e) to read as follows:

§ 501.8 Appeals by employees.

(a) Any Government employee who is aggrieved by a Government agency determination pursuant to §§ 501.6(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 liaison officer of the Government agency.

(b) On receipt 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 specified in § 501.7(c);

(2) A description of the invention in sufficient detail to identify the invention and show its relationship to the employee's duties and work assignments;

(3) The name of the employee and employment status, including a detailed statement of official duties and responsibilities at the time the invention was made; and

(4) A detailed statement of the points of dispute or controversy, together with copies 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 period 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 501.9 is revised to read as follows:

§ 501.9 Patent protection.

(a) A Government agency, upon determining that an invention coming within the scope of §§ 501.6(a)(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 unnecessarily delay the filing of a patent application by the agency to avoid the loss of patent rights. In cases coming within the scope of § 501.6(a)(2), the filing of a patent application shall be contingent upon the consent of the employee.

(b) Where there is an appealed dispute as to whether §§ 501.6 (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 specified in § 501.6(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 title to an invention with an employee under § 501.6(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 U.S. 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 rights in that country subject to the conditions stated in

§ 501.7(b) that may be imposed by the agency. Alternatively, the agency may permit the employee to retain foreign rights by including in any assignment to the Government of an unclassified U.S. patent application on the invention an option for the Government to acquire title in any foreign country within 8 months from the filing date of the U.S. application.

12. A new § 501.11 is added to read as follows:

§ 501.11 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 22, 1996.

Bruce A. Lehman,

Assistant Secretary of Commerce and Commissioner of Patents and Trademarks.

Dated: July 26, 1996.

Mary L. Good,

Under Secretary of Commerce for Technology.

[FR Doc. 96-19713 Filed 8-6-96; 8:45 am]

BILLING CODE 3510-10-P; 3510-10-P

GENERAL SERVICES ADMINISTRATION

41 CFR Part 101-11

[FPMR Interim Rule B-1]

RIN 3090-AG02

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 certain Federal Information Resources Management Regulation (FIRMR) provisions regarding records management in the Federal Property Management Regulations (FPMR). This 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.

Expiration Date: December 31, 1997.

ADDRESSES: Comments may be mailed 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

95-027-2

Ralph
6/20/97

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.

Barbara Williams
Barbara Williams
CSA/CAK-Forms. 6/20/97
Deputy SF/OF Management
Officer

95-029-9



Department of Energy
Washington, DC 20585

June 20, 1997

FAR Secretariat (MVRS)
GSA
Rm: 4037
18th Fst NW
Washington, D.C. 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,

A handwritten signature in black ink, appearing to read "Ed Lovett".

Ed Lovett
Office of Procurement and Assistance
Management

JUN 24 1997



6/24

DeStefano U.S. General Services Administration
18th and F Streets, N.W.
Washington, DC 20405

Office of Policy, Planning and Evaluation (M)
Office of Acquisition Policy (MV)

DATE:

Office of
GSA
Acquisition
Policy Division (MVP)

Federal
Acquisition
Institute (MVI)

Office of
Federal
Acquisition
Policy Division (MVR)

Government
Information
Systems Division (MVS)

FROM:

Name: Ralph DeStefano

FAX No: 202 501-4067

Phone No: 202 501-1758

Location: MVR

Total No. of pages
including cover: 31

TO:

Name: Melissa Rider

FAX No: _____

Phone No: (703) 602-0131

Location: _____

COMMENTS:

DeStefano U.S. General Services Administration
18th and F Streets, N.W.
Washington, DC 20405

Office of Policy, Planning and Evaluation (M)

Office of Acquisition Policy (MV)

DATE:

Office of
GSA
Acquisition
Policy Division (MVP)

Federal
Acquisition
Institute (MVI)

Office of
Federal
Acquisition
Policy Division (MVR)

Government
Information
Systems Division (MVS)

FROM:

Name: Ralph DeStefano

FAX No: 202 501-4067

Phone No: 202 501-1758

Location: MVR

Total No. of pages
including cover: _____

COMMENTS:

TO:

Name: Melissa Rider

FAX No: (202) 602-0350

Phone No: (202) 602-0131

Location: _____

95-029-10



DEPARTMENT OF THE TREASURY
BUREAU OF ENGRAVING AND PRINTING
WASHINGTON, D.C. 20228

06/19/97

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

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:

The Bureau of Engraving and Printing (BEP) has awarded 27 contracts using oral presentations. Five contracts were awarded to small business concerns and five to small disadvantaged businesses (SDBs). Of the remaining 17 contracts which 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 are set aside for small businesses and two for SDBs.

Statistics**Awards**

| | |
|-----------------|------------|
| Total Awards: | 27 |
| Large Business: | 17 (62.9%) |
| Small Business: | 02 (7.4%) |
| SDBs: | 09 (33.3%) |

Active Solicitations

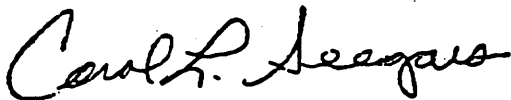
| | |
|-----------------|------------|
| Total Active: | 06 |
| Large Business: | 02 (33.3%) |
| Small Business: | 02 (33.3%) |
| SDBs: | 02 (33.3%) |

JUN 24 1997

95-029-10

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,



Carol L. Seegars, Chief
Office of Procurement

SOLLOWAY & ASSOCIATES

Professionals Helping Professionals

95-029-11

2414 Sycamore Lane
Edgewood, MD 21040

Charles D. Solloway CPCM
(410) 679-4096

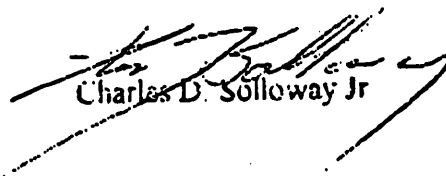
19 June 1997

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

Dear Colleagues,

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

Sincerely,



Charles D. Solloway Jr

JUN 24 1997

95-029-11

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

15.101

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 15.101 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

11

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 monies involved are not significant, agencies should consider other, less expensive selection techniques, such as awarding to the low offeror, or awarding to the offeror with the lowest cost, acceptable proposal." }

15.101.2

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

2

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.

2 cont

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 comparing the merits and costs of proposals received.]

15.405(a) (2) (iv).

3

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 experience and good past performance are essential to the

95-829-11

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 set-asides, mentor-protégé 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.

15.406 (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 merit 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 subparagraphs 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.

15.406

Somewhere in 15.406 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

95-029-11

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

95-039-12

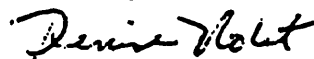
12158 Marbella Ct.
Waldorf, MD 20601
21 June 1997

General Services Administration
FAR Secretariat (VRS)
1800 F Sts., NW, Room 4035
Washington, D.C. 20405

The following comments are offered relative to the FAR Part 15 REWRITE proposed rule, as published 14 May 1997.

1. 15.205(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".
2. 15.406(c) -- Use of the terminology "...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.
3. 15.406(d)(3) and 15.407(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.
4. 15.408 -- Should not the SSA also compare all PROPOSALS in the assessment?
5. 15.504-1(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 16.102(c) and 15.504-4 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.

Sincerely,



Denise Nolet

JUN 26 1997

GAO

United States
General Accounting Office
Washington, D.C. 20548

95-029-13

Office of the General Counsel

B-275693

General Services Administration
FAR Secretariat (MVRB)
18th & F Streets, NW
Room 4037
Washington, D.C. 20405

Attention: Ms. Sharon A. Kiser

Dear Ms. Kiser:

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.

Sincerely,



Robert P. Murphy
General Counsel

Attachment

JUN-26-1997 10:53 FROM GAO GENERAL COUNSEL

TO

92023953242 P.03

95-009-13

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.

Preward and Postaward Debriefing of Offerors: Sections 15.605 and 15.606

2 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(a)(2) "shall" be the date the exclusion notice was received. Our current regulations do not address this situation.

3 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.)

95-009-13

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

4 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 Galston 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

5 The provisions at 15.203(a)(2) authorize offerors to propose alternative contract line item structures. While 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.

6 Subsections 15.203(e) and (f) authorize the use of letter RFPs and oral RFPs respectively. In each instance the prior version of FAR Part 15, published in September, 1996, provided that the use of letter or oral RFPs 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 RFPs 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

7 Subsection 15.205(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

JUN-26-1997 10:54 FROM GAO GENERAL COUNSEL

TO 92023953242 P.05

95-029-13

all potential offerors, 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

8
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 offerors' 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 offerors; 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

Author: "john battan" <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 established catalog or market prices as an example of information related to prices. I suggest the deletion of the language within the parenthesis, and the substitution of δ to be used to perform price analysis.

My concern is that the current wording will imply that the use of established catalog or market prices 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 is to encourage the CO 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 you're 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 CO 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's accounting system may not be able to produce cost data that is 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 contractor's internal needs, are incomprehensible to the average Government cost analyst who needs 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 increased proposal preparation costs, generally extends lead-time, and consumes additional contractor and Government resources. 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 surprise 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.

Author: "joe ely" <ely@contracts.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

95-029-15

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 proposals 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 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 than \$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." 7

J. C. ELY
Head, Contracting Division
Naval Research Laboratory

07/06/97 102 10:00 FAX 202 501 4007 FAR STAFF 005

95-029-16

Author: nobody@www.arnet.gov at internet
Date: 7/3/97 4:29 PM

Priority: Normal

TO: shari kiser at GSA-V

Subject: FAR Case 95-029 (Group A)

Below is the result of your feedback form. It was submitted by
Mary Lynn Scott () on Thursday, July 3, 1997 at 16:29:53
.....

sender: part15@www.gsa.gov

agency: U.S. Nuclear Regulatory Commission

TITLE: Part 15 proposed rule comments

text: The U.S. 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 setaside either for small businesses or 8(a) companies. In one of the three competitive procurements that did not involve a setaside, 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 to Susan Hopkins, Policy Analyst (301) 415-6514.

Mary Lynn Scott
Advocate for Procurement Reform
.....

REMOTE_HOST: igate.nrc.gov
REMOTE_ADDR: 148.184.176.31

JUL 7 1997

Author: "john battan" <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

97-004-16
96029

COMMENTS ON SUBPART 15.5

15.502

The first sentence of section 15.502(a)(2)(i) makes a parenthetical mention of "established catalog or market prices" as an example of "information related to prices". I suggest the deletion of the language within the parenthesis, and the substitution of "to be used to perform price analysis".

My concern is that the current wording will imply that the use of "established catalog or market prices" 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 is to encourage the CO 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 you're 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 CO 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's accounting system may not be able to produce cost data that is 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 contractor's internal needs, are incomprehensible to the average Government cost analyst who "needs" 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 "increased proposal preparation costs, generally extends lead-time, and consumes additional contractor and Government resources." 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 "surprise" audit findings. My personal experience is that the factual

JUL 8 1997

data provided to contractors by field auditors and technical specialists at exit conferences is often inaccurate or incomplete.

~~97-004-16~~
96-029

Author: "joe ely" <ely@contracts.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

97-004-17
96-029

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 proposals 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 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 than \$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."

JUL 10 1997

J. C. ELY
Head, Contracting Division
Naval Research Laboratory

~~99-004-17~~
96029



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

JUL 10 1997

Washington, D.C. 20201

95-029-18

General Services Administration
FAR Secretariat (VRS)
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).

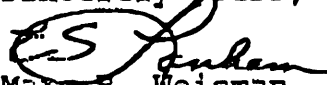
In general, the Department still finds the rewrite incomplete, disjointed, and confusing in some areas. Furthermore, we believe the rewrite lacks continuity and readability, and will cause a greater proliferation of "agency supplements" attempting to explain the vague and open-ended sections in the rewrite. 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 enclosures. Our agency comments are provided verbatim so that the Rewrite group may read, firsthand, what operational contracting office personnel think 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 fair 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.

Sincerely yours,

for 
Marc R. Weisman
Director, Office of
Acquisition Management

Enclosures

95-029-18

HHS COMMENTS ON FAR PART 15

2.101- The definition of "best value" is so generically nebulous that it suitably fits any situation. Obviously, this was the intent of the drafters; however, we disagree and believe it is a disservice to contracting officers.

4.10 & 11.8- We object to the establishment of two subparts solely to address the topics of "contract line items" and "pre-award testing."

14.404-1(f)(2)- We recognize this is in the existing FAR at 15.103, but believe it needs to be modified to better state its intent. We recommend: "The negotiated price(s) of the offeror(s) in line for award is(are) equal to or lower than the lowest bid price from a responsible bidder."

15.000- This section is totally disjointed! 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: "This part prescribes policies and procedures governing contracting by negotiation, whether with or without competition." The second sentence should be deleted because there is no reason to highlight the "bargaining" concept in the scope of the part. It is addressed in detail in the definition of "negotiation" in section 15.001. The third sentence is a definition of "negotiated contract," and, if deemed necessary, should be added to section 15.001.

15.001- The first three definitions (communications, discussions, and negotiation [should be "negotiations"]) are in a hierarchic or successive order and should be represented that way through their definitions. We propose:

"Communications" are all interchanges between the Government and an offeror following the receipt of offers. Communications may include discussions, negotiations, or other forms of interchange.

"Discussions" are communications between the Government and an offeror that occur after establishment of the competitive range, and that may, at the contracting officer's discretion, result in the offeror being allowed to revise its proposal. [NOTE: We substituted "communications" for "negotiations" to show the hierarchical relationship, and to be consistent with FAR 15.406(d)(1).]

"Negotiations" are discussions that involve bargaining. Bargaining includes.....etc. (verbatim).

We also recommend the definition of proposal modification be revised to read as follows for the sake of clarity:

"Proposal modification" is a change to a proposal by the offeror made before the solicitation's closing date and time, or made in response to an amendment, or made to correct a mistake at any time before award.

95-029-18

8 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.

9 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 first addressed in the text. It is not acceptable to title the section and then begin the description with a reference to the title.

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

11 Paragraph (b) (3) should be redesignated as new paragraph (c) because it addresses new thoughts separate from the items in paragraph (b).

12 15.101-2 The same comments made for 15.101-1 apply here. The sentence should begin: "The lowest price technically acceptable source selection process is....". In paragraph (b), the word "apply" should be used instead of "applies" because there are more than one item.

13 15.102- For clarity, the beginning of paragraph (b) should be rewritten to read: "To initiate the multi-step source selection technique, the agency issues a solicitation that describes....."

14 15.103- In the eighth line of paragraph (b), insert after "oral presentation," and "consider" the words "the contracting officer should". This gives direction to a specific individual and allows the contracting officer to exercise authority.

15 15.405- Paragraph (a) (4) requires a subject title, to be in accord with (a) (1) - (3).

16 15.603- Is there a conflict between 15.603(b) (3) and 15.605(a) (2)? We are not certain.

17 15.606- Is there a conflict between 15.606(a) (3), 15.606(a) (4) (i), and 15.605(a) (3)? Again, we are uncertain.

95-029-18

HHS CONTRACTING OFFICE COMMENTS ON FAR PART 15

15.001 Definitions

18 We have some basic concerns on the proposed changes in the communications, 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 definition in this subsection treats discussion as a form of negotiations when, in fact, only some discussions constitute negotiations. [We suggest defining and consistently using the three terms along the following lines. These suggestions 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 communications between the Government and an offeror that occur after establishment 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 distinguishable from bargaining and we question the need for the latter term.]

15.002 Negotiated Acquisition

19 We suggest calling this section "Types of Negotiated Acquisitions." While the entire Part 15 deals with negotiated acquisitions, this subsection addresses two specific types; i. e., sole source and competitive acquisitions.

15.1 Source Selection Processes and Techniques

15.101 Best Value Continuum

20 In order to be consistent with Subsections 15.101-1 and 15.101-2, the second sentence in this subsection should refer to "processes" instead of "approaches."

15.102 Multi-step Source Selection Technique

This subsection authorizes a multi-step source selection process that could potentially exclude some offerors from the competition prior to evaluation of full proposals. We have the following concerns:

21 -- Offerors could potentially be excluded during the initial phase of the multi-step 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 workload.

75-029-18

22 -- The multi-step process is authorized when the submission of full proposals would be "burdensome" to offerors and the Government. However, this is an inherently subjective criterion and the multi-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 multi-step process may be used and how it is to be conducted.

15.103 Oral Presentation

23 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, i.e., do the late "proposal" regulations apply to oral presentations?

15.2 Solicitation and Receipt of Proposals and Information

15.201 Presolicitation Exchanges with Industry

24 This subsection authorizes use of an RFI (Request for Information) to obtain planning information (including price) from vendors. The latest draft wording does state that the procurement integrity 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.

15.202 Advisory Multi-step Source Selection

25 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.

15.203 Requests for Proposals

26 Paragraph 15.203 (c) states that electronic methods may be used to issue RFPs and receive proposals. We would appreciate receiving clarifying guidance (in the paragraph) on whether hard copy RFPs must be provided, upon request, when electronic RFPs are used.

15.204 Contract Format

27 This section refers to a "standard" contract format but the language at 15.204-1 describes a "uniform" contract format. We suggest using "uniform" contract format throughout.

95-029-18

15.207 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 original 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."

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

15.208 Submission, Modification, Revision and Withdrawal of Proposals

29 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 offerors 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.

30 When Government-caused lateness is not an issue, we suggest establishing an objective criterion 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.

15.210 Forms

31 This section states that there are no prescribed forms for solicitations or contracts. While this would not inconvenience 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

32 Although this subpart provides helpful guidance for unsolicited proposals, given the definitions at 15.001, we question the frequent reference to "negotiations" instead of "discussions."

33 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.

95-029-18

15.309(h)(3) Limited Use of Data/Unsolicited Proposal Use of Data Limited

34

The sentence is no longer needed because there are no requirements for certifications in FAR 3.104-9.

15.4 Source Selection

15.400 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 "Clarifications" and "Best and Final Offers." For example:

35

- 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 offerors. This concept closely resembles the "Clarifications" that are currently defined in FAR 15.601 and authorized in FAR 15.607, but the proposal does not use that traditional term.

36

-- 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 15.611. 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.

15.404 Evaluation Factors and Subfactors

37

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 requiring that price or cost be "considered" (rather than "evaluated") in source selection.

15.404(f) Evaluation Factors and Subfactors

38

We recommend that a definition for "significantly" be provided.

15.405 Proposal Evaluations

39

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 appropriate to require documentation when using the lowest price technically acceptable source selection process described at 15.101-2.

95-029-18

15.406(b) Communications with Offerors Before Establishing the Competitive Range

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 15.607 currently authorizes precompetitive range communications on minor informalities or irregularities. 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 communications on substantive matters with some offerors.

4/0

15.406 Competitive Range

41 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.

42

Subsection 15.406 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; i.e., absent cost or price. However, cost or price 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

43

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 offerors to adopt the specific solution reflected in that estimate instead of trying to devise a better and less costly one.

15.407 Proposal Revision

44

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 material aspects of the proposal had been discussed or the offeror had been afforded an opportunity to submit a revised proposal. This authority 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.

95-029-18

45 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 15.611. 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

46 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 15.1 and in 15.401.

47 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

48 Adequate price competition should include lowest price technical acceptable offeror.

15.503(iii)(4) Waivers

49 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

50 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.

51 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)

52 This subpart requires cost realism analysis on competitive cost-reimbursement contracts. Cost realism analyses should be performed on noncompetitive cost-reimbursement contracts as well.

15.504-1(2)(g) Unbalanced Pricing

53 Consider changing Unbalanced Pricing to Performance Risk, and use Unbalanced Pricing as an example of a performance risk.

PART 52

52.212-1 Instructions to Offerors - Commercial Items

54 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 15.208 above.

95-029-18

HHS CONTRACTING OFFICE COMMENTS ON FAR PART 15

- 15.309(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."

55 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 casting us!

- Subpart 15.5 - 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 FPK. For 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's due to the rewrite team getting too close to their work.

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

- In paragraph 15.505(d), it appears that when an impasse is reached the CO can't 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. Offerors 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 a profit/fee"? I don't want the author of that paragraph to do any negotiating on my behalf!



U.S. Small Business Administration
Office of Advocacy

409 Third Street, SW
 Washington, DC 20416

Telephone (202) 205-6532
 Facsimile (202) 205-6928

F A C S I M I L E

This is Page 1 of **5**

Date: **7/11/97**

| | <u>Name</u> | <u>Fax</u> | <u>Phone</u> |
|-------|------------------------|-----------------------|-----------------------|
| To: | FAR Secretariat | | |
| From: | Jim O'Connor | (202) 205-6928 | (202) 205-6533 |

DID YOU KNOW THAT SMALL BUSINESSES:

- provided virtually all of the net new jobs from 1991 to 1995?
- were 99.7% of all employers in 1993?
- employed 53% of the private work force in 1993?

Small Business Internet Resources:

"NEW" Advocacy's Home Page: <http://www.sba.gov/ADVO/>

U.S. Business Advisor: <http://www.business.gov> [For Regulatory Information]

U.S. Small Business Administration: <http://www.sba.gov/> [For SBA Financial Programs]

"NEW" Angel Capital Electronic Network (ACE-Net): <http://www.sba.gov/ADVO/> [For Equity Capital]

"Small Business Friendly" State Banking Directories: <http://www.sba.gov/ADVO/stats/>
 [For Access to Credit Information]

The Office of Advocacy has been mandated by Congress to represent the views of small business before Congress and federal agencies. Advocacy works to reduce the burdens that federal policies impose on small firms and to maximize the benefits small businesses receive from the government. One of Advocacy's most important responsibilities is monitoring federal agencies' compliance with the Regulatory Flexibility Act and the recently enacted Small Business Regulatory Enforcement Fairness Act of 1996.

95-029-19



U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

JUL 11 1997

General Services Administration
FAR Secretariat (MVRS)
18th & F Streets, N.W.
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 Secretariat:

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 Secretariat, 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 offerors 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 offerors 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 against 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 undeniable 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, representing 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 administrative 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 competition? 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 eliminates the requirement to include the "greatest number" of proposals in its primary definition of competitive range, stating that "the contracting officer shall establish a competitive range comprised of those proposals most highly rated..." As proposed, a contracting officer can limit the competitive range to as few as two proposals because the top two proposals would always be the most highly rated.

In section 4103 of the Clinger (FARA Act)

95-029-1

Improvements to the proposal can be made by:

- 2 • defining what is meant by "efficient competition" and tracking the legislative language to include the "greatest number" in the primary definition of competitive range.
- 3 • 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.
- 4 • 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.

5 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.

6 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.

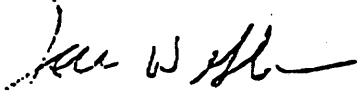
7 The IRFA states that the proposed rule "does not duplicate, overlap, or conflict with any other federal rules." Advocacy suggests that aspects in the proposal will conflict with Part 52-219 in the FAR. The FAR states, "It is the policy of the United States that small business concerns, small business 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.

95-029-19

8 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.

Sincerely,



Jere W. Glover
Chief Counsel
Office of Advocacy



James M. O'Connor
Procurement Policy Advocate
Office of Advocacy

cc: The Honorable Sally Katzen, OMB, OIRA

95-029-20



DEPARTMENT OF THE AIR FORCE
WASHINGTON DC



11 JUL 1997

OFFICE OF THE ASSISTANT SECRETARY

MEMORANDUM FOR GENERAL SERVICES ADMINISTRATION,
FAR SECRETARIAT (VRS)

FROM: SAF/AQC
1060 Air Force Pentagon
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 administrative correction (Atch 2). Some of the inputs of our field activities demonstrate the uncertainty that exists when long-standing policies and processes are so significantly revised and will require clarification and training.

Lt Col Greg Waeber and Mr Bob Bembcn, SAF/AQCP, (703) 695-3859 and (703) 695-0042, will continue to be our representatives on the Rewrite team for Phase I and Phase II respectively.

TIMOTHY J. MALISHENKO, Brig Gen, USAF
Deputy Assistant Secretary (Contracting)
Assistant Secretary (Acquisition)

Attachments:

1. Substantive Issues
2. Clarification Requests

95-029-20

Attachment 1

Air Force Input
Substantive Issues:

1. FAR 2.101 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 "significant" before the word "subfactors" in FAR 15.101-1 (b) (1), FAR 15.101-2 (b) (1), FAR 15.203 (a) (4), FAR 15.404 (d) and FAR 15.404 (e). Also remove the word significant before the words "factors" and "subfactors" in FAR 15.102 (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 15.102. 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 15.102 (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?).

95-029-20

4. FAR 15.203. In order to streamline the process involving sole source contracts we want to make it clear that letter RFPs may be used in all sole source acquisitions and not just for "follow-on" acquisitions as the current language reads.

Recommendation: In FAR 15.203 (e), first sentence, change to read: "Letter RFPs may be used in sole source acquisitions and other appropriate circumstances."

5. 15.206 (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 offerors 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. 254b(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: "(vii) Comparison of proposed prices to prices derived from use of commercially available cost estimating models."

8. 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."

95-029-20

9. 15.504-3(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 15.503-5(b)(1).

10. 15.506-3(a)(10). When doing price analysis of commercial items, 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. 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 items deleted? (see old 15-812-1(b))

Recommendation: Reinstate previous language citing inapplicability to commercial items.

Attachment 2

Air Force Input
Requests for clarification & administrative correction

- 12 ~~1~~. FAR 15.102(c) The next to last sentence is ambiguous and needs clarifying. Recommend adding "either" 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".
- 13 ~~1~~. FAR 15.203(d) Insert commas after words "proposals" and "modifications".
- 14 ~~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.
- 15 ~~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 15.208 (b) does not make sense in the context of this paragraph and 15.407 (d) does not exist.
- 16 ~~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.
- 17 ~~6~~. FAR 15.210(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 furnished with each request for proposals in order to promote identification and proper handling of proposals."
- 18 ~~7~~. FAR 15.303(c)(3). Add the following words: "endorsement, direction, or direct government involvement" after the word "supervision".
- 19 ~~8~~. FAR 15.309(a) and (d). Put quotation marks around the legend set forth in the paragraph.
- 20 ~~9~~. FAR 15.402. Add the following words to the end of the sentence: "to the Government".
- 21 ~~10~~. FAR 15.403(b)(1). Delete the word "an" after the word "includes" and delete the word "mix of" after the word "appropriate".
- 22 ~~11~~. FAR 15.404(c). Add the following words "to each step" between the words "apply" and "shall".

95-029-20

- 23
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/fail criteria.
- 24
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.
- 25
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.
- 26
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 15.501.
- 27
16. FAR 15.607(a), first sentence. Change the word "part" to "Part".
- 28
17. FAR 52.215-41. Delete "(End of clause)" and insert "(End of Provision)".
- 29
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 15.501.

07/11/97 11:48 ITT RESIDENT OFFICE
Defense Contract Audit Agency
Mid-Atlantic Region, Mountain Side Branch Office
ITT Sub Office
100 Kingsland Rd., Clifton, NJ 07014

95-029-21

Fax Cover Sheet

DATE: ^{12/} 7/11/97 TIME:
TO: FAR Secretary PHONE: 202 501 4955
FAX: 202 501 4067
FROM: Karen S. Davies PHONE: 201/284-2257
DCAA FAX: 201/284-2707

RE: FAR Case 95-029, Group B

CC:

Number of pages including cover sheets (5)

Message

Attached are comments related to the
above FAR case. please call if
you have any questions.

Thank you.

Parametric Cost Estimating**Joint Industry/Government Initiative**

9 July 1997

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 15.5 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 15.5 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 15.5 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 pricing actions.

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

FAR Case 95-029
Group B - FAR Part 15.5 Comments
Page 2

1
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.

2
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-estimating 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.

