

## Encourage Your Clients to Talk to Offerors: Understanding Federal Acquisition Regulation 15.306

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*From the moment the Government decides it needs to procure a good or service until it is delivered, the FAR governs the methods and types of communications that can take place between a CO and a potential contractor.*<sup>1</sup>

### I. Introduction

You have been the deputy command judge advocate at a contracting support brigade (CSB) for the last year, and you have just returned from the Contract Attorneys Course<sup>2</sup> at the Judge Advocate General's Legal Center and School. You arrive back at your home station full of new information and eager to put into practice all you learned at the course. You do not have to wait long for that opportunity.

Your command judge advocate (CJA) comes into your office at 1630 on Friday, November 7, 2014, and tells you, “

I know you just got back, but I came down on orders to support our efforts battling Ebola in Liberia.<sup>3</sup> I leave next Friday. The only pressing issue is the post guard contract. We received five timely proposals on November 2, 2014, and the current contract expires at the end of the month. The boss wants the new contract awarded beforehand, and does not want a repeat of the guard contract up in Germany.”<sup>4</sup>

After he leaves your office the weight of the situation sinks in as this is the first negotiated procurement you have seen.<sup>5</sup> You know from the Contract Attorneys Course and recent Government Accountability Office (GAO) decisions that high-dollar procurements are often subject to protest.<sup>6</sup> A commonly protested issue is whether the government's exchange with an offeror constitutes discussions. You turn to chapter eight of your Contract Attorneys Deskbook<sup>7</sup> and start reading about negotiated procurements—especially the permissible exchanges between the government and offerors after the receipt of proposals.<sup>8</sup>

Federal Acquisition Regulation (FAR) 15.306 governs the three forms of exchanges the government can have with offerors after receipt of proposals in negotiated procurements: clarifications, communications, and discussions.<sup>9</sup> Federal Acquisition Regulation 15.306, which was revised in the late 1990s, provided contracting officers with broad discretion to enter into these exchanges.<sup>10</sup> Contracting officers (COs) have been reluctant to use this authority. In fact, some academics have argued that “the discretion given to COs by the new rule turned out to be discretion *not to communicate* rather than to communicate.”<sup>11</sup> This “discretion not to communicate”<sup>12</sup> may rise from the contracting officer's fear of protest or fear

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<sup>1</sup> Erin L. Craig, *Searching for Clarity: Completing the Unfinished FAR Part 15 Rewrite*, 39 PUB. CONT. L.J. 661 (Spring 2010).

<sup>2</sup> The Contract Attorneys Course “provides basic instruction in government contract law for entry-level attorneys at installations, the Army Materiel Command, and comparable contracting activities.” *The Contract Attorneys Course (5F-F10)*, JAGCNET, <https://www.jagcnet2.army.mil/sites/tjagcls.nsf/homeContent.xsp?documentId=C7430FBBD6B8230585257C6A005E13B4> (last visited Jan. 11, 2016). It outlines, “[T]he fundamentals of the government contract system and the general principles of law applicable to government contracting. Students will depart the course understanding the government contracting process from requirement identification to receipt of the goods or services by the ultimate user.” *Id.*

<sup>3</sup> See Chris Carrol, *DOD: 1,400 Troops To Deploy To Liberia To Fight Ebola, Starting in October*, STARS & STRIPES (Oct. 1, 2014), <http://www.stripes.com/dod-1-400-troops-to-deploy-to-liberia-to-fight-ebola-starting-in-october-1.305906>.

<sup>4</sup> See Matt Millham, *Army Cancels New Security Contract with Sicherheit Nord*, STARS & STRIPES (Mar. 25, 2014), <http://www.stripes.com/news/army-cancels-new-security-contract-with-sicherheit-nord-1.274428> (The Army awarded a \$322,000,000.00 Germany-wide guard contract only to have to cancel the award in response to two protests.).

<sup>5</sup> See Federal Acquisition Regulation (FAR) 15.000 (2002) for the applicability of Part 15.

<sup>6</sup> Memorandum from Administrator for Federal Procurement Pol'y, Office of Mgmt. & Budget, subject: “Myth-Busting”: Addressing Misconceptions to Improve Communication with Industry during the Acquisition Process (Feb. 2, 2011), <http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/Myth-Busting.pdf> [hereinafter *Myth-Busting*].

<sup>7</sup> CONT. & FISCAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., *CONTRACT ATTORNEYS DESKBOOK* (2013) [hereinafter *CONTRACT ATTORNEYS DESKBOOK*].

<sup>8</sup> *Id.* at 45-61.

<sup>9</sup> FAR 15.306 (2002).

<sup>10</sup> The Background section of this article looks into the Rewrite of FAR 15.306 in greater detail.

<sup>11</sup> Ralph C. Nash, Jr. & John Cibinic, Jr., *Postscript: Communications With Offerors Before Establishing a Competitive Range*, 24 NASH & CIBINIC REP. NO. 10, ¶ 47 (Oct. 2010).

