March 2, 2017

Via Regulations.gov

General Services Administration
Regulatory Secretariat Division (MVCB)
Attn: Ms. Hada Flowers
1800 F Street, NW, 2nd Floor
Washington, D.C. 20405


Dear Ms. Flowers:

On behalf of the American Bar Association (“ABA”) Section of Public Contract Law (“Section”), I am submitting comments on the Proposed Rule cited above.1 The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section’s governing Council and substantive committees include members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, 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 ABA’s Board of Governors. The views expressed herein are presented on behalf of the Section. They have not been approved by the House of Delegates or the Board of Governors of the ABA and, therefore, should not be construed as representing the position of the ABA.2

1 Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, and Marian Blank Horn, Kristine Kassakert, and Heather K. Weiner, members of the Section’s Council, did not participate in the Section’s consideration of these comments and abstained from the voting to approve and send this letter. In addition, Scott N. Flesch and Doug Mickle, co-chairs of the Bid Protest Committee, did not participate in the Section’s drafting and consideration of these comments.

2 This letter is available in pdf format at http://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments.html under the topic “Acquisition Reform & Emerging Issues.”
I. INTRODUCTION

Section 887 of the National Defense Authorization Act ("NDAA") for Fiscal Year ("FY") 2016, Pub. L. 114-92 ("Section 887"), requires that the Federal Acquisition Regulatory ("FAR") Council "prescribe a regulation making clear that agency acquisition personnel are permitted and encouraged to engage in responsible and constructive exchanges with industry, so long as those exchanges are consistent with existing law and regulation and do not promote an unfair competitive advantage to particular firms."

The Proposed Rule implements Section 887 by amending FAR 1.102-2(a)(4) to state:

The Government must not hesitate to communicate with the commercial sector as early as possible in the acquisition cycle to help the Government determine the capabilities available in the commercial marketplace. Government acquisition personnel are permitted and encouraged to engage in responsible and constructive exchanges with industry as part of market research (see 10.002), so long as those exchanges are consistent with existing laws, regulations, and promote a fair competitive environment. ³

The Proposed Rule states that this revision, "coupled with the existing guidance in the FAR subpart 1.1 and the market research strategies set forth in FAR part 10, will better equip Federal acquisition officials with the information needed to issue high-quality solicitations."⁴ The Proposed Rule also requests public comment in response to multiple specific questions, which this letter sets forth in Section II.B, below.

The Section submits the following comments on the Proposed Rule and specific questions posed in that publication. The Section believes that effective communication between Government and industry can improve and promote better procurements, not just for the commercial sector, but for all sectors that provide supplies and services to the Government. The Section supports the Government’s efforts to consider the appropriate type and timing of communications during an acquisition. Nonetheless, the Section is also cognizant of the need to ensure full and open competitions that treat all potential offerors equally. Although the Section believes that the FAR Council can and should consider improvements to the status quo regarding exchanges with offerors both before and after receipt of proposals, any change to the current FAR rules could have unintended consequences. Our comments are meant to highlight some of the shortfalls we believe exist in the current FAR. We have not made specific recommendations, however, because we believe that further information-gathering would assist the FAR Council, industry, and Government with making recommendations that improve exchanges between industry and Government without creating an unequal competition environment, over burdening contracting officers, and unduly delaying the procurement process. Accordingly, the Section suggests that the FAR Council continue to gather information from the public and the acquisition community regarding the topic of this rulemaking after its receipt of comments on the current

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⁴ Id.
Proposed Rule. We further recommend that the FAR Council, upon evaluation of the information it receives, consider a further request for input from the public on proposed alternatives. We recommend that the FAR Council approach this process with deliberation, as any significant changes to the current FAR rules would have a significant impact on contracting officers, acquisition personnel, and industry offerors.

II. COMMENTS

A. Section 887 requires that agency acquisition personnel be permitted and encouraged to engage in responsible and constructive exchanges with industry throughout all phases of the acquisition lifecycle.

The Proposed Rule encourages communication with industry to improve the Government’s market research and solicitations. Although market research and high-quality solicitations would indeed benefit from better and earlier communication, the Section submits that these areas are only part of the full procurement lifecycle. Both the Government and industry would benefit from improved exchanges during all phases of the procurement lifecycle.

Section 887 envisions a regulatory framework that makes it clear to agency acquisition personnel that they are permitted and, in fact encouraged, to engage in all forms of communication regardless of the stage in the acquisition cycle, so long as those exchanges are consistent with existing law and regulation and do not promote an unfair competitive advantage to particular firms. The additional information sought by the Proposed Rule with the three questions below is consistent with Section 887; we encourage the FAR Council to expand the scope of this rule to encompass the full objectives of the statute.

