On November 27, 1996, the Section submitted lengthy comments to the General Services Administration regarding Phase I of its proposed FAR Part 15 rewrite. The Section expressed its general support for reform measures to streamline acquisitions, and enhance efficiency and provide flexibility, particularly in this era of downsized staff and reduced budgets. Such reform efforts, noted the Section, must be tempered by preserving fairness for those who contract with the Government through the statutory requirement for full and open competition.

The Section expressed concern that the FAR Part 15 rewrite, which seeks to accord source selection officials greater discretion, could open up new areas for legal challenges unless the statutory requirement for full and open competition and the need to maintain fairness also continue to be observed. The Section advised that the guiding principle for the FAR Part 15 rewrite is that the negotiation process must be open, fair, in accordance with announced criteria and supported by a reviewable rationale. The Section observed that negotiation techniques intended to maximize efficiency and drive the lowest possible price in a particular procurement may not be in the Government's long-term interest if they undermine confidence in the integrity of the acquisition process.

The Section offered several specific suggestions and recommendations to improve the proposed rule. First, the Section suggested a change in the language of proposed FAR 1.102(c)(3) which states that "fairness does not mean that offerors and contractors of different capabilities, past performance, or other relevant factors, must be treated the same." The Section observed that this could be misunderstood as an invitation for unequal treatment by contractors in violation of the statutory requirement for full and open competition.

The Section then addressed proposed FAR 15.406, which would permit the Government to estimate the size of the competitive range in advance. The Section observed that neither a fixed number nor an advance estimate appears consistent with the statutory mandate that the competitive range consist of the greatest number that will permit an efficient competition among the offerors rated most highly in accordance with such solicitation and criteria. The Section noted that the goal of "efficiency", which is essentially resource driven, cannot be accomplished in advance of proposed evaluation.

The Section next recommended modifying proposed FAR 15.407, which would authorize contracting officers to conduct communications with offerors before establishing a competitive range; these communications would not be considered discussions. The Section observed that this relaxation of procedures could give selected offerors an unequal advantage and allow insight into agency thought processes unavailable to other offerors. The Section noted that these provisions would present opportunities for unfairness and unequal treatment.

The Section also recommended changes to provisions of the proposed rule that would deny offerors any opportunity to comment on negative past performance reports and deny offerors the right to know the identity of the individuals who provided past performance information. Instead, the Section proposed that offerors should have an opportunity to comment on the relevance of past performance information.

The Section recommended various other changes to the proposed rule aimed at maintaining fairness in the procurement process in the face of wholesale acquisition streamlining reform.
November 27, 1996

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

Re: Proposed FAR Part 15 Rewrite - Phase I
FAR Case No. 95-029 (61 Fed. Reg. 48380)

Dear Sir or Madam:

On behalf of the Section of Public Contract Law of the American Bar Association ("Section"), I am submitting comments on the above-referenced matter. The 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 Directors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.

GUIDING PRINCIPLES

The Section supports reform measures to streamline acquisitions, enhance efficiency and provide flexibility, particularly in this era of downsized staffs and reduced budgets. At the same time, Congress has emphasized that in recent reform legislation (Federal Acquisition Reform Act of 1996, Pub. L. 104-106 ("FARA")), Congress has made "no change to the requirement for full and open competition or to the definition of full and open competition." H.R. Conf. Rep. No. 104-450, § 4010 (1996). Representative Clinger stated, concerning the enactment of several reform efforts during 1996, that Congress worked hard to "strike a balance between affordability, accountability, and accessibility. . . . Only through the most vigorous implementation will we achieve the goal of creating a more responsive system which provides more discretion to government buyers and freedom for those who sell to them while maintaining the requisite degree of control and fairness." 66 Fed. Cont. Rep. (BNA)(1996) p. 362.

Striking a workable balance between the government's need for flexibility, and the equally important need for fairness, is the challenge faced by the regulators. The Section believes that the FAR 15 Rewrite, which seeks to accord source selection officials greater discretion, could open up new areas for legal challenges unless the statutory requirement for full and open competition, and the need to maintain fairness, also continue to be observed. The Section trusts that by calling attention to those vulnerabilities, the FAR 15 Rewrite effort will be strengthened and may be able to avoid pitfalls that could well result in unnecessary litigation and eventually, a circumscribing of the very flexibility for government officials that the Rewrite hopes to accomplish.

The procedures in current FAR Part 15 have been developed and refined over many years and interpreted
in a large body of decisions from the courts, the boards and the GAO. Significant revisions to the rules such as those proposed by the FAR 15 Rewrite could unsettle the negotiated procurement process while a similar development/refinement takes place for the new rules. The Section believes the risk can be minimized through careful crafting of the revisions to avoid, wherever possible, unnecessary ambiguities and conflicts with existing statutory requirements.

Many of the practices found in the proposed changes to FAR Part 15 are currently being used in some form by agencies pursuant to the current FAR Part 15 provisions. Two examples are oral presentations and multiphase procurements. These are progressive developments that can be readily expanded through additional management initiatives in the government; they are being used under existing rules and procedures that provide procedural safeguards for both government and industry. These practices do not require changes in regulation.

In areas where changes in the regulations are necessary, a guiding principle for FAR Part 15 is that the negotiation process must be open, fair, in accordance with announced criteria and supported by a reviewable rationale. Since the enactment of the Administrative Procedure Act in the mid 1940s, Congress has declared that administrative actions of Government officials must be rationally based on clear and explicit standards, and supported by a written record that is available to a reviewing court. Congress long ago decided that, while Government officials must have the discretion they need to discharge their responsibilities, they must also act in a manner that permits later review for alleged abuse of that discretion. This principle is in no sense an affront to any Government official, but rather is an abiding premise of an open society.

Further, the basic goal of the negotiation process is to achieve fair and reasonable prices. The earliest iterations of the regulations governing negotiated procurements stated the Government's policy to procure supplies and services "at fair and reasonable prices calculated to result in the lowest overall costs to the Government." Armed Services Procurement Regulation (ASPR) § 3.108-1 (1959). Auction techniques, for example, have been prohibited from the outset (ASPR § 3.805-1), because they are inconsistent with the Government's duty -- both as the sovereign and as the dominant contracting party -- to treat its citizens and suppliers fairly and even-handedly. Negotiation techniques intended to maximize efficiency and drive the lowest possible price in a particular procurement may not be in the Government's long-term interest, if they undermine confidence in the integrity of the acquisition process.

With the comments that follow, the Section seeks to strengthen the ability of the government to act with flexibility, while maintaining consistency with guiding principles such as those set forth in statutory requirements, and maintaining a critical balance of fairness for those who would do business with the United States.

**SUMMARY OF COMMENTS**

The following is a summary of some of the more significant features of the Section’s comments:

- Many of the Section's concerns relate to fairness and equal treatment of offerors. The commentary accompanying the proposed regulation states "[t]he greatest challenge to the committee was addressing the concerns that traditionally have been raised under the concept of fairness, while maintaining an acquisition process that promotes best value to the taxpayers." 61 Fed. Reg. 48381. Proposed FAR 1.102(c)(3) states "[a]ll offerors and contractors are entitled to fair treatment." It further states, however, that "[f]airness does not mean that offerors and contractors of differing capabilities, past performance, or other relevant factors, must be treated the same." This could be misunderstood as an invitation for unequal treatment by evaluators, which, coupled with potential problem areas discussed in further detail in these comments, could lead to rulings that the proposed regulation exceeds the bounds of the statutory requirement for full and open competition. Equal treatment and fairness have been hallmarks of administrative and judicial rulings construing the statutory requirements for competition.