<sup>12</sup> *Id.*

of adding time to the procurement schedule.<sup>13</sup> By foregoing these exchanges the government arguably is not obtaining “best value in its purchases.”<sup>14</sup> This article is designed to illustrate the differences between the three types of exchanges, specifically “when they occur, their purpose and scope, and whether offerors are allowed to revise their proposals as a result of the exchanges.”<sup>15</sup> A contract attorney who knows and can clearly articulate these distinctions will bolster his contracting officer’s confidence in engaging with offerors after receipt of proposals. When the contracting officer properly executes them, these exchanges should result in the government obtaining best value for goods and services and also help minimize “issues that could give rise to a bid protest.”<sup>16</sup>

This article will use the guard contract scenario above to explore the three types of exchanges authorized under FAR 15.306 and highlight their distinctions. For ease of reference, this article will address these exchanges in the order listed in FAR 15.306.<sup>17</sup> Part II of the article will look at the changes made to FAR 15.306 in 1997 and some of the unintended failures resulting from the rewrite. Part III of the article will examine clarifications under FAR 15.306(a). Part IV of the article will focus on communications under FAR 15.306(b). The article will then explain the contracting officer’s establishment of the competitive range under FAR 15.306(c). Part VI will explore discussions under FAR 15.306(d). Finally, Part VII will discuss the government’s responsibilities when conducting discussions under FAR 15.306(e).

## II. Background

In the 1990s, the government sought to improve the acquisition process by making it more “businesslike.”<sup>18</sup> One way the government attempted to achieve this goal was by rewriting FAR Part 15 to “infuse innovative techniques into the source selection process, and facilitate the acquisition of best value.”<sup>19</sup> One of the techniques the rewrite encouraged was to have an open exchange between the government and industry in order to ensure the government received the best

value in negotiated procurements.<sup>20</sup> “The [r]ewrite’s most significant reforms address communications between COs and offerors”<sup>21</sup> throughout the procurement process, and “increase . . . the ability of COs to communicate with offerors”<sup>22</sup> through the use of clarifications, communications, and discussions.

The rewrite expanded the scope of clarifications. It accomplished this by allowing offerors the opportunity to clarify adverse past performance information, which the pre-rewrite FAR 15.306 did not allow.<sup>23</sup> The drafters hoped this expansion would assist those with limited experience in preparing proposals—to include small businesses—“by permitting easy clarification of limited aspects of proposals.”<sup>24</sup> In addition to expanding the scope of clarifications, the rewrite also expanded the scope of discussions under FAR 15.306(d)(3).

Federal Acquisition Regulation 15.306(d)(3) now “requires the Government to identify, in addition to significant weaknesses and deficiencies, other aspects of a proposal that could be enhanced materially to improve the offeror’s potential for award.”<sup>25</sup> This expansion benefits all offerors “because it permits offerors to develop a better understanding of the Government’s evaluation of their proposal, and permits them to optimize their potential for award.”<sup>26</sup> However, it is important to remember that the scope and extent of discussions are solely a matter of contracting officer discretion.<sup>27</sup> Nonetheless, these two changes were just some of the ways the drafters of the rewrite hoped to increase exchanges between the government and offerors after the receipt of proposals.<sup>28</sup> While the rewrite increased the scope of exchanges, there is academic debate as to whether it accomplished its ultimate goal of increasing exchanges between the government and offerors.

The rewrite “expanded the exchanges of information permitted between COs and offerors during the procurement process;”<sup>29</sup> however, it failed to clearly set forth the distinction between clarifications and discussions within the text.<sup>30</sup> This has resulted in “a system in which participants do not clearly know the legal limits of their behavior and where

<sup>13</sup> Myth-Busting, *supra* note 6, at 7.

<sup>14</sup> Craig, *supra* note 1, at 675.

<sup>15</sup> U.S. DEP’T OF ARMY, ARMY SOURCE SELECTION SUPPLEMENT (AS3) TO THE DEP’T OF DEF. SOURCE SELECTION PROCEDURES 26 (21 Dec. 2012) [hereinafter AS3].

<sup>16</sup> Myth-Busting, *supra* note 6, at 7.

<sup>17</sup> For ease of reference, FAR 15.306 (2002) is attached. See *infra* Appendix A.

<sup>18</sup> Craig, *supra* note 1, at 661.

<sup>19</sup> Federal Acquisition Regulation, Part 15 Rewrite, Contracting by Negotiation and Competitive Range Determination, 62 Fed. Reg. 51,224 (Sept. 30, 1997) (codified at FAR Part 15) [hereinafter Rewrite].

<sup>20</sup> *Id.*

<sup>21</sup> Craig, *supra* note 1, at 667.

<sup>22</sup> *Id.* at 674.

<sup>23</sup> *Id.* at 668.

<sup>24</sup> Rewrite, *supra* note 19, at 51229.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> FAR 15.306(d)(3) (2002).

<sup>28</sup> Craig, *supra* note 1, at 674.

<sup>29</sup> *Id.* at 678.

<sup>30</sup> *Id.* at 667-68.

adjudication on the issues can result in a variety of outcomes for a variety of reasons.”<sup>31</sup> This failure has had a chilling effect on contracting officers’ willingness to enter into these exchanges, and commentators have called for a new rewrite of FAR 15.306 which would clearly set forth the distinction between clarifications and discussions.

There are at least two recommended changes to the current FAR, which would arguably clarify the distinction between clarifications and discussions. The first recommended change would clearly define clarifications and discussions within the text of the FAR in order to “promote system transparency, integrity and competition.”<sup>32</sup> The second recommended change would define the term “proposal.”<sup>33</sup> The proponents of this view argued that the rewrite’s failure is the result of the drafters not clearly defining what “proposal” means.<sup>34</sup> Both camps have called for another revision to FAR Part 15. “Almost all procurement professionals recognize that the present FAR 15.306 has failed to work as intended. But it’s not carved on stone tablets. All that is needed is the will on the part of the members of the FAR councils to get the job done.”<sup>35</sup> Until the distinction between clarifications and discussions is clearly established in the FAR, contract attorneys must be able to advise their clients on the differences between the three forms of exchanges FAR 15.306 permits. This article will assist contract attorneys provide effective advice in this area.