3
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
Jim Collins
PCEI Working Group Co-Chair
410/765-8033 (phone)
410/765-4886 (fax)
collins.j.f@postal.essd.northgrum.com

David Eck
David Eck
PCEI Working Group Co-Chair
703/767-3290 (phone)
703/767-3234 (fax)
deck@hq1.dcaa.mil

Enclosure

PARAMETRIC ESTIMATING INITIATIVE WORKING GROUP

| Name/Title | Company/Agency/Address | Phone/FAX | e-mail Address |
|--|--|--|-------------------------------------|
| Carole Adams Professor of Quantitative Applications | Air Force Institute of Technology 2960 F Street, Bldg. 641, Wright Patterson AFB, OH 45433-7765 | 513-255-6565 X3258 (C) 837-656-7681 (F) | cedarns@attlrl.mil |
| Dein Boyfs Business Systems Manager | Defense Logistics Agency DPRO Northrop Grumman, Bethesda, NY 11714-3560 | 516-575-0742 (C) 516-575-6082 (F) | bv07655@prhango.dcrb.dau.mil |
| Jim Collins Parametric Estimating Specialist | Northrop Grumman ESSO PO Box 1080, Mail Stop 1270, Bethesda, MD 21208 | 410-765-6033 (C) 410-765-6886 (F) | collins.j.f@postal.esd.northrop.com |
| Gary Constantine Manager of Parametric Estimating | RAYTHEON E-Systems, Garland DV PO Box 600023, Unit F59200, Dallas, TX 75206-0023 | 972-205-4168 (C) 972-205-6840 (F) | gary_constantine@raytheon.com |
| Karen Davies Technical Specialist | DCAA Mid-Atlantic Region 615 Chestnut St., Suite 1000, Philadelphia, PA 19106 | 201-284-2257 (C) 201-284-2797 (F) | kdavies@ma.dcaa.mil |
| Marilyn Devulch Chief of Estimating Policy, Rm. & Comp. | Lockheed Martin Aeronautics PO Box 179, Mail Stop DC 2500, Denver, CO 80201-0179 | 303-671-6060 (C) 303-671-5143 (F) | marilyn_devulch@lma.lmco.com |
| David Eck Chief, Special Programs Division | Defense Contract Audit Agency 8725 John J. Krigman Rd., Suite 2136, Ft. Belvoir, VA 22060-0210 | 703-767-3290 (C) 703-767-3234 (F) | deck@hqi.dca.mil |
| Mel Eisenman Senior Cost Analyst | RAND Corporation 1700 Main Street, MS-A6-20, Santa Monica, CA 90407-2130 | 310-303-0411 X6704 (C) 310-461-6933 (F) | mehel_eisenman@rand.org |
| Jim Gleason Programs Analyst | US Army Medical Command - AMCAQ-E 5001 Eisenhower Ave, Room 8N15, Alexandria, VA 22303-0001 | 703-617-4437 (C) 703-617-6973 (F) | jgleason@hqamc.army.mil |
| Carolyn Griffin Manager of Military Proposals | GE Aircraft Company 1 Neuman Way, Mail Drop H358, Cincinnati, OH 45215 | 513-765-4449 (C) 513-243-7419 (F) | carolyn.j.griffin@ge.com |
| Virgil Harding Directorate of Pricing & Finance | US Air Force Headquarters - AFMCP/PMF, Bldg 262 4375 Chisholm Rd., Suite 6, Wright Patterson AFB, OH 45433-5006 | 513-257-6861 (C) 937-656-2435 (F) | hardv@wpafb1.wpafb.af.mil |
| Gary Hubert Department Manager, Labor Estimating | McDonnell Douglas Helicopter Systems 5000 E. McDowell Rd., Bldg S10, Mesa, AZ 85205 | 602-881-6600 (C) 602-881-7208 (F) | gshubert@mcgsh.helco.mdc.com |

PARAMETRIC ESTIMATING INITIATIVE WORKING GROUP

| Name/Title | Company/Agency/Address | Phone/FAX | e-mail Address |
|--|--|--------------------------------------|---|
| Joe LeCren Procurement Analyst | NASA Headquarters 300 E Street SW, Code MC, Washington, DC 20546 | 202-358-0444 (C) 202-358-3220 (F) | joseph.lecren@hq.nasa.gov |
| Paul Lubell Senior Engineer, Technical Estimating | Northrop Grumman ESSD PO Box 1090, Hill Stop 1 280, Baltimore, MD 21209 | 410-765-6153 (C) 410-765-5288 (F) | lubl.p.d@probdal.essd.northgrum.com |
| John Mathews Dean, School of Management Science | Army Logistics Management College 2401 Quartermaster Road, Fort Lee, VA 23801-1705 | 804-765-4714 (C) 804-765-4648 (F) | mathewj@lee-dra1.army.mil |
| Don Raiber DCMC/AQC-00 | Defense Logistics Agency 6725 John Kingman Rd., Room 47-500, Ft. Belvoir, VA 22060-6221 | 703-767-3487 (C) 703-767-2379 (F) | derraib_d_r@hq.dla.mil |
| Bernie Rudwick Professor of Systems Engineering | Defense Systems Mgmt College Building 208 FDYSE, Ft. Belvoir, VA 22060-5409 | 703-605-5254 (C) 703-243-6712 (F) | Leister.Rudwick@hmcda.com |
| Leister Richmond Manager of Parametric Estimating | Lockheed Martin Technical Aircraft Systems PO Box 748, M/S 1681, Ft. Worth, TX 76101 | 817-777-5759 (C) 817-777-2115 (F) | leister_rudwick@emtp-gwr.spsawar.navy.mil |
| Marcia Rudbeck Procurement Contracting Officer | US Navy - Space & Naval Warfare Systems Command 2451 Crystal Drive, Arlington, VA 22245-5000 | 703-602-0680 (C) 703-602-2024 (F) | marcia_rudbeck@nmc.com |
| George Seibert Manager of Estimating | McDonnell Douglas Aerospace, Bldg 301, Level 4W Room 635, Mail Code 308-1150, St. Louis, MO 63166 | 314-232-6461 (C) 314-232-7171 (F) | george.seibert@nasa.gov |
| LCDR Jack Blum F-19 EF Deputy PCO | US Navy - Naval Air Systems Command, Nr 22.5.E.3 1601 Jefferson Davis Hwy, Arlington, VA 22203-5120 | 703-604-6100 (C) 703-604-3662 (F) | blumj.jr@navair.navy.mil |

• Co-Chairman of Parametric Estimating Initiative

95-029-22

10802 Knoll Court
Upper Marlboro, MD. 20772

General Services Administration
FAR Secretariat (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 (e.g., see 15.503-5(a)(1)). Hopefully, the proposed changes and rewrite will decrease the number of instances where solicitations unnecessarily require the submission of cost data (e.g., 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.

Riskin

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(l) prescribes for inclusion in solicitations the provision at 52.215-41 which "provides instructions to offerors 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 waive 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 waivers. It provides that the HCA may waive the requirement for obtaining the contractor's signed Certificate of Current Cost or Pricing Data, i.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

Received 7/11/97
3:30 pm

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

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, i.e., a recurring normal occurrence.

Recommendation

The proposed waiver 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.

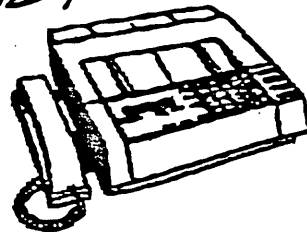
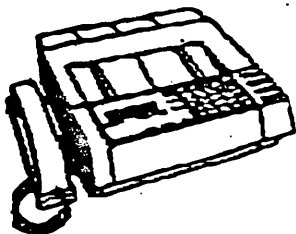
Thank you for consideration of these comments.

Sincerely,

Albert Riskin

Albert Riskin, CPCM

95-029-2



INTERNAL REVENUE SERVICE
ASSISTANT COMMISSIONER (PROCUREMENT) M:P
OFFICE OF PROCUREMENT POLICY (M:P:P)
CONSTELLATION CENTRE
6009 OXON HILL ROAD, 8TH FLOOR
OXON HILL, MD 20745

DATE: 7/11/97

FAR Case 95-029

TO: Ralph D. Steford

PHONE#: ~~601~~-501-1758 FAX#: 501-4067

FROM: Madeline Weenbergh

PHONE#: (202) 283-1258 FAX#: (202) 283-1529

NUMBER OF PAGES (including cover page): 6

REMARKS: Ralph: I sent these by
Internet, but it came back
as undelivered.

Madeline

95-029-20

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 (e.g., best value, statement of work (SOW)) appeared in the first publication, but SOW has now regressed to work statement.

Contracting by negotiating 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

15.000. The second sentence needs to be modified. Although taken from the current 15.101, 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.

15.001. 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 total 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, including 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.

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

95-029-23

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 15.4, 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 and 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 15.201 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 (e.g., capability review, capability analysis, qualification pre-screening, 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 Government's 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.

15.301. Expansion of the definition of unsolicited proposal dropped out the

95-029-23

statement, which is 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, 15.306, 15.307 and 15.309 use three different terms (i.e., Agency Liaison, Agency contact point, and Coordinating office) to refer to what appears to be the same person/office. If this is the case, use a single term. If this is not the case, then there needs to be further definition of the different functions of the different people/organizations.

15.401. Delete "material." First, material failure is undefined. If you insist on using material, 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 authority in establishing their own destiny. In lowest price technically acceptable source selections, it may be appropriate to have the contracting officer as the source selection authority. In tradeoff process source selections the decision should be made by requiring/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 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. If this must be in the FAR, caveat by adding "as necessary" or "if 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 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.

95-029-23

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 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, including evaluation of past performance.

15.405(a)(2)(i). 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-competitive 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 offerors outside of the competitive range. This is only a model that most, if not all organizations have adopted. This 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 estimate 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 incorporated in any

95-029-23

Page 5 FAR Case 95-029

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) are inconsistent.

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

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

95-02924



SEQUENT

Our Business is Your Success

July 11, 1997

General Services Administration
FAR Secretariat (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 rewrite of FAR Part 15. Listed below are my comments and recommendations for the final FAR:

Under the Regulatory Flexibility Act Page 5 last Paragraph, it states that the proposed rule would apply to all large and small entities.....that offer supplies and services to the Government in negotiated acquisitions. I recommend that this provision be amended to include Government agencies bidding on contracts. An example would be the Dept. of Agriculture 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 specific 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. I would recommend a \$500 maximum.

15.206 (g) This provision could result in technical leveling and I recommend that this provision 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 raising the level to \$500K.

15.406 (4) I am concerned about the scenario where a vendor is eliminated from the competitive range and is debriefed 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 provision for reconsideration if there was an error discovered during the debriefing. This would also eliminate a potential protest.

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

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

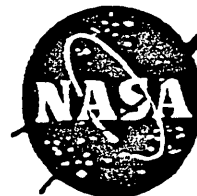
Very truly yours,


James E. Shay
Federal District Manager

JUL 14 1997

National Aeronautics and
Space Administration

Ames Research Center
Moffett Field, CA 94035-1000



95-029-20
JUL 10 1997

Reply to Aun of:

JA:241-1

General Services Administration
FAR Secretariat
1800 F Street NW, Room 4035
Washington, D. C. 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 combined synopsis/solicitation for purchase of commercial items, 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 20.1% to 20.6%.
Percentage of dollars to large businesses has declined from 55.56% to 53.1%.

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 business community.

A handwritten signature in black ink, appearing to read "Charles W. Duff, II".

Charles W. Duff, II
Procurement Officer

cc:
HC/ Frances Sullivan

JUL 14 1997



U.S. AGENCY FOR
INTERNATIONAL
DEVELOPMENT

JUL - 9 1997

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 give 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 is 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

JUL 14 1997

95-029-26

95-029-26

is 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(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 offerors 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.

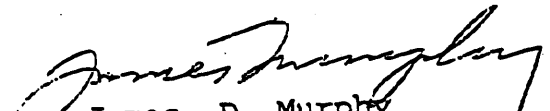
Tied in with the additional file documentation indicated (either to extend a due date superfluously or to document the file as to why a late proposal was accepted or not), the primary concern expressed by our contracting officers was that their judgment would be questioned, justifiably or not, and that 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.

95-029-26

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,


Mr. James. D. Murphy
Acting Procurement Executive

95-029-27

FROM: Department of Defense Education Activity (DoDEA)
Procurement Division
4040 North Fairfax Drive
Arlington, Va. 22203-1634

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

SUBJECT: FAR Part 15 Rewrite, 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, 15.1, 15.2, 15.3, 15.4, and 15.6

(1) 15.001 Definitions. Suggest that the definition of "clarifications" be included in this group, since it relates to the other terms defined here.

(2) 15.001 Definitions. It would be simpler and less confusing to have one term used for changes made to proposals both before and after the closing date. "Proposal revision" would be a suitable term to use for any changes made to proposals at any time.

(3) 15.103 Oral Presentations. The guidance on oral presentations is very good. It covers the subject well and will be useful to anyone considering the use of oral presentations.

(4) 15.201 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 area. In addition, it should be noted that it is not unusual for personnel unfamiliar with statutory and regulatory requirements to be unfairly 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) 15.401 Definitions.

The distinction between "deficiency" and "weakness" is not well made and could cause confusion. Suggest deleting the term "weakness". It appears to be subjective, and therefore not very useful.

95-029-27

b. GROUP B - Subpart 15.5

(1) 15.504.2(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 included 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.



95-029.28

Federal Bar Association

July 11, 1997

VIA FACSIMILE & U.S. 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")¹⁴, 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 rewrite (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 offerors 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

¹⁴ 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 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.

JUL 14 1997

95-029-28

FAR Secretariat (VRS)
 July 11, 1997
 Page 2

primary concerns that we expressed in response to earlier proposed versions of the rewrite, 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 "gimmed up" excuses — whose validity contracting officers will now have to take time to consider and decide upon. Because of this lingering concern, we continue to favor the "bright line" rule for late proposals set forth in current FAR 15.407 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 relatively few exceptions, are furthered — not hindered — by the current "bright line" standards for the acceptance of late proposals.)

2 Our second area of comment concerns the proposed rule governing the preaward debriefing of offerors, as set forth at FAR 15.605. In particular, we are concerned about the practical impact of proposed FAR 15.605(a)(2), which permits an offeror excluded from the competitive 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

95-029-28

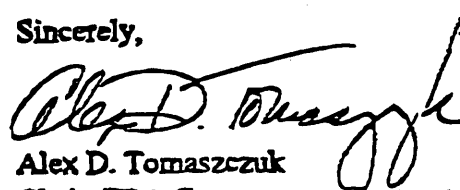
FAR Secretariat (VRS)
 July 11, 1997
 Page 3

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 believe 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.

Sincerely,



Alex D. Tomaszczuk
 Chair, FBA Government Contracts Section

10709401 / DOC5861



DEPARTMENT OF THE NAVY
OFFICE OF THE ASSISTANT SECRETARY
RESEARCH, DEVELOPMENT AND ACQUISITION
1000 NAVY PENTAGON
WASHINGTON DC 20350-1000

95-029-29

General Services Administration
FAR Secretariat (VRS)
18th & F Streets, NW, Room 4037
Washington, DC 20405

JUL 10 1997

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 Navy 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 offerors," at FAR 15.406, 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 them are the ability of an offeror to propose an alternate structure to the Government designated Contract Line Item Numbers (CLINs) 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, 15.406, 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 requested.

Elliott B. Branch
Elliott B. Branch
Executive Director
Acquisition and Business
Management

Attachments (3)

JUL 14 1997

95-029-29

ATTACHMENT (1)

GROUP A -

15.203(a)(2)(i)(ii) - Recommend reference to offerors being authorized to propose alternative CLIN structure be deleted. While this might be desirable with respect to performance specifications it 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 is common in DoD, multiple funding citations are applicable. Since agencies already have the authority to permit offerors to propose alternate CLINs 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.

2 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 or inaction", such as failure of the Government to follow established procedures for handling of proposals, which could constitute an excusable delay.

FAR 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 offeror 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.

3 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

95-029-29

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

15.406 - Communication with offerors.

4
FAR 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 to 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 offeror's 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.

5
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.

95-029-29

15.406(d) - Communications with offerors after establishment of the competitive range.

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:

6

The primary objective of discussions is to maximize the Government's ability to ~~obtain best value~~ select the offer which represents the best value, based on the Government's stated requirement and the evaluation criteria set forth in the solicitation..

15.406(d)(3) - Under the first paragraph the words "in the opinion of the contracting officer" are unnecessary and should be deleted. All words after "In discussing other aspects of the proposal . . ." should also be deleted because they are unnecessary and potentially confusing. The concept embodied in the language implies a change in the Government's requirement after some offers have been eliminated.

7

15.407, Proposal revisions - Recommend the language relative to "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" 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 doubtful 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 is eliminated, or discussions are declared over by issuance of a request for "final" offer, which replaces the concept of "best and final" offers.

8

GROUP B - None

95-029-29

ATTACHEMENT (2)

The following revisions to the Part 15 rewrite, which reflect the concerns expressed in Attachment (1), are offered for consideration:

15.208(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 offerors; or
- (2) The contracting officer, ~~determines in writing on the~~ ~~inactions on the basis of a review of the circumstances,~~ after thorough review of the circumstances which caused an offer to be received after the designated closing time, determines in writing that the lateness was caused by failure of the Government to establish or to follow adequate receipt and recording procedures; or
- (3) ~~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.~~ The contracting officer finds that the lateness was beyond the control of the offeror or the offeror's delivery agent (either employee or common carrier) on the basis of factual information submitted by the offeror which demonstrates (1) the proposal, modification or revision was delivered into the possession of the offeror's delivery agent in adequate time to be delivered by the designated closing time, (2) mitigating circumstances beyond the control of the offeror or the delivery agent (e.g., transportation delay caused by an accident, a flight cancellation, or an analogous circumstance) prevented timely delivery, and (3) actual delivery was completed as rapidly as reasonably possible given the extenuating circumstances and, further, the contracting officer determines in writing there is a reasonable basis to believe the proposal or change was prepared prior to the time specified for receipt, and that acceptance of the late proposal would not provide a competitive advantage to the offeror.

Far 15.406 Communications with offerors.

15.406(a) - (a) Communications and award without discussions. (1) ~~If award will be made without discussion,~~ the evaluation results indicate award without conducting discussions is feasible, communications with offerors may be used to resolve minor or clerical errors or to clarify business and administrative aspects of the proposal that are not subject to the evaluation criteria.

15.406(b) - Communications with offerors before establishment of the competitive range. ~~If a competitive range is to be established, these communications -~~ (1) ~~May be held~~ when the evaluation results indicate that the Government's ability to establish a competitive range would be enhanced by limited communications with those offerors whose exclusion from, or inclusion in, the competitive range is uncertain, ~~(e)~~

95-029-29

~~communications may be conducted to enhance Government understanding of proposals, allow reasonable interpretation of the proposal, or with such offerors to facilitate the Government's evaluation process ability to reasonably interpret the understanding of their proposals. Such communications may be considered in rating proposals.~~

~~(32) Are for the purpose of addressing issues that must be explored to determine Issues which may be 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 deficiencies, weaknesses, errors, omissions, or mistakes (see 14.407));~~
- ~~(ii) Information relating to relevant past performance.~~

~~(3) Shall address When 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, and/or otherwise revise the proposal nor shall not provide an opportunity for the offeror to revise its proposal be provided but may address.~~

15.406(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.

~~(2) The primary objective of discussions is to maximize the Government's ability to obtain best value, based on the requirement and the evaluations factors set forth in the solicitation. 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 forth 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 conditions) that could in the opinion of the contracting officer be altered to materially enhance the proposals the proposal's potential for award are susceptible to material enhancement in the areas subject to the evaluation criteria set forth in the solicitation. The scope and extent of discussion are a matter of contracting officer judgment. In discussing other aspects of the proposal, the Government may, in situations where the solicitation stated evaluation credit would be given for technical solutions exceeding any mandatory minimums, negotiated with offerors for increased performance beyond any mandatory minimums, and 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.~~

95-029-29

15.407 (a) - As a result of discussions, the contracting officer may request offerors retained in the competitive range to submit one or more revisions to their proposal until such time as the offeror has been eliminated from further consideration for award.

~~(b) If, after discussions have begun~~ When 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 not all material aspects of the proposal have been discussed, or the offeror has been afforded an opportunity to submit a proposal revision (see 15.406(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.

~~(c) The contracting officer may request proposal revisions that clarify and document understandings reached during negotiations.~~
At the conclusion of discussions . . .

95-029-29

ATTACHMENT (3)

GROUP A -

9. 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 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.

10. 15.101-1(3) - 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 perceived benefits of the selection of a~~ higher-priced proposal shall merit the additional cost, and the perceived benefits and rationale for tradeoffs must be documented in the file in accordance with 15.408.

11. 15.306-1(a)(2) - Revise to read as follows: ~~Should have been submitted~~ Is suitable for submission in response to an existing agency requirement (see 15.302).

12. 15.405(a)(1) - Amend fourth sentence by adding ". . . offeror's ability to perform the contract at the offered price."

13. 15.405(a)(2)(iii) - Amend to make a single sentence which ends "critical aspects of the requirement when such information may be relevant to the instant acquisition."

GROUP B

14. 15.504(2)(d) - Revise the first sentence to read: ". . . , shall notify the contracting officer immediately if the contractor data provided . . ."

15. 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 or pricing data for the prospective subcontractor most likely to receive award to the Government."

16. 15.507-4(b) - Insert "A" in front of Program should-cost . . .



INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
400 ARMY NAVY DRIVE
ARLINGTON, VIRGINIA 22202

95-029-30

July 14, 1997

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, 6.101, 7.105, 14.201-6, 14.404-1, 16.306, 42.1502, 42.1701, 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 15.4 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.

Sincerely,

Russell A. Rau
Assistant Inspector General
Policy and Oversight

Enclosure

OPTIONAL FORM 99 (7-90)

FAX TRANSMITTAL # of pages

| | |
|-----------------|---------|
| To | From |
| Larhonda Erby | |
| Dept./Agency | Phone # |
| FAR Case 95-029 | |
| Fax # | Fax # |
| 202-501-4067 | |

NSN 7540-01-317-7308 5099-101 GENERAL SERVICES ADMINISTRATION

JUL 14 1997

95-029-30

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

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 requirement 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 will 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, need not 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 ~~may~~ 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 offerors to develop offers.

95-029-30

(2) The solicitation is properly marked as a classified document and references specific agency regulations 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 FAR 15.408 and excludes any guidance on the issuance of solicitations containing classified information. FAR 15.205 should include guidance that is more specific to contracting officer responsibilities than the current guidance in FAR 15.408(b), which merely states that solicitations involving 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 ~~most advantageous~~ of best value to the Government (determined according to the established evaluation criteria) involves 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 15.208(b))~~ (see 15.207(b) and 15.407(d) 15.406(e))."

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 Regulations being implemented. We are striking through proposed language requiring further clarification and conformity as follows "~~However, if an offeror requests a delayed briefing 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 received notice of its exclusion from 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)(1). . . 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 competitive 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

95-029-30

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 proposed 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 CFR 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~~ Proposals-Construction, when contracting by negotiation."

95-029-30

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 item 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 market-based 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.

95-029-30

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 ~~may~~ 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 CERs 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(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 offerors identify in their proposals those items of supply that they will not manufacture or to which they will not contribute significant value 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" is 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 is 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

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 is needed --." The referenced subparagraphs (I) through (iv), which give 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 will 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

(i) \$1,000,000 or more or

(ii) Both more than the pertinent cost or pricing data threshold and more than 10 percent of the prime contractor's 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 million 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

95-029-30

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(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 analysis-price 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 is for all participating parties to receive copies of the price negotiation memorandums, those parties should be specifically identified.

7. FAR 15.507-1, Defective cost or pricing data. We recommend the following changes:

a. Paragraph (b) (7) (i) should be clarified to state: "In addition to the price adjustment amount, the Government is entitled to recovery of any overpayment plus interest on any the overpayment."

Rationale: Paragraph (b) (1) states that the Government is 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 fails 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 will continue.

b. Paragraph (b) (7) (iv) should be revised to state: "In the ~~price reduction modification or 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 million threshold in 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 ~~the lower of either \$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).

b. The italicized subject headings included in the current 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.

95-029-30

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 implement the new FASA requirements for receiving a commercial item exemption.

12. FAR 52.215-42(a)(1)(ii)(B) relates to subcontracts and should be revised for the same reason as FAR 52.215-41(a)(1)(ii).

95-029-31

HOUSEHOLD GOODS FORWARDERS ASSOCIATION OF AMERICA, INC.®



2320 MILL ROAD, SUITE 102, ALEXANDRIA, VIRGINIA 22314-4679

TELEPHONE (703) 684-3780 FAX (703) 684-3784

July 14, 1997

TERRY R. HEAD
President
Alexandria, Virginia

RICHARD W. CURRY
Chairman
Orange, California

HAN HELDERS
Vice Chairman
Carlsbad, California

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, California

HEINO PREISSLER
*Executive Committee
Member at Large*
Bellevue, Washington

DONALD L. COLLINS
*Associate Members'
Representative*
St. Thomas, U.S. Virgin Islands

JOEL SUMMER
*Associate Members'
Representative at Large*
Brooklyn, New York

ALAN F. WOHLSTETTER
General Counsel
Washington, D.C.

General Services Administration
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 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, 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 participants in the DoD Personal Property Program administered by the Military Traffic Management Command (MTMC).

According to MTMC's records, 1,364 motor carriers and freight forwarders participate as prime 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 carriers (MTMC Carrier Approval Statistics).

In addition, 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 facilities, viz., 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 predominantly small business concerns.

The HHGFAA previously filed comments on November 26, 1996 in this FAR 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, primarily 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 minimum 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(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(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 offerors that the competitive range can be limited for purposes of efficiency...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. 253b(d)).

The HHGFAA opposes the revised proposed Competitive

Range Determination Rule, 15.406(c),^{1/} on the ground that it confers unlimited 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 specific objections to the proposed rule are:

1. The proposed rule is vague and indefinite because it does not define "efficient competition" nor does it provide criteria for determining the "greatest number [of offerors] that will permit an efficient competition." The proposed Competitive 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 implement a statute (which this proposed rule does not do); a rule, as here considered, which 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 eliminate 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 available." Adoption of those provisions would have had a material adverse impact on the ability of small business 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 submitting proposals.

highly rated offerors that would be excluded from the competitive range.

We submit that this right of contracting officers arbitrarily to exclude highly rated offerors by citing "efficiency" will have a particularly adverse impact on small business concerns by discouraging their participation in government procurements. As the Revised Initial Regulatory Flexibility 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 highly-rated offerors 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 arbitrarily 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 limited to the "greatest number" that will permit an efficient competition, this direction is materially inadequate because there are no criteria governing 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 significant adverse impact on small business 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 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.

2. Establish FAR guidelines 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 arbitrarily and unduly limiting the number of proposals to be included in the competitive range, especially where the pool of potential offerors consists of a significant number of small business concerns, 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 submitting offers by significantly reducing the likelihood that a small business concern's offer would be considered for award even if otherwise qualified for the competitive range. As stated above, this restriction on competition by highly rated offerors falls with a heavy impact on small business concerns.

3. Require that the competitive range established 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 competitive range established should include a minimum of 20 per cent of small business offerors. If less than the specified percentage of small business offerors meet the criteria for the competitive range, those small business offerors that meet the criteria should be included in the competitive 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.

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 offerors prior to and after establishment 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 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 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 revisions be submitted to OMB for review in accordance with Executive Order No. 12866.

Respectfully submitted,

HOUSEHOLD GOODS FORWARDERS
ASSOCIATION OF AMERICA, INC.

By Alan F. Wohlstetter
Alan F. Wohlstetter
General Counsel

DELIVERED BY HAND



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
RESEARCH DEVELOPMENT AND ACQUISITION
103 ARMY PENTAGON
WASHINGTON DC 20310-0103

95-029-32

REPLY TO
ATTENTION OF

14 JUL 1997

SARD-PPP

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

Gentlemen/Ladies:

We appreciate the opportunity to provide comments on FAR 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 in 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 performance evaluation is a "comparative assessment of past performance information" that is separate from a responsibility determination, the language in 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 RFPs at 15.203. We are advocates of draft RFPs since our experience reflects that they contribute to simplifying and enhancing the source selection process.



95-029-32

3. The Model Contract Format included in the original proposed rule is more streamlined and easier to use than the current Uniform Contract Format (15.204). We encourage its widespread use in DOD.

4. 15.208 (c) permits the acceptance of late proposals if (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 is 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.

5. 15.405(a)(2)(iv) defines a neutral rating as "one that neither rewards nor penalizes offerors 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 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."

95-029-32

6. 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.

7. 15.406(a) permits award without discussion, subject to clerical/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.

8. The language at 15.406(b) "Communications with offerors before establishment of the competitive range" is confusing. We believe contracting officers will have difficulty implementing it. This section will become a likely source of much litigation, which will unduly delay the procurement process. Recommend elimination of 15.406(b)1). This language is restrictive and is inconsistent with the major shift toward more open communications.

9. 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.

10. 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 like 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

95-029-32

from being selected for award." 15,407(a) permits offerors to be eliminated from the competitive range after discussions have commenced without being given the opportunity to revise their proposals. As noted above, GAO may not find discussions to be meaningful unless offerors are given the opportunity to revise their proposals.

11. We agree with the coverage in 15.406(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 addition, 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 their 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 improvement over the prior coverage because it is much less confusing.

14. In light of the fact that the term "bargaining" is being introduced into the FAR 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 definition of the term "negotiation."

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

5

95-029-32

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 is Mrs. Esther Morse, 703-695-3039.

Sincerely,



Edward G. Elgart
Acting Deputy Assistant Secretary
of the Army (Procurement)

Enclosure

ADDITIONAL ARMY COMMENTS

95-029-32

14.404-1(f)(2) Delete. Restriction 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.

15.002(b) Shorten to "minimize the complexity of the process, while maintaining impartial and comprehensive evaluation of all proposals," etc.

15.103(c)(6) Delete. There should be no pre-set limit 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 offerors expect, not unreasonably, that a face-to-face meeting of the principal 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-time 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 clarify distinction between Section H and Section I: Section I should contain standard contract clauses whose text or detailed content is derived from FAR and its supplements, Section H the nonstandard clauses specific to the particular contract or to the contracting activity.

15.206(f) Revise beginning for clarity, 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 Government 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 innovative ideas that do not fall under topic areas publicized under those programs and techniques may be submitted as unsolicited 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 (ii) at this time, change threshold in (i) 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)."

Encl 1

... exceed \$1,000,000; however, past performance need not be evaluated if ... (OFPP Policy Letter 92-5)."

95-029-32

15.405 Add subparagraph: "(c) For restrictions on use of support contractor personnel in proposal evaluation see 37.203(d)." Absence of this very important cross-reference 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.

15.408 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 obtaining cost or pricing data" is confusingly harsh wording, following immediately after the 15.503 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 technical analyses of the proposed cost. In other words, you must use price analysis on every procurement." (Armed Services Pricing Manual, 1986, paragraph 1.6 "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)(i)(A) Better to specify "any identified allowances for contingencies," to clarify 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) contingencies that may arise.

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)(ii) "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."