- Proposed FAR 15.406 states that it would permit the Government to estimate the size of the competitive range in advance. Nevertheless, the rewrite would permit the competitive range to
be fixed in advance. Neither a fixed number nor an advance estimate appears consistent with the statutory mandate that the competitive range consist of the "greatest number that will permit an efficient competition among the offerors rated most highly in accordance with such [solicitation] criteria." That objective cannot be achieved without evaluation of offerors. The goal of "efficiency," which is essentially resource-driven, cannot be accomplished in advance of proposal evaluation.

Proposed FAR Part 15 Rewrite - Phase I

Proposed FAR 15.407 would authorize contracting officers to conduct communications with offerors before establishing the competitive range. Those communications could address deficiencies in the proposal, need not be confirmed in writing, and could be used in evaluation. These communications would not have to be conducted with all offerors, would not be considered "discussions," and would not be intended to permit changes in a proposal other than correction of mistakes. This relaxation of procedures could give selected offerors an unequal advantage and allow insight into agency thought processes unavailable to other offerors.

After establishment of the competitive range, discussions would be limited to "deficiencies." Agreements would not need to be confirmed before final evaluation, only before award. Discussion of "clarifications" would not be permitted. The agency could continue discussions with one offeror without discussions with other offerors. The requirement for best and final offers would be abolished (proposed FAR 15.409) and there would be no common cutoff date for revisions to offers. These provisions also present opportunities for unfairness and unequal treatment.

Proposed FAR 15.407(d) would only prohibit revealing an offeror's "technical solution," in place of the present prohibition against disclosing "technical information." Also, while the rewrite would nominally prohibit auctions, the agency could (a) indicate the cost or price the offeror must meet for further consideration, (b) advise of the price standing of another offeror, without disclosing its price, or (c) furnish other information about other offerors' prices, as long as the "price" itself is not disclosed.

Offerors, under proposed FAR 15.407(c), would have no opportunity to comment on negative past performance reports on which they presumably had an earlier opportunity to comment. Nor, under proposed FAR 15.407(d)(4), would offerors be entitled to know the identity of individuals who provided reference information about an offeror's past performance. These provisions could frustrate an offeror's right to comment on the relevance of past performance information to the solicitation requirements in question.

"Best Value" is redefined in proposed FAR 2.101 as "an offer or quote which is most advantageous to the Government, cost or price and other factors considered." Award should be made on the basis of "stated Government requirements," as set forth in present FAR 15.603(d). In addition, proposed FAR 15.102 could be challenged as providing incorrect guidance on the justification needed for tradeoff decisions. See also, proposed FAR 15.410(b).

Proposed FAR 15.101 would treat "lowest price technically acceptable" under the heading of best value, with a pass/fail criterion. This presents a definitional problem in that "lowest price technically acceptable" does not involve the cost/technical tradeoffs found in best value procurement. In addition, it is difficult to understand how the requirement of "neutral" evaluation of past performance for an offeror with no performance history would work in general, and, in particular, in the case of the lowest price technically acceptable category. See proposed FAR 15.405(a)(2)(iii).

Proposed FAR 15.104(a) would allow oral presentations to substitute for written information. There could even be oral proposals in response to oral RFPs. See proposed FAR 15.207(d). In the absence of a written record, there would likely be substantial dispute over the terms of the agreement.
Proposed FAR Part 15 Rewrite - Phase I

Proposed FAR 15.207(b) would unconditionally allow late proposals and late modification of proposals, without time limitation or a requirement to demonstrate excuse for failure to comply with time deadlines. These provisions are likely to be viewed as invitations for abuse.

**SPECIFIC COMMENTS**

Specific comments and recommendations on the proposed revisions are discussed in the following sections:

**Proposed Subpart 15.1 - Source Selection Processes and Techniques**

Proposed Subpart 15.1 - Source Selection Processes and Techniques generally summarizes some of the acquisition processes and techniques that can be used singularly, or in combination, depending upon the complexity of the procurement. The Section believes it is helpful to lay out the various procedures. Nevertheless, several clarifications are necessary to eliminate potential problems.

One general comment that applies to the entire proposed rewrite of FAR Part 15 is the inconsistent use of the terms "cost" and "price." Since FAR Part 15 applies to both cost reimbursement and fixed-price contracts, the terms "cost" and "price" are generally applicable to all the described contracting procedures. In some sections either "cost" or "price" is used, when both would seem applicable. Accordingly, in addition to the specific changes recommended below, conforming changes are needed throughout proposed Part 15 to reflect the applicability of both types of contracting.

**Proposed FAR 15.101 - The Inclusion Of The Lowest Price Technically Acceptable Process Under The Heading Of Best Value Creates Problems**

The language of proposed FAR Subpart 15.1 indicates that all methods of negotiated procurement, including the lowest price technically acceptable process, are considered to be "best value" procurements. Proposed FAR 15.100 states that the Source Selection Authority ("SSA") "should select the process most appropriate to the particular acquisition that is expected to result in the best value." (Emphasis added.) Further, "best value" is defined in proposed FAR 2.101 Definitions as "an offer or quote which is most advantageous to the Government, cost and price and other factors considered." This standard is different from the current requirement in FAR 15.603(d) for the offer that "best meets the stated Government requirements." The distinction is significant. Award should be made on the basis of stated Government requirements -- not simply on which proposal is deemed best.

The inclusion of the lowest price technically acceptable process in proposed FAR 15.101 under the general category of best value is inconsistent with the law that has developed at the GAO and the federal courts. See, e.g., Widnall v. B3H Corporation, 75 F.3d 1577 (Fed. Cir. 1996). Traditionally, these decisions have equated best value with the greatest value method of source selection described in the current FAR 15.605(c), where the SSA can trade off the cost or price against the non-cost factors to select the proposal that represents the greatest value to the Government. However, the low cost technically acceptable approach allows for no such tradeoff.

If the lowest price technically acceptable process is retained in this part of the FAR, some clarification or further definition is required. It would be appropriate to clarify the meaning of "technically acceptable" as meeting or exceeding all of the technical requirements set forth in the solicitation. Without guidance, this method might be used with inappropriate specifications, which could lead to vastly different approaches by offerors.

Also, it is not clear whether the drafters intended to use this method only in firm fixed-price procurements. Proposed FAR 15.101(b)(1) indicates that award will be made on the basis of the "lowest evaluated price." The use of "evaluated" usually implies other than a firm fixed-price procurement (although transportation costs, life cycle costs and operation and maintenance costs can be part of evaluation of a fixed-price proposal). If other types of contracts can be used, further clarifications and revisions are appropriate.

**Proposed FAR 15.102 - Tradeoff Process Requires Justification**
Proposed FAR 15.102(b)(3) states that best value cost/technical tradeoffs "need not be described in terms of cost or price imparts nor do the tradeoffs need to be quantified in any other manner." The Section recommends that this guidance be modified. Tradeoff decisions require justification and a statement of rationale is needed to provide visibility into the process. See additional discussion under proposed FAR 15.410(b).