### III. Clarifications and Award Without Discussions

The Department of Defense Source Selection Procedures<sup>36</sup> encourage the government to enter into discussions with all offerors in the competitive range. The belief is that the government obtains best value for the goods and services it contracts for when it enters into discussions with the most highly rated offerors,<sup>37</sup> and that discussions “afford[] the Government the opportunity to effectively understand and evaluate a proposal and permits industry the opportunity to clearly explain any aspects of a proposal that

appear to be deficient, ambiguous, or non-compliant. Such dialogue leads to more efficient, effective and improved source selections.”<sup>38</sup> It is for these reasons that “award without discussions shall occur in only limited circumstances.”<sup>39</sup> However, this recommendation is not absolute, and FAR 15.306 permits the government to award a contract to an offeror based on its initial offer without any further exchange.<sup>40</sup>

In order for an agency to award a contract to an offeror based on its initial offer, the government must have put all offerors on notice of its intent to award the contract without discussions.<sup>41</sup> The government puts prospective offerors on notice of its intent by including in the solicitation “a statement that the proposals are intended to be evaluated and awarded without discussions, unless discussions are subsequently determined to be necessary.”<sup>42</sup> The government’s inclusion of standard provision 52.215-1, “instructions to offerors-competitive acquisition” as prescribed in FAR 15.209, “solicitation provisions and contract clauses,” satisfies this notice requirement.<sup>43</sup>

This provision is important because it satisfies the notice requirement, and because it “provides incentive to offerors to provide in their initial proposal their best terms from a cost or price and technical standpoint as there may not be an opportunity to revise their proposals.”<sup>44</sup> When the proposal contains standard provision 52.215-1, it is even possible for the government to award the contract “to a marginally higher offeror without conducting discussions if the offer of the lowest offeror is so ambiguous that it could not be accepted without discussion.”<sup>45</sup> As such, it is clearly in the benefit of the offeror to submit a complete, clear, and well-reasoned proposal because the offeror may not have the chance to revise it before the government makes award.<sup>46</sup> However, the government may afford an offeror the opportunity to clarify certain aspects of its offer before award under FAR 15.306(a).<sup>47</sup>

<sup>31</sup> *Id.* at 675.

<sup>32</sup> *Id.*

<sup>33</sup> Nash & Cibinic, *supra* note 11.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> U.S. DEP’T OF DEF., SOURCE SELECTION PROCEDURES 26 (4 Mar. 2011) [hereinafter SOURCE SELECTION PROCEDURES]; *see also* DFARS 215.306(c) (1998) (recommending contracting officers conduct discussions “for acquisitions with an estimated value of \$100 million”).

<sup>37</sup> SOURCE SELECTION PROCEDURES, *supra* note 36, at 26.

<sup>38</sup> *Id.* at 25.

<sup>39</sup> *Id.*

<sup>40</sup> FAR 15.306(a)(3) (2002); *see also* FAR 52.215-1(f)(4) (2002).

<sup>41</sup> FAR 15.306(a)(3) (2002).

<sup>42</sup> 1B-9 Government Contracts: Law, Admin. & Proc. § 9.30 (citing to 10 U.S.C. § 2305(b)(4)(A); 41 U.S.C. § 3703; 48 C.F.R. § 15.306(a)(3)).

<sup>43</sup> The Competition in Contracting Act (CICA), 10 U.S.C. § 2305(a)(2)(A)(ii)(I) (2006), requires the agency to include its intent with regard to discussions in the solicitation. *See* FAR 15.209(a) (2002), (implementing the CICA provision); *see also* Kiewit Louisiana Company, B-403736, Comp. Gen. Oct. 14, 2010, <http://www.gao.gov/assets/400/390273.pdf>. For ease of reference, FAR 52.215-1 is attached. *See infra* Appendix B.

<sup>44</sup> SOURCE SELECTION PROCEDURES, *supra* note 36, at 25.

<sup>45</sup> 1B-9 Government Contracts: Law, Admin & Proc § 9.30 (citing SAI Comsystems Corp., B-189407, Comp. Gen. Dec. 19, 1977, <http://www.gao.gov/products/451611#mt=e-report>).

<sup>46</sup> SOURCE SELECTION PROCEDURES, *supra* note 36, at 25.

<sup>47</sup> FAR 15.306(a)(2) (2002).

Federal Acquisition Regulation 15.306(a) provides the government the opportunity to clarify certain aspects of an offeror's proposal.<sup>48</sup> The government "may, but is not required to"<sup>49</sup> allow offerors "the opportunity to clarify certain aspects of proposals (e.g., the relevance of an offeror's past performance information and adverse past performance information to which the offeror has not previously had an opportunity to respond) or to resolve minor or clerical errors."<sup>50</sup> These limited exchanges are called "clarifications."<sup>51</sup>

Clarifications are defined at FAR 15.306(a)(1) as "limited exchanges, between the Government and offerors, that may occur when award without discussions is contemplated."<sup>52</sup> The distinction between clarifications under FAR 15.306(a) and discussions under FAR 15.306(d) is fact specific and difficult to determine. However, the purpose of the inquiry helps the practitioner determine if the exchanges are clarifications or discussions. Discussions, which can only occur under the procedures at FAR 15.306(d), will be discussed in detail in Section VI of this article.<sup>53</sup>