Author: daniel_damanskis@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 COMMENTS
Subject: FAR PART 15 REWRITE COMMENTS
Author: DANIEL DAMANSKIS at FISC-PHILA
Date: 7/14/97 9:59 AM

95-029-33

These comments are from a team of contracting officers at the following Navy contracting office:

FISC Norfolk Detachment Philadelphia
700 Robbins Avenue, Bldg. 2B
Philadelphia, 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 sections 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 serve the contracting community if it were included in the form of a Guide Book similar 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 possible. 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 jeopardize the integrity of the acquisition process on individual actions.

FAR 15.207(c): We have a concern that inclusion of the language as written could be a problem unless the words "at the discretion of" is added before "the contracting officer" in the first sentence. The potential exists that offerors 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 is not permitted discretion to determine if the additional time for submission beyond that granted all offerors should be allowed. The current language appears to bind the contracting officer to allow for resubmission 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 this paragraph should be rewritten as follows:

JUL 14 1997

(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.

95-029-33

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

95-029-34

Please see following message.

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 offerors. Does this mean the PCO 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.

JUL 14 1997

95-029-35



CCIA

Computer & Communications Industry Association

Washington, D.C. 20001

666 Eleventh Street, N.W., Sixth Floor

(202) 783-0070 Facsimile: (202) 783-0534

July 14, 1997

General Services Administration
FAR Secretariat (MVRs)
18th & F Streets, N.W.--Room 4037
Washington, D.C. 20403

BY HAND

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 offerors 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

Handwritten signature and date: *M. C. D. 7-14-97*

95-029-35

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 failing 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 similar 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) (iii), when using the lowest price, technically acceptable selection process.

FAR 15.102--Multi-Step Source Selection Technique

Although this section is a significant improvement over the initial version, CCIA believes that the multi-step technique 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" initially, but they must provide "at a minimum, 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 initial 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 definition of the competitive range remains in effect. As proposed, multi-step source selection adds traps for the unwary while 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 15.208 (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 15.208 (c) (1)). By fairly enforcing the current late proposal rules, contracting officers are already achieving the desirable result of encouraging vendors to submit their proposals

95-029-35

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 failure 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 15.209 (c) (2). Any Government action or inaction that causes a proposal to be late is, by definition, "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 opportunity to comment." CCIA believes that it is not enough simply to rely on the general provisions of FAR 15.406 (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.

95-02 9-35

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 is 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 definition 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 highly in accordance with such criteria." (Emphasis added). Proposed FAR 15.406 (c) (2) limits the competitive range to "those proposals most highly rated. . ." Under this 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 its 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 continues to believe that there is no need to revise the competitive range test that is contained in current FAR 15.609 (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

95-029-35

eliminates any concern that the FAR's current, competitive range test will include too many proposals in too many procurements. CClA also continues 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 perceive.

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. CClA 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."

CClA is also troubled by the FAR drafters' failure 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 minimum, 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 prohibitions contained in FAR 15.610 (e) against auction techniques. CClA believes that this prohibition 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. CClA believes that some additional changes will further improve this section. First, offerors should be given an opportunity 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 CClA does not believe that

95-029-35

common cut-offs are necessary for each round of revisions prior to BAFOs, offerors must be treated fairly. The best way to avoid unfairness 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 15.407 (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 opportunities 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 15.606--Postaward Debriefing of Offerors

This section contains two provisions regarding the timeliness of protests (15.606 (a) (4) (ii), (iii)) 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 administered 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 avoided.

These provisions are also bad policy. By arbitrarily starting the deadline for protesting at a point where the offeror lacks significant information, the regulation encourages protests based on rumor, speculation or the understandable desire to avoid rejection based on untimeliness. 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 significantly greater than the amount of information provided in a pre-award debriefing. An offeror should be allowed to make a reasoned business decision as to whether a protest is appropriate based on as full

95-029-35

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--Discovery of Mistakes

This provision defines the rules that apply to mistakes discovered after award. Current FAR 15.607 contains useful procedures regarding the disclosure of mistakes before award. We believe that these procedures should be retained in the FAR 15 Rewrite.

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

Sincerely,

Edward J. Black
Edward J. Black
President *etc*



95-029-36

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

1957 E Street, N.W. • Washington, D.C. 20006 • (202) 393-2040 • FAX (202) 347-4004

www.agc.org

cinmaster@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 billion. 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.

JUL 14 1997

95-029-36

[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 15.102(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. 15.102(c) should be revised to provide this discretion to the contracting officer.

[4] 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 structuring oral presentations. AGC further suggests that a videotape or audiotape of all oral presentations should be required under 15.103(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 deleting this subpart.

[6] 15.205 Issuing solicitations.

AGC encourages agencies to make all solicitation sets available free of charge to industry associations and other not-for-profit organizations for purposes of making the solicitation sets widely available.

[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 believes that offerors previously removed from the competitive range should be allowed to rejoin the competitive range based on an amendment to the solicitation.

95-029-34

AGC believes that 15.206(g) is unfair. A new solicitation should occur if the Government plans to award a contract based on a departure from its stated requirements.

[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 unascertainability of the submitted document, is required, the resubmission is not required to occur immediately. AGC believes 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 fair and impartial to all parties. AGC suggests modifications to 15.406 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 fully 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 well 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 relating to each offeror's past performance. AGC suggests the following modifications pursuant to past performance evaluations:

95-029-36

Under 15.406(a)(1), delete the parenthetical expression that follows the words "... aspects of proposals ..." and insert the following new sentence: "Whenever the Government determines 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 their proposals accordingly before any final award decision is made."

Under 15.406(b)(3), delete section "(ii)".

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, rating 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 15.406(d), insert new section (4) as follows: "The contracting 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 15.406 as proposed.

Under 15.406(b)(2), it appears the Government may enter into communications 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 communication, notwithstanding the government's disclaimer later in this section. Communications should be narrowly tailored to allow the government to gain 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 15.406(c)(1), agencies are required to establish a competitive range based on proposals from the "most highly rated" offerors, unless the range needs to be reduced for reasons of government efficiency. 15.406(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

95-029-34

consisting of one preferred offeror, who then becomes the only offeror to submit a final proposal. This interpretation is facilitated by an exemption to the requirement to obtain cost or pricing data, 15.503-1(c)(1)(iii), 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(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 guidelines for profit or fee prenegotiation objectives and contracting officers are concerned about deviating from the prenegotiation 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)(iii), 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 unfairly. 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)(iii) 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)(ii) 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

95-029-36

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 15.505(a) reading: "... 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. ..."
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(b)(6)(ii) 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 available 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 regarding 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 faith 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 gained 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 clarification is necessary under 15.605(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 21.2(a)(2) timeliness shall be determined 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 15.607(b)(2). This language can be read to enable the government to select preferred offerors to the exclusion of other qualified offerors, including the protestor, who were in the competitive range on a protested award.

95-029-34

AGC recognizes 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.

Sincerely,



Christopher S. Monek
Executive Director
Market Services



U.S. General Services Administration
Office of Inspector General



JUL 14 1987

95-029-36

General Services Administration
FAR Secretariat (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), appreciates the opportunity to submit its comments on FAR Case 95-029, a proposed rule which would rewrite FAR Part 15, Contracting by Negotiation, in order to "infuse innovative techniques into the source selection process, simplify the process, and facilitate the acquisition of best value." Our sole comment relates to the proposed coverage, at section 15.504-2, which would provide guidance to contracting officers on when to request audit assistance in negotiating contracts. As you may know, GSA OIG auditors perform, at the request of contracting officials, audit reviews and prepare field 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 officers "should request field pricing assistance when the information available at the buying activity is inadequate to determine a fair and reasonable price." We would advocate retaining the current standard which, while it provides contracting officials with sufficient flexibility and appropriately vests them with discretion on a case-by-case basis to not require field pricing support if appropriate, nevertheless affirmatively 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 emphasizes and encourages

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



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. Tighe, Counsel to the Inspector General on (202) 501-1932.

Sincerely,

A handwritten signature in cursive script that reads "William R. Barton".

William R. Barton
Inspector General



U.S. General Services Administration
Office of Inspector General



JUL 14 1997

95-029-37

General Services Administration
FAR Secretariat (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), appreciates the opportunity to submit its comments on FAR Case 95-029, a proposed rule which would rewrite FAR Part 15, Contracting by Negotiation, in order to "infuse innovative techniques into the source selection process, simplify the process, and facilitate the acquisition of best value." Our sole comment relates to the proposed coverage, at section 15.504-2, which would provide guidance to contracting officers on when to request audit assistance in negotiating contracts. As you may know, GSA OIG auditors perform, at the request of contracting officials, audit reviews and prepare field 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 officers "should request field pricing assistance when the information available at the buying activity is inadequate to determine a fair and reasonable price." We would advocate retaining the current standard which, while it provides contracting officials with sufficient flexibility and appropriately vests them with discretion on a case-by-case basis to not require field pricing support if appropriate, nevertheless affirmatively 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 emphasizes and encourages

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

, 4 1997

95-029-37

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. Tighe, Counsel to the Inspector General on (202) 501-1932.

Sincerely,

William R. Barton

William R. Barton
Inspector General



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

95-029-38

JUL 11 1997

OFFICE OF
ADMINISTRATION
AND RESOURCES
MANAGEMENT

Ms. Sharon A. Kiser
General Services Administration
FAR Secretariat (MVRs)
1800 F Street, NW, Room 4037
Washington, DC 20405

Re: FAR Case 95-029

Dear Ms. Kiser:

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 15.404 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 15.605. 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 impartially if they are not afforded the same treatment. Consideration should be given to revising the sentence to read as follows: "...The goal

95-029-38

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 "...fulfill 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 15.001 Definitions. This section as a whole does not recognize communications or discussions with offerors 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 15.001 Definitions--Communications: it should indicate that communications occur after the receipt of initial proposals.
- FAR 15.001 Definitions--Negotiation: it should indicate that negotiation occurs after receipt and evaluation of initial proposals.
- FAR 15.001 Definitions--Proposal modification: it should state that it 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

95-029-38

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 "...fulfill 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 15.001 Definitions. This section as a whole does not recognize communications or discussions with offerors 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 15.001 Definitions--Communications: it should indicate that communications occur after the receipt of initial proposals.

FAR 15.001 Definitions--Negotiation: it should indicate that negotiation occurs after receipt and evaluation of initial proposals.

FAR 15.001 Definitions--Proposal modification: it should state that it 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

95-029-38

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 15.103 in addressing oral presentations at the end of the introductory paragraph should state "when appropriate and requested." FAR 15.103(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 15.406(d))." This conflicts with the definition of "Discussions", as defined in FAR 15.001 and the FAR clause 52.215-1(a)(4), where it 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 15.406(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.

95-029-38

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) i.e., that if the departure from the stated requirements is so substantial that it is beyond what prospective offerors could have reasonably anticipated, cancellation and re-solicitation 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 offerors 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?

95-029-38

- 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/IO contracts with fixed unit prices.
- FAR 15.405(a)(2)(ii) addresses past performance evaluation. It should state that offerors 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?

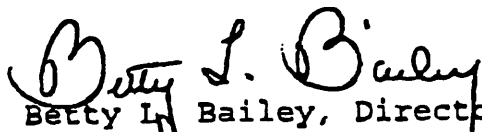
95-029-38

- 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 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 offerors. It only refers to deficiencies and significant weaknesses.
- FAR 15.407(a) Proposal revisions. The first sentence should be clarified to read, "If, after discussions have begun, an offeror originally in the competitive 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?

95-029-38

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

Sincerely,


Betty L. Bailey, Director
Office of Acquisition Management



**NEWPORT NEWS
SHIPBUILDING**

4101 Washington Avenue
Newport News, Virginia 23607-2770
Phone: 757-380-2000
http://www.nns.com

July 14, 1997

95-029-39

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

Subject: Proposed Revisions to FAR Part 15, FAR Case 95-029

Gentlemen:

On behalf of Newport News Shipbuilding and Dry Dock Company, the following comments on the proposed new FAR rule cited in Case 95-029 are submitted:

1. Newport News Shipbuilding supports this effort on the part of the Government to reduce or eliminate burdensome and unneeded paperwork, processes and regulation that add cost and generate little or no value to the work product.
2. From a shipbuilding perspective, the Government needs to take a broader approach when considering past performance in proposal evaluation. Ships are complex weapon systems that take from five to seven years to complete and many changes take place during those years that have a direct impact on a shipbuilders performance. This raises several problems including:
 - a) Old information that is out of date. Ship construction takes so many years that information, whether good or bad, generated for past performance during the construction phase for one contract may not be valid for the next solicitation.
 - b) The Government should perform some analysis of the shipyards past performance prior to including past performance in solicitations. This analysis should be provided to the respective shipyards for review and comment. There should also be some schedule for the analysis to be reviewed and updated periodically and provided to the respective shipyards for comment each time an update is done.
 - c) The proposed rule states that the Government should take into consideration information provided by the offeror that is similar to the Government requirement. It should be a requirement that the Government use such information in the evaluation process. In shipbuilding, for instance, information on ship repair work is applicable to ship construction and vice versa.

We thank you for giving us the opportunity to submit our comments.

Sincerely,

R. D. Ward
Director, Contracts

DEFENSE LOGISTICS AGENCY

DEFENSE PERSONNEL SUPPORT CENTER

2800 SOUTH 20TH STREET

PHILADELPHIA, PA 19145-5099

95-2940

FACSIMILE TRANSMITTAL HEADER

- 14 JUL 97 -

| ACTIVITY | NAME | PHONE NUMBER |
|---|-----------------|-------------------------------------|
| From: DEFENSE PERSONNEL SUPPORT CTR. | LINDA MAGAZU | DSN: 444-2622 COMM: 215 737-2622 |
| To: GENERAL SERVICES ADMIN. | FAK SECRETARIAT | DSN: COMM: |
| FAX NUMBER: 202-501-4067 | | NUMBER OF PAGES: 5 (INCL. COVER) |
| Releasing official: COMMENTS FORWARDED BY E-MAIL ALSO. | | Signature: |
| TOT: | | Operator: |

CALL 2622 IF PROBLEMS ENCOUNTERED IN RECEIPT OF THIS FAX

"WARNING"

"FAX MESSAGES ARE TO BE DELIVERED TO THE ADDRESSEE ONLY. Release to anyone other than the addressee is prohibited. No further distribution of this fax is authorized without the originator's approval."

95-029-40

**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 15.1 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 I 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

95-029-40

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 (e.g., 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 writer(s) 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

95-029-40

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 15.1 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!! 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.

95-027-40

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!

95-029-41

MCR MCR FEDERAL, INC.
700 TECHNOLOGY PARK DRIVE
BILLERICA, MASSACHUSETTS 01821
(508) 670-5800



FAX COVER SHEET

| | | |
|--|--------------------------------------|-------------------------------------|
| <input checked="" type="checkbox"/> Rush <input type="checkbox"/> ASAP <input type="checkbox"/> Low Priority | To: FAR Secretariat | From Neil Albert |
| | | Sent By: Marilyn Kasprzak |
| | Location/Fax Number: 202-501-4067 | MCR Fax Number: (508) 670-6061 |
| Time Sent: 3:26 PM | Copy To: | No. of pages including this page: 8 |
| Date Sent: 07/14/97 | Copy To: | Project Charge: |

Comments/Contents:

Originals Being Mailed?

Yes No

If you have trouble/questions or wish to verify your transmission, please call (508) 670-5800

MANAGEMENT CONSULTING & RESEARCH, INC.

95-029-41

July 7, 1997

General Service Administration
FAR Secretariat (VRS)
1800 F. Streets, NW, Room 4035
Washington, D.C. 20405

To: FAR Secretariat

From: SCEA Forum

The Society of Cost Estimating and Analysis (SCEA) is a non-profit organization representing industry and government in the areas of cost analysis, cost estimating, and contracting pricing. For the past six and a half years, SCEA has sponsored a DOD-oriented Industry Forum, which includes contracts and pricing professionals.

The purpose of the Forum is to discuss issues pertaining to the federal acquisition process, share best practice information, and discuss issues impacting the cost estimating and cost analysis profession. The SCEA Forum has representation on it from industry and government oversight personnel that are directly affected by FAR Part 15.

In the course of our meetings, the Forum members have discussed many issues pertaining to the Federal Acquisition Regulations (FAR). In the Forum's most recent meeting, members reviewed the proposed rule (FAR Case 95-029). This proposed rule seeks to rewrite Federal Acquisition Regulation (FAR) Part 15, contracting by negotiation.

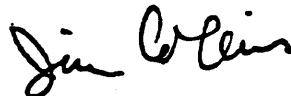
The Forum appreciates the acquisition streamlining changes that the FAR Council has implemented under FASA 94 and is recommending under this proposed FAR Case. Although our recommendations may seem insignificant compared to other sweeping acquisition reform changes, the Forum believes that countless resources are wasted by government and industry personnel debating the interpretation of certain FAR paragraphs. As a result the Forum respectively submits the attached recommended changes to clarify the intent of FAR Part 15.

Thank you for the opportunity to submit these comments. The Forum wishes you well in your endeavor and applauds your efforts to streamline the acquisition process. Requests for further clarification can be addressed to the undersigned.

Sincerely,



Neil F. Albert
President, SCEA
(508) 670-5800



Jim Collins
SCEA Forum Chairman
(410) 765-8033

Enclosure
cc: SCEA Forum Members

95-029-41

SCEA FORUM
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 "parametric estimates."

The revised wording would read as follows:

....such factors as: vendor quotations; non-recurring costs; parametric estimates; information on that could have a significant bearing on costs.

Rationale: 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 word "significant"

The revised wording would read as follows:

- (a) (2) Price analysis shall be used for all significant subcontracts when cost or pricing data are not required

Rationale The word significant was dropped in the rewrite, it does not appear cost beneficial to add contractor effort to analyze insignificant subcontracts.

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.

15.504-1 Proposal Analysis Techniques

- 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.

95-029-41

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 requiring the Government to ascertain if the risk is real or perceived; offeror's should not be rejected because of differences caused by following their disclosed accounting practices.

15.504-3Subcontract 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 if 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.

15.504-3Subcontract Pricing Consideration

- 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)

15.504-3Subcontract Pricing Consideration

- Paragraph (c) (1) (ii)

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....

95-029-41

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 remaining thresholds should be revised appropriately or the \$10,000,000 change will have no positive impact on streamlining the process.

15.504-3Subcontract Pricing Consideration

- Paragraph (c) (3)

Change the word "shall" to "may be" and add "in an alternate format specified in the solicitation or in the contractor's format."

The revised wording would read as follows:

(3) Subcontractor cost or pricing data may be submitted in the format provided in table 15-2 of 15.508, in an alternate format specified in the solicitation or in the contractor's format.

Rationale: With table 15-3 eliminated, provision should be made to allow the contracting officer to specify the format they believe is required to adequately evaluate the data. Contractors should not be required to develop data that is not required. FAR 15.503-5(b)(1), also permits submission in the contractor's format.

15.504-3Subcontract Pricing Consideration

- Paragraph (c) (4)

Delete the last sentence "The contractor shall update... during source selection and negotiations."

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.

15.506-3Documenting 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 contacting officer should identify to what extent they--."

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 contacting officer should identify to what extent they --

The contracting officer has many sources of data available to determine their position (i.e.: 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 relied 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.

95-029-41

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.

- (3) 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.

Table 15-2 Instructions for Submitting Cost or Pricing Data

- 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 as otherwise directed by the RFP.

Rationale: This would require contractors to submit subcontractor data in the format required for evaluation, but not require contractors to develop unnecessary formats.

Table 15-2 Instructions for Submitting Cost or Pricing Data

- Cost Elements, Paragraph A. Materials and Services

Add wording that allows for estimating techniques other than the detailed bottoms-up methodology.

The revised wording would read as follows:

"Materials and Services - 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 bottoms-up estimating method are used, provide the basis of how the cost estimate was derived and furnish supporting data and documentation suitable for an analysis of the proposed cost."

Rationale: Other estimating 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.

Table 15-2 Instructions for Submitting Cost or Pricing Data

Cost Elements, Paragraph A

Add: "When comparative pricing data exists", also add "significant"

95-029-41

The revised wording would read as follows:

A. When comparative pricing data exists, conduct price analyses of all significant subcontractor proposals.

Rationale: On new development and change order proposals, price analysis data may not exist. The addition of the term significant is based on the same rationale as 15.504-1(a).

Table 15-2 Instructions for Submitting Cost or Pricing Data

- 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.

Rationale: Same as 15.504-3 (b) (2)

Table 15-2 Instructions for Submitting Cost or Pricing Data

- Cost Elements, Paragraph A (2)

Delete the word "source" and replace with the word "subcontractor"

The revised wording would read as follows:

In addition, provide a summary of your cost analysis and a copy of cost or pricing data submitted by the prospective subcontractor in support of each subcontract, or purchase order

Rationale: Same rationale as Table 15-2, Cost Elements, paragraph (A) (2)

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 remaining thresholds should be revised appropriately or the \$10,000,000 change will have no positive impact on streamlining the process.

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS

1250 Eye Street, N.W., Suite 1200
Washington, D.C. 20005
(202) 371-8414

95-029-42

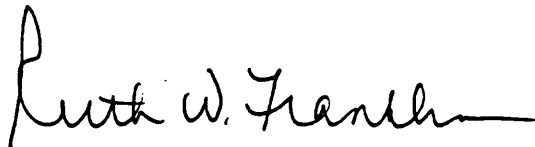
14 July 1997

MEMORANDUM

TO: Mr. Jeremy Olson, GSA
Ms. Melissa Rider, DAR Council

SUBJECT: CODSIA Comments on FAR Part 15 Rewrite
FAR Case 95-029

Because many CODSIA member association representatives are currently out of town, I have been asked to send you the enclosed agreed-upon but *unsigned* CODSIA letter, which provides industry's comments on Phase II of the FAR Part 15 rewrite project. A *signed* version of this letter will be sent to you as soon as possible. The *signed* version may contain a few changes, but these will be editorial, rather than substantive, in nature.



Ruth W. Franklin
Administrative Officer

Enclosure

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS

1250 Eye Street, N.W., Suite 1200

Washington, D.C. 20005

(202) 371-8414

July 14, 1997

CODSIA Case 19-96

General Services Administration
FAR Secretariat (VRS)
18th & F Streets, N.W.
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 15.0 through 15.4 and 15.6) 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 believe will increase clarity and content, while remaining consistent with the intent of the Rewrite. We urge your consideration and adoption of these recommendations.

The following summary identifies 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 negative comments that the drafters received on this section (15.102) 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, i.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 Multi-Step process should never result in a potential competitor being refused further access to the process without any recourse.
2. **Communications vs. Discussions:** CODSIA members believe that the bright line which existed between communications and discussions in Phase I of the Rewrite has been eliminated 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 15.0 and 15.4 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 minimums and allow the government to negotiate with offerors for increased performance beyond the stated mandatory minimums. 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 15.406(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.

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 offerors. CODSIA members consider this to be a solution that is neither 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 15.406(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, e.g., 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 15.605.
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(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.” 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 15.406 and 15.408 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 DAR Council and CAA Council consolidated and reorganized Subparts 15.7 (Make-or-Buy Programs), 15.8 (Price Negotiation), and 15.9 (Profit) into a single new Subpart 15.5 (Contract Pricing). Old Subpart 15.5 (Unsolicited Proposals) has been moved to Subpart 15.3. According to the Federal Register other significant changes being proposed in this area included the following:

- Parametric estimates would be added to the definition of cost or pricing data;
- Standard Form 1411, Standard Form 1448, and Table 15-3 would be eliminated;
- The requirements for field pricing support would be reduced and, if performed, would be limited to selected areas;
- The definition of unbalanced pricing would be revised; and
- The scope of cost realism assessments would be broadened, including application to fixed price type contracts.

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 15.7, 15.8, and 15.9. Further, except as noted below, we were pleased that the reforms implemented under the Federal Acquisition Streamlining Act of 1994 (FASA) and the Clinger-Cohen Act of 1996 have essentially remained intact. Below is a summary of CODSIA’s analysis and recommendations on the proposed Subpart 15.5 rewrite and conforming changes to other sections of the FAR.

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.

As the DAR Council and CAA Council are no doubt aware, government access to records and audit rights has consistently been one of private industry's greatest concern 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:

- Eliminate contracting officer discretion at FAR 15.503-5(a)(4) to determine 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
- Reinstate Standard Form 1448 (if Standard Form 1411 is reinstated, it should be substantially revised to eliminate unnecessary questions).

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 15.501 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 15.502 that the contracting 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.
- 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).

Parametric Estimates

We strongly disagree with the proposed revision to the definition of "cost or pricing data" at FAR 15.501, which adds parametric estimates 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.

Cost Realism

We are concerned that the proposed rewrite misapplies 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 primary concern is that confusing these concepts will induce contracting 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 unrealistically 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 until the Cost Accounting 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 activities of the FAR Council and the CAS Board have not been adequately coordinated. This lack of coordination 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.

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 team 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

DAR Council and CAA Council
July 14, 1997
Page 8

prime contractor or higher-tier contractor. CODSIA urges the DAR Council and CAA Council to retain this policy.

Finally, it is clear that the ultimate effectiveness of acquisition reform lies 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.

If you have any questions about our comments, we will be pleased to make available representatives from CODSIA's Operating Committee who have engaged in extensive deliberations on the proposed FAR Part 15 Rewrite.

Sincerely,

SEE CODSIA SIGNATOIRES, NEXT PAGE

Enclosures

CODSIA Analysis and Recommendations, FAR Part 15 Rewrite

Group A Miscellaneous Clarifications and Corrections

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

ISSUE

1.102-2 Performance standards.

DISCUSSION

CODSIA members believe 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.~~

TAB1

ISSUE

2.101 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 15.101 in lieu of the definition in 2.101. 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 15.101 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.

* * * * *

~~Best value means the outcome of an acquisition that, in the Government's estimation, provides the greatest overall benefit in response to the requirement.~~

* * * * *

15.101 Best value continuum.

~~An agency can obtain best value in negotiated procurements by using any one or a combination 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 of unsuccessful contract performance is minimal, cost or price may play a dominant 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 dominant 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

11.801 Preaward testing.

DISCUSSION

See 15.405 for Discussion and Recommendation.

RECOMMENDATION

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

See the revised language in 15.405(c).

ISSUE

Section 15.001 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 doing 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 (i.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 offerors 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 15.406 will be compromised.

RECOMMENDATION

Communications are all interchanges that occur between the government and offerors ~~and an offeror, including discussions conducted after the competitive range is 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 offerors, permits bargaining.~~ Bargaining includes persuasion, alteration of assumptions and positions, give-and-take, and may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract.

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 offerors 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 ~~A~~all evaluation factors and significant subfactors that will affect contract award and their relative importance ~~shall be clearly stated in the solicitation~~ including those related to capabilities in excess of the solicitation requirements.

ISSUE

15.102 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 offerors 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 offerors 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 Rewrite. 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 multi-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 offerors 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 pre-solicitation notice.

4. Evaluate the proposals submitted and either 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 multi-step 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 15.102 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) Multi-step source selection may be appropriate ~~when the submission of full proposals at the beginning of a source selection would be burdensome for offerors to prepare and for Government personnel to evaluate 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 more 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 solicitation that describes the supplies or services to be acquired, identifies the criteria that will be used in making the source selection decision, and identifies the information that must be submitted in response to the first step solicitation.~~ 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. ~~While the solicitation will not require the submission of full proposals in first step, it shall require, at minimum, the submission of statements of qualifications, proposed technical concepts, and past performance and pricing 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 solicitation also shall outline what submissions are expected in future steps. The solicitation must disclose all significant factors and subfactors, including cost or price, that the agency will consider in evaluating proposals, and their relative importance. The solicitation must contain sufficient information to permit potential offerors to make informed decisions about whether to participate in the acquisition, and shall advise them that failure to participate in the first step will preclude participation in any subsequent step.~~

(c) The agency shall evaluate all responses in accordance with the criteria stated in the solicitation notice, and shall advise each ~~offeror~~ respondent either that it

~~has been selected to participate in the next step of the acquisition or that it has been excluded 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. Those not determined to be in the competitive range shall be informed in accordance with 15.603 that they will not be permitted to participate in any subsequent step, and shall be debriefed as required by 15.605 and 15.606. The agency shall seek additional information in any subsequent step sufficient to permit any award without further discussion or another competitive range determination. 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; i.e., 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 process ends at contract award or cancellation of the acquisition.~~

ISSUE

15.103 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 (*i.e.*, 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 offerors 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-time 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.** ~~(e.g., videotaping, written minutes, Government notes, copies of offeror briefing slides or presentation notes)~~ shall be at the discretion of the source selection authority. **A copy of the record placed in the contract file shall be provided to the offeror.**

ISSUE

15.201 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 2.101. 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 cross-reference.

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 offerors. 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 offerors. 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 3.104 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--

(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 proposals~~ 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, W**hen a presolicitation 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

15.202 Advisory multi-step source selection.

See above recommendation combining 15.102 and 15.202

ISSUE

15.203 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 RFPs."

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 either 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 21st and 22nd 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)(ii) 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 RFPs

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 RFPs in other appropriate circumstances.

"Other appropriate circumstances" is not defined, illustrated, or discussed. It effectively gives the contracting officer authority to use letter RFPs 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 RFPs 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 RFPs may be used in sole source follow-on acquisitions and other appropriate circumstances. Letter RFPs should be as complete as possible and, as a minimum, should contain the following:~~ **(e) Letter RFPs may be used in sole source acquisitions and sole source follow-on acquisitions, as appropriate. Letter RFPs 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 offerors.

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 offerors 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.