**Proposed FAR 15.103 - Needs To Be Modified To Provide Offerors A More Meaningful Evaluation And The Government The Opportunity To Consider The Best Proposals**

The Section recognizes the potential benefits from the multiphase procurement process. It provides the Government with a useful tool for those situations when "the submission of full proposals at the beginning of a source selection would be burdensome for offerors to prepare and for Government personnel to evaluate." Proposed FAR 15.103(a). However, it is unclear why this multiphase process is being introduced as a separate form of negotiated procurement. Multiphase procurements are being utilized by agencies under the current provisions of FAR Part 15. If this process can be generally accommodated under the current FAR, it may be questioned why the proposal procedure (particularly with the shortcomings described below) should be specifically proposed as a separate process. Indeed, inclusion of specific detailed procedures may be interpreted by some agencies as removing contracting officer discretion to use other innovative multiphase procurement methods. Furthermore, several aspects of this proposed language may result in unfair treatment and the Government not achieving the hoped for efficiencies.

The procedures laid out in the proposed language appear similar to the provision in the Federal Acquisition Reform Act ("FARA") for the new design-build, two-phase procurement method for construction contracts. See FARA 4105(a), (b), codified at 10 USC 2305(d). However, unlike the provisions in FARA, the proposed FAR language provides no further guidance on when this process should be used. For example, this multiphase process seems unnecessary if there are only two offerors capable of meeting the Government's requirements.

More fundamentally, the proposed language suffers from its failure to provide the Government's ultimate evaluation criteria and evaluation process in the first phase. From the outset, the Government and the offerors should be operating from a common understanding as to how the Government will ultimately evaluate and select an awardee. The Section appreciates that in a multiphase procurement the Government may not know precisely the scope of work or approach it will ultimately select. In fact, in typical large development contracts the design of the desired item evolves over time and is not established until the production stage. Nevertheless, the evaluation criteria and the evaluation process used to judge the various proposals can be established and disclosed from the beginning. To make an informed decision whether to participate in the procurement and how to prepare their proposals, offerors should be apprised of the contemplated evaluation factors and process from the outset. To the extent the Government lacks this fundamental information, it should further define the need for the project, obtain more information on possible approaches, or both. Should the Government determine there is a need to change the evaluation criteria and method during the process, it can do so by amending the solicitation.

This problem is not remedied by the proposed language in FAR 15.103(d)(1), which makes the initial down-select mandatory only if the evaluation criteria and process for the succeeding phases are disclosed in the first phase and sufficient information is required to constitute binding offers. If both are not present, proposed FAR 15.103(d)(1) indicates that the down-select is only advisory. Even though the down-select might only be advisory, it seems unlikely that any offeror that is informed it should not participate in the following phases would ever stand a reasonable chance of being selected for award. Moreover, in the absence of any disclosure of evaluation criteria and process, offerors can only guess at the Government's initial preferences.

Another problem with the proposed language is the difficulty in using this process while only requiring a minimum amount of information in the first phase. Proposed FAR 15.103(c) indicates that the information in the first phase may be limited to "a statement of qualifications and appropriate information (e.g., proposed technical concept, past performance information, limited pricing information)." This information may be so limited that the agency is unable to conduct an adequate analysis of the proposal and gain an understanding of whether an offeror could meet the Government's ultimate requirement. Further, smaller
companies, or those that are less well known in a particular area, would likely be at a substantial disadvantage. Given the limited information that can be required there is also a potential for undue emphasis on past performance. Without additional guidance, over-reliance on any single item may distort the analysis of an offer and cause its premature elimination.

Nor is the problem resolved by making the down-select advisory if sufficient information is not required to constitute a binding offer. As noted above, an offeror that is advised it should not continue may not, as a practical matter, stand much of a chance in succeeding phases. At a minimum, being told it should not continue to participate in the procurement would discourage many companies even though one might ultimately propose the best offer. There is a distinct potential for even an advisory down-select on the limited information allowed by the proposed FAR language to be abused as a circumvention of the statutory requirement for full and open competition. Without additional guidance and the requirement for offerors to provide, and the Government to consider, more complete initial information, this process could effectively become a prequalification step that does not meet the statutory requirements for prequalification. See 10 U.S.C. \(15.103\) and 41 U.S.C. \(15.103\).

Based on the foregoing, the Section recommends that proposed FAR 15.103 be modified to require that the Government disclose the evaluation criteria and process, as it exists in the first phase. Additionally, more than the information listed in proposed FAR 15.103(c) should be required from offerors in the first phase. While a requirement for a full proposal might defeat the underlying purpose of this multiphase process, more than the minimal "qualification-type" information should be solicited. At a minimum, the second sentence in proposed FAR 15.103(c) specifying the minimum information in a first phase response, should be modified to require more detailed information about the offeror's proposal. Finally, additional guidance should be provided in the proposed language as to when the multiphase process is appropriate.

**Proposed FAR 15.104 - Should Be Modified To Make Clear That Oral Presentations Cannot Be Substituted For Written Information**

The Section endorses the use of oral presentations as an important tool for both the Government and contractors during the evaluation process. It allows the offerors to clearly articulate and explain in a meaningful way their proposals. However, an underlying concept in proposed FAR 15.104 would create problems.

Proposed FAR 15.104(a) allows and encourages oral presentations to "substitute for, rather than augment, written information." The only restriction on the scope of the oral presentation is the admonition that "[e]xcept for certification, representation, and a signed offer sheet (including any exception to the Government's terms and conditions)," offerors may be required to submit all, or part of, their proposals through oral presentation. The proposed FAR provision does not require, nor even address recording the oral presentation in some fashion.

Substituting oral presentations for written submissions may be appropriate in limited circumstances. However, encouraging this practice as the norm raises serious questions. The following questions highlight the problem of allowing oral presentations to basically represent the entire substantive portion of a company's proposal:

- What happens if there is a subsequent dispute over what was said at the presentation regarding the offeror's proposal?
- What will form the basis for the contract?
- Will there be a requirement for the presentation to be reduced to writing?
- How will evaluators who are not present for the oral presentation conduct an effective evaluation?
- Must every evaluator be present for every oral presentation?
What record will be reviewed if award is challenged by an unsuccessful offeror?

To allow oral presentations to substitute rather than augment written proposals violates one of the fundamental precepts of contract law -- an integrated document that reflects the totality of the common understanding of the contractual obligations. In the absence of such a document, there is no record of the meeting of the minds of the parties, a basic requirement of all contracts. Without a written record, (a) disputes over the content of proposals could not be resolved either before or after award, (b) the Government could not rely on its contract to require the bargained-for goods and services, and (c) increased litigation would likely result. This problem could be amplified when oral offers are permitted in response to oral RFPs, under 15.202(g) and 15.207(d). Accordingly, the Section strongly recommends that FAR 15.104(a) be modified to read: "Except under the most limited circumstances, oral presentations should augment and not substitute for written information."

Proposed FAR 15.2 - Presolicitation Communication, Solicitations, Late Proposals, Model Contract Format

The Section wholeheartedly endorses increased communication between the Government and potential offerors at the presolicitation stage and agrees that it will "improve the understanding of Government requirements, thereby enhancing the Government's ability to obtain quality products and services at reasonable prices, and increase the efficiency in proposal preparation, proposal evaluation, negotiation and contract award." The Section encourages the continued use of draft RFPs, presolicitation conferences and other initiatives to discuss the Government's requirements with prospective offerors in advance of the solicitation closing date. The earlier a potential offeror becomes aware it cannot meet the Government's requirements, the less time and money will be spent pursuing and evaluating a fruitless proposal. In addition, in many cases the Government could do a better job of ensuring that its specifications are clearly and completely stated. Through draft RFPs and presolicitation conferences, the Government can ensure that vendors are able to identify potential problems. This technique could go far toward reducing ambiguities and forestalling bid protests.