The GAO and courts have looked at the purpose of the communication to determine whether the exchange constitutes clarification or discussion and have recognized that "if an offeror is given an opportunity to revise its proposal, the agency has engaged in discussions."<sup>54</sup> If the purpose of the exchange is to allow an offeror to clarify or confirm information in its original offer, without affording it the opportunity to revise its offer, that exchange would be a clarification.<sup>55</sup> Generally speaking "discussions, on the other hand, occur when an agency communicates with an offeror for the purpose of obtaining information essential to determine the acceptability of a proposal, or provides the offeror with the opportunity to revise or modify its proposal in some material respect."<sup>56</sup> It should also be noted that the GAO has consistently held "offerors have no automatic right to clarifications regarding proposals."<sup>57</sup>

Referring to the hypothetical discussed earlier, you arrive at your office early Monday morning immediately after physical training, with the hope of reviewing the guard contract file without any distractions. That hope is short-lived as your phone rings as soon as you turn your office light on. It is the contracting officer for the guard contract who asks you, "Have you read my email yet?" You then open your email and find the following:

Offeror A's proposed price for contract line item (CLIN) 0005 is obviously wrong. Offeror A just misplaced a comma. It should read \$16,000.00 and not \$1,600.000. The overall price of the contract confirms this error. Can I contact them to confirm the error? We do not have time to enter into discussions, and I only want them to confirm the error and its intended price. I think I can but am reaching out in an abundance of caution.

You remember a GAO case which discussed a similar issue and remember that the government has to explicitly let offerors know whether it intends to award without discussions.<sup>58</sup> Fortunately, you tabbed the clause in your copy of the FAR and look at standard provision 52.215-1. You then confirm that the solicitation contained the clause before going any further.<sup>59</sup> Federal Acquisition Regulation 52.215-1 states the government's intention to award the contract without discussions.<sup>60</sup> This clause is typically found in section L of the solicitation.<sup>61</sup> You next look at the more difficult issue of whether the contracting officer's proposed course of action constitutes clarifications or discussions.

You respond by writing the following email:

FAR 15.306(a) allows offerors the opportunity to resolve minor clerical errors. Here, you are just confirming that a decimal point is in the wrong position, and that CLIN 0005 should read \$16,000.00. You are not giving Offeror A an opportunity to modify or revise its proposal. If

<sup>48</sup> FAR 15.306(a)(1) (2002).

<sup>49</sup> Wolverine Services LLC, B-409906.3; B-409906.5 (Comp. Gen. Oct. 14, 2014), <http://www.gao.gov/assets/670/666771.pdf>.

<sup>50</sup> FAR 15.306(a)(2) (2002). *See also* Environmental Quality Management, Inc., B-402247.2, (Comp. Gen. Mar. 9, 2010), <http://www.gao.gov/assets/390/388389.pdf>.

<sup>51</sup> FAR 15.306(a)(1) (2002).

<sup>52</sup> *Id.*

<sup>53</sup> Environmental Quality Management, Inc., *supra* note 50, at 5.

<sup>54</sup> Michelle E. Litteken & Luke Levasseur, *When Does an Agency Cross the Line from Clarifications to Discussions?*, MAYER BROWN (Aug. 19, 2014), <http://www.meaningfuldiscussions.com/when-does-an-agency-cross-the-line-from-clarifications-to-discussions/>.

<sup>55</sup> Environmental Quality Management, Inc., *supra* note 50, at 5.

<sup>56</sup> Pinnacle Solutions, Inc., B-406998, B-406998.2 (Comp. Gen. Oct. 16, 2012), <http://www.gao.gov/assets/660/650507.pdf>. The Government Accountability Office (GAO) and Court of Federal Claims (CFC) have differing standards regarding the classification of exchanges, which go to technical acceptability, which are looked at further in Part VI.

<sup>57</sup> PN&A, Inc., B-406368 (Comp. Gen. Apr. 23, 2012), <http://www.gao.gov/assets/600/590355.pdf>.

<sup>58</sup> Kiewit Louisiana Company, *supra* note 43.

<sup>59</sup> All contract attorneys should sign up for GAO's email notification system to receive Comptroller General decisions. *See E-mail Updates*, GAO.GOV, <http://www.gao.gov/subscribe/index.php>, (last visited Jan. 11, 2016).

<sup>60</sup> It is important to also look at all the amendments to the solicitation to confirm no changes were made regarding the Government's intention to award without discussions.

<sup>61</sup> *See* FAR 15.406-1 (2002), Tab 15-1, setting forth section "L" of the Uniform Contract Format.

Offeror A tries to change its overall price in any way, we would have a problem. I recommend including language similar to the following in your evaluation notice (EN)<sup>62</sup>: “No other changes to your proposal are allowed, and no such changes will be accepted.”

At the end of your e-mail, you say, “As you know, discussions are highly recommended in negotiated procurements. We still have twenty days before the current contract expires, which gives us time to enter into discussions, if you determine them to be necessary.”<sup>63</sup> Satisfied you answered the contracting officer’s question regarding clarifications, you then turn your attention to FAR 15.306(b) and communications.