CODSIA members believe there may be times that the government may want to require proposals to remain valid during the entire solicitation process. Accordingly, we recommend that the contracting officer be given the flexibility to prohibit withdrawal of proposals and have revised subparagraph (e) accordingly.

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 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 inactions, 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 immediate 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 suffice.

(e) Unless otherwise prohibited by the solicitation, 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 4.803(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 do 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 15.5, 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

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)

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

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

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.

~~52.215-8 Order of Precedence--Uniform Contract Format.~~

Order of Precedence--Uniform Contract Format (Date)

~~Any inconsistency in this solicitation or contract shall be resolved by giving precedence in the following order:~~

- ~~(a) 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;~~
- ~~(e) Representations and other instructions.~~

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
15.3 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 15.306-2 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 15.309(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:

15.309 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

~~This proposal includes 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 right 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
15.401 Definitions.

DISCUSSION

We have two comments for this definitional section. First, the three (not two) definitions should be moved to 15.001 so they can relate, and be interpreted as relating, to the entire Part 15, not just Subpart 15.4 on source selection. For example, the phrase "significant weaknesses and deficiencies" appears in 15.606(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; i.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 15.001 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 15.001 should read:

"Deficiency," as used in this subpart, is ~~a material~~ the failure of a proposal to meet a material Government requirement ~~or a combination of significant weaknesses in a proposal that increases the risk of unsuccessful contract performance to an unacceptable level.~~

"Weakness," as used in this subpart, is a flaw in the proposal that increases the risk 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 ~~indecreases~~ the risk of unsuccessful contract performance likelihood of award unless addressed and resolved.

ISSUE

15.405 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 utilize 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 contained 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 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 Realism

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 11.801, 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 15.4 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 15.001:

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 15.405(a)(1) a few additional words related to proposal evaluation, delete the sentence on cost realism at 15.405(a)(1) and add a new second sentence at 15.405(a)(2)(ii).

(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)(i)(B)) may be appropriate to establish reasonableness of the otherwise successful offeror's price. When contracting on a cost-reimbursement 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, in exceptional cases, on other competitive fixed-price type contracts (see 15.504-1(d)(3))~~. The contracting officer shall document the cost or price evaluation.

(2) Past performance evaluation.

(i) ...

(ii) The solicitation shall describe the approach for evaluating past performance, including evaluating offerors 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 ~~source selection~~ contract file records shall include--

ISSUE

15.406 Communications with offerors.

DISCUSSION

There are several elements to the proposed section on communications with offerors.

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 15.001, 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 15.406(a). The fact that the definition of "discussions" (also at 15.001) 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 15.001), offerors shall not be allowed to revise their proposals."

Furthermore, the Rewrite proposal must clarify the distinction between communications and discussions. The definitions at 15.001 define "discussions" as a subset of "communications." The critical distinction between the two (i.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 applicable, part of the regulation. We suggest that a revised sentence be inserted and moved from 15.406(b)(2) to a location immediately after the title of section 15.406 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 final Rewrite, *i.e.*, "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 clarification 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 15.406(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 P.L. 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 15.406(c)(2), first sentence: Delete the phrase "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" and insert the following:

After evaluating all proposals in accordance with 15.405(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~~ **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 offerors 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 clarity 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 (i.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 15.610(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, offerors 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 believe 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

15.406 Communications with offerors. 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 offerors may be used to resolve minor or clerical errors or to clarify certain aspects of proposals (e.g., 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 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.

(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 most highly rated proposals that might otherwise be included 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 52.215-1(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. 253b(d)).

...
(d) ~~Communications~~ Discussions 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.

...
(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. ~~In discussing other aspects of the proposal, the Government may, in situations where the solicitation stated that evaluation credit would be given for technical solutions exceeding any mandatory minimums, negotiate with offerors for increased performance beyond any mandatory minimums, and the Government may suggest to offerors that have exceeded any mandatory minimums, 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 officer may inform an offeror that its price is considered by the Government to be too high, or too low, and reveal the results of the analysis supporting that conclusion.~~ **It is also permissible, at the Government's discretion, to indicate to all offerors the cost or price that the Government's price analysis, market research, and other reviews have identified as reasonable (41 U.S.C. 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 3.104 and 41 U.S.C. 423(h)(1)(2).

ISSUE

15.407 Proposal revisions.

DISCUSSION

The regulation allows an offeror "an opportunity to submit a proposal revision" (FAR 15.406(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 15.407(b)). This section contemplates maintaining the old system under which offerors 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 offerors being considered for award, that offeror may be eliminated from the competitive range whether or not all material aspects of the proposal have been discussed, or the offeror has been afforded an opportunity to submit a proposal revision (see 15.406(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 revisions that clarify 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 ~~final~~ proposal revisions shall advise offerors that ~~the final proposal~~ such revisions shall be in writing and that the government intends to make award without ~~obtaining further discussions~~ revisions.

ISSUE

15.408 Source selection.

DISCUSSION

Proposed FAR 15.408 allows the source selection authority'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 15.408 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

15.408 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 business judgments and tradeoffs, including benefits associated~~

with additional costs. Although the rationale for the selection decision must be documented, and that documentation need not must provide quantification of the tradeoffs that led to the decision.



ISSUE

15.605 Preaward debriefing of offerors.

DISCUSSION

In earlier 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 significant.

The proposed Rewrite comes close to achieving 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 guidance to contracting officers on what types of circumstances could legitimately be deemed "compelling." CODSIA members continue to believe 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 explicitly clear that, for purposes of a potential 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 clarifying language delineating examples of "compelling reasons."

(a)(1) The offeror may request a preaward debriefing by submitting a written request for debriefing to the contracting officer within ~~3~~ **three** days after receipt of the notice of exclusion from the competition.

(2) At the offeror's request, this debriefing may be delayed until after award. If delayed until after award, the debriefing shall include all information normally provided in a postaward debriefing (see 15.606(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 received 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 ~~if, only for compelling reasons, it is not in the best interests of the Government to conduct a debriefing at that time.~~ **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 15.606. 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.**

....
(4) **An evaluation of past performance information obtained by the government and which was used in source selection evaluation.**

ISSUE

15.606 Postaward debriefing of offerors.

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.

RECOMMENDATION

(b) Debriefings of successful and unsuccessful offerors 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

52.212-1 Instructions to Offerors -- Commercial Items

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 Contracting 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 inactions, 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

52.215-3 Request for Information or Solicitation for Planning Purposes.

DISCUSSION

See Discussion in 15.001.

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 15.001.

(c) This solicitation is issued for the purpose of: [state purpose].

(End of provision)

ISSUE

52.215-8 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 of Precedence--Uniform Contract Format (Date)~~

~~Any inconsistency in this solicitation or contract shall be resolved by giving precedence in the following order: (a) 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.~~

~~(e) Representations and other instructions.~~

~~(End of clause)~~

See Recommendation in 15.209(h).

**MISCELLANEOUS CLARIFICATIONS AND CORRECTIONS
TO
PROPOSED FAR PART 15 DATED MAY 14, 1997**

The material which follows consists of various clarifications 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 15.000 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 either "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 ...*".

TAB 2

15.204-2(a)(3)(viii). Recommend that the list of respondent information to be provided include also the respondent's e-mail 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 lieu of) oral notices. Speed and efficiency are maintained, since electronic notices can be sent to all offerors 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 "is" 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 either (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 handling 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 15.208 concerning timely submission of offers and the rules for consideration of late offers apply."

15.606(a)(4)(ii). In subparagraph (a)(4)(ii) change the reference from "15.605(a)(ii)" to "15.605(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, 15.609(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 Certifications-Negotiation retains obsolete language. The language in the current clause at 52.215-35 should be used in lieu 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

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 price agreement 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, 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 15.5 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 determinations 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 pricing data may include 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 modeling 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 neither 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

~~Cost realism means an assessment of whether or not the costs in an offeror's proposal are realistic for the work to be performed; reflect a clear understanding of the requirements; and are consistent with the various elements of the offeror's technical 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.

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-ins; nonmonetary incentives (e.g., 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 (i.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 administrative 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
FAR SUBPART 15.5 REWRITE
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 15.503-4, 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:

(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) 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 ~~evaluating~~ *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 15.501.

(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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

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 either propose or agree to the lowest price at which a commercial item 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. 2306a and 41 U.S.C. 254b).

15.503-1 Prohibition on obtaining cost or pricing data (~~10 U.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 15.503-4(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** (~~contracts, subcontracts, or modifications~~) (but may require information other than cost or pricing data to support a determination of price reasonableness or **assess cost realism**) -*

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
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

CODSIA 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 -

(i) Two or more responsible offerors, competing independently, submit priced offers ~~in 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 to the offeror whose proposal represents the best value where~~ Price is a substantial factor in source selection *the award decision*; and

CODSIA ANALYSIS

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;

(ii) There was a reasonable expectation, based on market research or other assessment, that two or more responsible offerors, competing independently, would submit priced offers ~~in 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, e.g., circumstances indicate that -

(1) The offeror believed that at least one other offeror was capable of submitting a ~~meaningful~~ *responsive* offer; and

(2) The offeror had no reason to believe that other potential offerors 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

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 items. Any acquisition for ~~an item that meets the a~~ commercial item definition in 2.101, ~~or any modification, as defined in paragraph (c) (1) or (2) of that definition, that does not change the item from a commercial item to a noncommercial item,~~ 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 ~~consider waiving~~ *wave* the requirement if the price can be determined 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

~~15.503-2 Other circumstances where cost or pricing data are not required.~~

~~(a) The exercise of an option at the price established at contract award or initial negotiation does not require submission of cost or pricing data.~~

~~(b) Cost or pricing data are not required for proposals used solely for overrun funding 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., incremental 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 ***determining 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 (40 U.S.C. 2306a(d)(1) and 41 U.S.C. 254b(e)(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 15.5.

(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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

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 ~~determine~~ **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.C. 2306a(d)(2) and 41 U.S.C. 254b(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 items 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 15.503-1(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 undefinitized actions such as letter contracts).

CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(ii) 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)(ii) of this subsection. Price adjustment amounts shall consider both increases and decreases (e.g., 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 head of the contracting activity, without power of delegation, may authorize the contracting officer to obtain cost or pricing data for pricing actions below the pertinent threshold in paragraph (a)(1) of this subsection, provided the action exceeds the simplified acquisition threshold. The head of the contracting activity shall justify the requirement for cost or pricing data. The documentation shall include 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.~~

CODSIA ANALYSIS

CODSIA recommends relocating provision at 15.503-4(a)(2) to 15.503-1(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 15.506-2, 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, an earlier *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 15.501 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

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 15.502, the contracting officer shall ~~specify~~ ***insert the solicitation provision at 52.215-41 and contract clause at 52.215-42 in the solicitation (see 15.508 (l) and (m)) when either cost or pricing data or information other than cost or pricing data are required -***

~~(1) Whether cost or pricing data are required;~~

~~(2) That, in lieu of submitting cost or pricing data, the offeror may submit a request for exception from the requirement to submit cost or pricing data;~~

~~(3) Any information other than cost or pricing 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 49.6, 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

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 15.5. 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 ~~final agreed to~~ ***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 used, ~~singly or in combination with others,~~ to ensure that the ~~final agreed upon~~ ***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?

**CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

~~(4) Cost analysis may also be used to evaluate information other than cost or pricing data to determine cost reasonableness or cost 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 differentiate 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 rights.

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) 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 Air Force Institute of Technology (AFIT) and the Federal Acquisition Institute (FAI) jointly prepared a series of five desk references to guide 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 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) 512-2550, 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>.

(b) Price analysis. (1) Price analysis is the process of examining 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:

(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 similar end items, if both the validity of the comparison and the reasonableness of the previous price(s) can be established.

**CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(iii) Application 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 (~~including cost or pricing data or information other than cost or pricing 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 fair and reasonable price, given the circumstances of the acquisition. Such techniques and procedures include the following:

(i) 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 cost-estimating relationships; and

(D) The application of audited or negotiated indirect cost rates, labor rates, and cost of money or other factors.

(ii) 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 offerors 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

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 determine 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 obtain 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 analysis assessment.** (1) **Cost realism analysis assessment** 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; 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 realism does not equate to the Government's estimate of most probable cost.***

(2) **Cost realism analyses assessments** shall be performed on ***significant*** competitive cost-reimbursement contracts to determine the probable cost of performance for each offeror.

(i) ~~The probable cost may differ from the proposed cost and should reflect the Government's best estimate of the cost of any contract that is most likely to result from the offeror's proposal. The probable cost shall be used for purposes of evaluation to determine the best value.~~

(ii) ~~The probable cost is determined by adjusting each offeror's proposed cost, and fee when appropriate, 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 distinctly 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

~~(3) Cost realism analyses may also be used on competitive fixed-price incentive contracts or, in exceptional cases, on other competitive fixed-price type contracts when new requirements may not be fully understood by competing offerors, there are quality concerns, or past experience indicates that contractors' proposed costs have resulted in quality or service shortfalls. Results of the analysis may be used in performance risk assessments and responsibility determinations. However, proposals shall be evaluated using the criteria in the solicitation, and the offered prices shall not be adjusted as a result of the analysis.~~

CODSIA 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 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 disappointed that, despite its repeated suggestions, the activities 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 price contracts have been exempted from TINA but not CAS. For many companies, CAS is a key criterion for declining Government business.

(3) Cost realism assessments shall not be performed on contracts for commercial items.

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 quantities of material proposed and the need for the types and quantities 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 little or no variation in base cost.

CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(2) ~~Except for the acquisition of commercial 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(d)(5)(A)(i)). 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 section 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 realism assessments* or price analysis techniques. 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.

(i) Startup work, mobilization, first articles, or first article testing are separate line items;

(ii) Base quantities and option quantities 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 -

(i) Consider the risks to the Government associated with the unbalanced pricing in determining the competitive range and in making the source selection decision; and

(ii) Consider whether award of the contract will result in paying unreasonably high prices for contract performance.

(3) An offer may be rejected if the contracting 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 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(j) 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 4.807(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.

(i) 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(2) The contracting officer shall not request a separate preaward audit of indirect 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. Copies of updated information that will significantly 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 immediately 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 promptly in writing, including a description of deficient or denied data or records. The contracting officer immediately 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 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 subcontractor 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-tier subcontractor without disclosing subcontractor proprietary data (e.g., range of fair and reasonable prices). If the subcontractor requested an exception under 15.503-1(b), the contracting officer shall indicate 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 retain this policy.

CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

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 negotiated 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, 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~~ 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 ~~price proposal~~ own cost or pricing data submission.

CODSIA ANALYSIS

CODSIA recommends that the present language of 15.504-3(b)(2) and (3) be retained. This will acknowledge the very real situation where it is not feasible to submit all required data at the time of initial price proposal submission and subcontract price analyses and subcontract cost or pricing 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 exemption in 15.503-1(b) applies to that action.

(1) The contractor shall ~~submit forward~~, or cause to be ~~submitted forwarded~~ by the subcontractor(s), cost or pricing data to the Government for subcontracts that are the lower of either -

(i) \$10,000,000 or more; or

(ii) Both more than the pertinent 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 contracting officer may require the contractor or subcontractor to ~~submit forward~~ to the Government (or cause ~~submission 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 15.508.

ISSUE

52.212-1 Instructions to Offerors -- Commercial Items

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 Contracting 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 inactions, 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

52.215-3 Request for Information or Solicitation for Planning Purposes.

DISCUSSION

See Discussion in 15.001.

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 15.001.

(c) This solicitation is issued for the purpose of: [state purpose].

(End of provision)

ISSUE

52.215-8 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 of Precedence--Uniform Contract Format (Date)~~

~~Any inconsistency in this solicitation or contract shall be resolved by giving precedence in the following order: (a) 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.~~

~~(e) Representations and other instructions.~~

~~(End of clause)~~

See Recommendation in 15.209(h).

**MISCELLANEOUS CLARIFICATIONS AND CORRECTIONS
TO
PROPOSED FAR PART 15 DATED MAY 14, 1997**

The material which follows consists of various clarifications 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 15.000 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 either "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 ...*".

TAB 2

15.204-2(a)(3)(viii). Recommend that the list of respondent information to be provided include also the respondent's e-mail 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 lieu of) oral notices. Speed and efficiency are maintained, since electronic notices can be sent to all offerors 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 "is" 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 either (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 handling 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 15.208 concerning timely submission of offers and the rules for consideration of late offers apply."

15.606(a)(4)(ii). In subparagraph (a)(4)(ii) change the reference from "15.605(a)(ii)" to "15.605(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, 15.609(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 Certifications-Negotiation retains obsolete language. The language in the current clause at 52.215-35 should be used in lieu 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

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 price agreement 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, 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 15.5 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 determinations 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 pricing data may include 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 modeling 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 neither factual nor verifiable. Therefore, they are not cost or pricing data. As a minimum, this change should 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

~~Cost realism means an assessment of whether or not the costs in an offeror's proposal are realistic for the work to be performed; reflect a clear understanding of the requirements; and are consistent with the various elements of the offeror's technical 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.

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-ins; nonmonetary incentives (e.g., 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 (i.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 administrative 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
FAR SUBPART 15.5 REWRITE
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 15.503-4, 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:

(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) 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 evaluating *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 15.501.

(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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

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 either propose or agree to the lowest price at which a commercial item 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. 2306a and 41 U.S.C. 254b).

15.503-1 Prohibition on obtaining cost or pricing data (~~10 U.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 15.503-4(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 (~~contracts, subcontracts, or modifications~~) (but may require information other than cost or pricing data to support a determination of price reasonableness or **assess** cost realism) -*

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
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

CODSIA 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 -

- (i) Two or more responsible offerors, competing independently, submit priced offers ~~in 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 to the offeror whose proposal represents the best value where~~ Price is a substantial factor in source selection ***the award decision***; and

CODSIA ANALYSIS

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;

- (ii) There was a reasonable expectation, based on market research or other assessment, that two or more responsible offerors, competing independently, would submit priced offers ~~in 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, e.g., circumstances indicate that -

- (1) The offeror believed that at least one other offeror was capable of submitting a ***meaningful responsive offer***; and
- (2) The offeror had no reason to believe that other potential offerors 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

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 items. Any acquisition for ~~an item that meets the~~ **a commercial item definition in 2.101, or any modification, as defined in paragraph (c) (1) or (2) of that definition, that does not change the item from a commercial item to a noncommercial item;** 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 ~~consider waiving~~ **waive** the requirement if the price can be determined 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

~~15.503-2 Other circumstances where cost or pricing data are not required.~~

~~(a) The exercise of an option at the price established at contract award or initial negotiation does not require submission of cost or pricing data.~~

~~(b) Cost or pricing data are not required for proposals used solely for overrun funding 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., incremental 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 ***determining 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 (10 U.S.C. 2306a(d)(1) and 41 U.S.C. 254b(e)(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 15.5.

(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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

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 ~~determine~~ **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.C. 2306a(d)(2) and 41 U.S.C. 254b(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 items 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 15.503-1(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 undefinitized actions such as letter contracts).

CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(ii) 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)(ii) of this subsection. Price adjustment amounts shall consider both increases and decreases (e.g., 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 head of the contracting activity, without power of delegation, may authorize the contracting officer to obtain cost or pricing data for pricing actions below the pertinent threshold in paragraph (a)(1) of this subsection, provided the action exceeds the simplified acquisition threshold. The head of the contracting activity shall justify the requirement for cost or pricing data. The documentation shall include 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.~~

CODSIA ANALYSIS

CODSIA recommends relocating provision at 15.503-4(a)(2) to 15.503-1(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 15.506-2, 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, an earlier *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 15.501 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

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 15.502, the contracting officer shall *specify insert the solicitation provision at 52.215-41 and contract clause at 52.215-42* in the solicitation (see 15.508 (l) and (m)) *when either cost or pricing data or information other than cost or pricing data are required -*

~~(1) Whether cost or pricing data are required;~~

~~(2) That, in lieu of submitting cost or pricing data, the offeror may submit a request for exception from the requirement to submit cost or pricing data;~~

~~(3) Any information other than cost or pricing 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 49.6, 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

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 15.5. 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 ~~final agreed to~~ ***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 used, ~~singly or in combination 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?

**CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

~~(4) Cost analysis may also be used to evaluate information other than cost or pricing data to determine cost reasonableness or cost 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 differentiate 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 rights.

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) 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 Air Force Institute of Technology (AFIT) and the Federal Acquisition Institute (FAI) jointly prepared a series of five desk references to guide 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 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) 512-2550, 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>.

(b) Price analysis. (1) Price analysis is the process of examining 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:

(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 similar end items, if both the validity of the comparison and the reasonableness of the previous price(s) can be established.

CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(iii) Application 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 (~~including cost or pricing data or information other than cost or pricing 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 fair and reasonable price, given the circumstances of the acquisition. Such techniques and procedures include the following:

(i) 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 cost-estimating relationships; and

(D) The application of audited or negotiated indirect cost rates, labor rates, and cost of money or other factors.

(ii) 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 offerors 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

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 determine 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 obtain 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 analysis *assessment*. (1) Cost realism analysis *assessment* 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; 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 realism does not equate to the Government's estimate of most probable cost.*

(2) Cost realism analyses *assessments* shall be performed on *significant* competitive cost-reimbursement contracts to determine the probable cost of performance for each offeror.

(i) ~~The probable cost may differ from the proposed cost and should reflect the Government's best estimate of the cost of any contract that is most likely to result from the offeror's proposal. The probable cost shall be used for purposes of evaluation to determine the best value.~~

(ii) ~~The probable cost is determined by adjusting each offeror's proposed cost, and, when appropriate, 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 distinctly 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

~~(3) Cost realism analyses may also be used on competitive fixed-price incentive contracts or, in exceptional cases, on other competitive fixed-price type contracts when new requirements may not be fully understood by competing offerors, there are quality concerns, or past experience indicates that contractors' proposed costs have resulted in quality or service shortfalls. Results of the analysis may be used in performance risk assessments and responsibility determinations. However, proposals shall be evaluated using the criteria in the solicitation, and the offered prices shall not be adjusted as a result of the analysis.~~

CODSIA 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 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 disappointed that, despite its repeated suggestions, the activities 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 price contracts have been exempted from TINA but not CAS. For many companies, CAS is a key criterion for declining Government business.

(3) Cost realism assessments shall not be performed on contracts for commercial items.

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 quantities of material proposed and the need for the types and quantities 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 little or no variation in base cost.

CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(2) ~~Except for the acquisition of commercial 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(d)(5)(A)(i)). 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 section 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 realism assessments* or price analysis techniques. 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.

(i) Startup work, mobilization, first articles, or first article testing are separate line items;

(ii) Base quantities and option quantities 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 -

(i) Consider the risks to the Government associated with the unbalanced pricing in determining the competitive range and in making the source selection decision; and

(ii) Consider whether award of the contract will result in paying unreasonably high prices for contract performance.

(3) An offer may be rejected if the contracting 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 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(j) 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 4.807(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.

(i) 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(2) The contracting officer shall not request a separate preaward audit of indirect 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. Copies of updated information that will significantly 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 immediately 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 promptly in writing, including a description of deficient or denied data or records. The contracting officer immediately 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 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 subcontractor 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-tier subcontractor without disclosing subcontractor proprietary data (e.g., range of fair and reasonable prices). If the subcontractor requested an exception under 15.503-1(b), the contracting officer shall indicate 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 retain this policy.

CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

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 negotiated 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, 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~~ 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 ~~price proposal~~ own cost or pricing data submission.

CODSIA ANALYSIS

CODSIA recommends that the present language of 15.504-3(b)(2) and (3) be retained. This will acknowledge the very real situation where it is not feasible to submit all required data at the time of initial price proposal submission and subcontract price analyses and subcontract cost or pricing 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 exemption in 15.503-1(b) applies to that action.

(1) The contractor shall ~~submit forward~~, or cause to be ~~submitted forwarded~~ by the subcontractor(s), cost or pricing data to the Government for subcontracts that are the lower of either -

(i) \$10,000,000 or more; or

(ii) Both more than the pertinent 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 contracting officer may require the contractor or subcontractor to ~~submit forward~~ to the Government (or cause ~~submission 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 15.508.

CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

CODSIA 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 earlier *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 receive 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. *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 combining FAR Subparts 15.7, 15.8, and 15.9.

(1) Profit or fee prenegotiation objectives do not necessarily represent net income 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 prenegotiation objective. Just as actual costs may vary from estimated costs, the contractor's actual realized profit or fee may vary from negotiated 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 opportunities for financial rewards sufficient to stimulate efficient contract performance, attract the best capabilities of qualified 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 motivator of efficient and effective 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 interest. 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 optimum contract performance.

(b) Policy. (1) Structured approaches (see paragraph (d) of this subsection) for determining profit or fee prenegotiation objectives provide a discipline for ensuring that all relevant factors are considered. Subject to the authorities in 1.301(c), agencies making noncompetitive contract awards over \$100,000 totaling \$50 million or more a year -

(i) 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 inappropriate.

(2) Agencies may use another agency's structured approach.

CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

CODSIA 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) Contracting 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 31.2), facilities capital cost of money will not be an allowable cost in any resulting contract (see 15.508(i)).

(4)(i) 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 experimental, developmental, or research work performed under a cost-plus-fixed-fee contract, the fee shall not exceed 15 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.

(ii) The contracting officer's signature on the price negotiation memorandum or other documentation supporting determination of fair and reasonable price documents the contracting officer's determination that the statutory price or fee limitations have not been exceeded.

(iii) Agencies shall not establish administrative ceilings 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 15.901, should be removed. The imposition of ceilings 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
FAR SUBPART 15.5 REWRITE
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) (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.

(i) 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)(i) (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 include 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

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-and-materials, 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 involving 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

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 Prenegotiation 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 prenegotiation 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

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 information other than cost or pricing data.***

| |
|---|
| <p>CODSIA ANALYSIS CODSIA believes additional clarity is needed.</p> |
|---|

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 15.501 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 _____ * are accurate, complete, and current as of _____ **. 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*** _____

* Identify the proposal, quotation, request for price adjustment, or other submission involved, giving the appropriate identifying number (e.g., 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.

CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(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 minimize 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 reports is acceptable, as certain data may not be reasonably available before normal periodic closing dates (e.g., 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 Current 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 include:*

(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.

CODSIA ANALYSIS

CODSIA believes additional clarity is needed, including examples of circumstances where certified cost or pricing data would be subsequently determined to be uncertified.

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, including appropriate identifying numbers (e.g., 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 (e.g., purchasing, estimating, accounting, and compensation) to the extent they affected and were considered in the negotiation.

CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

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 -

(i) 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 contracting 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 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 significant facts or considerations controlling the establishment of the prenegotiation 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 (i.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 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 office(s) providing assistance. When appropriate, information on how advisory field support can be made more effective should be provided separately.

CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

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 inaccurate, 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 earlier *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 15.508 (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 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:

(i) 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 (e.g., the initial pricing of the same contract or the pricing of the same change order).

**CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(5) An offset shall be allowed only in an amount supported by the facts and if the contractor -

(i) 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

(ii) 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 -

(i) The understated data was known by the contractor to be understated when the Certificate of Current Cost or Pricing Data was signed; or

(ii) The Government proves that the facts demonstrate that the 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.

(7)(i) 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 supplies or services accepted by the Government. Overpayments do not result from amounts paid for contract financing, as defined in 32.902.

(ii) 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 time of repayment, utilizing rate(s) prescribed by the Secretary of the Treasury under 26 U.S.C. 6621(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 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 continue to accrue until repayment is made.

CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

CODSIA 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 time of negotiation, the contracting 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 certified 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 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 Pricing Data-Modifications, 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.

(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 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 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 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 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 15.508 (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 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 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 Subparts 15.7, 15.8, and 15.9.

(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 identifying 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 -

(i) 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

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 items (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 estimated 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:
- (i) A description of each major item or work effort.
 - (ii) Categorization of each major item or work effort as "must make," "must buy" or "can either make or buy."
 - (iii) For each item or work effort categorized as "can either make or buy," a proposal either 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 19.7 for subcontracting plan requirements).
 - (vii) Any recommendations to defer make-or-buy decisions when categorization of some items or work efforts is impracticable at the time 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 negotiate 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 52.215-21, Changes or Additions to Make-or-Buy Program.
- (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 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 52.215-21, 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

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 -

(i) The contract is a cost-reimbursable contract, or a cost-sharing contract in which the contractor's share of the cost is 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, offerors 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 initial 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 continuous 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

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 multi-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 -

- (i) Some initial production has already taken place;
- (ii) 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

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:

(i) Dollar amount of Government business.

(ii) 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 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 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 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

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 52.215-27, 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 52.215-30, 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 31.2).

(i) 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, Waiver of Facilities Capital Cost of Money, in the resulting contract.

(j) The contracting officer shall insert the clause at 52.215-39, Reversion or Adjustment 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 52.215-40, 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 31.2.

(l) Considering the hierarchy at 15.502, the contracting officer may insert the provision at 52.215-41, 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 offerors 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(m) Considering the hierarchy at 15.502, the contracting officer may insert the clause at 52.215-42, 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 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

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 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 earlier ~~another~~ *another* date agreed upon between the parties if 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(i) 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.

(j) 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 an earlier *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 estimating process, including -

a. The judgmental factors applied and the mathematical or other methods used in the estimate, 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 earlier *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.

CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
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 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 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 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 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 appropriate threshold set forth at 15.503-4 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, subsidiary, or affiliate of the contractor, explain the pricing method (see 31.205-26(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 15.503-1(b) (i.e., adequate price competition, commercial items, 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 an earlier *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 pricing data obtained from a subcontractor, either 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 furnish bases for estimates.

