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proposed rule reflects changes made as a result of public comments on Phase I as well as proposed changes in previously unpublished Phase II.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:

\[
\text{Best value means the outcome of an acquisition that, in the Government’s estimation, provides the greatest overall benefit in response to the requirement.}
\]

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 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.

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 . . .".

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.

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 (e) requires that when an oral presentation contains information that the parties intend to include in the contract as material terms and conditions, that information must be reduced to writing. The Section recommends that additional language be included in subsection (e) to require that the written record of an offeror's oral presentation be promptly provided to the concerned offeror, if requested.

**Proposed Subpart 15.2 - Solicitation and Receipt of Proposals and Information**

The Section's comments on proposed subpart 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."

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

(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
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 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 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, 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:

> while 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 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 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 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 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 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 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 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(e) - Limits on Communications**

Proposed FAR 15.406(e) replaces initial proposed FAR 15.407(d). The proposed rule addresses one of the Section’s concerns with the initial version by making clear that an agency may not reveal to one offeror another offeror’s unique technology, innovative and unique uses of commercial items, or any information that would compromise an offeror’s intellectual property. Proposed FAR 15.406(e)(2). Nevertheless, other than this change, the present version is virtually identical to the initial version. Accordingly, the 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.
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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):

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 it is 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.

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
This understanding of the definition of cost or pricing data is also supported by numerous case decisions interpreting the fact versus judgment distinction.

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 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 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 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 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.

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.

\* 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, 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 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.

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,

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Endnotes

[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.

[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 is correct, only that the contractor has accurately and completely disclosed its current estimate.


[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., GSBCA 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).