

ORAL PRESENTATIONS - REVISITED

One of the “tools” which has gotten a lot of attention and use in the current acquisition streamlining environment is “oral presentations”. While much has been written about this topic in the way of articles and essays describing the authors’ opinions and experiences, there is currently no regulatory guidance addressing oral presentations. This, however, is about to change. The Federal Acquisition Regulation (FAR) Council is presently in the process of rewriting major portions of the FAR. Their proposed rewrite of FAR Part 15, Contracting by Negotiation, was published in the Federal Register on May 14, 1997 as a “proposed rule” with request for comments by July 14, 1997. This is the second version of the proposed rewrite of FAR Part 15. The first version was published in September 1996. That first version generated intense controversy and resulted in the receipt of over 1500 comments. The FAR Council has attempted to address as many of the concerns raised by these comments as possible and this second version of the rewrite is probably very close to what will ultimately become the final version.

FAR Part 15, as published in the Federal Register on May 14, 1997, includes a Subpart 15.1 entitled “Source Selection Processes and Techniques”. Within that Subpart is FAR 15.103, “Oral Presentations”, providing, for the first time, specific regulatory guidance addressing the use of oral presentations in negotiated acquisitions. This new FAR section allows oral presentations to be used as an information gathering tool at any time in the acquisition process, describes what types of information may be suitable for gathering through an oral presentation and what types of information must be obtained in writing, provides some criteria to consider in deciding exactly what information to obtain through an oral presentation in any particular acquisition, describes what instructions should be included in the solicitation if oral presentations by offerors are to be required, and requires that the contract file include a record of the oral presentation (the method and level of detail of the record is left to the discretion of the source selection authority).

Under the current FAR, one of the most perplexing issues a contracting agency must deal with in using oral presentations is whether the

oral presentation constitutes “discussions” as that term is used in FAR Subpart 15.6. FAR 15.601 currently defines the term as follows;

“Discussion,” as used in this subpart, means any oral or written communication between the Government and an offeror (other than communications conducted for the purpose of minor clarification), whether or not initiated by the Government, that (a) involves information essential for determining the acceptability of a proposal, or (b) provides the offeror an opportunity to revise or modify its proposal.

FAR 15.610, which is based in statute (10 U.S.C. Section 2305 (b) (4) (A)), requires that, unless award is made without discussions, discussions must be held with all offerors within the competitive range. The General Accounting Office (GAO) has consistently held that the Government has a duty to assure that these discussions are “meaningful”. The GAO case law considers discussions meaningful only if the offeror is put on notice of all significant weaknesses and deficiencies in its proposal and is given an opportunity to cure these problems. FAR 15.611 requires that, upon completion of discussions, the Government must request Best and Final Offers (BAFO) from all offerors still in the competitive range. The issue that this regulatory framework presents with regard to oral presentations is whether, if the Government engages in a dialogue with the offeror or asks questions of the offeror during the oral presentation, discussions have commenced. If the answer is yes, the Government must make sure it conducts meaningful discussions with all the offerors still in the competitive range. In other words, the Government would have to be sure to put every offeror which has not been officially notified prior to that point in time that it was no longer within the competitive range on notice of all significant weaknesses and deficiencies in its proposal and give each of those offerors a chance to cure those problems. If the answer is no, then the Government may still determine that an offeror is not within the competitive range without going through the complete meaningful discussion process. It should be clear that, depending on the answer, the result can be a significant increase in the time, complexity and cost of a competitive negotiated acquisition, especially where there is a substantial number of initial proposals and some of them are clearly not competitive, i.e. clearly have no chance of winning the award.