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 ~~evaluating~~ *determining* the reasonableness of proposed rates. Indicate the rates used and provide an appropriate explanation.

**CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

D. Other Costs. List all other costs not otherwise included 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 27.204 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)

| Cost elements | Proposed contract estimate – total cost | Proposed contract estimate – unit 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

B. Change Orders, Modifications, and Claims

| Cost elements (1) | Estimated cost of all work deleted (2) | Cost of deleted work already performed (3) | Net cost to be deleted (4) | Cost of work added (5) | Net cost of change (6) | Reference (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 actuals 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. $\text{Column (2)} - \text{Column (3)} = \text{Column (4)}$.

(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. $\text{Column (5)} - \text{Column (4)} = \text{Column (6)}$. 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.

**CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

C. Price Revision/Redetermination

| Cutoff date | Number of units completed | Number of unit to be completed | Contract amount | Redetermination proposal amount | Difference |
|-------------|---------------------------|--------------------------------|-----------------|---------------------------------|------------|
| (1) | (2) | (3) | (4) | (5) | (6) |

| Cost elements | Incurred costs - preproduction | Incurred cost-completed units | Incurred cost-work in process | Total incurred cost | Estimated cost to complete | Estimated total cost | Reference |
|---------------|--------------------------------|-------------------------------|-------------------------------|---------------------|----------------------------|----------------------|-----------|
| (7) | (8) | (9) | (10) | (11) | (12) | (13) | (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 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-price-incentive and fixed-price-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 (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 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 estimates. Explain the basis for each estimate and how the costs are charged on your accounting records (e.g., included in production costs as direct engineering labor, charged to manufacturing 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.

**CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

CODSIA 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 inception 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 item(s) 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

CODSIA RECOMMENDATIONS SHOWN IN BOLD/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.

**CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

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 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:

(i) 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 if accurate, complete, and current cost or pricing data had been submitted.

(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 the contract.

(iv) The Contractor or subcontractor did not submit a Certificate of Current Cost or Pricing Data.

(2)(i) Except as prohibited by subdivision (c)(2)(ii) 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 in the amount requested; and

**CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

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 if 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 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 pricing data that were incomplete, inaccurate, or noncurrent.

(End of clause)

**CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

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 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:

(i) 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 if accurate, complete, and current cost or pricing data had been submitted.

(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 the contract.

(iv) The Contractor or subcontractor did not submit a Certificate of Current Cost or Pricing Data.

(2)(i) Except as prohibited by subdivision (d)(2)(ii) 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 -

**CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

CODSIA 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.

(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 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 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 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 pricing data that were incomplete, inaccurate, or noncurrent.

(End of clause)

**CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

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 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 15.503-1 applies.

(b) 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 (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 either -

(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
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

CODSIA 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 15.503-1 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 15.503-4 on the date of agreement on price or the date of award, whichever is later.

(End of clause)

**CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

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 (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 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.

**CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

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:

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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

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(l), 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 lieu of submitting cost or pricing 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 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.

(ii) 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 15.501. 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

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 applies:

(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 15.506-2.

(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.

CODSIA ANALYSIS

See CODSIA's comment at FAR 15.503-5 and FAR 15.503-6. CODSIA believes that the access to records and audit rights must be absolutely clear, particularly if Table 15-3 and Standard Form 1448 are eliminated.

(End of clause)

Alternate I (DATE). As prescribed in 15.508(l), 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(l), 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 III (DATE). As prescribed in 15.508(l), 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 via the following electronic media: [Insert media format, e.g., electronic spreadsheet format, electronic mail, etc.]

Alternate IV (DATE). As prescribed in 15.508(l), 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

**52.215-42 Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data-
Modifications.**

As prescribed in 15.508(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 subparagraphs. 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.

(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 minimum, 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 (~~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.

(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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

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 15.508(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 15.508(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 15.508(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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

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 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

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 CFR 9903.201-1(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 this require a calculation in relation to subparagraph (ii) and a comparison between the amounts in subparagraphs (i) and (ii)? 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 believes 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 subparagraphs (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 15.508 *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.

95-029-43

Comments of
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:

Computing Technology Industry Association
American Defense Preparedness Association/National Security Industrial Association
The Electronics Industries Association

David M. Nadler, Counsel
Dickstein Shapiro Morin & Oshinsky LLP

MUR

7/14/97

95-029-43

COMMENTS OF
THE MULTI-ASSOCIATION SMALL BUSINESS TASK FORCE
ON THE FEDERAL ACQUISITION REGULATION PART 15 REWRITE

The Multi-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 majority 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 U.S. electronics manufacturers. Committed to the competitiveness of the American producer, EIA 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, in 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 fairly 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

95-029-43

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 offerors.

Although the Task Force believes that the May 14, 1997 rewrite is a significant 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 Rewrite Committee to further assist the Committee in implementing its goals.

1. *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 15.102. 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 offerors should be few in number and limited in scope. On

95-029-43

the other hand, multiphase acquisition may be appropriate when submission of detailed proposals at the beginning of source selection would be burdensome for offerors to prepare and for the government to evaluate.

2. *Communications With Offerors.* The Task Force is encouraged by the proposed FAR 15.406, which gives the government latitude to communicate with offerors 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 15.406(b) clearly prohibits proposal revisions that result from communications prior to establishment of the competitive range. However, FAR 15.406(d) does not make clear that proposal revisions can result from discussions between the government and offerors. 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 offerors lacking a relevant past performance history may be categorically excluded from competing for government requirements.

The proposed past performance evaluation under FAR 15.405(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 experienced (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 -- i.e., that a company is responsible. The proposed rule seems to be inconsistent with the program because the government could still claim that the company's past performance is lacking *vis-à-vis* other offerors 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 believes that preaward debriefings should be mandatory for offerors requesting them. The

95-029-43

current proposed rule allows the contracting officer to refuse preaward debriefing requests for "compelling reasons." We believe that this "exception" is unnecessary and should be removed because of the specific limitations already placed on preaward debriefings by 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 offerors 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 aggrieved offeror between a rock and a hard place: a delayed debriefing 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 suppliers 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 Rewrite Committee. The Task Force looks forward to working with government representatives to finalize and implement this keystone of the administration's acquisition reform initiatives.

95-029-44

FAX TRANSMITTAL

TO: FAR Secretariat (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 experience with Oral Presentations.

Linda H Smith
Principal Assistant Responsible for
Contracting

JUL 15 1997

95-029-44
11 March 1997

MCAA-CS (715)

INFORMATION PAPER

SUBJECT: Oral Presentations

1. 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 hired or developed expert proposal writers who were much better at preparing proposals than they were at performing. Even though we had applied the latest "best value" techniques, we still found ourselves awarding to other than 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

95-029-44

of portions of written technical proposals. During oral presentations, we have continually required other contract specialists and contracting officers to sit in and observe the proceedings. This has done wonders to decrease staff resistance.

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, etcetera 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 Clinics at Fort Belvoir (total value of \$70.6 million). Contracting average lead time (CALT) for this acquisition was 5 months. While being extremely short for a project of this magnitude, it is particularly noteworthy since CALT for contracted clinics was generally 13-15 months on previous procurements.

(2) A requirement for integrated modular medical support system (total value of \$20 million). This is 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 in expedited awards and better understanding by all stakeholders.

95-029-44

g. Oral presentations have proven invaluable in researching the market for commercial market practices.

(1) One example is maintenance of medical imaging equipment. Obtaining contract maintenance for such equipment had been a problem for many 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 failed to perform because they could not obtain the parts or technical expertise required for the maintenance. Since these maintenance contracts were vital to the delivery of health care, we sought to find 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 maintaining each other's equipment, 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 maintain all equipment in a medical treatment facility. We are now negotiating command-wide maintenance contracts very similar to those used in the civilian sector by large hospital chains. We first 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, with 6 pending; and competition of several task orders. We have evolved by continually 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 into our building with one envelope. Previously, the same proposal would have involved at least two trips with a two-wheel dolly stacked as high as possible with boxes.

i. Favorable comments have been received from high level officers of major corporations about our use of oral presentations. The consensus seems to be that both parties saved time and money by using oral presentations rather than adhering to voluminous written proposals, and that the process is fair to all competing offerors. In this regard, no protests have been filed about oral presentations.

j. The CCO continues to increase the use of oral presentations. The numerous benefits include:

95-029-44

(1) Selection of the most advantageous offer in best value procurements and facilitated review and understanding of complex technical issues.

(2) Facilitated awards because proposals can be evaluated with the submission of extremely limited printed material. With the use of oral presentations, proposals can be evaluated on as little written information as past performance and financial capability. This reduces the number of evaluation factors, simplifies the evaluations, and saves time and money.

(3) Significant savings 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 competing 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 familiar with them beforehand.

(2) Requiring past performance submission with written proposal and performing the actual review of that information beforehand.

(3) Video taping the presentations.

(4) Limiting attendance.

(5) Limiting the process, normally to somewhere between 1 and 2 hours.

(6) Limiting the presentation media to black and white overhead transparencies.

(7) Including required topics in the solicitation instructions.

l. We are continually improving our oral presentations process. Currently, we are experimenting with obtaining presentations by both videoconference and telephone conference. In appropriate cases, this may create further savings for both the government and prospective contractors.

Mr. Richard Towers/221-9088

RONALD G. COULSTON
Chief, Central Contracting
Office

ACQUISITION AND
TECHNOLOGY

OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

95-029-45

14 JUL 1997

General Services Administration
FAR Secretariat (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.

A handwritten signature in black ink, appearing to read "David A. Drabkin".

David A. Drabkin
Assistant Deputy Under Secretary of Defense
(Acquisition Process and Policies)

JUL 15 1997



95-029-46

Author: Joyce Milner at HQS2

Date: 7/14/97 3:17 PM

Priority: Normal

Receipt Requested

TO: 95-029B@www.gsa.gov at SMTP

CC: Milo Fogle at SCA1

CC: Dale Siman at SCA1

CC: Eric Mens at HQS4

CC: DIANE MCKAIN at SCA1

CC: Joyce Milner

Subject: DISA Comments on Case 95-029, FAR 15 Proposed Rule

----- Message Contents -----

TO: GSA, FAR Secretariat

- Attached is the Defense Information Systems Agency's comments on Case 95-029, FAR 15 proposed rule as published in the 14MAY97 Federal Register.

Questions on the attached may be addressed to Joyce Milner on 703-607-6917.

Attachment: a/s

JUL 15 1997

95-029-46

DEFENSE INFORMATION SYSTEMS AGENCY
Procurement Management Division, Code D41

Comments on FAR Case 95-029

Per the 14MAY97 Federal Register, the Defense Information Systems Agency (DISA), Procurement Management Division, Code D41 has the following comments on the proposed rule for the Federal Acquisition Regulation (FAR), Case 95-029, Part 15 Rewrite:

1. Group A, comments relating to Subparts 15.00, 15.1, 15.2, 15.3, 15.4 and 15.6 and conforming revisions to Part 1, 5, 6, 14, 36, 52 and 53:

15.407(b)/Definitions of Discussions and 15.001 seem to be in conflict. 15.001, definition of "Discussions" states:

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.

15.407(b) states:

The contracting officer may request proposal revisions that clarify and document understandings reached during negotiations. At the conclusion of discussions, each offeror still in the competitive range shall be given an opportunity to submit a final proposal revision.

As 15.407(b) is stated, offerors can submit a final proposal revision inclusive of both their cost and noncost proposals, regardless of the fact that the contracting office may not have requested the changes. Usually, a price proposal is required, but changes to the noncost portions of the offerors proposals are usually not required nor desired.

2. Group B, comments relating to Subpart 15.5 and conforming revisions to Part 4, 7, 11, 16, 42 43, and 52:

No comments.

95-029-47

NORTHROP GRUMMAN

Northrop Grumman Corporation
1840 Century Park East
Los Angeles, California 90067-2199
Telephone 310-553-6262

REP. 150-01-004 FAR 15 NEW
(310) 201-3346

July 14, 1997

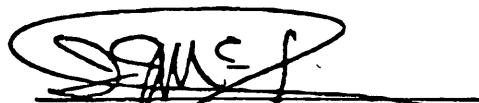
Person: General Services Administration
FAR Secretariat (VRS)
1800 F Streets NW
Washington, DC 20405

Subject: FAR Part 15 Rewrite
FAR Case 95-029

Dear FAR Secretariat:

Northrop Grumman Corporation appreciates the opportunity to comment on this very 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

JUL 15 1997

95-029-47

Northrop Grumman Comments on

FAR PART 15 REWRITE

July 14, 1997

- Section 4.1001 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 15.102 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 Multi-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 15.203 Requests for Proposals - (a)(2)(i) - see comments to 4.1001 above
- Section 15.206 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 15.309 - Limited use of Data (Unsolicited Proposals) and 15.207 (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 15.404 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)(i) says "past performance shall be evaluated...". However, 15.404(d)(3)(iii) states: "Past performance need not be evaluated if 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 15.405 Proposal Evaluation - (a)(2) Past performance: It is recommended that offerors 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)(ii and iv)

95-029-47

Offerors 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 15.406 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 (i.e., "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 15.501 Definitions - 15.501** - 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 15.502 Pricing Policy - (a)(3)** Consistent with the phrasology 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 15.811, 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 15.605 Pre award Debriefing of Offerors - 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.

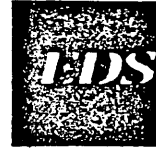
95-029-47

Contractors spend significant sums of money in preparing and supporting a proposal and they should be assured of a complete and adequate debriefing.

- Section 15.606 - 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 interorganizational transfers at cost are not subcontracts (contra 15.501 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.

Fred W. Geldon
SSU Director/Contracts & Legal
Legal Affairs Division

95-029-48



July 14, 1997

BY TELECOPY

General Services Administration
FAR Secretariat (VRS)
Room 4035
18th and F Streets, NW
Washington, DC 20405

Attn: Ms. Beverly Fayson

Re: FAR Case No.: 95-029 (Group A)

Dear Ms. Fayson:

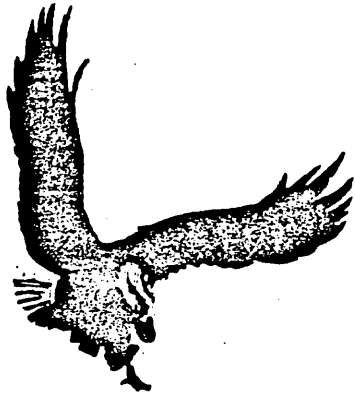
Electronic Data Systems has reviewed the revised rewrite of FAR Part 15 (Group A), and is pleased that the revised rewrite is responsive to comments submitted by EDS in November, 1996. EDS supports the revised rewrite and we urge you to proceed promptly with publication.

Sincerely yours,

A handwritten signature in cursive script that reads "Fred W. Geldon".

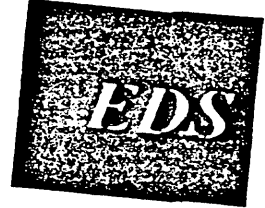
Fred W. Geldon

Contracts and Legal Division
AON-1348
13600 EDS Drive
Herndon, Virginia 22071
(703) 742-2000



**Electronic Data Systems
Corporation**
Contracts and Legal Division
13600 EDS Drive
Mail Stop A6N-D48
Herndon, Virginia 20171-3225

95-029-48



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

JUL 15 1997



95-029-49

**National Association of
Surety Bond Producers**

5225 Wisconsin Avenue, NW, Suite 600
Washington, DC 20015-2014
(202) 686-3700 • FAX (202) 686-3656

July 14, 1997

General Services Administration
FAR Secretariat (VRS)
Room 4035
18th & P Streets, N.W.
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 satisfactorily applied to construction contracts. The sealed competitive bidding system in 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 competitive range.

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 risk aversion and risk management are not clear to us. We're concerned that a federal policy on risk 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 offerors 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 if the fluidity is understandable.

Sincerely,

Theodore M. Pierce
Vice President of Government Affairs

JUL 15 1997



U.S. Department of
Transportation
Office of the Secretary
of Transportation

400 Seventh St., S.W.
Washington, D.C. 20590

95-029-50

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 is such a fundamental change in the way the Government does business, we believe it is 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.

Sincerely,

David J. Litman
Director of Acquisition
and Grant Management

Enclosure

JUL 15 1997

DEPARTMENT OF TRANSPORTATION COMMENTS
(FAR CASE 95-029)

95-029-50

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. Definitions.

- 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. 2306a 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 15.101-2(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 (i.e., 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)."

95-029-50

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)(iii).

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(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(d))".

15.201.

- a. Subparagraph (c)(5). To aid 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 it 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 15.102. 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).

95-029-50

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)(viii). This paragraph and others (e.g., 15.204-5(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 13.108 which covers the legal effect of an offer in response to a request for quotation.

15.206(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 is entitled to protection (see 15.207(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 anticipated 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 solicitations issued 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 solicitation.

(e) At a minimum, 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 multi-step source selection techniques 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 time, ... 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 following substitution for the second sentence: It may be withdrawn in person by an authorized representative of the offeror, if the identity of the person requesting withdrawal is established by the contracting officer and the authorized representative signs a receipt for the proposal". If our proposed change is not amenable, we recommend that the text of 52.215-1(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 implies that the Government's policy is only to encourage new and innovative ideas 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 Unsolicited 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 "significant 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(b).

15.403. We believe that all major source selection decision making responsibilities should be identified and assigned to either the contracting officer or source selection authority under this subsection. These responsibilities include determination of the competitive range(s) and selection of those respondents who will be advised they are unlikely 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 deficiencies, and risks shall be documented in the contract file. Please also see 15.406(d)(3) and 15.606(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: Communications with offerors and establishment of the competitive 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. 253b(d)(1)(B) does not require it and it adds no value.

15.406(b)(3)(i). Change to read: "Perceived deficiencies, significant 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 appropriate 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 items of a type customarily used for nongovernment purposes, but which do not necessarily have prices established in the nongovernment market. This poses a significant 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 policies are still appropriate.

95-029-50

15.503-2. We recommend deleting this entire coverage since there is no value added. However, if it 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 priced options added by modification of an existing contract). If 15.503-2(b) is 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 submit 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. First, if the price is determined to be fair 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 signature documentation the principal elements of the negotiated agreement. This documentation (e.g., price negotiation 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 with 15.504-4(c)(4)(ii). As written, the contract file, in lieu of a person, is required to provide the documentation.

95-029-50

15.603(b)(i): When using electronic commerce (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 solicited except when the solicitation 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 solicitation authorizes their submission". We recommend modifying 36.520 to include the statement that "the evaluation approach for alternate proposals shall be described in the solicitation."

OF-307 --

- a. Block 11, part IV, should be deleted in its entirety 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.

LAW OFFICES

95-029-51

HEWES, GELBAND, LAMBERT & DANN

Professional Corporation

Suite 300
The Flour Mill
1000 Potomac Street, N.W.
Washington, D.C. 20007-3501
(202) 337-6200

FACSIMILE COVER SHEET

TO: Ms. LARONDA EBBY

FAX NO. (202) 501-4067

FROM: DAVID M.F. LAMBERT

FAX NO. (202) 333-0871

DATE: July 14, 1997

TOTAL NUMBER OF PAGES: 8

MESSAGE:

THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone at (202) 337-6200 and return the original message to us by mail. Thank you.

JUL 15 1997

95-029-51

SMALL BUSINESS ROUNDTABLE

1000 Potomac Street, N.W.
The Flour Mill, Suite 300
Washington, D.C. 20007
Phone: (202) 337-6200
FAX: (202) 333-0871

VIA FACSIMILE (202) 501-4067

July 14, 1997

General Services Administration
FAR Secretariat (VRS)
Room 4035
1800 F Street, N.W.
Washington, D.C. 20405

RE: 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 A and 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 sixty-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.

Letter to General Services Administration/FAR Secretariat (VRS)
July 14, 1997

95-029-51

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 Subfactors; 15.405(2), Proposal Evaluation-Past 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." OFPP Regulatory Flexibility Act 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, i.e. 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 19.6, 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 Secretariat at page 2, Section 15.101-2, Lowest Price Technically Acceptable Source Selection Process. The GAO recommends the reference to the COC process be emphasized by adding to Section 15.101.2. We concur with that recommendation and suggest the emphasis also be added to 15.405(a)(2)(i).

Letter to General Services Administration/FAR Secretariat (VRS)
July 14, 1997

95-029-51

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,



Daniel R. Gill
Coordinator, Small Business Roundtable

Enclosures

cc: Jody Olmer, Chairperson, FOCC
SBR Members
David M.F. Lambert, Counsel, SBR

95-029-51

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 Subparts (along with comments on conforming regulations for seven separate FAR Parts). The FAR 15 Subparts are: 15.0, SCOPE; 15.1, SOURCE SELECTION PROCESSES AND TECHNIQUES; 15.2, SOLICITATION AND RECEIPT 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 REQUIREMENTS; Part 14, SEALED BIDS; Part 36, CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS; Part 52, SOLICITATION PROVISIONS AND CONTRACT 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 FARs singularly and collectively may have adversely affected the institutionalized Congressional small business mandates in 15 U.S.C. 631, *et seq.* and implementing FAR regulations including FAR 19, SMALL BUSINESS, SMALL DISADVANTAGED BUSINESS (WOMEN OWNED BUSINESS). 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*.

Enclosure B
Page 1 of 3
July 14, 1997

RECOMMENDED LANGUAGE CHANGES

95-029-51

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)(iii). Also delete the first part of the sentences in 15.404(d)(3)(i) and (ii) that states "[E]xcept as set forth in paragraph (d)(3)(iii) of this section." Section (iii) provides that "... [p]ast 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 a 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. "[A]ll evaluation factors and significant subfactors that will affect contract awards and their relative importance shall be clearly stated in the solicitation," and (2) "[t]he 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

95-029-51

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 offerors 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.

95-029-51

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)(ii):

The last sentence in 15.405(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(a)(2)(iii):

The following should be added as 15.405(a)(2)(iii):

"All offerors 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).]



TECHSYSTEMS

95-029-52

July 10, 1997

Alliant Techsystems Inc.
600 Second Street NE
Hopkins, MN 55343-8384

Tel 612 931-6000

General Service Administration

FAR Secretariat (VRS)
1800 F. Streets, NW, Room 4035
Washington, D.C. 20405

FAR Council,

We appreciate 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 industry 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,

A handwritten signature in black ink, appearing to read "Douglas D. Lien".

Douglas D. Lien
Manager, Cost Estimating
Alliant Techsystems Inc.
Defense Systems and Ammunitions Groups
(612) 931-6247

Enclosure

JUL 15 1997

FAR PART 15 RECOMMENDATIONS

95-029-52

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 it is encouraging for FAR to recognize parametric techniques, only the factual data, not judgmental data (parametric 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)

95-029-52

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 requiring the Government to ascertain if the risk is real or perceived; offeror's should not be rejected because of differences caused by following their disclosed accounting practices.

95-029-52

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 if 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) (ii)

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....

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 remaining thresholds should be revised appropriately or the \$10,000,000 change will have no positive impact on streamlining the process.

95029-52

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 believe 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 available 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 relied 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.

95029-52

15.507-5 Estimating Systems

• Paragraph (b)

Add the words "the contractor's responses and the Administrative Contracting 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.

95-029-52

Table 15-2 Instructions for Submitting Cost or Pricing Data
• **Cost Elements, Paragraph A. Materials and Services**

Add wording that allows for estimating 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.”

Rationale: Other estimating 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 comparative 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.

Rationale: Same as 15.504-3 (b) (2)

Table 15-2 Instructions for Submitting Cost or Pricing Data

• **Cost Elements, Paragraph A (2)**

95-029-52

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 remaining thresholds should be revised appropriately 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.....;

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 15.504-3; 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.

95-029-52

Table 15-2 Instructions for Submitting Cost or Pricing Data

- **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.

U.S. Chamber
of
Commerce

95-029-53

July 14, 1997

General Services Administration
FAR Secretariat (VRS)
Room 4035
18th & F Streets, N.W.
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

¹Building 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.

MUR
11 15 1997

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 funneling

95-029-53

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 initiatives to rewrite this critical chapter of the federal acquisition process. Several of these initiatives 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 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. Section 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 OMB, 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 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 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 improvement in the flexibility analysis performed pursuant to the Regulatory Flexibility Act on the May 14 rule.

The Full and Open Competition Coalition believes that, if implemented as published, the proposed rule will lead to the following consequences:

- * Arbitrary discretion vested in contracting officers enable them to funnel money to favorite 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/quality 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 will 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 FARA

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 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 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. 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 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 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 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).

4. COMMUNICATIONS

Prior to deciding the competitive range, the contracting officer can take into consideration an oral representation that is made in "communications" with offerors whose exclusion from or 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 offerors.

The Full and Open Competition Coalition recommends that the FAR require the contracting officer to hold communications with all such offerors before making a competitive range determination. Moreover, the contracting officer should be

95-029-53

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 Coalition 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 offerors 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 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.

A recent review reported in the Nash Cibinic Report (Vol. II, No. 5 at page 70) questioned whether past performance evaluations were "fair," 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,

95-029-53

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 disagreement with the agency's evaluation does not of itself render the evaluation unreasonable.

H.L.C. Industries, Inc., B-274374 (emphasis added), Dec. 6, 1996, and cases cited therein.

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 considered by a contracting officer in making the requisite "affirmative" determination of responsibility. Under the regulations, anything short of an affirmative determination is a non-responsibility 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 offerors 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.

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 opportunity to respond.

The Comptroller General's decisions in granting or denying the protests revolved around the presence or lack of specificity in the solicitation's evaluation criteria, the use of price and past performance as a price-related factor, or when specifying "relevant" past performance, the absence of a definition of same or similar contract performance experience.

In a recent decision on a protest involving past performance, the Comptroller General granted a protest where the RFP called for "demonstrated successful performance on similar efforts" and defined "similar experience" as "providing support to similar type mail and courier efforts and/or

administrative support service type efforts." The Comptroller General concluded that the agency had ranked two offerors 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, ¶ 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 issue may be resolved and would have the support of the Full and Open Competition Coalition. In two sections of the proposed regulations 15.403(b)(4) and 15.505(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. 15.204-5(c) (emphasis added). The minimum requirement for evaluating past performance information is set forth in 15.404(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 price;
 - (2) Approximately equal to cost or price; or
 - (3) Significantly less important than cost or price (10 U.S.C. 2305(a)(3)(A)(iii) and 41 U.S.C. 253a(c)(1)(C)).

The current proposed regulations provide that prior to establishing the competitive range, communications may be held with those offerors whose exclusion from, or inclusion in, 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 42.15 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(a)(2)(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 FARs also currently provide that the identity of the Government (and other)

sources of past performance information is not to be revealed.

The FOCC 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 Policy (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.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' 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.

6. DISCUSSIONS

Proposed FAR 1.102-2(c)(3) fails to specify 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 Coalition 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 impartially.

The FOCC proposal represents an unambiguous standard of fair treatment and includes fixed standards against which to measure such treatment. In addition 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 offerors 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 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. 15.208 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 offerors might be denied this opportunity. All offerors 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 "first-step solicitation." Commonly referred to as the "mandatory downselect" multi-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 its 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," H.R. 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 offerors 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 its capabilities to compete for the contract. Revealing the offerors' rankings -- a process already successfully in place in New York state -- would clearly help offerors 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 offerors 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(i) of the Small Business Act (15 U.S.C. Section 637(1)), small business concerns are guaranteed access to copies of the

95-029-53

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(i) 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 (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. 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 non-uniform 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

will 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 streamlined procurement system. We emphasize, 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 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.

Sincerely,

American Gear Manufacturers Association
American Movers Conference
American Society of Interior Designers
American Small Businesses Association
American Subcontractors Association
Associated Builders and Contractors, Inc.
Computer & Communications Industry Association
Household Goods Forwarders Association of America
Minority Business Enterprise Legal Defense
and Education Fund
National Association of Perishable Agricultural Receivers
National Association of Surety Bond Producers
National Small Business United
Small Business Legislative Council
Small Business Roundtable
Society of Travel Agents in Government
U.S. Chamber of Commerce

95-029-04



AMERICAN BAR ASSOCIATION

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

1996-1997
CHAIR

John F. Kuehls
1100 Wilson Blvd., 2000 Floor
Arlington, VA 22209-2249
(703) 284-4355

CHAIR-ELECT

Marcia G. Madson
625 15th Street, NW, 10th Floor
Washington, DC 20005-5201
202/626-1468

VICE-CHAIR

David A. Churchill
1900 K Street, NW, Suite 100
Washington, DC 20006
202/496-7359

SECRETARY

Rand J. Alton
1726 K Street, NW
Washington, DC 20006
202/429-7329

BUDGET AND FINANCE OFFICER

Lynda Troutman O'Sullivan
Suite 800
1001 Pennsylvania Avenue, NW
Washington, DC 20004-2505
202/639-7056

SECTION DELEGATE

Marshall I. Dokes, Jr.
Suite 1000
1601 Elm Street
Dallas, TX 75201
214/999-4703

IMMEDIATE AND PREVIOUS PAST CHAIRS

Frank H. Menaker, Jr.
6801 Rockledge Drive, MP200 9
Bethesda, MD 20817
301/897-6125

John H. Miller
77 Massachusetts Avenue
Cambridge, MA 02139-1407
617/253-1192

COUNCIL MEMBERS

Thomas P. Badetta
1330 Connecticut Avenue, NW
Washington, DC 20006-1704

Theodore J. Collins
P.O. Box 1707, MS 13-08
Seattle, WA 98124-2707

Agnes E. Dwyer
809 Kuehn Place
Alexandria, VA 22304

Kim L. Frazier
277 San Marin Drive
Novato, CA 94948

Anthony H. Campbell
840 Cumberland Road
Harwood, MD 20776

Michael A. Fordell
1747 Pennsylvania Avenue, NW
Washington, DC 20006

Laura K. Kennedy
815 Connecticut Avenue, NW
Washington, DC 20006

Michael K. Linn
1227 25th Street, NW
Washington, DC 20037

Graig O'Brien
200 West Main Street, #129
Santa Fe, NM 87501

David M. Prange
2433 McClinton Court
Vienna, VA 22180

Mary Ellen Coster Williams
10th & T Streets, NW, Room 7021
Washington, DC 20005

Patricia H. White
1615 New Hampshire Avenue, NW
Washington, DC 20009

EDITOR, PUBLIC CONTRACT LAW JOURNAL

Carl L. Vicketta
Washington, DC

EDITOR, THE PROCUREMENT LAWYER

Patricia H. White
Washington, DC

BOARD OF GOVERNORS LIAISON

Allan J. Joseph
San Francisco, CA

LAW STUDENT LIAISON

Richard L. Ike, Jr.
Littleton, CO

SECTION MANAGER

Marilyn Nelsons
750 North Lake Shore Drive
Chicago, IL 60611-4497
312/944-5506
Fax: 312/944-5688

July 14, 1997

General Services Administration
FAR Secretariat (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 authority granted by the Association's Board of Governors. 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.