#### IV. Communications With Offerors Before Establishment of the Competitive Range

Federal Acquisition Regulation 15.306(b) allows agencies to hold communications with offerors after the receipt of proposals in order to determine whether or not an offeror should be included in the competitive range.<sup>64</sup> There are two types of offerors with whom the government can enter into communications. The first is the offeror whose “past performance information is the determining factor preventing their proposal from being placed in the competitive range.”<sup>65</sup> In this case, the agency is required to hold communications with the offeror.<sup>66</sup> The second is the offeror “whose exclusion from, or inclusion in, the competitive range is

uncertain.”<sup>67</sup> In this situation, the government is not obligated to enter into communications but may choose to do so.<sup>68</sup> The FAR also allows agencies to enter into communications so as “to enhance the agency’s understanding of proposals, allow reasonable interpretation of the proposal, or facilitate the evaluation process.”<sup>69</sup> As mentioned above, communications, like clarifications, do not provide an offeror the opportunity to revise its proposal.<sup>70</sup>

It is now Tuesday morning and the contracting officer on the guard contract is waiting outside your office. Before you can even unlock your office door he says,

Although I was hoping to avoid discussions, it looks like we will have to enter into them because all of the offerors’ prices are higher than the independent government cost estimate (IGCE).<sup>71</sup> I wanted to get your thoughts on possibly limiting the competitive range to three offerors. I want to exclude Offerors B and C because I found negative past performance information on the Contractor Performance Assessment Reporting System (CPARS).<sup>72</sup>

You immediately begin to think of what authority may allow the contracting officer to do so, and ask, “Are you trying to exclude them from the competitive range solely because of their negative past performance information? If that is your intent, FAR 15.306 prohibits you from doing so.”<sup>73</sup> You also note that after he establishes the competitive range of the most

<sup>62</sup> Evaluation Notices (ENs) are the contracting officer’s “written notification to the offeror for purposes of clarifications, communications, or in support of discussions.” SOURCE SELECTION PROCEDURES, *supra* note 36, at 30.

<sup>63</sup> You should always confirm or have the contracting officer confirm the availability of the source selection evaluation board (SSEB) members to review any final proposal revisions (FPRs). While not required, it is best practice to have the same SSEB members review any and all FPRs received after entering discussions.

<sup>64</sup> See *Firearms Training Sys. v. United States*, 41 Fed. Cl. 743 (1998).

<sup>65</sup> FAR 15.306(b)(1)(i) (2002). See also *Presidio Networked Solutions, Inc.*, B-408128.33, B-408128.35, B-408128.36, B-408128.50 (Comp. Gen. Oct. 31, 2014), <http://www.gao.gov/assets/670/666752.pdf>.

<sup>66</sup> See *Presidio Networked Solutions, Inc.*, *supra* note 65, at 10.

<sup>67</sup> FAR 15.306(b)(1)(ii) (2002).

<sup>68</sup> *Id.* See also *Professional Performance Development Group, Inc.*, B-408925 (Comp. Gen. Dec. 31, 2013), <http://www.gao.gov/assets/670/661730.pdf>.

<sup>69</sup> *Presidio Networked Solutions, Inc.*, *supra* note 65, at 10.

<sup>70</sup> FAR 15.306(b)(3) (2002). See also *Presidio Networked Solutions, Inc.*, *supra* note 65, at 10 (holding that offerors cannot use communications to “cure proposal deficiencies or material omissions, alter the technical or cost elements of the proposal, and/or otherwise revise the proposal”).

<sup>71</sup> See *Department of Defense COR Handbook*, DEFENSE ACQUISITION UNIVERSITY, <https://acc.dau.mil/CommunityBrowser.aspx?id=526706> (last visited Jan. 11, 2016).

The IGCE is the Government’s estimate of the resources and projected cost of the resources a contractor will incur in the performance of a contract. These costs include direct costs such as labor, products, equipment, travel, and transportation; indirect costs such as labor overhead, material overhead, and general and administrative (G&A) expenses; and profit or fee (amount above costs incurred to remunerate the contractor for the risks involved in undertaking the contract).

*Id.*

<sup>72</sup> *Contract Performance Assessment Reporting System (CPARS)*, OFFICE OF THE UNDERSECRETARY OF DEFENSE, <http://www.acq.osd.mil/dpap/pdi/eb/cpars.html> (last visited Jan. 11, 2016).

CPARS is a web-enabled application that collects and manages the library of automated Contractor Performance Assessment Reports (CPARs). A CPAR assesses a contractor’s performance and provides a record, both positive and negative, on a given contractor during a specific period of time. Each assessment is based on objective facts and supported by program and contract management data, such as cost performance reports, customer comments, quality reviews, technical interchange meetings, financial solvency assessments, construction/production management reviews, contractor operations reviews, functional performance evaluations, and earned contract incentives.