The restructuring of the uniform contract format currently in FAR 15.406 into the model contract format in proposed FAR 15.203 is apparently proposed to reduce the time spent creating and responding to RFPs but at a substantial cost. Existing automatic contract preparation and administration systems could require substantial modification to accommodate the proposed model contract format. The Section recommends further study of the cost benefit analysis associated with conversion from the present format to the proposed model contract format before implementing this dramatic change.

In large part, the proposed rule achieves the appropriate balance between open communication and full and open competition. There are, however, several clarifications that the Section believes would (a) increase efficiency and cost reduction even further and (b) reduce the potential for successful legal challenges to the language in Section 15.2.

First, in addition to emphasizing that increased communication at the presolicitation stage will "improve the understanding of Government requirements, thereby enhancing the Government's ability to obtain quality products and services at reasonable prices, and increase the efficiency in proposal preparation, proposal evaluation, negotiation and contract award," proposed Section 15.201(b) should also emphasize that such communication presents a prime opportunity for the Government to conduct market research into the products and services available in the commercial marketplace to fulfill its needs. Substantial savings will also accrue to the Government when its solicitations reflect the products and services already being sold to other customers by its potential contractors.

Second, the Section strongly supports the early disclosure of general information about agency needs and future requirements (proposed Section 15.201(f)) but is concerned that if such information is released to an offeror and not made public in a timely fashion, protests may result. The Section believes the risk of controversy could be substantially reduced by eliminating the language "but not later than the next release of information," and substituting "but not later than the second business day following the release of the information."
Third, if a determination is made to retain the proposed model contract format, "basic agreements" and "shipbuilding (including design, construction and conversion), ship overhauls, and ship repairs," which currently appear on the list of items exempt from the Uniform Contract Format in FAR 15.406-1, should be added to the exemption list for the model contract format appearing in proposed FAR 15.203(a).

Fourth, proposed FAR 15.206(c) provides:

If a proposal received by the contracting officer in electronic format is unreadable to the degree that conformance to the essential requirements of the solicitation cannot be ascertained from the document, the contracting officer shall immediately notify the offeror and request retransmission of the proposal or, at the contracting officer’s discretion, resubmittal of the proposal in another format. If the retransmitted proposal is still unreadable, it may be rejected.

In the event the proposal is unreadable in any respect, the contracting officer should contact the contractor and have it retransmitted. The proposal should be susceptible to rejection only if the solicitation specifies that the proposal must be submitted in an electronic format and the contractor is unable to comply with that direction. Accordingly, the Section recommends proposed section 15.206(c) be rewritten to read:

If a proposal received by the contracting officer in electronic format is unreadable in any respect, the contracting officer shall immediately notify the offeror and request retransmission of the proposal. If the retransmitted proposal is still unreadable, and the solicitation requires submission of the proposal in the electronic format, it may be rejected, or at the contracting officer’s discretion it may be resubmitted in another format.

Fifth, proposed FAR 15.207(b) would provide that:

proposals, modifications, and revisions received in the designated Government office after the exact time specified are ‘late’ but may be considered if doing so is in the best interests of the Government. Government mishandling or fault need not be established in order to accept a late offer. The contracting officer shall promptly notify any offeror if its proposal, modification, or revision was received late and whether or not it will be considered, unless contract award is imminent and the notice prescribed in 15.803(b) would suffice.

Full and open competition would seem to demand that all offerors receive an identical amount of time in which to submit their proposals, for in many instances there will be a marked improvement in the quality of an offeror’s proposal with additional time. Although the GAO has upheld an agency practice of establishing a new proposal due date after receipt of a late proposal, in that instance, all offerors received the additional time, not just the offeror submitting the late proposal.

Moreover, the Government will not be able to achieve maximum efficiency in the proposal evaluation process if proposals continue to trickle in after the deadline. Such an open-ended process is bound at some point to call into question the integrity of the system because of the built-in opportunity for abuse. Accordingly, absent any Government fault, if one offeror is given additional time, the proposal cutoff date must be extended for all offerors. The Section believes the appropriate standard for late proposals is contained in the current FAR 15.412(c):

Proposals, and modifications to them, that are received in designated Government office after the exact time specified
are late and shall be considered only if (1) they are received
before award is made, and (2) the circumstances, including
acceptable evidence of date of mailing or receipt at the
Government installation, meet the specific requirements of the
provision at 52.215-10, Late Submissions, Modifications, and
Withdrawals of Proposals.

The Section recommends deleting proposed FAR 52.207(b) and replacing it with existing FAR 15.412(c). Consistent with this modification, in proposed FAR 52.215-1(c)(3), "and shall be considered at the Source Selection Authority's discretion" should be replaced with "in accordance with FAR 15.412(c)."

If proposed FAR 15.207(b) is retained, proposed FAR 52.215-1(c)(3) should be modified to reflect the standard in FAR 15.207(b) that such proposals "may be considered if doing so is in the best interests of the Government."

Finally, proposed FAR 53.213, FAR 53.214 and FAR 53.215-1 indicate that use of certain forms is "prescribed" for use in contracting by negotiation. The use of the word "prescribed" could indicate that the use of these forms is mandatory, which is not the intent expressed in proposed FAR 15.209 that "forms are not needed to prepare solicitations described in this subpart." The Section suggests the use of the terms "are authorized" in lieu of "prescribed."

Proposed FAR 15.402(b) - Lowest Price Technically Acceptable; Requires Clarification

While the intent appears clear, the wording of FAR 15.402(b) is somewhat confusing. The clause states:

(b) A lowest price technically acceptable process is used where it has been determined that the Government’s interests are best served by the selection of the lowest price offer that is evaluated (on a pass/fail basis) as technically acceptable used to select the most advantageous offer where proposals are evaluated on a pass/fail basis, and award is made to the lowest cost (price) technically acceptable offeror. Proposals need not be ranked under this process nor are communications precluded.

Here the term "used to select the most advantageous offer" is awkward and confusing. Under a lowest price technically acceptable approach, the lowest price offer is by definition the most advantageous offer to the Government.

The Section recommends the proposed language be modified as follows:

(b) A lowest price technically acceptable process is used where it has been determined that the Government’s interests are best served by selection of the lowest price offer that is evaluated (on a pass/fail basis) as technically acceptable. A technically acceptable proposal is one that meets or exceeds the requirements set forth in the solicitation. The Government’s requirements must be such that the Government’s minimum needs are susceptible to being defined and evaluated on a pass/fail basis. These requirements must be described clearly to advise offerors of the thresholds that must be met to be evaluated as technically acceptable. Proposals need not be ranked under this process nor are communications precluded.

As indicated above, the proposed FAR provision dealing with this process should provide guidance on when the Government’s technical requirements can be evaluated and award determined on a pass/fail basis. For example, technical requirements that are likely to result in submission of offers with widely varying
The capabilities would not appear appropriate for this type of process. Rather, such procurements would more appropriately be evaluated using a tradeoff selection procedure. For example, where it is anticipated through a market survey or historical data of these kinds of procurements that the offered technical solutions would be very similar in capabilities and features, then this lowest price technically acceptable process can be used. Likewise, if the Government requirements will be satisfactorily met by a product or service that is minimally acceptable as opposed to one that excels in all respects, this process may be appropriate.