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

JUL 15 1997

95-029-54

General Services Administration
July 14, 1997
Page 2

II. The stated goals of the rewrite 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 6. 62 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 treatment of offerors. 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 - Definitions

Proposed FAR 2.101 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 well-established 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

95-029-54

General Services Administration
July 14, 1997
Page 3

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 15.605(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, technically 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 technically 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 Rewrite. One solution is to delete this process in this Part. Nevertheless, if the process is retained in Part 15, additional clarifications and modifications are required to avoid confusion and litigation. For example proposed FAR 15.405(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 applicable to the lowest price technically acceptable approach and proposed FAR 15.101-2 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.

95-029-54

General Services Administration

July 14, 1997

Page 4

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 15.405(a)(2)(iv) generally attempts to address situations where a firm lacks relevant past experience 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 15.405(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 solicitation 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 criteria 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 . . ."

95-029-54

General Services Administration

July 14, 1997

Page 5

Proposed FAR 15.102(b) requires that the solicitation disclose "all significant 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 significant 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 15.404(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 15.102. It is an appropriate minimum 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 technique continues to allow for the submission 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 initially requesting less than a full proposal, the Section continues 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 Administration's Certificate of Competency procedures. Therefore the Section continues to recommend that more information be required in the initial 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 raised by the Section in commenting on the initial version.

95-029-54

General Services Administration
July 14, 1997
Page 6

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 15.103. 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 (c) 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 (c) 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 15.2 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."

95-029-54

General Services Administration

July 14, 1997

Page 7

The Section supports the proposed rule's deletion of the Model Contract Format from subpart 15.203 and the proposal to add 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 until 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 15.204.

Proposed FAR 15.207 (c) provides that "if a proposal received by the contracting officer electronically or by facsimile 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 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 fails 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 15.207(c) should be rewritten 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, "Facsimile Proposals."

Proposed FAR 15.208 (c) provides:

Late proposals, modifications, and final revisions may be accepted by the contracting officer provided-

(i) The contracting officer extends the due date for all offerors; or

(ii) 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

95-029-54

General Services Administration
July 14, 1997
Page 8

(iii) 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 (iii) 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 (iii), 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 offerors. This change should also be incorporated into proposed FAR 52.212-1(f) and 52.215-1(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 15.202 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, including a multi-step procurement under proposed FAR 15.102. 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 (e.g., 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

95-029-54

General Services Administration
July 14, 1997
Page 9

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 misunderstandings 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 15.301 defines an unsolicited proposal as "a written proposal that is submitted to an agency on the initiative 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-initiated 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 15.302 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 requirement in the current FAR 15.502(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 15.308 and 15.309. The revised definition replaces "designed . . . to determine the

95-029-54

General Services Administration
July 14, 1997
Page 10

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 15.404 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 15.102(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 15.404 (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 15.404 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 initial 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 criteria. 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 their 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 15.405(a)(4) retains the earlier language without modification. This provision would reverse the practice of keeping cost data from the technical team to ensure proper focus on the technical merits 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,

95-029-34

General Services Administration
July 14, 1997
Page 11

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 15.405 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 "[f]irms lacking relevant past performance history shall receive a neutral evaluation for past performance." The proposed regulation states further: "A neutral evaluation is one that neither rewards nor penalizes offerors without relevant past performance history (41 U.S.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 offerors. 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

General Services Administration
July 14, 1997
Page 12

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 15.405(a)(2)(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(ies).

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 ¶ 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 lower-cost vendor with a neutral past performance rating.

Excalibur Systems, *supra*, 96-2 CPD ¶ 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/fail" rating. Proposed FAR 15.101-2(b)(1) still

95-02954

General Services Administration
July 14, 1997
Page 13

does not address the problem raised by a neutral past performance rating. If all of the offerors have *some* relevant past performance history, then use of past performance as a pass/fail factor under the lowest price technically acceptable process would not be objectionable. The problem arises where an otherwise acceptable offeror has no relevant past performance history.

The pass/fail scheme required or non-cost factors under the lowest price technically acceptable process is inconsistent with proposed FAR 15.405(a)(2)(iv), which requires that offerors *lacking* relevant past performance history be provided a "neutral" evaluation on past performance. The "pass/fail" evaluation scheme can never constitute or permit a "neutral" evaluation, because it requires either 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 offerors 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 U.S.C. 2305(b)(1) and 41 U.S.C. 253b(a)), and (2) an added risk, and possible penalty, for offerors *with* relevant past performance histories.

The Section previously noted a problem regarding the "relevance" of the past performance information. Proposed FAR 15.405(a)(2)(i) 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 15.405(a)(2)(iv) refers to a neutral evaluation for firms lacking "relevant" history.

Additional regulatory guidance was provided in revised proposed FAR 15.405(a)(2)(iii), 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)(iii), 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 Pte., Ltd., B-275725, March 19, 1997, 1997 WL 223977 (C.G.), GAO sustained a protest where the

95-029-54

General Services Administration

July 14, 1997

Page 14

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 (C.G.) (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)(ii) 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 price-related 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

95-029-57

General Services Administration
July 14, 1997
Page 15

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 initial 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-competitive range communications. Proposed FAR 15.406(b)(3)(ii).

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 obtained in such communications could be used in the evaluation of proposals. Thus the Section's November 27, 1996 comments noted that the proposed rule might 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 pre-competitive range communications to those offerors whose exclusion from, or inclusion in, the competitive range is uncertain. FAR 15.406(b)(1). The proposed rule also clarifies that pre-competitive range communications shall not be used to cure proposal deficiencies or materially alter proposals. FAR 15.406(b)(2). These changes should significantly curtail 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 15.406(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

General Services Administration
July 14, 1997
Page 16

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 15.406.^{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. § 2305(b)(4)(C); 41 U.S.C. § 253b(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 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" This provision appears inconsistent with

^{1/} The initial version, as well as the present version also replaces proposed FAR 15.609, published in the July 31, 1996 Federal Register and assigned FAR Case No. 96-303.

95-029-57

General Services Administration
July 14, 1997
Page 17

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 15.406(c)(1) and (2) be revised to read as follows:

(1) 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 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 52.215-1(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)(C) and 41 U.S.C. 253b(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 15.407(b), which requires that all

95-029-54

General Services Administration
July 14, 1997
Page 18

offerors 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 offerors.

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 15.610(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 offerors of deficiencies, attempt to resolve uncertainties in the proposal, and resolve suspected mistakes by calling them to the offeror's attention. Continued objective treatment of these topics, balanced with the need to provide offerors with sufficient information, will require an agency to treat all offerors equally and minimize the potential for unfair treatment.

Proposed FAR 15.406(c) - Limits on Communications

Proposed FAR 15.406(c) 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 15.406(e)(2). Nevertheless, other than this change, the present version is virtually identical to the initial version. Accordingly, the

95-029-59

General Services Administration
July 14, 1997
Page 19

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 15.7 Make-or-buy programs, FAR 15.8 Contract pricing and FAR 15.9 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 realism analysis to proposed FAR 15.504-1(d), and generally 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 appropriate validated calibrated parametric models.

Proposed FAR 15.501. 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)(i)(C):

95-029-54

General Services Administration
July 14, 1997
Page 20

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 well-established. Thus, it is unclear what constitutes a "calibrated" parametric model. Nor is it explained how such a "calibrated" 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(i); 10 U.S.C. 254b(i). This aspect of the definition of cost or pricing data is embodied in current FAR 15.801 and would remain unchanged in proposed FAR 15.501.

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 § 15.801 (emphasis added). The definition in the FAR offers several specific examples of cost or pricing data.

25-029-59

General Services Administration
July 14, 1997
Page 21

Congress also recognized and addressed the problem that arises 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.^{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 include 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

(Footnote cont'd on next page.)

95-029-54

General Services Administration
 July 14, 1997
 Page 22

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 subcontractor(s), cost or pricing data to the Government for subcontracts that the contractor estimates to be ~~are the lower of~~ either --

(i) \$10,000,000 or more, or

(ii) 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 cont'd from previous page.)

is correct, only that the contractor has accurately and completely disclosed its current estimate.

H. Rep. No. 923, 101st Cong., 2d Sess. 657 (1990).

^{3/} See, e.g., 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 ¶ 20,195 (September 28, 1987) (judgmental factors included in estimates must be disclosed when they give meaning to underlying facts); Millipore Corp., GSBGA No. 9453, 91-1 BCA ¶ 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 ¶ 21,489 (November 7, 1988) (estimates of future G&A and other burden rates themselves are not cost or pricing data).

95-02954

General Services Administration
July 14, 1997
Page 23

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-reimbursement 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-reimbursement 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 cost-reimbursement contracts because, where there is competition, the offerors are not required to submit certified cost or pricing data. Also, competitive pressure can entice offerors to propose *unrealistically low* estimates. Without cost realism analysis, offerors 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

95-029-54

General Services Administration
July 14, 1997
Page 24

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 estimate to determine whether the estimated 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 realism 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 ¶ 22335 ("Cost realism 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 realism and price realism 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 unrealistically 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-in." The FAR already provides ample guidance regarding buying-in. See FAR Subpart 3.5.

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 realism analysis in the

95-029-54

General Services Administration
July 14, 1997
Page 25

solicitation of fixed-price proposals." Volmar Construction, Inc., B-272188, Sept. 18, 1996, 96-2 CPD ¶ 119; Cardinal Scientific, Inc., B-270309, Feb. 12, 1996, 96-1 CPD ¶ 70; Oshkosh Truck Corp., B-252708, Aug. 24, 1993, 93-2 CPD ¶ 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 9-311.4. 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 realism* 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 15.501: "*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."
- Under FAR 15.504-1(c) *Cost analysis*, insert the following:
 - (3) Cost realism analysis.
 - (i) Cost realism analysis is a process of independently reviewing and evaluating

95-029-54

General Services Administration
July 14, 1997
Page 26

specific elements of an offeror's cost proposal to ascertain whether the offeror submitted unrealistically low estimates.

- (ii) In awarding a cost-reimbursement 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-reimbursement contracts primarily on the basis of estimated costs may encourage the submission of unrealistically low estimates and increase the likelihood of cost overruns.
- (iii) Cost realism analyses shall be performed on competitive cost-reimbursement contracts to determine the probable costs of performance for each offeror. Cost realism analyses may be performed on non-competitive cost-reimbursement 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.

95-029-54

General Services Administration

July 14, 1997

Page 27

- Under FAR 15.504-1(b) *Price Analysis* insert the following:
 - (3) Price realism analysis.
 - (i) 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.
 - (ii) Price realism analysis should be performed on any fixed price contract in which the contracting officer perceives a risk of poor performance if the offeror were to incur a financial loss to properly perform the contract, because the offeror's proposed price is unrealistically low.
 - (iii) Where the probable price is significantly higher than the proposed price, the contracting officer should seek to ascertain whether the offeror is buying in. See FAR Subpart 3.5.
 - (iv) Regardless of whether the offeror is buying in, 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.

95-029-54

General Services Administration
July 14, 1997
Page 28

- 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 15.605 and 15.606 replaces initial proposed FAR 15.805 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 15.605(a)(2). Further, proposed FAR 15.605(a)(2) and 15.606(a)(4)(ii) and (iii) define the timeliness of protests (provided in GAO rules at 4 C.F.R. § 21.2(a)(2)) as triggered by the date the offeror *could have* received a debriefing rather than when the offeror actually receives the debriefing. 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 15.605(a)(2) and 15.606(a)(4)(ii) 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 C.F.R. Part 21 (GAO Bid Protest Regulations). In the event guidance concerning GAO procedures in FAR Part 15 conflicts with 4 C.F.R. Part 21, 4 C.F.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,

95-029-54

General Services Administration
July 14, 1997
Page 29

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 Offers-Construction" 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, 52.215-6 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, 52.215-31, 52.215-40, 52.215-41, and 52.215-42, 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-Uniform 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 initial 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 52.215-1 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

95-029-54

General Services Administration

July 14, 1997

Page 30

other instructions." A problem arises 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 52.215-8, 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 ¶ 27,966.

The Section recommends FAR 52.215-8 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, "Integrity of Unit 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.

95-029-54

General Services Administration
July 14, 1997
Page 31

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,

John T. Kuelbs AIB.

John T. Kuelbs

Chair, Section of Public Contract Law

cc: Marcia G. Madsen
David A. Churchill
Rand L. Allen
Lynda Troutman O'Sullivan
Marshall J. Doke, Jr.
Frank H. Menaker, Jr.
John B. Miller
Alan C. Brown
Council Members
FAR Rewrite Working Group
Alexander J. Brittin

95-029-55



DEPARTMENT OF THE ARMY
HEADQUARTERS, U.S. ARMY INDUSTRIAL OPERATIONS COMMAND
ROCK ISLAND, ILLINOIS 61299-6000

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 electronic mail, dmitchel@ria-
emh2.army.mil.

Sincerely,

*Bambi Mitchell
for*

Randall J. Bartholome
Chief, Acquisition Policy
Branch

2 Enclosures

JUL 15 1997

95-029-55

Comments:

2.101 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?

15.406 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

Encl 1

95-029-55

=====
Comment No. 1: 15.505(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.? 15.504-1(g) discusses the issue of ?unbalanced pricing? which requires the Contracting Officer to considers the risks with unbalanced pricing (15.504-1(g) (2) (i) 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 successive task order?

Encl 2

95-029-56

July 10, 1997
9811 Dorval Avenue
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-titled, Part 15 Rewrite ("Rewrite")

Dear Sir or Madam:

I am a Contracting Officer at the Department of Transportation (DOT), Federal Railroad Administration (FRA). I recently participated with other DOT contracting professionals in a round table discussion and analysis of the proposed rule, and you should be receiving 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 believe deserves repeating. The recommendation is to move FAR Subpart 15.3 - Unsolicited Proposals to either Part 17 - Special Contracting Methods or at the very least, to the end of Part 15 - Contracting by Negotiation. The rationale being that in its 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 until the point 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 cross-referenced as is currently done for other contracting methods, e.g., Part 35 - Research and Development Contracting, Part 36 - Construction and Architect-Engineer 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 receive almost immediate acceptance and concurrences from most if not all participants. I've since checked with others in the procurement field and they too have always found the placement of the subpart to be a nuisance and I'm confident your own inquiries would reveal similar results. This recommendation also appears to be in keeping with 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 is ripe to act on such a recommendation.

Below are a few comments I did not have an opportunity to present for consideration for inclusion in the TASC/OST comment letter.

Item: 2.101 Recommendation: 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

JUL 15 1997

95-029-56

added language are that it more fully embraces the intent and principles of value-added choice or opting for the greater good that are often employed in negotiated awards made in support of Subchapter D - Socioeconomic Programs; 6.202 - Establishing or maintaining alternative sources; and the preferences or economic advantages of making multiple-awards (see FAR 16.504(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 through 52.215-38).

Item: 15.204-1 Recommendation: Reinstate a simplified contract format as currently prescribed in FAR 15.416 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 Flexibility Act. It would also seem a bit odd to permit a simplified contract format under sealed bidding 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 check-mark 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 solicitation as required under the proposed 15.204-2(g). This is similar 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. 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 Recommendation: Add a Block entitled, Acknowledgment of Amendments. Rationale: Here or elsewhere, prospective offerors should be put on notice of the need to affirm the receipt 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° 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 15.610), 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 15.406(a)(2) and 52.215-1).

Your team has done an admirable job thus far and I wish you the best of

95-029-56

added language are that it more fully embraces the intent and principles of value-added choice or opting for the greater good that are often employed in negotiated awards made in support of Subchapter D - Socioeconomic Programs; 6.202 - Establishing or maintaining alternative sources; and the preferences or economic advantages of making multiple-awards (see FAR 16.504(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 through 52.215-38).

Item: 15.204-1 Recommendation: Reinstate a simplified contract format as currently prescribed in FAR 15.416 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 Flexibility Act. It would also seem a bit odd to permit a simplified contract format under sealed bidding 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 check-mark 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 solicitation as required under the proposed 15.204-2(g). This is similar 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. 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 Recommendation: Add a Block entitled, Acknowledgment of Amendments. **Rationale:** Here or elsewhere, prospective offerors should be put on notice of the need to affirm the receipt 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° 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 15.610), 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 15.406(a) (2) and 52.215-1).

Your team has done an admirable job thus far and I wish you the best of luck on completing the Rewrite.

Sincerely


Thomas L. Riddle

95-029-57

08 JULY 1997

MEMORANDUM

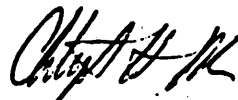
From: Mr. Christopher H. Beck, Contract Specialist, NAVFACENGCOM, PACDIV
To: FAR Secretariat

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 Housing 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.

Should 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
HEADQUARTERS
8725 JOHN J. KINGMAN ROAD, SUITE 2533
FT. BELVOIR, VIRGINIA 22060-6221

95-029-55

IN REPLY
REFER TO

MMP

JUL 14 1997

Mr. Edward Loeb
General Services Administration
FAR Secretariat (VRS)
1800 F Streets, N.W.
Room 4035
Washington, DC 20405

| | | | | | |
|-------------------|-----------------------|---------|-----------------|------------|---|
| Post-It® Fax Note | 7671 | Date | 7/14/97 | # of pages | 5 |
| To | Mr. Loeb | From | DLA MMP | | |
| Co./Dept. | FAR Secretariat - GSA | Co. | Def. Log Agency | | |
| Phone # | | Phone # | 707-1355 | | |
| Fax # | 202-501-4067 | Fax # | 767-1357 | | |

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 believe 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 offerors. 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 is contrary to 15.404(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.

JUL 15 1997

95-129-58

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 existing 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 authorization 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 15.209(b) should continue this exception.

95-129-58

3

15.3 Unsolicited Proposals

15.301 Definitions

The new definition of unsolicited proposals in 15.301 and the policy statement in 15.302 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 15.303(d), which is carried over from the current 15.503(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 15.306-2, 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 15.306-1, Evaluation, and 15.307, 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 15.506-1(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.

10-127-55
4

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 15.507(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(b)(4), 15.406(e)(4), and 15.606(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.

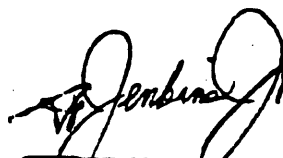
95-127-18

15.503-3 Instructions for submission of cost or pricing data or information other than cost or pricing data.

Suggest that 15.503-5(b)(2) and 15.503-3(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.dla.mil.

Sincerely,



GWILYM H. JENKINS, JR.
Captain, SC, USN
Deputy Executive Director
(Procurement)



U.S. GENERAL SERVICES ADMINISTRATION
Office of Governmentwide Policy

JUL 16 1997

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

FROM:

Sharon A. Kiser
SHARON A. KISER
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.

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

Attachments

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



95-029-57

From: Commander, Naval Air 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 rewrite. 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.

JUL 15 1997

1. FAR 14.404-1 The proposed FAR 14.404-1f should be modified to allow the head of the contracting activity rather than the head of the agency to make the determination that it is appropriate to allow a contracting officer to enter into negotiations with offerors 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 15.001 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 15.103 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 offerors 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 risk 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 real-time interactive dialogue may be included in offeror submissions when appropriate and requested".

4. FAR 15.103(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 offerors 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 15.205(g) This whole section allows the government to accept proposals to be most advantageous to the Government and amending the solicitation to reflect the

change; this change should protect the fairness standard and provide other offerors 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 15.302)” contradicts the 15.302 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 15.403(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 15.403(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 15.405(a)(2)(ii) 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 15.405(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 15.408 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 15.504(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 offerors 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. FAR15.504-2©(i) 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 either.

FAR 15.504-2©(ii) 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 administratively 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. FAR15.606(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.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
National Security & International Affairs
WASHINGTON, D.C. 20503
FAX 202-395-5157 Phone 202-395-3300

95-029-6d

FAX #: 501-~~0692~~4067
FROM: Wayne A. Wittig, Procurement Adviser

DATE:

TO: ED LOEB

Ed -

Steve Helman asked that you
receive his memo from The Front Line
Forum.

W

JUL 15 1997

95-129-60

July 11, 1997

MEMORANDUM FOR: The Federal Acquisition Regulation (FAR) Council

FROM: Front-Line 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 36 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 the Administrator, Office of Federal Procurement Policy and Under Secretary of Defense for Acquisition Reform. The Forum has previously reviewed and provided written comments to the FAR Council on FAR Case 95-029. The Forum has recently reviewed the follow-up document, "FAR Part 15 Rewrite: Contracting by Negotiation; Competitive Range Determinations" proposed rule, published in the Federal Register at 62 FR 26640, dated May 14, 1997.

The Forum believes the May 14, 1997 rewrite resolves our previously provided comments. The Forum does not have any additional comments or suggestions to forward to the FAR Council.

SUBMITTED BY:

The Members of The Front-Line Procurement Professional's Forum

JUL 15 1997

Author: " linda magazu" <paa2433@exmail.dpsc.dla.mil> at internet
Date: 7/15/97 8:03 AM
Priority: Normal
TO: shari kiser at GSA-V
Subject: FAR PART 15 Rewrite - Group A
Shari,

95-029-61

Sorry these comments are submitted a little late to you but I used the address in the federal register and sent my comments to GSA yesterday. This morning however, I had a reject message that my e-mail did not go through. I had also called one of the phone numbers in the Register and asked for help. The number I was given still didn't work. So this morning I decided to go into the ARNET and saw your name for submitting comments. I hope my comments will still be considered. They are included in this attached document.

Thankyou,

Linda G. Magazu
Procurement Analyst

JUL 15 1997

05-11-97

**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 15.1 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 I 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

95-059

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 (e.g., 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 writer(s) 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

95-029-61

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 15.1 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!! 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.

95-029-61

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!

95-029 62



**DEFENSE LOGISTICS AGENCY
HEADQUARTERS
8725 JOHN J. KINGMAN ROAD, SUITE 2533
FT. BELVOIR, VIRGINIA 22060-6221**

IN REPLY
REFER TO MMP

JUL 11 1997

Ms. Victoria Moss
General Services Administration
FAR Secretariat (MVR)
1800 F Street, NW
Room 4035
Washington, DC 20405

Dear Ms. Moss:

The Defense Logistics Agency offers the following comments with regard to the Proposed Rule (Federal Acquisition Regulation (FAR) coverage, FAR Case 97-004) published in 62 Federal Register 90, pages 25785-25795, May 9, 1997.

FAR 15.1003(a)(2) - This coverage states that notification is to be accomplished prior to award. This will add to administrative lead time (ALT), and may place an additional burden on the procurement process. We recommend that notification be completed at time of award.

FAR 19.201(b) - This subsection provides that the Department of Commerce will recommend, and the Office of Federal Procurement Policy will publish on an annual basis, by two-digit Standard Industrial Classification Code (SIC) Major Group, the appropriate price evaluation adjustment factor percentage for SDB concerns. DLA considers use of two-digit-level Major Groups too broad: their use could result in an inaccurate representation of SDB participation in a particular industry. That is, combining unrelated industry categories within the same two-digit SIC to establish the evaluation adjustment factor may distort the SDB award statistics and result in disproportionate percentages being applied to specific commodity areas. Although the "Response to Comments to Department of Justice Proposed Reforms to Affirmative Action in Federal Procurement," also published in the May 9, 1997 Federal Register, indicates at page 25650 that implementation of benchmarks at the four-digit SIC level is too burdensome (presumably for the Government, rather than for the private sector), this does not appear to be a sufficient reason to be satisfied with results that may lead to erroneous conclusions. We offer two DLA examples where use of the Major Group codes could yield (or has already yielded) unsatisfactory results. In the first, the Defense Fuel Supply Center's acquisitions are concentrated in the petroleum commodity area, with substantial awards made to small and small disadvantaged concerns. In Major Group 51, "Petroleum Product Wholesalers" are lumped together with totally unrelated commodity areas, such as tobacco products and other items that the Government does not purchase in significant quantities. The lack of substantial SDB participation in these other commodity areas may dilute the statistics of SDB participation in the fuel industry and result in a higher regional evaluation adjustment factor. (This type of disproportionate impact seems inconsistent with the "narrow tailoring" guidelines of the Adarand decision.) The second example is the Defense Industrial Supply Center's (DISC's) experience with SBA's waiver

JUL 15 1997

75-127-62
JUL 11 1997

2

of the nonmanufacturer rule for "high-nickel alloy" in federal supply group 95, which was established without DISC input. "High nickel alloy" is not a common term in the steel industry, and is highly ambiguous as a product description: DISC had great difficulty in determining the products, specifications, and acquisitions to which the waiver actually applied.

In order to improve the accuracy of the SDB adjustment factor and satisfy the "narrow tailoring" requirement of Adarand, we recommend that the DoC/OFPP industry analysis be performed at the four-digit SIC level. According to the "Response to Comments" cited above, DoC analysis indicated that 40 four-digit SICs accounted for approximately 80% of dollars awarded under prime contracts above \$25,000 in FY 1995. Thus, use of four-digit designators, at least for these 40 SICs, would not be unreasonably burdensome, and would have a better chance of satisfying the requirements of Adarand. Rather than considering use of the four-digit codes at some future date, therefore, recommend that these be used in the immediate implementation of these procedures.

In addition, we recommend that the evaluation process performed by the Department of Commerce be modified to provide for Agency-level participation in the final recommendations made to OFPP. This will give Agencies the opportunity to raise industry-unique considerations, while providing OFPP and the DoC additional insight into whether use of the SDB mechanism described in Part 19.11 would cause an industry to be disproportionately impacted by efforts to achieve affirmative action goals.

Apart from the selection process for applicable commodities, there is another point regarding this paragraph. The OFPP's publication is to provide for inclusion of pertinent mechanisms in solicitations issued by a particular date. In order to be efficient, though, this notice must be disseminated to reach contracting officers well before the effective dates specified for each mechanism. It may be presumed (but ought to be stated explicitly) that a mechanism properly included in a solicitation will remain in effect throughout the entire process, even though the published effective date might expire before a solicitation is brought to award.

FAR 19.201(f)(1) - The coverage allows anyone to complain to designated agency personnel that the new SDB mechanisms are causing a disproportionate impact on a particular industry. While technically/administratively possible, this procedure creates a potential administrative burden for the agency, but no rationale is provided for eliminating the usual determination that the complainant have "standing" to raise the objection.

FAR 19.304(b)(1) - The last sentence states that the contracting officer "may assess the validity of the [non-presumed offeror's] representation of social and economic disadvantage by accessing the SBA's on-line central registry..." Since assessments typically encompass analysis, evaluation, and estimation, recommend that the wording be changed to "may verify the validity..." This same recommendation applies to paragraph (a)(1) of clause 52.219-25.

FAR 19.305(g) - We are very concerned about SBA's ability to process determinations of the disadvantaged status of challenged offerors in a timely manner. If the SBA cannot provide an answer within 15 days, the contracting officer is obliged to presume that the challenged offeror is disadvantaged. Request that the SBA be required to respond within the timeframe specified.

95-029-62

JUL 11 1997

3

FAR Subpart 19.11 - This coverage will have to be read in conjunction with proposed coverage for Empowerment Contracting (FAR Case 97-603, published in 62 Federal Register 75, pages 19200-205, April 18, 1997, especially proposed FAR 26.406-1(b)), as well as with existing source selection evaluation factors. Since these factors are additive, there is the potential for exceptionally high preference percentages. Recommend that a cumulative preference cap or maximum be established. Alternatively, since some of the preferences are established at the Agency level, recommend that Agencies be permitted independently to establish their own cumulative maximum percentages for the various preference programs.

FAR 19.1103(c) - Many contracting personnel associate the FMP with 8(a) buying under Subpart 19.8. For these buys, the FMP is typically determined prior to and independent of any current proposals. This proposed coverage may lead personnel to conclude that, under Subpart 19.11, the FMP needs to be determined prior to receipt of competitive proposals. FAR 19.202-6 (which should be revised to accommodate the new coverage) instructs agencies to determine the FMP in two different ways for two different categories of acquisitions, neither of which is price evaluation adjustments for SDB concerns. Recommend that proposed 19.1103(c) be revised to specify that, on non-set-aside competitive acquisitions involving price evaluation adjustments for SDB concerns, contracting officers shall determine the FMP in accordance with FAR 15.805-2 (especially 15.805-2(a)). This would make it clearer that, in competitive acquisitions, prices offered on the instant acquisition should be considered in the determination of the FMP.