An illustration of how perplexing this issue can be and the problems it can cause for an agency can be seen in a recent protest decided by the

GAO (General Physics Federal Systems, Inc., B-275934, April 21, 1997, redacted version released May 8, 1997). The agency in this case wanted to use oral presentations as part of its evaluation scheme but also wanted to award without discussions under the current provisions of FAR 15.610. Following a theory currently popular in acquisition circles, the agency clearly defined in the solicitation what information the offerors must submit for evaluation. The solicitation also clearly differentiated between that information which was to be considered part of the offeror's proposal and that information which was not to be considered part of the offeror's proposal. The solicitation told the offerors that there would be an oral presentation addressing the portion of the offeror's submission which was not part of the proposal, followed by a question and answer (Q&A) session regarding that information. The solicitation also expressly stated that this Q&A session was not considered discussions as that term is used in the FAR and that the Government intended to make award without discussions. In spite of all this explanation of the ground rules of this acquisition, one of the unsuccessful offerors protested that the agency failed to conduct meaningful discussions as required by statute and regulation. The protestor alleged that, contrary to what the solicitation said, the agency's Q&A session constituted discussions and, therefore, the agency improperly failed to advise the protestor of significant weaknesses in its proposal and failed to give the protestor a chance to submit a revised proposal. The GAO, in denying the protest, declined to decide the question of whether the Q&A session constituted discussions. GAO avoided this difficult issue by holding that, because the protestor was not prejudiced by the agency's actions in this particular case, the GAO would "...hold in abeyance our views on whether this approach is consistent with current statutory and regulatory requirements." Thus, even the GAO seems reluctant to tackle this perplexing issue. This reluctance is not surprising in light of the current absence of regulatory guidance combined with the fact that the issuance of new regulatory guidance that purportedly will significantly impact this issue is just around the corner. GAO has, after all, been deeply involved in shaping this new regulatory guidance through its comments on the proposed rules issued by the FAR Council.

Has the FAR Part 15 rewrite solved or eliminated this difficult dilemma for the contracting agency? The short answer is "Maybe." The FAR Part 15 rewrite, at FAR 15.001, introduces a new term - "communications" - which is defined as follows;

Communications are all interchanges after receipt of proposals between the Government and an

offeror, including discussions conducted after the competitive range is established.

The FAR Part 15 rewrite, at FAR 15.406, also establishes four different stages or phases of communications with offerors as set forth below;

- (a) Communications and award without discussions.
- (b) Communications with offerors before establishment of the competitive range.
- (c) Competitive range.
- (d) Communications with offerors after establishment of the competitive range.

Prominently displayed at the beginning of FAR 15.406(d) is the statement, “Such communications are discussions...” At FAR 15.001, the FAR Part 15 rewrite also introduces a new definition of the term “discussions”, which reads as follows;

Discussions are negotiations that occur after establishment of the competitive range that may, at the contracting officer’s discretion, result in the offeror being allowed to revise its proposal.
(emphasis added)

Thus it should be clear that, while communications can occur at any time in the acquisition process after receipt of the proposals, discussions are only intended to occur after the competitive range has been established. “Discussions” are apparently a subset of “communications”. The definition of discussions seems to have two mandatory elements - 1) they have to be “negotiations” and 2) they have to occur after establishment of the competitive range. “Negotiation” is defined at the new FAR 15.001 as follows;

Negotiation is a procedure that, after receipt and evaluation of proposals from offerors, permits bargaining. Bargaining includes persuasion, alteration of assumptions and positions, give-and-take, and may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract.

This new regulatory framework shows a clear intent to allow communication with offerors prior to the commencement of discussions.