Furthermore, the proposed clause includes a general definition of a technically acceptable proposal. This definition could be retained in this clause or included as a separate definition under proposed FAR 15.401.


The proposed regulations include a provision that requires "[t]he quality of the product or service" be addressed in every source selection through the consideration of one or more non-cost evaluation factors. FAR 15.404(d)(2). This provision parallels current practice and requirements as stated in FAR 15.605(b) and DoD Directive 5000.1. However, clarifying language would be helpful with respect to consideration of quality under proposed FAR 15.101 when the lowest price technically acceptable process is used by the Government.

Under the proposed lowest price technically acceptable process, the non-cost evaluation is done on a pass/fail basis, and no tradeoff is permitted between price and non-cost factors or subfactors. See proposed FAR 15.101(b)(2). Consequently, proposed FAR 15.404(d)(2) should be clarified to ensure that when the Government selects the lowest price technically acceptable process for source selection, the non-cost evaluation factors intended to encompass the Government's specific quality objectives are expressed in terms of standards that can meaningfully be evaluated on a pass/fail basis.

Ultimately, when the Government selects this process, the quality considerations must be expressed in terms of acceptable quality, or lowest-common denominator terms, since the evaluation will be on a "pass/fail" basis. No credit will be available under the lowest price technically acceptable process to a higher priced but higher quality product.

**Proposed FAR 15.405 - The Proposed Authorization Of The Practice Of Comparing One Offer To Another Should Be Amended To Prevent Comparison Of Offers When The Government Selects The Lowest Price Technically Acceptable Process**

Proposed FAR 15.405(a) provides that "[i]n the evaluation of competitive proposals against the evaluation factors specified in the solicitation, an agency should compare their relative qualities." This proposed authorization to compare one offer to another is not appropriate for lowest price technically acceptable procurements where the offerors must only meet certain announced technical acceptability standards. There is no comparison between offerors because each offeror is judged against the requirements stated in the solicitation on a pass/fail basis. Accordingly, this proposed language should be amended to clearly state that this process is not appropriate for lowest price technically acceptable procurements.

**Proposed FAR 15.405(a) - Should Be Amended To Clarify When Comparison Of Proposals Is Appropriate**

Proposed FAR 15.405(a) states in part:

In evaluation of the competitive proposals against the evaluation factors specified in the solicitation, an agency should compare their relative qualities.

The explanatory note at the beginning of the Federal Register notice indicates simply that "[t]he proposed rule also specifically authorizes practices currently in use at some agencies including -Comparison of one
The exact intent of the change is unclear. The explanatory note would indicate that the proposed change would simply validate the common practice of comparing one offer to another. In a formal source selection, this comparison is typically performed at the Source Selection Evaluation Board ("SSEB") or similar body, by the Source Selection Advisory Council and ultimately by the SSA.

The provision, however, can be read 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 factors. This could result in the absence of any analysis of a proposal based exclusively on the evaluation criteria and the solicitation requirements. Furthermore, this could result in the award being made on the basis of other than the stated evaluation criteria. The Competition in Contracting Act ("CICA") requires the agency to state in the solicitation the evaluation factors that will be used to evaluate proposals and to evaluate the proposals solely on these factors. 10 USC 2305(a)(2)(A)(I), (b)(1); 41 USC 253a(b)(1)(A), 253b(a). While comparison of the relative strengths and weaknesses of the offers is appropriate after evaluation of the proposals, CICA demands that the evaluation be based on the stated evaluation criteria. Allowing comparison of offerors during the basic evaluation of the proposals could lead to a violation of CICA. The appropriate order is (a) an evaluation of the offers based exclusively on how well the individual proposals meet or exceed the stated evaluation criteria, then (b) a relative comparison of the proposals.

This problem would be exacerbated in multiphase procurements where there may be substantial change in design or approach during a particular phase. This would necessitate a constantly moving and potentially unmanageable evaluation process. Accordingly, the Section recommends that this valuable ability to compare offerors be allowed but that the proposed language be modified to isolate this process from the objective evaluation of each proposal against the stated evaluation criteria.

Proposed FAR 15.405(a)(2) - The Proposed Past Performance Evaluation Requirement Should Be Amended To Better Address "Relevance" and "Neutrality" and To Prevent Both The Use Of Past Performance With The Lowest Price Technically Acceptable Process And The Use Of Past Performance As A Price Related Factor

The Section commends the expanded guidance on the consideration of past performance. This builds upon the guidance presently contained in FAR 15.605(b) and further implements OFPP Policy Letter No. 92-5, Past Performance Information. See 58 Fed. Reg. 3573 (January 11, 1993). The Section, however, believes certain problem areas need to be further addressed.

Proposed FAR 15.405(a)(2)(iii) provides that "firms lacking relevant past performance history shall receive a neutral evaluation for past performance." The proposed regulation states further: "A neutral evaluation means any assessment that neither rewards nor penalizes firms without relevant past performance history." The Section believes that this "neutrality" provision requires further clarification. If an offeror lacks relevant past performance history, it is 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.

Another problem area regarding past performance evaluations relates to the "relevance" of the information. Proposed FAR 15.405(a)(2)(i) states: "The age and relevance of the information, source of the information, subjectivity of the data and general trends in contractor's performance should be considered." Similarly, proposed FAR 15.405(a)(2)(iii) refers to a neutral evaluation for firms lacking "relevant" history. In several recent cases, GAO has sustained protests regarding the contracting agency's application of the term "relevant" information. For example, 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." Similarly, in PMT Services, Inc., B-270538.2, April 1,
1996, GAO sustained a protest where the agency determined the protester’s past performance as marginal based on the erroneous conclusion that PMT had not performed contracts of similar complexity. In determining whether a contract identified by PMT was relevant with regard to its complexity, the agency considered only its size and ignored other critical factors. In light of these decisions, the Section urges that additional regulatory guidance be provided.

Use of past performance evaluations under the lowest price technically acceptable process raises substantial concerns. Under FASA, agencies are required to evaluate past performance. However, under the lowest price technically acceptable process, it does not appear possible to meet this requirement with regard to offerors having "neutral" past performance.

Under the lowest price technically acceptable process, the past performance evaluation should be limited to a "pass/fail" rating as with other non-cost factors. Thus, under this approach, there could be no trade-off decision by the Government using past performance as a factor. 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 for non-cost factors under the lowest price technically acceptable process is inconsistent with proposed FAR 15.405(a)(2)(iii), 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, since 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 (2) an added risk, and possible penalty, for offerors with relevant past performance histories.

Proposed FAR 15.405(a)(2) should also 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. 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 performance history related to questioned cost history on different contracts, that information could be taken into account under the past performance factor.

Proposed FAR 15.405 (a)(4) - Should Be Amended To Provide Guidance On The Technical Evaluation Team’s Access To Cost Data

Proposed FAR 15.405(a)(4) specifically sanctions cost data being provided to the technical evaluation team:

(a)(4) Cost information may be provided to members of the technical evaluation team if the source selection authority concurs.