FAR 19.1104 - The last sentence indicates that clause 52.219-23, Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns, does not apply to the Department of Defense, NASA, or the Coast Guard. However, DoD was not exempt from the overall coverage, even though much of it is "rolled up" from DFARS. In fact, DoD is listed as one of the Agencies to which it applies in the introductory (identification) information and the proposed rule's Summary. Under the circumstances, recommend that one of these three actions be taken: specifically exempt DoD from certain portions of the coverage; cite to the applicable DFARS coverage and clause via cross-reference to 219.7003 and 252.219-7006, respectively; or delete this sentence from proposed 19.1104. (Note: clause 52.219-23 is also cited in proposed 19.1202-4(a), which provides general procedures for use of the evaluation factor in the context of the SDB participation program. However, if the clause does not apply to DoD under Subpart 19.11, neither should it apply to DoD under 19.12. Furthermore, if the decision is made to use the DFARS coverage, a question arises as to whether it will pertain to all products and industries, as it does now, or only to those SICs authorized by OFPP under the FAR guidance.)

FAR 19.1202-2(b)(2) - [editorial note] - The reference should be to FAR Subpart 19.8, rather than to 19.7.

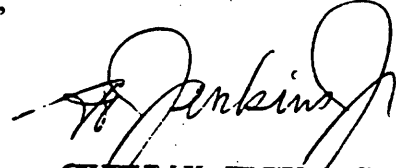
FAR 52.219-24 - There is no exclusion of DoD from operation of this provision, which refers to clause FAR 52.219-23. Depending on the resolution of the apparent inconsistency at 19.1104, perhaps this provision ought to state in paragraph (a): "...Credit under that evaluation factor or subfactor is not available to an SDB concern that qualifies for a price evaluation adjustment under the clause at FAR 52.219-23... or at DFARS 252.219-7006..."

95-029-66

JUL 11 1997 4

We appreciate the opportunity to comment on the Proposed Rule. Should you have any questions about the foregoing, please contact Ms. Mary Massaro, MMPPP, who can be reached at (703) 767-1366, or via Internet message addressed to mary_massaro@hq.dla.mil.

Sincerely,



GWILYM H. JENKINS, JR.
Captain, SC, USN
Deputy Executive Director
(Procurement)

National Aeronautics and
Space Administration

Headquarters

Washington, DC 20546-0001



JUL 11 1997

Reply to Attn of:

HK

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

SUBJECT: Part 15 Rewrite

We appreciate the opportunity 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. 15.501 Definitions:

The last sentence of the Cost or pricing data definition, dealing with parametrics, should be revised to replace the phrase "appropriate validated calibrated 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,

JUL 15 1997

where FAR Part 27 discusses rights 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(c)(1)(ii)(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, e.g., "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 verify 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 15.805-1 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 15.501, 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, e.g. 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(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 entire 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 implies 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 denial 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 evaluating 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 “certified” 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/Price 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 \$10M, 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 "e.g., monthly, quarterly, etc." was changed to "e.g., 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 applicable 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. 52.215-22(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 earlier 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)(ii)(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 (c)(2)(i)(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 appropriate and should be deleted (see comment for subparagraph (c)(2)(i)(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)(i)(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: Subparagraphs (d)(2)(i)(B) and (d)(2)(ii)(B):

See the comments above for 52.215-22 subparagraphs (c)(2)(i)(B) and (c)(2)(ii)(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 15.508(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 prior-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. Either 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
800 NORTH QUINCY STREET
ARLINGTON, VA 22217-5660

95-029-64

IN REPLY REFER TO

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 02) 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 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 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 than \$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.

JUL 16 1997

95-029-64

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](mailto:harlesp@onr.navy.mil).

Sincerely,



CHARLES R. PAOLETTI
Executive Director,
Acquisition Management

SBA

95-029-65

July 16, 1997

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

Dear FAR Secretariat:

On behalf of the Small Business Administration (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

11.801 Preaward testing. This paragraph goes too far in the use of discretionary authority 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 15.103. The language proposed at 14.404-1(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 14.404-1(f)(1).

JUL 16 1997

15.001 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 solicitation...”

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 6.401(a). It is suggested another example be used.

15.102 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 15.406(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.

15.103 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 on-site oral presentations.

15.201 Presolicitation exchanges with industry.

We have reservations in regard to 15.201(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.

15.202 Advisory multi-step source selection.

See our comment for 15.102. 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 offerors 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.

15.206 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.

15.206(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 15.407(d) should be 15.407(b). interpreted to mean only two offerors. 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?

15.406 Communications with offerors.

15.406(a) The relevancy of an offerors 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.

15.406(c)(2) - The term "efficient competition" is used in this paragraph. What criteria defines "efficient competition"?

Thank you for this opportunity to comment.

Judith A. Roussel for
CAAC member

Judith A. Roussel
Senior Procurement Executive

95-029-66

Date: 7/15/97
Sender: moresj@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 modification" to "proposal amendment."

2. FAR 15.102, Multi-step source selection technique.

a. 15.102(b), second sentence. Recommend that the words "the" and "limited" 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(b), 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(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 indirect costs audit can never be requested within 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 verify with the auditor if 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

JUL 16 1997

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 receive the award changes prior to award but after conclusion of negotiations?

4. 15.504-4(c)(3), fourth sentence ("If the prospective contractor fails to identify or propose facilities"). Recommend that the sentence be changed to "If the prospective contractor fails to propose facilities capital..." This would make it consistent with the language at 15.508(i).

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 USC 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. FAR 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.

95-029-66

10. 15.507-1(b)(7)(i). 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 PCOs 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)(i) 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 "bottomline" 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 Lichorobiec, 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 re-write 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

95-029-67
A

95-029-67
A

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 in turn, 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 if 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(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

95-029-67
A

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 debriefing 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 offerors.

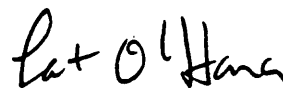
Finally, ACEC and HWAC continue to encourage the FAR Council to provide increased guidance to Contracting Officers on the utilization of these new procurement rules. The purpose of these rules is clearly designed to improve the value received by the government. Providing Contracting Officers with latitude 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
ACEC



Pat O'Hara
President
HWAC



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 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 15.5 – 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.

95-029-01
E

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 rights.

Subpart 15.503.3 (c)(3) - Lowest Price: Consistent with procedure in Part 52, an offeror is not compelled to disclose its lowest price, 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 contractor's 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).

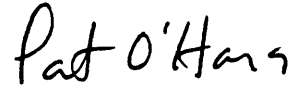
We would ask the Council to note these general and specific suggestions and request that the appropriate changes be made before a final rule is issued. ACEC and HWAC would also like to support the comments being submitted by the Council on Defense and Space Industry Associations (CODSIA), which has conducted much of the analysis of Subpart 15.5. We have included CODSIA's detailed comments for your review along with this letter.

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,



James R. Thomas, Jr., PE, FACEC
President
ACEC



Pat O'Hara
President
HWAC

CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

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 price agreement 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, 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 15.5 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 determinations 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 pricing data may include 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 modeling 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. 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

~~Cost realism means an assessment of whether or not the costs in an offeror's proposal are realistic for the work to be performed; reflect a clear understanding of the requirements; and are consistent with the various elements of the offeror's technical 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.

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-ins; nonmonetary incentives (e.g., 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 (i.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 administrative 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
FAR SUBPART 15.5 REWRITE
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 15.503-4, 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:

(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) 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 ~~evaluating~~ *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 15.501.

(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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

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 either propose or agree to the lowest price at which a commercial item 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. 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. 2306a and 41 U.S.C. 254b*).

15.503-1 Prohibition on obtaining cost or pricing data (*10 U.S.C. 2306a and 41 U.S.C. 254b*).

(a) Cost of pricing data should not be obtained for contract actions below the pertinent threshold at 15.503-1(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(a)(2) 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 (~~contracts, subcontracts, or modifications~~) (but may require information other than cost or pricing data to support a determination of price reasonableness or *assess* cost realism) -*

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);

(3) When a commercial item is being acquired (see standards at paragraph (c)(3) of this subsection);

**CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

- (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 -
- (i) Two or more responsible offerors, competing independently, submit priced offers ~~in 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 to the offeror whose proposal represents the best value where Price is a substantial factor in source selection~~ *the award decision*; and

CODSIA ANALYSIS

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;
- (ii) There was a reasonable expectation, based on market research or other assessment, that two or more responsible offerors, competing independently, would submit priced offers ~~in 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, e.g., circumstances indicate that -
- (1) The offeror believed that at least one other offeror was capable of submitting a ~~meaningful~~ *responsive* offer; and
- (2) The offeror had no reason to believe that other potential offerors 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

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.~~

CODSIA ANALYSIS

Whether or not comparable contracts resulted 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 similar actions of a governmental body, or embodied in the laws are sufficient to set a price.

(3) Commercial items. Any acquisition for ~~an item 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 item from a commercial item to a noncommercial item,~~ 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 ~~consider waiving~~ *waive* the requirement if the price can be determined 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

~~15.503-2 Other circumstances where cost or pricing data are not required.~~

~~(a) The exercise of an option at the price established at contract award or initial negotiation does not require submission of cost or pricing data.~~

~~(b) Cost or pricing data are not required for proposals used solely for overrun funding 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., incremental 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 ***determining 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 (10 U.S.C. 2306a(d)(1) and 41 U.S.C. 254b(e)(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 15.5.

(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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

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 ~~determine~~ **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.C. 2306a(d)(2) and 41 U.S.C. 254b(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 and certify 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 items 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 15.503-1(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 undefinitized actions such as letter contracts).

CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(ii) 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)(ii) of this subsection. Price adjustment amounts shall consider both increases and decreases (e.g., 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 head of the contracting activity, without power of delegation, may authorize the contracting officer to obtain cost or pricing data for pricing actions below the pertinent threshold in paragraph (a)(1) of this subsection, provided the action exceeds the simplified acquisition threshold. The head of the contracting activity shall justify the requirement for cost or pricing data. The documentation shall include 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.~~

CODSIA ANALYSIS

CODSIA recommends relocating provision at 15.503-4(a)(2) to 15.503-1(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 15.506-2, 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, ~~an earlier~~ **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 15.501 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

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 15.502, the contracting officer shall *specify insert the solicitation provision at 52.215-41 and contract clause at 52.215-42 in the solicitation (see 15.508 (l) and (m)) when either cost or pricing data or information other than cost or pricing data are required -*

~~(1) Whether cost or pricing data are required;~~

~~(2) That, in lieu of submitting cost or pricing data, the offeror may submit a request for exception from the requirement to submit cost or pricing data;~~

~~(3) Any information other than cost or pricing data that is required; and~~

~~(4) Necessary preaward or postaward access to offeror's records.~~

CODSIA ANALYSIS

Guidance is generally unnecessary since it duplicates instructions contained in FAR 52.215-41 and FAR 52.215-42.

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 49.6, 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

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. 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 ~~final agreed to~~ ***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 used, ~~singly or in combination with others,~~ to ensure that the ~~final agreed upon~~ ***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?

CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

~~(4) Cost analysis may also be used to evaluate information other than cost or pricing data to determine cost reasonableness or cost 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 differentiate 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 rights.

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) 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 Air Force Institute of Technology (AFIT) and the Federal Acquisition Institute (FAI) jointly prepared a series of five desk references to guide 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 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) 512-2550, 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>.

(b) Price analysis. (1) Price analysis is the process of examining 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:

(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 similar end items, if both the validity of the comparison and the reasonableness of the previous price(s) can be established.

CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

- (iii) Application 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 (~~including cost or pricing data or information other than cost or pricing 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 fair and reasonable price, given the circumstances of the acquisition. Such techniques and procedures include the following:
 - (i) 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 cost-estimating relationships; and
 - (D) The application of audited or negotiated indirect cost rates, labor rates, and cost of money or other factors.
 - (ii) 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 offerors 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

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 determine 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 obtain 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 analysis *assessment*. (1) Cost realism analysis *assessment* 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; 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.

(2) Cost realism analyses *assessments* shall be performed on *significant* competitive cost-reimbursement contracts to determine the probable cost of performance for each offeror.

~~(i) The probable cost may differ from the proposed cost and should reflect the Government's best estimate of the cost of any contract that is most likely to result from the offeror's proposal. The probable cost shall be used for purposes of evaluation to determine the best value.~~

~~(ii) The probable cost is determined by adjusting each offeror's proposed cost, and fee when appropriate, 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 distinctly 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

~~(3) Cost realism analyses may also be used on competitive fixed price incentive contracts or, in exceptional cases, on other competitive fixed price type contracts when new requirements may not be fully understood by competing offerors, there are quality concerns, or past experience indicates that contractors' proposed costs have resulted in quality or service shortfalls. Results of the analysis may be used in performance risk assessments and responsibility determinations. However, proposals shall be evaluated using the criteria in the solicitation, and the offered prices shall not be adjusted as a result of the analysis.~~

CODSIA 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 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. CODISA was disappointed that, despite its repeated suggestions, the activities 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 price contracts have been exempted from TINA but not CAS. For many companies, CAS is a key criterion for declining Government business.

(3) Cost realism assessments shall not be performed on contracts for commercial items.

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 quantities of ~~material proposed~~ and the need for the types and quantities 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 little or no variation in base cost.

(2) ~~Except for the acquisition of commercial 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(d)(5)(A)(i)). Such information shall be used to determine whether the intrinsic value of an item has been distorted through application of overhead

CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

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 negotiated contracts when appropriate.

(3) This section does not apply to contracts for commercial 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 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 or price analysis techniques. 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?).

(i) Startup work, mobilization, first articles, or first article testing are separate line items;

CODSIA ANALYSIS

It is not clear why separately priced startup work, mobilization, first articles, or first article testing give rise to unbalanced pricing conditions. The example should be clarified or deleted.

(ii) Base quantities and option quantities 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 -

CODSIA ANALYSIS

That all offers with separately priced line items or subline items be analyzed for unbalanced pricing is probably not a workable requirement to impose on contracting officers. It also creates potential new grounds for bid protests if a contracting officer failed to analyze each line item or subline item. Some reasonable limits should be applied.

(i) Consider the risks to the Government associated with the unbalanced pricing in determining the competitive range and in making the source selection decision; and

(ii) Consider whether award of the contract will result in paying unreasonably high prices for contract performance.

(3) An offer may be rejected if the contracting 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 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 (j) 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 4.807(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.

(i) 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(2) The contracting officer shall not request a separate preaward audit of indirect 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. Copies of updated information that will significantly 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 immediately 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 promptly in writing, including a description of deficient or denied data or records. The contracting officer immediately 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 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-tier contractor without disclosing subcontractor proprietary data (e.g., range of fair and reasonable prices). If the subcontractor requested an exception under 15.503-1(b), the contracting officer shall indicate to the prime contractor or higher-tier contractor whether the exception is approved.

CODSIA ANALYSIS

CODSIA does 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 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 retain this policy.

6

**CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

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 negotiated 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, 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 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 exemption in 15.503-1(b) applies to that action.

(1) The contractor shall **submit forward**, or cause to be **submitted forwarded** by the subcontractor(s), cost or pricing data to the Government for subcontracts that are the lower of either -

(i) \$10,000,000 or more; or

(ii) Both more than the pertinent 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 contracting officer may require the contractor or subcontractor to **submit forward** to the Government (or cause **submission 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.

CODSIA ANALYSIS

CODSIA recommend clarification to preclude potential misunderstanding between the submission of subcontractor proposals and the submission of cost or pricing data and the application of related thresholds.

(3) Subcontractor cost or pricing data shall be submitted in the format provided in Table 15-2 of 15.508.

(4) Subcontractor cost or pricing data shall be current, accurate, and complete as of the date of price agreement, or, if applicable, an earlier ~~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 receive award to the Government.

CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

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. *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 combining FAR Subparts 15.7, 15.8, and 15.9.

(1) Profit or fee prenegotiation objectives do not necessarily represent net income 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 prenegotiation objective. Just as actual costs may vary from estimated costs, the contractor's actual realized profit or fee may vary from negotiated 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 opportunities for financial rewards sufficient to stimulate efficient contract performance, attract the best capabilities of qualified 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 motivator of efficient and effective 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 interest. 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 optimum contract performance.

(b) Policy. (1) Structured approaches (see paragraph (d) of this subsection) for determining profit or fee prenegotiation objectives provide a discipline for ensuring that all relevant factors are considered. Subject to the authorities in 1.301(c), agencies making noncompetitive contract awards over \$100,000 totaling \$50 million or more a year -

(i) 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 inappropriate.

(2) Agencies may use another agency's structured approach.

(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.

CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(3) Contracting 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 31.2), facilities capital cost of money will not be an allowable cost in any resulting contract (see 15.508(i)).

(4)(i) 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 experimental, developmental, or research work performed under a cost-plus-fixed-fee contract, the fee shall not exceed 15 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.

(ii) The contracting officer's signature on the price negotiation memorandum or other documentation supporting determination of fair and reasonable price documents the contracting officer's determination that the statutory price or fee limitations have not been exceeded.

(iii) Agencies shall not establish administrative ceilings 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 15.901, 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 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
FAR SUBPART 15.5 REWRITE
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) (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.

(i) 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)(i) (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 include 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

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-and-materials, 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 involving 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.

E

**CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

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 Prenegotiation 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 prenegotiation 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

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 where information other than cost or pricing data is submitted.*

| |
|--|
| <u>CODSIA ANALYSIS</u> 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 15.501 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 _____* are accurate, complete, and current as of _____**. 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*** _____

* Identify the proposal, quotation, request for price adjustment, or other submission involved, giving the appropriate identifying number (e.g., 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.

CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(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 minimize 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 reports is acceptable, as certain data may not be reasonably available before normal periodic closing dates (e.g., 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 Current 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. ***Instead, the data shall be considered to be information other than cost or pricing data. Examples include:***

(1) Contractor erroneously 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.

CODSIA ANALYSIS

CODSIA believes additional clarity is needed, including examples of circumstances where certified cost or pricing data would be subsequently determined to be uncertified.

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, including appropriate identifying numbers (e.g., 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 (e.g., purchasing, estimating, accounting, and compensation) to the extent they affected and were considered in the negotiation.

CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

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 -

(i) 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 contracting activity's written justification -

(i) Why the contracting officer could not determine the reasonableness of price with 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 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 significant facts or considerations controlling the establishment of the prenegotiation 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 (i.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 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 office(s) providing assistance. When appropriate, information on how advisory field support can be made more effective should be provided separately.

**CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

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 inaccurate, 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 earlier *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 15.508 (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 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:

(i) 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 (e.g., the initial pricing of the same contract or the pricing of the same change order).

**CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(5) An offset shall be allowed only in an amount supported by the facts and if the contractor -

(i) 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

(ii) 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 -

(i) The understated data was known by the contractor to be understated when the Certificate of Current Cost or Pricing Data was signed; or

(ii) The Government proves that the facts demonstrate that the 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.

(7)(i) 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 supplies or services accepted by the Government. Overpayments do not result from amounts paid for contract financing, as defined in 32.902.

(ii) 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 time of repayment, utilizing rate(s) prescribed by the Secretary of the Treasury under 26 U.S.C. 6621(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 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 continue to accrue until repayment is made.

CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

CODSIA 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 time of negotiation, the contracting 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 certified 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 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 Pricing Data-Modifications, 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.

(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 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 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 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 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 15.508 (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 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 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 Subparts 15.7, 15.8, and 15.9.

(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 identifying 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 -

(i) 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.

**CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(e) Program requirements. To support a make-or-buy program, the following information shall be supplied 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 materials, commercial items (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 estimated 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:

(i) A description of each major item or work effort.

(ii) Categorization of each major item or work effort as "must make," "must buy" or "can either make or buy."

(iii) For each item or work effort categorized as "can either make or buy," a proposal either 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 19.7 for subcontracting plan requirements).

(vii) Any recommendations to defer make-or-buy decisions when categorization of some items or work efforts is impracticable at the time 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 negotiate 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 52.215-21, Changes or Additions to Make-or-Buy Program.

**CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(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 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 Governmentwide 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 52.215-21, 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.

(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 -

(i) The contract is a cost-reimbursable contract, or a cost-sharing contract in which the contractor's share of the cost is 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, offerors 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 initial 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 continuous 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

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 multi-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 -

- (i) Some initial production has already taken place;
- (ii) 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

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:

(i) Dollar amount of Government business.

(ii) 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 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 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 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

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 52.215-27, 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 52.215-30, 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 31.2).
- (i) 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, Waiver of Facilities Capital Cost of Money, in the resulting contract.
- (j) The contracting officer shall insert the clause at 52.215-39, Reversion or Adjustment 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 52.215-40, 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 31.2.
- (l) Considering the hierarchy at 15.502, the contracting officer may insert the provision at 52.215-41, 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 offerors 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(m) Considering the hierarchy at 15.502, the contracting officer may insert the clause at 52.215-42, 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 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

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 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 ~~earlier~~ *another* date agreed upon between the parties if 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

- I. 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

(i) 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.

(j) 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 ~~an earlier~~ *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 estimating process, including -

a. The judgmental factors applied and the mathematical or other methods used in the estimate, 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 earlier~~ *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.

CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
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 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 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 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 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 appropriate threshold set forth at 15.503-4 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, subsidiary, or affiliate of the contractor, explain the pricing method (see 31.205-26(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 15.503-1(b) (i.e., adequate price competition, commercial items, 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 ~~an earlier~~ **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 pricing data obtained from a subcontractor, either 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 furnish bases for estimates.

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 ~~evaluating~~ **determining** the reasonableness of proposed rates. Indicate the rates used and provide an appropriate explanation.

**CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

D. Other Costs. List all other costs not otherwise included 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 27.204 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)

| Cost elements | Proposed contract estimate – total cost | Proposed contract estimate – unit 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 ANALYSIS & RECOMMENDATIONS
 FAR SUBPART 15.5 REWRITE
 FAR CASE 95-029**

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

B. Change Orders, Modifications, and Claims

| Cost elements (1) | Estimated cost of all work deleted (2) | Cost of deleted work already performed (3) | Net cost to be deleted (4) | Cost of work added (5) | Net cost of change (6) | Reference (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 actuals 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. $\text{Column (2) - Column (3) = Column (4)}$.
- (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. $\text{Column (5) - Column (4) = Column (6)}$. 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.

**CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

C. Price Revision/Redetermination

| Cutoff date (1) | Number of units completed (2) | Number of unit to be completed (3) | Contract amount (4) | Redetermination proposal amount (5) | Difference (6) |
|--------------------|-------------------------------------|--|---------------------------|---|-------------------|
|--------------------|-------------------------------------|--|---------------------------|---|-------------------|

| Cost elements (7) | Incurred costs - preproduction (8) | Incurred cost- completed units (9) | Incurred cost- work in process (10) | Total incurred cost (11) | Estimated cost to complete (12) | Estimated total cost (13) | Reference (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 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-price-incentive and fixed-price-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 (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 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 estimates. Explain the basis for each estimate and how the costs are charged on your accounting records (e.g., included in production costs as direct engineering labor, charged to manufacturing 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.

**CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

K

CODSIA 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 inception 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 item(s) 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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

CODSIA RECOMMENDATIONS SHOWN IN BOLD/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.

**CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

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 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:

(i) 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 if accurate, complete, and current cost or pricing data had been submitted.

(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 the contract.

(iv) The Contractor or subcontractor did not submit a Certificate of Current Cost or Pricing Data.

(2)(i) Except as prohibited by subdivision (c)(2)(ii) 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 in the amount requested; and

**CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

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 if 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 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 pricing data that were incomplete, inaccurate, or noncurrent.

(End of clause)

**CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

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 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:

(i) 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 if accurate, complete, and current cost or pricing data had been submitted.

(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 the contract.

(iv) The Contractor or subcontractor did not submit a Certificate of Current Cost or Pricing Data.

(2)(i) Except as prohibited by subdivision (d)(2)(ii) 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 in the amount requested; and

**CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

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 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 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 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 pricing data that were incomplete, inaccurate, or noncurrent.

(End of clause)

**CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

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 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 15.503-1 applies.

(b) 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 (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 either -

(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
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

CODSIA 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 15.503-1 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 15.503-4 on the date of agreement on price or the date of award, whichever is later.

(End of clause)

**CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

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 (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 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.

**CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

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:

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 ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029

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(l), 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 lieu of submitting cost or pricing 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 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.

(ii) 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 15.501. 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.

15

**CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

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 applies:

(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 15.506-2.

(3) *In submitting 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 in accordance with the provisions of 52.215-2.*

CODSIA ANALYSIS

See CODSIA's comment at FAR 15.503-5 and FAR 15.503-6. CODSIA believes that the access to records and audit rights must be absolutely clear, particularly if Table 15-3 and Standard Form 1448 are eliminated. The most practical alternative is to revised FAR 52.215-41 and FAR 215-42. This is a **high-risk concern** to industry.

(End of clause)

Alternate I (DATE). As prescribed in 15.508(l), 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(l), 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 III (DATE). As prescribed in 15.508(l), 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 via the following electronic media: [Insert media format, e.g., electronic spreadsheet format, electronic mail, etc.]

Alternate IV (DATE). As prescribed in 15.508(l), 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.]

E

**CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

CODSIA RECOMMENDATIONS SHOWN IN BOLD/ITALICS

**52.215-42 Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data-
Modifications.**

As prescribed in 15.508(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 subparagraphs. 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.

(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 minimum, 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 (~~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.

(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.

(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

CODSIA ANALYSIS & RECOMMENDATIONS
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 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, at any time before award, 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 15.508(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 15.508(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 15.508(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.]

K

**CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

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. 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.

15-029-010

**CODSIA ANALYSIS & RECOMMENDATIONS
FAR SUBPART 15.5 REWRITE
FAR CASE 95-029**

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 CFR 9903.201-1(b)(15) for firm fixed price contracts that do not involve the submission of certified cost or pricing data.



U.S. GENERAL SERVICES ADMINISTRATION
Office of Governmentwide Policy

JUL 18 1997

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

FROM:

Edward L. Kiser
 SHARON A. KISER
 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.

| <u>Response Number</u> | <u>Date Received</u> | <u>Comment Date</u> | <u>Commenter</u> |
|------------------------|----------------------|---------------------|------------------------------------|
| 95-029-68 | 07/16/97 | 07/14/97 | DoD |
| 95-029-69 | 07/17/97 | 07/17/97 | Nathan Tash |
| 95-029-70 | 07/17/97 | 07/17/97 | Department of Commerce |
| 95-029-71 | 07/18/97 | 07/14/97 | NAMC |
| 95-029-72 | 07/18/97 | 07/14/97 | Small Business Legislative Council |
| 95-029-73 | 07/18/97 | 07/14/97 | ASA, Inc |

Attachments



ACQUISITION AND TECHNOLOGY

DP/CPF

OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON DC 20301-3000

95-029-68

July 14, 1997

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

Subject: FAR Case 95-029

Dear sir:

We have reviewed the proposed rule published in the May 14, 1997,
Federal Register; our comments are attached.

Carol F. Covey
Deputy Director of Defense Procurement
(Cost, Pricing, & Finance)

Attachment

JUL 16 1997



95-029-68

GROUP A COMMENTS

1. FAR 15.209(b), prescription for 52.215-2, Audit and Records-Negotiation. Add "For commercial items 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.

15-029-66

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)(i)(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)(ii). Revise the parenthetical reference from "(but see waivers at 15.503-1(b)(4))" to "(but see waivers at 15.503-1(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 FAI'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.

95-029-6i

The Air Force Institute of Technology (AFIT) and the Federal Acquisition Institute (FAI) jointly prepared a series of ~~five desk references~~ [five volume set of Contract Pricing Resource Guides] to guide pricing and negotiation personnel. The five ~~desk references~~ [guides] are: [I -] Price Analysis~~;~~[;] ~~Cost Analysis~~, [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) 512-2550, 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>.

95-029-69



OFFICE OF FEDERAL
PROCUREMENT POLICY

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

FAX SHEET

[Handwritten signature]

TO:

Ed Loeb

Telephone Number:

FAX Number:

501 - 4067

FROM:

Nathan Tash

Telephone Number:

FAX Number:

(202) 395-6167

(202) 395-5105

NUMBER OF PAGES (including cover):

23

REMARKS:

E-029-69

1825 Middlebridge Drive
Silver Spring, MD 20906

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

Dear Sir or Madam:

This letter is in reference to FAR Case 95-029. I would like to submit the following comments.

1. I believe the sentence in 15.205⁴ 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 15.406(b)(2), perhaps the "may" should be "shall."
3. Given that in some circumstances there can be adequate price competition with only offeror, perhaps it is not prudent to state that the government should only get additional information in "unusual" circumstances in 15.503-3(b).
4. I recommend that in 15.406(c) "proposals rated most highly" be changed to "most highly rated proposals." *consistently*
5. I recommend that 15.406(c)(1) be changed to state proposal(s). By not having parentheses around the "s," it makes it seem as if there cannot be one proposal in the competitive range.
6. In discussing past performance evaluation in 15.405(a)(2) the rule should address the issue of what constitutes contract performance for determining when the three year past performance time frame starts to run. *Part 42*
7. The language at 15.206(g) is unclear in three areas.
 - a. First, it does not state what happens if the solicitation cannot be amended without revealing sensitive information.
 - b. Second, there is an inconsistency in the language because a proposal cannot at the same time involve 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. Perhaps language should be added to state what should be done when the departure is not advantageous.