B. Requests for Public Comment in Specific Areas

The Section provides recommendations to the Council in response to the following specific questions posed in the Proposed Rule:

1. Which phase(s) of the Federal acquisition process—i.e., acquisition planning/market research; solicitation/award; post award—would benefit from more exchanges with industry and what specific policies or procedures would enhance communication during these phases?

All phases of the acquisition process would benefit from improved exchanges between the Government and industry. It can be difficult for agencies to obtain the goods and services that they need, for the best value to the taxpayer, where existing regulations, policies, and practices formality restrict and often chill lines of communication between government personnel and relevant industry representatives. Instead of communication with industry to procure the best deal for the Government, many exchanges seem to be conducted with an over-emphasis on avoiding bid protests.

This current approach to communication undermines the Government’s ability to conduct efficient and effective procurement, while there is little evidence that guarded communications
reduce bid-protest risks. The Director of the President’s Office of Federal Procurement Policy (“OFPP”) recently issued a memorandum underscoring this point and encouraging more robust debriefings to unsuccessful offerors.\(^5\) The Section posits that appropriate and better communications—\textit{i.e.}, exchanges that do not disclose the proprietary solution of the successful offeror but that still answer the competitor’s questions about why it was not selected—may in fact serve to reduce the number of protests because disappointed offerors would have better understanding of why they lost and in many cases would look ahead to the next procurement, not backwards in protest over a completed procurement.

2. Is there a current FAR policy that may inhibit communication? If so, what is the policy, and how could this policy be revised to remove barriers to effective communication?

FAR Part 15 intends to provide a structure of contracting by negotiation that enables both sides of the bargain to understand the other’s needs and positions and to shape the proposal in question so that there is robust competition and a best-value result for the stakeholders.\(^6\) The Section believes that the goal of FAR Part 15 should be to enhance contracting by negotiation to assist offerors with understanding the Government requirements and the Government with obtaining the best value.

a. Improve Exchanges Between Industry and Government

The Section is concerned that the FAR may impede effective communication between the Government and industry with its current construct of clarifications, discussions, and other communications. The differing content, timing, and processes associated with these respective terms are inconsistent with purchasing in the commercial market. Moreover, matters relating to these types of exchanges are regularly contested in bid protests. As a result, contracting officers today must wrestle with how to label communications, and what rules govern each communication, instead of focusing on whether the exchange helps the Government get a better deal. We also question whether a competitive range determination, as set forth in FAR 15.306(c), is a necessary or beneficial predicate to the conduct of exchanges between the Government and offerors. In other words, the Government (and competition) may benefit from holding more fulsome exchanges with a broader range of offerors. Therefore, the Section recommends that the FAR Council explore further modifications to the FAR relating to exchanges between the Government and offerors after the receipt of proposals to enhance the Government’s ability to obtain information from offerors to allow it to best satisfy its needs, without fear of a bid protest if communications are incorrectly labeled.


\(^6\) The Section uses the term “best value” here in a general sense, not to refer to the “best value” method of evaluating proposals; the Section recognizes that other bases of award, such as “lowest-priced, technically acceptable” can in certain procurements result in the overall best value to the Government and taxpayers.
b. **Evaluation factor amendments**

The Proposed Rule seeks to use communication with industry to improve the Government’s ability to define its requirements and market research to determine available products or services to meet those requirements. As described throughout FAR part 15, however, communication with industry occurs throughout the procurement process, through formal means such as proposal submission and through less formal means such as negotiation. During this process, the Government continues to collect information, which much like in commercial procurements may alter assumptions and preferences included in the original solicitation. As with any buyer, the Government may not always articulate its requirements perfectly at a procurement’s outset. Current FAR policy and guidance largely assume that the Government is capable of articulating its initial requirements with perfection, and is therefore encouraged to make awards while adhering to initial evaluation criteria.