The commentary accompanying the proposed changes does not state the rationale behind this language. Traditionally, cost data has been kept from the technical team to insure 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 separate technical evaluation and considered for the first time in an integrated process at the SSEB level.

The Section believes this separation of cost and technical considerations at the basic technical and cost
evaluation stage is a sound and prudent approach, reflecting many years of experience in a variety of best value procurements. If the tradeoff is between cost and other evaluation criteria, typically including technical factors, then each of these components first should be separately evaluated with regard to the stated Government requirements for that factor in the solicitation. This will allow a focused evaluation of the stated technical requirements without the consideration of cost. Furthermore, in many cases, the technical evaluators may lack both training and understanding of the cost/price aspects of an offeror’s proposal. Consideration of cost/price during the basic technical evaluation could contaminate the evaluation and lead to an erroneous conclusion. Thus, this change could be expected to open up a new area of controversy without any value to the Government.

On the other hand, after the technical evaluation against the technical requirements set forth in the solicitation, the technical evaluation team’s access to cost data could benefit the selection process. Indeed, there may be considerable benefit in having access to cost data, especially in estimating the cost impact of underestimated technical effort or additional testing or development identified by the Government technical evaluators. The Section therefore recommends that the text of this provision be modified by adding the following sentence:

Cost data and pricing information should not be provided to the technical evaluators before the technical evaluation is complete.

**Proposed FAR 15.406 - Competitive Range**

Proposed FAR 15.406, published in the September 12, 1996 Federal Register, replaces proposed FAR 15.609, published in the July 31, 1996 Federal Register and assigned FAR Case No. 96-303. For the most part, the September 12, 1996 version merely repeats the July 31, 1996 version. Accordingly, the Section attaches a copy of its October 7, 1996 comments on proposed FAR 15.609, FAR Case No. 96-303.

The significant change to the September 12, 1996 version concerns FAR 15.406(b), which would authorize the contracting officer to determine in advance the Government’s estimate of the greatest number of proposals that will be included in the competitive range. In a recently published news article, the Administrator of the Office of Federal Procurement Policy is cited as stating that the July 31, 1996 proposed rule contains a clause that is misleading in that, if the determination to limit the competitive range is made at the time a solicitation is issued, it is only an estimate of the size of the competitive range and, as such, it may be revised after receipt of proposals.

The September 12, 1996 revision, however, does not fully correct the "mistake." Proposed FAR 52.215-1, Alternate II states:

(4) If the Contracting Officer exercises the Government’s right to limit the number of proposals in the competitive range, the competitive range will be limited to no more than _____. [Insert #]

(Emphasis added.) This statement would unequivocally authorize a pre-established fixed limitation, not an "estimate."

In any event, the Section does not believe that changing the advance determination of competitive range from a fixed number to an estimate resolves the concern that the advance determination may violate the FARA’s requirement that the contracting officer include in the competitive range the "greatest number that will permit an efficient competition among the offerors rated most highly in accordance with such criteria." As discussed in the Section's October 7, 1996 comments, substantial legal and policy considerations militate against including in the solicitation an advance estimate of the greatest number of proposals that will be included in the competitive range.

Establishing a competitive range estimate prior to evaluation of proposals does not appear consistent with FARA’s requirement that the contracting officer determine the number of proposals after evaluation of
offers. Moreover, the public interest is better served by establishing a competitive range after receipt and evaluation of proposals. The best value is most likely to be obtained in this manner. Even if the number set forth in the solicitation is described as an estimate, contracting officers are likely to view it as a fixed number, absent extraordinary circumstances. Thus, if the solicitation publicly establishes the Government’s estimate of the maximum number of proposals in the competitive range as 3, the agency is unlikely to expand that number to include 5 offers, even if offerors 3, 4 and 5 are essentially equal.

The argument in favor of the proposed regulation is that establishing the maximum number for the competitive range in advance benefits both the Government and the contractor community. The argument, in addition to "efficiency," is that by providing the information in the solicitation (a) the Government would reduce the potential for manipulation of the number for other purposes, (b) offerors could challenge the number at a time when the Government could more easily reconsider and find additional resources if the objection is well-founded, and (c) offerors could make more meaningful "bid/no-bid" decisions.

Although these are meritorious concerns, establishing a maximum estimated number in advance would not yield the desired benefit. Before receipt of offers, it is difficult, if not impossible, for the agency to (a) estimate the "greatest number" that would permit efficient competition and (b) ensure full and open competition. Moreover, informing the offerors of the maximum estimated number for the competitive range would not likely assist offerors in "bid/no-bid" decisions or proposal preparation. Regardless of the number of offerors expected in the competitive range, each offeror has to make an independent decision based on its assessments of the agency’s requirements. Further, the offerors can only guess at the identity or number of other offerors. In addition, any advance limitation on the competitive range could operate as a deterrent against the entry of new competitors.

Proposed FAR 15.407 - Communications With Offerors

Proposed FAR 15.407 would make fundamental changes to the rules governing the conduct of communications between the Government and offerors during negotiated procurements, by (a) authorizing the contracting officer to conduct communications with offerors before establishing the competitive range, and (b) repealing the existing regulatory requirements for discussions.

The Section agrees that "open communications support the goal of efficiency in Government procurement." Proposed FAR 15.407(a). However, the proposed changes in the conduct of communications could have the unintended consequence of undermining full and open competition, as discussed below.

The proposed regulation would create a distinction between communications before and after establishment of the competitive range. Under the present regulations, there is no such distinction. The present regulations recognize two types of communications: clarification and discussion. Discussions are defined as:

- 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.

FAR 15.601. Clarifications, on the other hand, are communications with an offeror for the sole purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes in the proposal. FAR 15.601. Thus, unlike discussions, clarifications do "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." FAR 15.601. These definitions (and the limitations set forth in FAR 15.610 regarding written or oral discussions) control once the Government receives proposals.

The proposed regulations create a new framework for communications with offerors. They contemplate a new category of "communication[s] with offerors prior to establishment of the competitive range" and would limit the definition of discussions to "communications after establishment of the competitive range between the contracting officer and an offeror in the competitive range." Proposed FAR 15.401.
A. Background; Proposed FAR 15.407(a)

Proposed FAR 15.407(a) provides a general policy statement regarding communications in the source selection process. The Section concurs with the first two sentences of this provision. The Section is concerned, however, that the last sentence of proposed FAR 15.407(a) could be read to suggest that the requirements of proposed FAR 15.407(b) - (d) are optional.

Currently, FAR 15.610(b) states, in pertinent part:

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).

The questioned last sentence of proposed FAR 15.407(a) provides:

The nature and extent of communications between the Government and offerors is a matter of contracting officer judgment.

The Section suggests that the proposed regulation be revised to add the following at the end of the sentence: "based on the particular facts of each acquisition (see paragraphs (b) - (d))". This change will clarify FAR 15.407(a) and make it consistent with proposed FAR 15.407(b)-(d).

B. Communication with Offerors Before Establishment of the Competitive Range

Under proposed FAR 15.407(b), the contracting officer would be authorized to communicate with offerors after receipt of proposals, but before establishment of the competitive range (or before award, if award is to be made without discussions). The proposed rule would provide that information received during this early phase of communications may be used in proposal evaluation. However, under the proposed regulation, such communications would not be discussions and are not intended to permit changes in the offeror's proposal other than correction of mistakes.