E-029-69

8. In 15.406 perhaps you should add back the language from current FAR prohibiting telling an offeror its standing relative to other offerors.
9. In 15.201, perhaps the procurement integrity cite should be moved to include all of the section.

S.V.E.V.,

Nathan Tash

Nathan Tash



UNITED STATES DEPARTMENT OF COMMERCE
Chief Financial Officer
Assistant Secretary for Administration
Washington, D.C. 20230

95-029-70

General Services Administration
FAR Secretariat (VRS)
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 15.406, Communications 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 furnish a copy of their evaluation to their contractor (i.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 Government 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

JUL 17 1997

95-029-70

agency in light of what is important to the agency. At this point, the agency makes a subjective judgment 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 offerors know about that information?

(b) Another concern we have in this area is related to differing opinions 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 pre-existing 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 offerors if they contain "adverse" information?

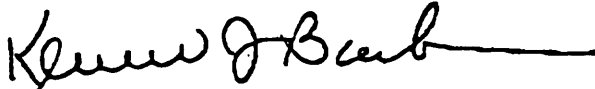
From an operational standpoint, sending copies of survey responses or interview notes to contractors would be a burden to the government. Additionally, it could adversely affect the willingness of references to participate candidly.

(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.

95-029-70

If you have any questions or wish to discuss the issues further, please contact me or Deborah O'Neill on (202) 482-0202.

Sincerely,



Kenneth J. Buck, Acting Director for
Acquisition Management and
Procurement Executive

45-029-71

NATIONAL
ASSOCIATION OF
MINORITY
CONTRACTORS

1333 F Street, N.W.
Suite 500
Washington, DC 20004

(202) 347-8259
(202) 628-1876 Fax



July 14, 1997

VIA U.S. MAIL ONLY

General Services Administration
FAR Secretariat (VRS)
1800 F Street, N.W.
Room 4035
Washington, D.C. 20405

Re: **FAR Case 95-029; Federal Acquisition Regulation;
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 Rewrite. 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 significantly on minority contractors, and will have major links 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) ongoing process on "benchmarking" in accordance with the U.S. Supreme Court's decision in *Adarand v. Peña*; 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 business-owners requesting clarification on the links between the FAR Part 15 rewrite and the above-mentioned 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. Peña*. While

JUL 18 1997

95-029-71

NAMC Comments; FAR Case 95-029

July 14, 1997

Page 2

acknowledging the committed efforts of the federal government to develop fair rules and standards under *Adarand*, our experience with business owners demonstrates deep uncertainty and anxiety over where they stand relative to the future. This uncertainty is confirmed by a simple reading of the proposed FAR Part 15 rewrite, and brings into focus the question of regulatory fairness. There is, 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 applies new standards for SDB procurement opportunities on a government-wide basis. Similarly, only minimal 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 clarify 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 minority-owned businesses -- lack of fair 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 7.105 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 15.102 outlines the process for "multi-step source selection." This proposed process concerns minority businesses greatly because of the actual or perceived potential for built-in 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

95-029-71

NAMC Comments; FAR Case 95-029

July 14, 1997

Page 3

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 SDBs or other less non-traditional market participants in the multi-step source selection process. More importantly, it would help assure small and minority business-owners of a safeguard against unfair treatment in the multi-step source selection process.

- C) SDB References under FAR section 15.103 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." Appropriate modifications in this vein should be made throughout the proposed rule to reflect the unique concerns and issues faced by SDBs. Alternatively, an overriding definition should be inserted at an appropriate location in the proposed rule (e.g. under FAR section 15.001) indicating SDBs as a subset of small businesses. (There may be technical problems with the latter approach, however, since small business and SDB issues are significantly distinguished 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 SDBs of their treatment under FAR Part 15.

D) Presolicitation Exchanges with Industry

The proposed new FAR section 15.201 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 outlined in the FAR Council proposed rule on affirmative action in FAR Case 97-004.

E) Minimum Requirements on RFPs for Competitive Acquisitions

The proposed new FAR section 15.203(a)(4) requires Government requests for proposals (RFPs) 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

95-029-71

NAMC Comments; FAR Case 95-029

July 14, 1997

Page 4

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 15.605(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 unfairly 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, including FAR section 42.1502.

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 (i.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 business, 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 earlier, the biggest concerns have to do with how FAR Case 95-

95-029-71

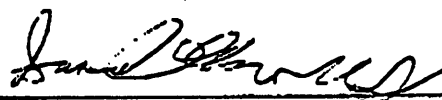
NAMC Comments; FAR Case 95-029

July 14, 1997

Page 5

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, minority 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. Cobbie de Graft
General Counsel



SMALL BUSINESS
LEGISLATIVE
COUNCIL

95-029-92

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 F.R. 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 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

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

95-029-72

Page - 2 Small Business Legislative Council. Comments
RE: FAR Case 95-029 "Federal Acquisition Regulation Part 15 Re-write"

The small business community has consistently embraced streamlining 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 re-writing 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 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.

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 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 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 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.

15-029-72

Page - 3 Small Business Legislative Council. Comments
RE: FAR Case 95-029 "Federal Acquisition Regulation Part 15 Re-write"

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:

- ✓ Arbitrary discretion vested in contracting officers enable them to funnel money to states or favorite contractors.
- ✓ 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.
- ✓ Arbitrary discretion vested in a contracting officer lowers incentives to increase competition, rather it offers an incentive to the contracting officer to decrease competition.

95-029-72

Page - 4 Small Business Legislative Council. Comments
RE: FAR Case 95-029 "Federal Acquisition Regulation Part 15 Re-write"

- ✓ 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.
- ✓ 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 million or 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.

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 FARA

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 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 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

D. C. H.

Page - 5 Small Business Legislative Council, Comments
RE: FAR Case 95-029 "Federal Acquisition Regulation Part 15 Re-write"

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 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 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 15.406 (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

75-029-72

Page - 6 Small Business Legislative Council Comments
RE: FAR Case 95-029 "Federal Acquisition Regulation Part 15 Re-write"

also specify the documentation required when proposals are eliminated 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 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" 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 dealing with offerors and contractors. All offerors 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 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 "action techniques"

95-029-12

Page - 7 Small Business Legislative Council. Comments
RE: FAR Case 95-029 "Federal Acquisition Regulation Part 15 Re-write"

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. 15.208 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.

5. COMMUNICATIONS

Prior to deciding the competitive range, the contracting officer can take into consideration an oral representation that is made in "communications" with offerors 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 offerors.

SBLC recommends that the FAR require the contracting officer to hold communications with all such offerors 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 offerors 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.

95-029-16

Page - 8 Small Business Legislative Council. Comments
RE: FAR Case 95-029 "Federal Acquisition Regulation Part 15 Re-write"

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 offerors 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 non-responsibility 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 offerors 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 15.403 (b) (4) and 15.505 (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. 15.404 (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 price;
 - (2) Approximately equal to cost or price; or
 - (3) Significantly less important than cost or price (10 U.S.C. 2305 (a) (3) (A) (iii) and 41 U.S.C. 253a (c) (1) (C)).

The current proposed regulations provide that prior to establishing the competitive range, communications may be held with those offerors whose exclusion from, or inclusion in, the competitive range is uncertain (15.406 (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 42.15 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." 15.405 (a) (2) (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, 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 FARs 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 Policy (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.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' authorities and accountability.

95-029-75

Page - 11 Small Business Legislative Council Comments
RE: FAR Case 95-029 "Federal Acquisition Regulation Part 15 Re-write"

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 non-uniform 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.

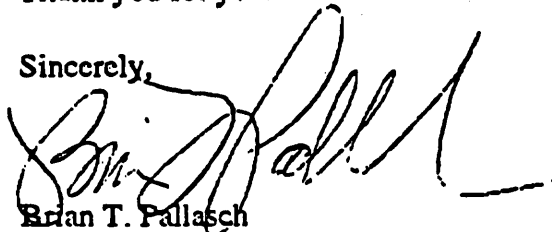
CONCLUSION

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.

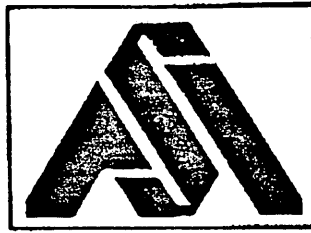
For these reasons, the proposed rule must be revised to conform to the minimal FARA changes that were enacted, to minimize diversion from the current FAR unless there is justification for doing so, to ensure the supremacy of the FAR as the uniform guiding rules of the federal procurement process, and to preserve full and open competition for government contracts. 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.

Sincerely,



Brian T. Pallasch
Chairman, Procurement Committee



95-029-73

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 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 F.R. 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 re-writing 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.

AMERICAN SUBCONTRACTORS ASSOCIATION, INC.

1004 Duke Street, Alexandria, VA 22314-3588

Phone: (703) 684-3450 Fax: (703) 836-3482

e-mail: ASAOffice@aol.com

JUL 18 1997

95-029-10

Page - 3 American Subcontractors Assn. Comments
RE: FAR Case 95-029 "Federal Acquisition Regulation Part 15 - Re-write"

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 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.

ASA believes that, if implemented as published, the proposed rule will lead to the following consequences:

- ✓ Arbitrary discretion vested in contracting officers enable them to funnel money to states or favorite contractors.
- ✓ 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.
- ✓ Arbitrary discretion vested in a 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/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.
- ✓ 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 million or 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

15-1-15

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 offerors 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.

95-029-13

Page - 5 American Subcontractors Assn. Comments
RE: FAR Case 95-029 "Federal Acquisition Regulation Part 15 - Re-write"

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 "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 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. 15.208 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.

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 15.208. 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 offerors 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 15.208 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 offerors 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

95-029-16

Page - 6 American Subcontractors Assn. Comments
RE: FAR Case 95-029 "Federal Acquisition Regulation Part 15 -- Re-write"

to one or a few and decide not to talk to the others similarly situated, thus precluding fair competition among these offerors.

ASA recommends that the FAR require the contracting officer to hold communications with all such offerors 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 offerors 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 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 offerors 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 non-responsibility 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 offerors 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

95-024-73

Page - 7 American Subcontractors Assn. Comments
RE: FAR Case 95-029 "Federal Acquisition Regulation Part 15 - Re-write"

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 15.505 (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. 15.404 (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 price;
 - (2) Approximately equal to cost or price; or
 - (3) Significantly less important than cost or price (10 U.S.C. 2305 (a) (3) (A) (iii) and 41 U.S.C. 253a (c) (1) (C)).

The current proposed regulations provide that prior to establishing the competitive range, communications may be held with those offerors whose exclusion from, or inclusion in, the competitive range is uncertain (15.406 (b) (1)) and "may" address "information relating to relevant past performance." ASA 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 42.15 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, ASA 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.

ASA 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

95-029-73

Page - 8 American Subcontractors Assn. Comments
RE: FAR Case 95-029 "Federal Acquisition Regulation Part 15 -- Re-write"

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 (a) (2) (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, 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.

ASA remains concerned that the FARs also currently provide that the identity of the Government (and other) sources of past performance information is not to be revealed.

ASA 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 Policy (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.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' 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 15.202 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.

95-029-73

Page - 9 American Subcontractors Assn. Comments
RE: FAR Case 95-029 "Federal Acquisition Regulation Part 15 -- Re-write"

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 believe 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 15.205 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 15.205.

9. PARTICIPATION THROUGH ELECTRONIC CONTRACTING

Proposed FAR 15.203 (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 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 non-uniform 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

95-029-13

Page - 10 American Subcontractors Assn. Comments
RE: FAR Case 95-029 "Federal Acquisition Regulation Part 15 -- Re-write"

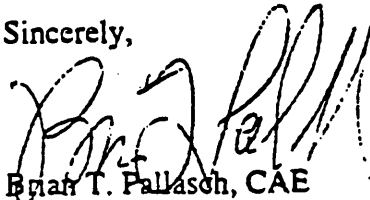
to ensure the integrity of the federal procurement process, the involvement of small business in the competition for federal contracts, and will result in a streamlined procurement system.

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 peddling, and not to one which fosters full 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.

Sincerely,



Brian T. Pallasch, CAE
Director of Government Relations

7-21-97

FROM THE DESK
OF
LARRHONDA M. ERBY-SPRIGGS

PHONE: (202)501-0692

FAX: (202) 501-4067

TO: DAR-Council

FAX: _____

LOCATION: _____

COMMENTS: Attached is Comment

Number 95-029-74

please bring to Ralph Dastefanis
attention

Thank you
Very much

95-029-74
United States Department of State

Washington, D.C. 20520

Office of the Procurement Executive
State Annex Number Six, Room 603

July 14, 1997

FAR Secretariat (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. 15.100 - 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.
2. 15.101 - This coverage essentially negates the accepted meaning of the term "best value" acquisition, in that lowest-priced technically acceptable awards are now considered best value. It is suggested that some other term be used to convey the intended message (e.g., "most advantageous selection," etc.).
3. 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 (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.

JUL 18 1997

95-029-74

4. 15.102 - Paragraph (b) needs clarification in that references to "solicitation" and "first-step solicitation" are used interchangeably so that it is unclear which step is intended.
5. 15.103 - 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).
6. 15.201 - The reference to "products" in paragraph (b) should be replaced with "supplies," for consistency with the rest of the FAR.
7. 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 15C provides instructions to offerors regarding remittance address, but this item is deleted from the OF-308 and thus requires that Section H of all RFPs contain additional wording on this topic (see proposed FAR 15.204-2(g)).
8. 15.205 - 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. 15.401 - 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. 15.405(a)(2)(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.
13. 15.606 - 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.

95-029-74

15. 52.215-1 - 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. 15.502(a) - The guidance in this paragraph is inartfully presented. The numbered subparagraphs 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 15.503-1(c)(4).
18. 15.504-4(c)(4)(i)(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. 15.504-4(d)(1)(i)(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. 15.504-4(d)(1)(ii)(B) - Please define what is meant by "closely priced."
21. 15.504-4(d)(1)(iii) - This subparagraph should be deleted; at its premise is that small businesses are inherently more risky than large businesses, which is an improper assumption.
22. 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 primarily 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 15.002(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.

95-029-74

We appreciate the opportunity to comment on the proposed regulation.

Sincerely,



Lloyd W. Pratsch
Procurement Executive

Enclosures (as stated)

95-029-74

Notes for FAR 15.6 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 15.6 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 15.6, 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 15.6, 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.

95-029-74

Version A

Delete current FAR 15.6 and replace with the following:

SUBPART 15.6 - SOURCE SELECTION**15.600 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.

15.601 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--

- (i) Significantly more important than cost or price;
- (ii) Approximately equal to cost or price; or
- (iii) Significantly less important than cost or price.

15.602 DISCUSSIONS

(a) Except as provided in paragraph (b) of this section, the contracting officer shall conduct written or oral discussions with all responsible offerors 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 offerors 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

95-029-74

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.

15.603 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.

95-029-74

Version B

SUBPART 15.6 - SOURCE SELECTION

15.600 SCOPE OF SUBPART.

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 during the competition are discussed in 15.613.~~

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 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 authority 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, as used in this subpart, means any practice which (a) reduces the amount of any hazardous substance, pollutant, or contaminant entering any waste stream or otherwise released into the environment prior to recycling, treatment, or disposal; and (b) reduces the hazards to public health and the environment associated 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 proposals that meet the Government's minimum requirements stated in the solicitation; or~~

~~(2) Competition involving an evaluation and comparison of cost or price and other factors.~~

(b) This subpart [is not required for] ~~does not apply to~~ acquisitions using simplified acquisition procedures (see part 13).

15.603 PURPOSE.

Source selection procedures are designed to -

~~(a) Maximize competition;~~

[(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 highest degree of realism and whose performance is expected [best] to best meet stated~~ Government requirements.

15.604 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 15.4 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.

15.605 EVALUATION FACTORS AND SUBFACTORS.

45-029-74

(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--

(i) Price or cost to the Government shall be included as an evaluation factor in every source selection.

(ii) Past performance shall [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 contracting officer documents in the contract file the reasons why past performance should not be evaluated. Agencies may develop their own phase in schedule for past performance evaluations which meets or exceeds the following milestones: All solicitations with an estimated value in excess 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 performance may be evaluated in competitively negotiated acquisitions estimated at \$100,000 or less at the discretion of the contracting officer.

~~(iii) Quality shall be addressed in every source selection through inclusion in one or more of the non-cost evaluation factors or subfactors, such as past performance, technical excellence, management capability, personnel qualifications, prior experience, and schedule compliance.~~

~~(iv) Environmental objectives, such as promoting waste reduction, source reduction, energy efficiency, and maximum practicable recovered material content (see part 23), shall also be considered in every source selection, when appropriate.~~

(2) Any other relevant factors or subfactors, such as cost realism, may also be included.

(c) In awarding a cost-reimbursement 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 cost-reimbursement 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.

95-029-74

(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 15.406-5(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--

- (i) Significantly more important than cost or price;
- (ii) 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] will be evaluated on the basis of advantages and disadvantages to the Government that might result from making more than one award (see 15.407(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 administering 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 administrative costs.

15.606 CHANGES IN GOVERNMENT REQUIREMENTS.

(a) When, either before or after receipt of proposals, the Government changes, relaxes, increases, or otherwise modifies its requirements, the contracting officer shall [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 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 [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 shall [should] consider the stage in the acquisition cycle at which the change occurs and the magnitude of the change, as follows:

95-029-74

(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 offerors 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 shall [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 originally solicited and to any firms added to the original 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 offerors the solution proposed in the original departure or any other information that is entitled to protection (see 15.407(c)(8) and 15.610(d)).

15.607 DISCLOSURE OF MISTAKES BEFORE AWARD.

(a) Contracting officers shall [should] examine all proposals for minor informalities or irregularities and apparent clerical mistakes (see 14.405 and 14.407). Communication with offerors to resolve these matters is 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 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.

95-029-74

(3) If an offeror requests permission to correct a mistake in its proposal, the agency head ~~(or a designee not below the level of chief of the contracting office)~~ [contracting officer] may make a written determination permitting the correction; provided, that (i) both the existence of the mistake and the proposal actually intended are established by clear and convincing evidence from the solicitation and the proposal and (ii) ~~legal review is obtained before making the determination.~~

(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 subparagraphs (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 ~~only~~ through discussions under 15.610.

(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 ~~immediately 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 originally submitted; and

(2) That the unreadable condition of the proposal was caused by Government software or hardware error, malfunction, or other Government mishandling.

15.608 PROPOSAL EVALUATION.

(a) Proposal evaluation is an assessment of both the proposal and the offeror's ability to successfully accomplish 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 15.8) 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.

~~(2) Past performance evaluation.~~

~~(i) Past performance information is an indicator of an offeror's ability to perform the contract. The comparative assessment of past performance information is separate from the responsibility determination required under 48 CFR 9.103. The number and severity of an offeror's problems, the effectiveness of corrective action taken, the offeror's overall work record, and the age and relevance of past performance information should be considered at the time it is used.~~

95-029-74

~~(ii) Where past performance is to be evaluated, the solicitation shall afford offerors the opportunity to identify Federal, state, and local government, and private contracts performed by the offerors that were similar in nature to the contract being evaluated, so that the Government may verify the offerors' past performance on these contracts. In addition, at the discretion of the contracting officer, the offerors may provide information on problems encountered on the identified contracts and the offerors' corrective actions. Past performance information may also be obtained from other sources known to the Government. The source and type of past performance information to be included in the evaluation is within the broad discretion of agency acquisition officials and should be tailored to the circumstances of each acquisition. Evaluations of contractor performance prepared in accordance with 48 CFR part 42, subpart 42.15 are one source of performance information which may be used.~~

~~(iii) Firms lacking relevant past performance history shall receive 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 -

- (i) The basis for evaluation;
- (ii) An analysis of the technically acceptable and unacceptable proposals, including an assessment of each offeror's ability to accomplish the technical requirements;
- (iii) 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 3.3 for reports to be made to the Department of Justice);
- (3) A cost comparison as prescribed in OMB Circular A-76 and subpart 7.3 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).

95-029-74

(c) The requirements of 14.408-3, Prompt payment discounts, are applicable to negotiated acquisitions.

15.609 COMPETITIVE RANGE [REJECTION OF PROPOSALS]

(a) The contracting officer [may at any time reject] ~~shall determine which proposals [that are not considered to be in the competitive range from a price or technical standpoint.] are in the competitive range for the purpose of conducting written or oral discussion (see 15.610(b)).~~ The competitive range shall be determined on the basis of cost or price and other factors that were stated in the solicitation and shall include all proposals that have a reasonable chance of being selected for award. When there is doubt as to whether a proposal is in the competitive range, the proposal should be included.

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

~~(c) The contracting officer shall notify in writing an unsuccessful offeror at the earliest practicable time that its proposal is no longer eligible for award (see 15.1002(b)).~~

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

15.610 WRITTEN OR ORAL DISCUSSION.

(a) The requirement in paragraph (b) 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 offerors 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.

95-029-74

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

(c) The contracting officer shall

~~(1)~~ Control all discussions and should:

(2[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 15.607 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 (i.e., helping an offeror to bring its proposal up to the level of other proposals through successive rounds of discussion, such as by pointing out weaknesses resulting from the offeror's lack of diligence, competence, or inventiveness in preparing the proposal).

(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 3.104 to which civil and criminal penalties and administrative remedies apply.

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

(2) Auction techniques, such as -

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

95-029-74

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

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

15.611 BEST AND FINAL OFFERS.

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

(d) Following evaluation of the best and final offers, the contracting officer (or other designated source selection authority) shall select that source whose best and final offer is most advantageous to the Government, ~~considering price and the other factors included in the solicitation (but see 15.608(b))~~ in accordance with the evaluation factors stated in the solicitation.

~~15.612 FORMAL SOURCE SELECTION.~~

~~(a) General. A source selection process is considered formal when a specific evaluation group structure is established to evaluate proposals and select the source for contract award. This approach is generally used in high 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.~~

95-029-74

~~(b) Responsibilities. When using formal source selection, the agency head or a 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 establishes an evaluation group structure appropriate to the requirements of the particular solicitation; and~~

~~(3) Before conducting any presolicitation conferences (see 15.404) or issuing the solicitation, the source selection authority approves a source selection plan.~~

~~(c) Source Selection Plan. As a minimum, the plan shall include—~~

~~(1) A description of the organization structure;~~

~~(2) Proposed presolicitation activities;~~

~~(3) A summary of the acquisition strategy;~~

~~(4) A statement of the proposed evaluation factors and any significant subfactors and their relative importance;~~

~~(5) A description of the evaluation process, methodology, and techniques to be used; and~~

~~(6) A schedule of significant milestones.~~

~~(d) Source Selection Decision. The source selection authority shall use the factors established in the solicitation (see 15.605) to make the source selection decision.~~

~~(1) The source selection authority shall consider any rankings and ratings, and, if requested, any recommendations prepared by evaluation and advisory groups.~~

~~(2) The supporting documentation prepared for the selection decision shall show the relative differences among proposals and their strengths, weaknesses, and risks in terms of the evaluation factors. The supporting documentation shall include the basis and reasons for the decision.~~

~~(e) Safeguarding information. Consistent with part 24 and subpart 3.104, agencies shall exercise particular care to protect source selection information.~~

~~(1) During the source selection process, disclosure of proprietary or source selection information shall be governed by 3.104-5 and applicable agency regulations. After the~~

95-029-74

~~source selection, releasing authority shall be as prescribed in agency procedures. 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 source selection authority (see 3.104 for additional restrictions).~~

~~(f) Postaward notices and debriefings. See 15.1002(e) and 15.1004.~~

~~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, and that differ from other procedures prescribed in subpart 15.6. The procedures are the NASA Source Evaluation Board procedures and the DoD Four Step Source Selection Procedures. Detailed coverage of these procedures is in the respective agency acquisition regulations.~~

~~(b) Other agencies may use either the NASA or DoD procedure as a model in developing their own procedures, including applicability criteria, consistent with mission needs.~~

PFC 730.5.21

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

95-029-75

(iv) The contracting officer determines 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 estimating 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 may 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 denied 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 prime contractor or higher tier subcontractor, with the consent of the subcontractor reviewed, a summary of the analysis performed in determining any unacceptable costs 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 prevent disclosure of subcontractor proprietary data.

Group 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 15.106 provides the exception for excluding contract clause FAR 52.215-2, Audit and Records--Negotiation, in commercial

DIR DEL PROC

FAX: 703-6931142

95-029-75

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 claimed on cost-reimbursement, incentive, time-and-material, labor-hour, or price redeterminable contracts. FAR 52.215-2 does not provide for examination of costs on fixed-priced contracts or fixed-price contracts with economic price adjustment. Commercial item contracts are only fixed-price or fixed-price with economic price adjustment. 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 this clause in a commercial item 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 52.215-2 in commercial item contracts.

Questions may be addressed to Ms. Joyce Friedland, Program Manager, Pricing, Finance and Claims Division, at (703) 767-2270.

Sincerely,

/Signed/
Lawrence P. Uhlfelder
Assistant Director
Policy and Plans



U.S. GENERAL SERVICES ADMINISTRATION
Office of Governmentwide Policy

JUL 22 1997

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

FROM:

Sharon A. Kiser
for SHARON A. KISER
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.

| <u>Response Number</u> | <u>Date Received</u> | <u>Comment Date</u> | <u>Commenter</u> |
|------------------------|----------------------|---------------------|------------------|
| 95-029-76 | 07/21/97 | 07/16/97 | DoD/Air Force |
| 95-029-77 | 07/21/97 | 07/16/97 | Veterans Affairs |
| Attachments | | | |

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



DEPARTMENT OF THE AIR FORCE
11TH WING

95-029-154

U.S. AIR FORCE



JUL 16 1997

MEMORANDUM FOR GENERAL SERVICES ADMINISTRATION
FAR SECRETARIAT (VRS)
1800 F STREETS, NW, ROOM 4035
WASHINGTON, DC 20405

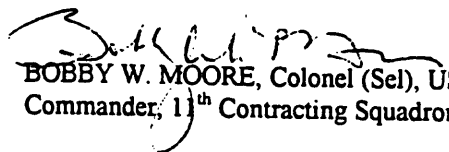
FROM: 11 CONS/LGC
500 Duncan Ave, Rm 250
Bolling AFB DC 20332-0305

SUBJECT: Comments on FAR Case 95-029, FAR Part 15, Group A

1. This office has reviewed the proposed new rule and has the following comments.

FAR Part 15.209 (a), Solicitation 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-Competitive Acquisition, if the Government intends to make award without discussions. and use the Alternate I if the Government intends to make award after discussions with offerors within the competitive range. This FAR Part as proposed in the rewrite, provides the Contracting 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 limit the ability of the CO to make the correct decision at the proper time 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 submit the best proposal because the CO may determine that an award can be made without discussions. However, if 15.209 (a) is left as it is, what would be the criteria for the determination of the CO for award with or without discussions at the time before the solicitation sent out. The FAR provides no direction on this issue. However, at FAR Part 15.406 (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. Questions regarding the above should be addressed to Janice K. McConaha, LGCP, (202) 404-1223.


BOBBY W. MOORE, Colonel (Sel), USAF
Commander, 1st Contracting Squadron

JUL 21 1997



DEPARTMENT OF THE AIR FORCE
11TH WING



JUL 16 1997

MEMORANDUM FOR GENERAL SERVICES ADMINISTRATION
FAR SECRETARIAT (VRS)
1800 F STREETS, NW, ROOM 4035
WASHINGTON, DC 20405


FROM: 11 CONS/LGC
500 Duncan Ave, Rm 250
Bolling AFB DC 20332-0305

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 Realism Analysis. This section provides for cost realism analysis on fixed-price type contracts limited 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 responsibility 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 experience (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.


BOBBY W. MOORE, Colonel (Sel), USAF
Commander, 11th Contracting Squadron



DEPARTMENT OF VETERANS AFFAIRS
DEPUTY ASSISTANT SECRETARY FOR ACQUISITION AND MATERIEL MANAGEMENT
WASHINGTON DC 20420

95-029-111

JUL 21 1997

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 "agencies may seek limited information initially" in paragraph 15.102(a) appears to be in conflict with the specific requirements 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. 15.204. Add contracts for commercial items to the list of contracts where the standard contract format need not be used.
- c. 15.207. 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. 15.209. Needs to address whether or not the prescribed clauses apply to commercial item acquisitions.
- e. 15.210. 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 likelihood of award" in lieu of "efficient competition". The term "efficient competition" is too arbitrary and increases the chances of litigation by excluded offerors. 52.215-1(f)(4) should be revised accordingly.

OPTIONAL FORM 99 (7-96)

| | | |
|--------------------------------------|----------------------|---------------------------------|
| FAX TRANSMITTAL | | # of pages = 2 |
| TO Beverly Fayson Dept./Agency | FROM Ramona Jones | Phone # 273-8821 |
| Fax # 501-4067 | Fax # 273-9352 | |
| NSN 7540-01-317-7368 | 5099-101 | GENERAL SERVICES ADMINISTRATION |

JUL 21 1997

95-029-11

2.

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 rewrite incorporates information currently contained in 52.215-11, Authorized Negotiators, and 52.215-12, Restriction on Disclosure and Use of Data and deletes them as separate clauses. If 52.215-1 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 solicitations for commercial items, it needs to be revised to conform with 52.212 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 Policy Team. She may be reached at (202) 273-8821.


Gary I. Krump