*Id.*

<sup>73</sup> FAR 15.306(b)(1)(i) (2002).

highly rated offerors, he may be able to further reduce its numbers for reasons of efficiency.<sup>74</sup> The contracting officer agrees with you, saying, “I thought so, but wanted to confirm because we have no room for error here. I will send over the draft ENs, which will afford Offerors B and C the opportunity to address the negative past performance information for your review later today. Thanks.” As he turns toward the door you also remind him that FAR 15.306(a)(3) requires him to document his decision to enter into discussions in the contract file.<sup>75</sup>

## V. Competitive Range

Federal Acquisition Regulation 15.306(c) requires the procuring contracting officer to establish a competitive range composed of the most highly-rated proposals before entering into discussions with offerors.<sup>76</sup> Simply stated, the “competitive range is the group of offerors with whom the contracting officer will conduct discussions and from whom the agency will seek revised proposals.”<sup>77</sup> The contracting officer’s decision of which offerors are the most highly rated must be based on all of the evaluation factors contained in the solicitation.<sup>78</sup>

The current “most highly rated” standard articulated in FAR 15.306(c)(1) is considerably different than the pre-rewrite standard of “reasonable chance of being selected for award.”<sup>79</sup> Before the rewrite, if there was any doubt as to whether an offeror had a chance of being selected for award, that offer was included in the competitive range.<sup>80</sup> This is no longer the case. The GAO rejected the old presumption of inclusion and held that it does “not read the revised language to require agencies to retain in the competitive range a proposal that the agency reasonably concludes has no realistic prospect of award.”<sup>81</sup> The contracting officer even has the ability to further limit the number of offerors in the competitive range for efficiency’s sake.

After having evaluated all proposals in accordance with the request for proposals, 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.”<sup>82</sup> However, in order to limit the number of highly-rated proposals, the government

has to give offerors notice of its right to limit the competitive range. Inclusion of standard provision 52.215-1 satisfies this notice requirement.<sup>83</sup>

The contracting officer has to document this decision to further restrict the competitive range and must consider “the expected dollar value of the award, the complexity of the acquisition and solutions proposed, and the extent of available resources”<sup>84</sup> before making a determination to limit the number of offerors in the competitive range. If the contracting officer is not the source selection authority (SSA) for the procurement, the contracting officer should obtain the SSA’s approval of the competitive range.<sup>85</sup> After obtaining the SSA’s approval, the contracting officer must clearly articulate his rationale in the competitive range determination and advise offerors of their exclusion where necessary.

Federal Acquisition Regulation 15.503(a)(1) requires the contracting officer to provide written notice to an offeror excluded from the competitive range.<sup>86</sup> Federal Acquisition Regulation 15.503(a)(1) states, “The contracting officer shall notify offerors promptly in writing when their proposals are excluded from the competitive range or otherwise eliminated from the competition. The notice shall state the basis for the determination and that a proposal revision will not be considered.”<sup>87</sup> The contracting officer can also eliminate an offeror from the competitive range after discussions. If a contracting officer decides to do so, he must provide written notice to the unsuccessful offerors in accordance with FAR 15.503.<sup>88</sup> The offerors “excluded or otherwise eliminated from the competitive range may request a debriefing (see 15.505 and 15.506).”<sup>89</sup>

Looking back at the hypothetical, your contracting officer calls you and states, “Offeror D’s proposal needs a lot of work. In fact, if I include it in the competitive range, it would basically have to submit a whole new proposal in order to be rated acceptable. I think I will exclude them from the competitive range. Thoughts?” You respond by telling the contracting officer that legally he must include only the most highly-rated proposals in the competitive range, and that GAO ordinarily gives great deference to the agency’s decision on whether to exclude an offeror from the competitive range. There is judicial precedent to supporting

<sup>74</sup> JOHN CIBINIC & RALPH C. NASH, FORMATION OF GOVERNMENT CONTRACTS 871 (George Washington University, 3d ed. 1998).

<sup>75</sup> FAR 15.306(a)(3) (2002). *See also* FAR 52.215-1 (2002).

<sup>76</sup> FAR 15.306(c) (2002). *See also* AS3, *supra* note 15, at 27.

<sup>77</sup> CONTRACT ATTORNEYS DESKBOOK, *supra* note 7, at 8-51.

<sup>78</sup> *Id.*

<sup>79</sup> WALTER STARK ET AL., 1-4 FEDERAL CONTRACT MANAGEMENT ¶ 4.06 (Matthew Bender & Co., Inc., 2013).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> AS3, *supra* note 15, at 28.

<sup>83</sup> FAR 52.215-1(f)(4) (2002).

<sup>84</sup> AS3, *supra* note 15, at 28.

<sup>85</sup> *Id.*

<sup>86</sup> FAR 15.503(a)(1) (2002).

<sup>87</sup> FAR 15.503(a) (2002).

<sup>88</sup> *Id.* at (c)(3).

<sup>89</sup> *Id.* at (c)(4).

his position to exclude.<sup>90</sup> You remind him to document your decision to exclude.

The contracting officer agrees with your recommendation and includes the four most highly-rated offerors within the competitive range. You reviewed his competitive range determination and are standing by to review the new discussion ENs. While waiting for the ENs, you read the last ten GAO decisions pertaining to the Department of Defense and discussions under FAR 15.306(d).<sup>91</sup>

## VI. Exchanges With Offerors After Establishment of the Competitive Range

Federal Acquisition Regulation 15.306(d) controls the exchange of information between the government and all offerors within the competitive range.<sup>92</sup> As briefly discussed in Part II, it is often difficult to determine whether the government's exchange with an offeror constitutes clarifications or discussions. This section will further explore and clarify the distinction between clarifications and discussions.

Contract attorneys must know when clarifications cross over into discussions. When the government enters into discussions with one offeror, it must enter into discussions with all offerors within the competitive range.<sup>93</sup> Failure to conduct meaningful discussion with all offerors within the competitive range leaves the government vulnerable to protest.<sup>94</sup> The results of holding discussions with only one offeror can be devastating. For example, the GAO recently recommended the government cancel an award and reopen the procurement to “afford all of the competitors an opportunity to revise their quotations.”<sup>95</sup> The first step to avoid such a situation is to determine whether or not the exchange constitutes discussions.