This approach may cause problems in enforcing agreements reached during this phase of communications. On one hand, the offeror has an incentive to make general claims to inflate its evaluation scores. On the other hand, since these communications do not permit changes in the offeror's proposal and need not be contemporaneously confirmed in writing, the Government will have no way to enforce agreements reached with the offeror during the communications until after the offeror has been included in the competitive range.

The proposed regulation provides that such pre-competitive range communications "need not be conducted with all offerors." The proposed regulation notes that these pre-competitive range communications "are conducted to obtain information that explains or resolves ambiguities or other concerns." The proposed regulation provides the following examples:

- When trying to determine a competitive range, the Government could limit communications to those offerors whose proposals, on initial evaluation, would be neither clearly "in" nor "out" of the competitive range.

- Similarly, in trying to decide whether or not to award without discussions, the Government could limit communications to the offeror(s), based on initial evaluation, deemed to have the greatest likelihood of award.

Proposed FAR 15.407(b)(5). The regulation also cautions that "a willingness by the offeror to correct any perceived errors, perceived omissions, perceived deficiencies, or other concerns does not require that the offeror be placed in the competitive range."
An opportunity would thus be accorded the agency to coach favored offerors to improve their proposals or to ignore disfavored offerors to justify their exclusion from the competitive range. For example, assume two similarly situated marginal offerors, one of which is favored by the contracting agency. The agency could conduct extensive communications with that offeror to elevate its proposal to include it in the competitive range, and ignore the other offeror to justify excluding it. The result would be discriminatorily unequal treatment of offerors. Given the statutory mandate for full and open competition, the lack of process to assure fairness and equal treatment raises a serious concern. This is another area that is likely to invite close scrutiny and charges of favoritism.

The significant increase in emphasis given to past performance by the Office of Federal Procurement Policy ("OFPP") to improve quality delivery to the Government makes this a significant discussion topic. The recent Final Report for the Contractor Past Performance Systems Evaluation Study by Arthur D. Little, Inc. (the "Little Report") to the Department of Defense reveals that reliability of past performance information is questionable. Thus, it is important that pre-competitive range communications permit offerors to address past performance concerns of the agency. Accordingly, the Section suggests that proposed FAR 15.407(b)(4) be amended "to provide offerors an opportunity to communicate and discuss relevant past performance reports." This should not be limited to offerors in the competitive range if past performance information has caused an otherwise qualified offeror to be excluded from the competitive range.

C. Communications with Offerors After Establishment of the Competitive Range

Once the contracting officer establishes the competitive range, a different set of rules would apply. Under the proposed regulation, when a competitive range is established, the contracting officer "shall conduct discussions at least once with all offerors in the competitive range." Under this provision, all evaluated "deficiencies" in the offeror's proposal -- except those relating to past performance on which the offeror has already had an opportunity to comment -- and any other issues which, in the judgment of the contracting officer, should be brought to the offeror's attention, would be disclosed during discussions.

The Section supports the proposed regulation's coverage of post-competitive range communications. The Section proposes the following clarifications.

Proposed FAR 15.407(c) provides, in pertinent part:

While the Government may rely upon agreements made during discussions for purposes of proposal evaluations, such agreements shall be confirmed by a proposal revision(s) before contract award (See FAR 15.411)./

This rule creates an opportunity for confusion and inefficiency. An offeror's vague agreements during discussions may improve its evaluation scores; but, after the evaluation, its disagreement with the agency's interpretation may result in refusal to execute a proposal revision satisfactory to the agency. Although the agency would still have discretion to then downgrade that offeror and select another offeror for award, the process would become inefficient and disruptive, contrary to the Government's intent.

It would be better to require written confirmation of any communication that would potentially improve an offeror's standing before final evaluation. Any disagreements would be resolved before the Government acts on an interpretation the offeror does not share.

Proposed FAR 15.407(b) and (c) may have the unintended consequence of reducing the contracting officer's discretion to clarify offerors' proposals in certain circumstances. Under the present regulation, after establishment of the competitive range, the contracting officer is permitted to communicate with offerors regarding clarifications -- that is, communications for the sole purpose of eliminating minor irregularities, informalities or apparent clerical mistakes in the proposal. Under proposed FAR 15.407(c), the contracting officer has no discretion to discuss clarifications and those post-competitive range determination communications would be deemed "discussions" -- not "communications." Under those circumstances, where the contracting officer might believe it necessary to conduct discussions to clarify an offeror's
proposals, the contracting officer may feel compelled to conduct discussions with the other offerors in the competitive range. One solution to this problem is to include a provision allowing post-competitive range "clarifications" as exist under the present regulations.

Under proposed FAR 15.407(c), the agency would not be required during discussions to disclose evaluated deficiencies in an offeror's proposal relating to past performance on which the offeror had already had an opportunity to comment. This limitation, in a proposed regulation that otherwise encourages more communication, is troubling. Unless the agency that prepared the performance evaluation is also the procuring agency, discussion of whether the deficiency was originally justified might be of little consequence. But, given a negative report, there is every reason to discuss the agency's specific concerns with regard to the procurement at issue.

Past performance evaluation must have two components at least: (a) how well the contractor performed, and (b) how that performance (or aspects of it) is relevant to the current procurement. Discussion about the second point should normally be undertaken. For example, the offeror may have received an overall good rating on a prior contract but received lower scores in discrete areas. The offeror may assume that its past performance is acceptable at least on the overall contact rating even though agency personnel may conclude that the offeror is unacceptable due to problems in discrete areas that may be relevant to the procurement at issue. In such cases, the offeror should have an opportunity to comment on the agency's specific concerns through discussions. As presently written, the proposed rule precludes offerors from improving their past performance scores by addressing the agency’s actual concerns. Proposed FAR 15.407(d)(4) would add to the offeror's difficulties by prohibiting Government personnel from "[r]eveling the names of individuals providing reference information about an offeror's past performance." In short, the regulation is seriously flawed in its inherent assumption that the "record" of past performance provides adequate protection to the offeror in relation to its proposed effort on the current procurement.

D. Improper Discussions and Communications

Proposed FAR 15.407(d) revises the rules governing improper discussions. The proposed regulation narrows the limitations in the present rules and may have the consequence of allowing conduct inconsistent with the statutory mandate for full and open competition.

For example, the proposed regulations would replace the present definition of technical transfusion ("Government disclosure of technical information pertaining to a proposal that results in improvement of a competing proposal," FAR 15.610(e)(1)), with "revealing an offeror's technical solution to another offeror." This new definition could be read to authorize the contracting officer to disclose particular approaches or components selected by an offeror that do not reveal the offeror's overall technical solution. This is all but certain to invite legal challenges on the ground that it poses a serious risk of inviting improper disclosure of proprietary information. Interested parties can be expected to seek scrutiny of award decisions to determine whether such an abuse occurred.

Similarly, the new definition for auction techniques may effectively permit the contracting officers to conduct auctions, even though auctions are still nominally prohibited. The present regulation precludes:

- Indicating to an offeror the cost or price that is needed to obtain further consideration;
- 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); or
- Otherwise furnishing information about other offerors' prices.

FAR 15.610(e). Under the new definition, contracting officers would be prohibited only from "advising an offeror of another offeror's price without that other offeror's permission." Award decisions will thus be open to challenge that this ultimate prohibition against auctions is meaningless because the newly permitted conduct strips the prohibition of the protection needed to insure against it.
The new rule would provide further:

However, the contracting officer may inform an offeror that its price is considered by the Government to be too high or unrealistic, and the results of the analysis supporting that conclusion. It is also permissible to indicate to all offerors the cost or price that the Government's price analysis, market research, and other reviews have identified as reasonable. (41 U.S.C. 423(h)(1)(2)).