It sets up a tiered framework in which different levels of communication are allowed at different stages of the acquisition process. First, where the Government intends to award without discussions, FAR 15.406(a) states that the Government can still communicate with offerors for the limited purpose of resolving minor clerical errors or to clarify certain aspects of the proposal. This limited window of communication is very similar to the “clarification” window recognized in the current definition at FAR 15.601 and in GAO case law - communications with offerors for the sole purpose of “clarifying” minor informalities or clerical errors are not considered to be a commencement of “discussions”. Second, where the Government does intend to establish a competitive range and conduct discussions, FAR 15.406(b) allows the Government to communicate with the offerors prior to establishing that competitive range. Apparently these communications will not be considered discussions because, as we have seen above, the new definition of discussions says it is communications which occur after the competitive range has been established. This second level of communications is certainly broader than the first level (clarification), but still must satisfy the criteria set forth in FAR 15.406(b). The communications may only be held with those offerors whose exclusion from, or inclusion in, the competitive range is uncertain. The new FAR 15.406(b) language gives a fairly broad sampling of the types of topics that can be covered during this second level of communications, including things of such significance as perceived deficiencies and weaknesses, and even states that these communications “...may be considered in rating proposals.” The language even mandates that these communications address adverse past performance information that the offeror has not previously had an opportunity to comment on. The key limitation on this broad level of communication is one that is stated twice. FAR 15.406(b)(2) states that this second level of communications “...shall not be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, and/or otherwise revise the proposal.” FAR 15.406(b)(3) again states that these communications “...shall not provide an opportunity for the offeror to revise its proposal...” The third level of communications is that which occurs after the establishment of the competitive range and is described in the new FAR 15.406(d) language. This level of communications is the broadest of all and, as stated above, is specifically defined as “discussions”. It involves “bargaining” with the offerors and clearly encompasses the concept of allowing the offeror to alter or revise its proposal.

The bottom line here seems to be that the new FAR 15.406 gives the Government a broader ability to talk to offerors about their proposals before establishing a competitive range. If the Government intends to award

without discussions, the ability to communicate is still limited as in the past to “clarifications”. However, it should be recognized that there may even be a slight broadening of the concept of clarification with the express inclusion in FAR 15.406(a) of certain aspects of past performance as examples of matters which could be addressed in a communication prior to an award without discussions. Where the Government intends to have discussions, the matters that can be addressed in a communication with the offeror prior to setting the competitive range have been greatly expanded, apparently for the purpose of allowing the Government to make the most educated and effective competitive range determination possible. This purpose is expressly addressed in the new FAR 15.406(b), where it is stated that this level of communication prior to establishment of the competitive range;

- (2) May be conducted to enhance Government understanding of proposals; allow reasonable interpretation of the proposal; or facilitate the Government’s evaluation process...
- (3) Are for the purpose of addressing issues that must be explored to determine whether a proposal should be placed in the competitive range...

(Note the new standard set forth in FAR 15.406(c) for determining which proposals shall be included in the competitive range - which is no longer based on those proposals which have a “reasonable chance” to win but rather on those proposals “most highly rated” and “efficient competition”.) It would appear that anything that is reasonably related to the Government’s understanding or evaluation of the proposal would be fair game for being addressed during this second level of communication, as long as it did not involve allowing the offeror to revise its proposal in any way. This type of broad license to “communicate” with offerors prior to establishing the competitive range should increase an agency’s ability to effectively utilize oral presentations prior to establishing a competitive range without fear of inadvertently and prematurely “commencing discussions”. Most of those who are experienced with the use of oral presentations will agree that, in order to be effective and useful to the Government, an oral presentation by an offeror must include an opportunity for the Government to engage the offeror in a dialogue/question and answer session about the offeror’s proposal.

One word of caution might be appropriate here. From the discussion of this issue set forth above, it should be clear that there is great significance to the question of whether the communication allows the offeror to revise its “proposal”. This, of course, presents the further

question of exactly what constitutes a “proposal”. The FAR Part 15 rewrite did not include, within the new language of Part 15, any definition of the word “proposal”. Therefore, if the FAR Part 15 rewrite were to become final as published on May 14, 1997, the only provision in the FAR which gives any indication of what is meant by the word proposal is FAR 2.101, which states;

“Offer” means a response to a solicitation that, if accepted would *bind* the offeror to perform the resultant contract. Responses to invitations for bids (sealed bidding) are offers called “bids or sealed bids”; responses to requests for proposals (negotiation) are offers called “*proposals*”; responses to requests for quotations (negotiation) are not offers and are called “quotes”. (Italics added)