The GAO and the Court of Federal Claims (CFC) have long held that discussions occur when the government affords an offeror the opportunity to revise or modify its proposal.<sup>96</sup> This rule is often referred to as the “acid test.”<sup>97</sup> The “acid test for deciding whether discussions have been held is whether it can be said that an offeror was provided the

opportunity to revise its proposal.”<sup>98</sup> However, there are situations that are not as clear cut. For example, in situations “when either (i)[sic] questions (often called ‘clarifications’ by the agency) seek information that is necessary to determine technical acceptability, or (2) the agency seeks a substantial amount of ‘clarify[ing]’ information and an offeror’s response approaches (or crosses) the line of changing the proposal” the GAO and CFC disagree on whether the exchanges constitute discussions.<sup>99</sup>

### A. When Exchanges Constitute Discussions

It may not always be obvious when an exchange constitutes a discussion. “Decisions from the GAO and CFC reveal that the two protest forums apply the FAR provisions differently, with the CFC appearing to embrace a more substantial exchange of information that can still be characterized as clarifications.”<sup>100</sup> This is highlighted in how the GAO and CFC view exchanges between the government and an offeror in which the government seeks information to determine the technical acceptability of an offeror’s proposal.

[The] GAO has ruled that, when an agency uses information from an offeror after submission of a proposal to determine the technical acceptability of a proposal “discussions” occurred.<sup>101</sup> In contrast, CFC decisions generally find that discussions occur only when an offeror is given the opportunity to revise its proposal, and the court is less likely to characterize the provision of information related to a technical acceptability determination as discussions.<sup>102</sup>

Contract attorneys must know this distinction and advise their contracting officers accordingly because many contracting officers think gathering information of technical acceptability always constitute discussions. This belief is most likely based on the fact that contracting officers are generally more versed in GAO decisions than CFC decisions. In addition to the different standard GAO and CFC employ regarding technical acceptability exchanges, they also

<sup>90</sup> CONTRACT ATTORNEYS DESKBOOK, *supra* note 7, at 8-52.

<sup>91</sup> Search of Last Ten GAO Decisions for Department of Defense and FAR 15.306(d), GAO.GOV, <http://gao.gov> (follow “Legal Decisions & Bid Protests” hyperlink; then follow “Search” hyperlink; then enter “15.306(d)” in the search bar and filter results by clicking “Department of Defense” under “Agency”).

<sup>92</sup> FAR 15.306(d) (2002).

<sup>93</sup> *Id.* at (d)(1).

<sup>94</sup> Presidio Networked Solutions, Inc., *supra* note 65, at 8.

<sup>95</sup> Standard Communications, Inc., B-406021 (Comp. Gen. Jan. 24, 2014), <http://www.gao.gov/assets/590/588569.pdf>.

<sup>96</sup> Litteken & Levasseur, *supra* note 54.

<sup>97</sup> Evergreen Helicopters of Alaska, Inc., B-409327.3 (Comp. Gen. Apr. 14, 2014), <http://www.gao.gov/assets/670/662588.pdf>.

<sup>98</sup> *Id.* See also Companion Data Services, LLC, B410022, B-410022.2 (Comp. Gen. Oct. 9, 2014), <http://www.gao.gov/assets/670/666661.pdf>; Litteken & Levasseur, *supra* note 54.

<sup>99</sup> Litteken & Levasseur, *supra* note 54.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

disagree on the deference which should be given to the government's classification of the exchange.<sup>103</sup>

## B. Classification of the Exchange

The CFC gives greater deference to the government's characterization of an exchange than GAO.<sup>104</sup> The GAO looks to the actions of the parties as opposed to the government's characterization of the exchange to determine if discussions occurred.<sup>105</sup> "In determining whether exchanges between the government and offerors are clarifications or discussions, the agency's characterization of the exchange is not controlling, as it is the actions of the parties that determine whether discussions have been held."<sup>106</sup> The CFC generally gives the agency's characterization of the exchange greater deference, holding "in close cases, it is well-established that the government's classification of a particular communication as a clarification or discussion 'is entitled to deference from the court,' as long as that classification is permissible and reasonable."<sup>107</sup>

Looking back at our hypothetical, you receive an email from the contracting officer with a draft EN, labeled "clarifications." The EN reads in pertinent part, "Offeror E, please provide the resumes for your four proposed shift supervisors as required by section L of the solicitation." You remember this requirement from your review of the solicitation. You call the contracting officer and ask him, "Does the purpose of these resumes go to the technical acceptability of Offeror E? If so, the GAO would most likely determine this exchange to be discussions. Therefore, I recommend you establish the competitive range and conduct meaningful discussions with all offerors within the competitive range." The contracting officer sends you an email stating, "Great catch. My contract specialist typed the EN and I did not review it before sending over for legal review. It should have been labeled 'discussions.' I will hold off and send you each offeror's ENs in one email."