Proposed FAR 15.407(b)(3). Under this new rule, it may be suggested that contracting officers would be authorized to (a) indicate to an offeror the cost or price that it must meet to obtain further consideration, (b) advise an offeror of its price standing relative to another offeror, as long as the other offeror's "price" is not disclosed or (c) otherwise furnish information about other offerors' prices, as long as the price itself is not disclosed. Again, these possible interpretations would pose an unacceptable risk of compromising proprietary information. Also, these provisions could effectively allow agencies to conduct auctions despite the nominal retention of the prohibition against them.

Some of the questionable conduct discussed above may be restricted by the procurement integrity provisions of the Office of Federal Procurement Policy Act, 41 U.S.C. 423, as referenced in proposed FAR 15.407(d)(5). However, the mere reference to the procurement integrity provisions does not provide sufficient information to contracting officers in their conduct of discussions.

FAR 15.409 - Should Be Amended To Provide For Best And Final Offers And Simultaneous Revisions

The proposed FAR 15.409 establishes a process by which the contracting officer can request multiple proposal revisions. Further, proposed FAR 15.409(a) allows, but does not require, contracting officers to "establish a common cutoff date for receipt of proposal revisions." The exact purpose of this revision is unclear. As discussed in the comments accompanying the proposed rule (61 Fed. Reg. 48381), the proposed rewrite would abandon the concept of multiple rounds of discussions. The proposed language would permit discussions to take place in a less structured manner. Under these circumstances, common cutoff dates for the receipt of proposal revisions from the offerors might not be needed.

The wording of this provision, however, appears to indicate only one date. This suggests that the contracting officer need not notify the offerors when their last revision is due and need not have a common date for this last revision. On the other hand, the establishment of a common date would not appear to unduly burden the Government. Fundamental fairness requires that offerors are working under the same assumptions and under the same time constraints.

Of even more significance is the apparent abandonment of the concept of best and final offers ("BAFO"). This is particularly troubling given the proposed rules on discussions. Under the proposed rules, offerors would not know when discussions will end. Further, they would not know whether responses to the questions they are being asked would be their last opportunity to make revisions. Such a system could only lead to the perception (and perhaps the fact) of improper conduct. In either case, the integrity of the system is called into question.

The other major reason for a BAFO is to allow offerors the opportunity to assess the overall impact of any revisions resulting from discussions. It is often only after discussions are complete and the offerors are more fully aware of the Government's precise needs and interpretation of the solicitation requirements that the offerors can fully integrate revisions and determine the best price they can offer the Government. The comments accompanying the proposed rule do not adequately explain why the BAFO is being abandoned. The comments merely refer to a desire for greater reliance on "agreements reached during discussions without requiring offerors to develop revised proposals," 61 Fed. Reg. 48381. It is seriously questionable whether the Government could gain anything by this fundamental change. With a BAFO and the clear ending of discussions, all of the offerors are on an even footing. Furthermore, it is universally recognized that most offerors propose their best prices at BAFO, when their understanding of the Government
requirements has matured.

Doing away with BAFOs would likely deprive the Government of the best possible offers from which to make award. Accordingly, the Section strongly recommends that the concept of BAFOs be retained as the normal procedure in negotiated procurements. However, where the Government specifically determines that it is in its best interests not to allow a BAFO, then it should clearly state this at the very beginning of the procurement process. This will at least allow all offerors to proceed under the same understanding.

**Proposed FAR 15.410 - Should Be Amended To Address The Lowest Price Technically Acceptable Process And To Require In Other Processes That The Source Selection Authority Justify Tradeoff Decisions**

Proposed FAR 15.410 purports to establish a uniform basis for source selection in negotiated procurements, i.e., an “integrated comparative assessment of proposals" and a selection that is consistent with factors and subfactors. It does not, however, distinguish source selection under the various types of source selection processes. No integrated comparative analysis assessment of proposals described in proposed FAR 15.410 is required for a lowest price technically acceptable process. Accordingly, the provision should be modified to indicate that no integrated assessment is required in that instance. The only evaluation required is to select the lowest price offer that has also passed the threshold of being technically acceptable to the Government.

The Section also believes that the basis under proposed FAR 15.410(b) for source selection where a specific tradeoffs made should be modified. Under the proposed language:

\[(b)\] The basis for the source selection decision shall be documented and shall reflect the rationale for any tradeoffs among factors, subfactors, and business judgments. The perceived benefits to be received for any total additional cost should be specified. Specific tradeoffs need not be described in terms of cost/price impacts nor do the tradeoffs need to be quantified in any other manner.

*See also,* proposed FAR 15.102(b)(3).

This language does not require the source selection authority to justify that the benefits to the Government from the non-price factors, in comparison to the difference in evaluated cost or price, result in the best value to the Government. Under decisions of the federal courts and GAO, the best value determination, based on a tradeoff, must provide a sufficient rationale to demonstrate that the Government is receiving appropriate value for award to an offeror that has a higher cost/price, but also a higher technical evaluation rating. Proposed FAR 15.410(b) does not make this clear.

The current Air Force FAR Supplement for source selection establishes the appropriate standard:

Clear rationale for the source selection decision. When award is made on a best value basis, the SSA should make a specific determination that the superiority of the higher priced proposal warrants the additional cost involved; merely stating a proposal’s superiority is not acceptable. The cost/technical trade-off must indicate the value to the Government associated with the added costs and justify why it is in the Government's interest to expend additional funds, regardless of the superiority of the technical rating.

*AFFARS, Appendix BB-*, at BB-315(b). This is a simple straightforward standard that has been adopted by the federal courts and GAO and should be included in proposed FAR 15.410 for procurements that use the tradeoff provisions in FAR 15.102.

Accordingly, the Section recommends that proposed FAR 15.410 be modified to require the source selection
authority to make a specific determination that the non-cost factors of the proposal selected for award justify any additional cost/price to the Government.

**Proposed 15.805 and 15.806 - Preaward and Postaward Debriefings**

Proposed FAR 15.805 provides for preaward debriefing of offerors, and 15.806 provides for postaward debriefings. Proposed 15.805(c) and 15.806(b) state that debriefings "may be done orally, in writing, or by any other method acceptable to the contracting officer." 15.805(e)(3) and 15.806(d)(6) would allow "reasonable response to relevant questions" on designated topics. Many offerors, particularly unsuccessful offerors at postaward debriefings, may prefer oral debriefings, particularly given the opportunity stated in the proposed regulation to ask "relevant questions." Oral debriefings may also present the best opportunity to resolve all concerns in one setting by permitting questions to limit the need for the filing of bid protests. Reasonable requests by offerors as to the form of the debriefing should be considered.

In addition, proposed 15.805(e)(3) and 15.806(d)(6) would require that preaward and postaward debriefings include, at a minimum, "reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed." This would not necessarily require disclosure of actual procedures used, beyond those described in the "solicitation, applicable regulations, and other applicable authorities," which frequently are given in outline form. A more complete disclosure of the procedures would be consistent with the objective of openness.

**CONCLUSION**

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
Chair, Section of Public Contract Law

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