If the Government has any doubt about its ability to define requirements and evaluation criteria before receiving proposals, the FAR should recognize that the basis for evaluation and award may need to change to reflect evolving requirements and judgments. Encouraging acquisition professionals to identify needed solicitation updates throughout the process will foster a more open dialogue about the Government’s evaluation and its ultimate needs. Although FAR 15.206 already permits amending the solicitation as necessary to meet the Government’s needs, reiterating that this option is available to update evaluation criteria would remind agencies that the objective of negotiated procurement is not merely to follow the evaluation criteria, but rather to ensure that the Government makes its needs known in a manner that maximizes its ability to satisfy those needs.

c. **Protect market research communication from unauthorized disclosure**

Under FAR 15.201, the Government is encouraged to exchange information to understand industry’s capabilities and the Government’s requirements. FAR 15.201 suggests the manner in which the Government may encourage exchanging information with industry (e.g., market surveys and requests for information (“RFIs”)). But no detailed set of rules specifically protects a prospective offeror’s proprietary information disclosed during market surveys, RFIs, or another time before solicitations are issued. A prudent business in a competitive market might be reluctant to participate in market surveys or RFIs in order to avoid disclosure of their technologies and potential solutions to the benefit of their competition. Detailed rules protecting industry information received during information gathering would create the level of trust required for open and meaningful dialogue. It would further help industry if the regulation would address communications that occur before solicitations are issued and those that occur after the

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7 The Procurement Integrity Act (“PIA”) prohibits current and former Government employees from knowingly disclosing contractor bid or proposal information or source selection information before an award of a procurement contract to which the information relates. See 41 U.S.C. § 2102(a). The FAR provisions implementing the PIA detail the procedures for protecting procurement information from unauthorized disclosure. See FAR 3.104-4. The Freedom of Information Act, 5 U.S.C. § 552, may afford protection to prospective offerors, if such information falls within one of the established exemptions and if the offeror properly asserts its entitlement to protection.
solicitation is issued to confirm that this information can and will be protected from disclosure. The Section recommends expanding FAR 15.201(f) to ensure that information will remain confidential if requested by a prospective offeror and that Government procurement professionals properly handle proprietary information received during the acquisition planning or pre-solicitation stage.

d. Encourage robust communication during debriefings

The OFPP’s Myth-Busting 3 memorandum identified debriefings “as one of the most valuable events during the acquisition lifecycle.” The memorandum describes benefits to robust debriefings, including improved proposals from industry, agency self-reflection to improve internal processes, and even decreased pressure for disappointed bidders to pursue protests. The memorandum encourages procurement officials to explain a proposal’s deficiencies to help the offeror avoid repeating mistakes. The Section strongly agrees with these observations by OFPP. Inadequate debriefings by agencies remain a problem that leads to avoidable protests.

A debriefed contractor should be provided with sufficient information to understand why it lost. The Section recommends revising FAR 15.505 and 15.506 to encourage better communication during the debriefing stage of acquisition, consistent with the intent of Section 887 and the spirit of the Myth-Busting 3 memorandum.

3. Might it be beneficial to encourage, or require, contracting officers to conduct discussions with offerors after establishing the competitive range for contracts of a high dollar threshold? If so, what would be the appropriate dollar threshold?

In 2011, at the request of the Department of Defense (“DoD”) Source Selection Joint Analysis Team, chartered by the Deputy Under Secretary of Defense (Acquisition, Technology, and Logistics), DoD finalized a rule under DFARS Case 2010-D013 (76 Fed. Reg. 58150 (Sept. 20, 2011)) that “strongly encouraged” discussions before award for source selections valued at $100 million or more. According to the rule:

DoD research has indicated that holding meaningful discussions with industry prior to contract award on high-dollar value, complex requirements improves both industry's understanding of solicitation requirements and the Government's understanding of industry issues. By identifying and discussing these issues prior to submission of final proposals, the Government is often able to issue clarifying language. The modified requirements documentation allows industry to tailor proposals and better describe the offeror's intended approach, increases the probability that the offeror's proposal satisfies Government requirements, and often results in better contract performance. Asking contracting officers to conduct discussions with industry provides a reasonable approach to recognizing

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8 See note 5, supra, at 2.
and addressing valid industry concerns and a constructive alternative to protests resulting from industry frustration over misunderstood requirements.

The Section endorses any proposal that improves industry’s understanding of the Government’s requirements, the Government’s understanding of industry’s concerns, and the Government’s ability to obtain the best value for taxpayer resources. While the Section does not take a position on whether a particular dollar value should be imposed, the Section encourages the FAR Council to leverage and expand upon the research DoD has performed in considering improvements to the process of exchanges of information. We believe factors that could be considered in encouraging exchanges include the high dollar value of a procurement, but could also include complex or novel requirements.

III. CONCLUSION

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require. Moreover, given the significant impact of any changes to the negotiated procurement scheme, the Section requests that specific proposed rules or revisions to existing rules in this area be subject to full procurement notice and comment rulemaking.

Sincerely,

James A. Hughes
Chair, Section of Public Contract Law

cc:
Aaron P. Silberman
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Council Members, Section of Public Contract Law
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