This language would seem to indicate that “proposal” refers to that portion of the information submitted by an offeror which is intended by the parties to be binding (i.e., part of the contract). However, the FAR Part 15 rewrite does not use the word proposal strictly in accordance with the definition in FAR 2.101. For example, FAR 15.103(a) states that the solicitation “...may require each offeror to submit part of its proposal through an oral presentation.”(emphasis added) On the other hand, FAR 15.103 states that any information which the parties intend to include as part of the contract “...shall be put in writing.”(emphasis added) Instead, the word "proposal" seems to be used in Part 15 to refer to that complete body of information submitted by the offeror, whether orally or in writing, for evaluation by the Government. The FAR Council could easily resolve this potential area of confusion - which is critical to an agency being able to distinguish between that level of communication which is permissible prior to establishing the competitive range and that level of communication which is permissible only after the competitive range has been established - by specifically defining what the word "proposal" means as that term is used in the new FAR Part 15. In the absence of such a specific definition, it is suggested that, in trying to understand or apply the new FAR Part 15 language, the term "proposal" be construed to mean all that information that is submitted to the Government for evaluation, regardless of whether it is submitted orally or in writing.

In summary, it is clear that, if the proposed changes to the FAR that have been discussed above become final, the regulatory framework within which we conduct our acquisitions will have changed. The intent of these

changes is to increase the Government's ability to communicate with offerors throughout the acquisition and source selection process. To this end, this new regulatory framework specifically allows "communication" with offerors both prior to making award without discussions and prior to establishing a competitive range, as well as after establishing a competitive range. The new regulatory framework also sets parameters for what level of communication is permissible at each of these stages of the acquisition process. Of course, there is nothing new about having extensive communications with offerors after establishing a competitive range. The level of communication permissible at this stage will be as it has always been - full discussions, "bargaining", give and take between the parties, revision of proposals, etc. The concept of allowing communications with offerors for the limited purpose of "clarifying" the proposal or resolving minor or clerical errors prior to awarding without discussions is also not new. The big change here is in the area of communication with the offerors prior to establishing a competitive range. Under current regulations, the level of permissible communication at this stage is limited to "clarifications". Under the new regulations, the level of permissible communication is expanded significantly. These new regulations make it permissible for these communications to address almost anything that is reasonably related to the Government's understanding or evaluation of the proposal, as long as these communications are not used to revise or give the offeror an opportunity to revise its proposal. The purpose of this expanded level of permissible communications is to maximize the Government's ability to understand the proposals submitted and thereby effectively apply the new competitive range standard of determining which proposals are "most highly rated" and should be included in the competitive range in order to conduct an "efficient competition". Remember, the underlying objective of all this rewriting of the regulations is to make the acquisition process more efficient. Also remember that, once these new regulations are approved and published, GAO will generally not disturb a procurement as long as the agency complies with its own published regulations.

Thus, these new regulations should make oral presentations a more useful tool in the acquisition and source selection process because of the expanded ability to communicate with offerors within the context of an oral presentation conducted prior to the establishment of a competitive range and the commencement of discussions with offerors within that competitive range. In making sure that these expanded communications stay within the bounds of what is permissible under these new regulations, a good rule of thumb may be what could be called the "uncertainty rule" - if the Government is uncertain about something, communication is permissible; if the Government is certain about something, communication is not

permissible until after the competitive range has been established. For example, if the Government is not sure about whether something is a deficiency, it would be permissible to “communicate” with the offeror about this perceived deficiency prior to establishing the competitive range. If the Government is certain that something is a deficiency, then it would not be permissible to communicate with the offeror about this deficiency until after the competitive range has been established. This means that any questions asked of offerors during the oral presentation should probably be framed in the form of an “uncertainty”.

Should you have any questions regarding “oral presentations” generally, please contact Mr. Thomas Carroll at ext. 29805.

CECOM Bottom Line: THE SOLDIER.

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