Although the GAO and CFC take differing approaches as to what constitute discussions and how much deference

should be given to an agency's classification of an exchange, both agree on the government's responsibility when it enters into discussions as set forth in FAR 15.306(d)(3).<sup>108</sup> Federal Acquisition Regulation 15.306(d)(3) provides the minimum requirements the government must satisfy when it enters into discussions with offerors in the competitive range.<sup>109</sup> Therefore, "it is a fundamental precept of negotiated procurements that discussions, when conducted, must be meaningful; that is, discussions must identify deficiencies and significant weaknesses in each offeror's proposal that could reasonably be addressed to materially enhance the offeror's potential for receiving award."<sup>110</sup> For this reason, the government must tailor the ENs to each offeror's proposal.<sup>111</sup> However, the government need not identify each and every deficiency in an offeror's proposal.<sup>112</sup>

All that is required of the government when it enters into discussions with an offeror is to "lead the contractor into areas requiring improvement."<sup>113</sup> Contract attorneys should encourage their contracting officers to exceed this standard<sup>114</sup> so as to achieve the purpose of discussions; namely, "maximize the Government's ability to obtain best value, based on the requirement and the evaluation factors set forth in the solicitation."<sup>115</sup> In order to accomplish this, the contracting attorney must be familiar with the evaluation board's findings and with each offeror's proposal to help the contracting officer shape the ENs. Having knowledge of the evaluation board's findings and each offeror's proposal also helps the contract attorney ensure that the government does not engage in the activities prohibited in FAR 15.306(e), limit of exchanges. Federal Acquisition Regulation 15.306(e) is designed to ensure the government does not favor one offeror over another. Simply stated, the government should treat all offerors fairly.

## VII. Limits On Exchanges

"Fair treatment of offerors is a cornerstone of effective competition. Thus, ensuring that all offerors are treated fairly

<sup>103</sup> The EN will always spell out under which authority the contracting officer is sending the EN to the offeror.

<sup>104</sup> Litteken & Levasseur, *supra* note 54.

<sup>105</sup> *Id.*

<sup>106</sup> Evergreen Helicopters of Alaska, Inc., *supra* note 97 (quoting Kardex Remstar, LLC, B-409030 (Comp. Gen. Jan. 17, 2014), <http://www.gao.gov/assets/670/660392.pdf>).

<sup>107</sup> Litteken & Levasseur, *supra* note 54.

<sup>108</sup> FAR 15.306(d)(3) (2002).

<sup>109</sup> *Id.*

<sup>110</sup> Theodore Watson, *Meaningful Discussions and GAO Protest Decisions*, WATSON & ASSOCIATES, LLC (Jan. 24, 2014), <http://blog.theodrewatson.com/meaningful-discussions-gao-bid-protest/>. See also FAR 15.001 (2002) ("Deficiency" is "a material failure of a

proposal to meet a Government requirement or a combination of significant weaknesses in a proposal that increases the risk of unsuccessful contract performance to an unacceptable level," and "weakness" as a "flaw in the proposal that increases the risk of unsuccessful contract performance. A "significant weakness" in the proposal is a flaw that appreciably increases the risk of unsuccessful contract performance.).

<sup>111</sup> FAR 15.306(d)(1) (2002).

<sup>112</sup> CONTRACT ATTORNEYS DESKBOOK, *supra* note 7, at 8-56.

<sup>113</sup> *Id.*

<sup>114</sup> It is important for you to ensure that the offeror is able to understand its deficiencies and significant weaknesses. If you are having trouble understanding, it is likely the offeror will too.

<sup>115</sup> FAR 15.306(d)(2). See also CONTRACT ATTORNEYS DESKBOOK, *supra* note 7, at 8-56.

is a major concern when conducting negotiations.”<sup>116</sup> Federal Acquisition Regulation 15.306(e) seeks to ensure fair treatment of offerors by limiting the conduct of government personnel involved in the acquisition.<sup>117</sup> Contract attorneys must know these limitations so that they may identify them and take corrective action when necessary.<sup>118</sup>

Referring to the hypothetical, you receive a phone call from the contracting officer at 1630 on Friday afternoon. He tells you that he is finishing the ENs for all the offerors in the competitive range. During your review, you notice one EN contains the following language: “Offeror C, the government has determined your overall price to be too high. It is 23% greater than the IGCE and 15% higher than the next lowest offeror.” Fortunately, the contracting officer is also in his office so you call him and tell him, “This language appears to be in violation of FAR 15.306(e) because we do not address the IGCE with any of the other offerors and because we appear to have revealed another officer’s price. While FAR 15.306(e) allows us to disclose our IGCE, we must disclose it to all offerors.”<sup>119</sup> The contracting officer makes your recommended changes and sends them back for one last legal review. After reading through the ENs, you are confident the government’s exchanges with the offerors are meaningful and fair and approve the ENs for release. The ENs set 1300 on November 24, 2014, as the date and time for the offerors to submit their final proposal revisions.<sup>120</sup>

### VIII. Conclusion<sup>121</sup>

High-dollar, negotiated procurements are always ripe for protest.<sup>122</sup> Knowing the distinction between the different forms of exchanges authorized under FAR 15.306 and being able to advise your contracting officers on these distinctions will reduce the likelihood of sustainable protest issues while achieving best value for the government.<sup>123</sup> This is the end-result all contract professionals should strive for and the area

where contract attorneys really can be value added to the procurement process.

Clarifications under FAR 15.306(a) are the most limited of the three types of exchanges between the government and an offeror when the government intends to award without discussions.<sup>124</sup> They are designed to allow offerors the opportunity to clarify certain aspects of their proposals or to resolve minor clerical errors.<sup>125</sup> Examples of clarifications include the relevance of an offeror’s past performance, adverse past performance information, and the resolution of minor clerical errors.<sup>126</sup> Clarifications are similar to communications in that they do not afford the offeror the opportunity to revise its proposal.<sup>127</sup>

Communications occur when the government contemplates award after discussions.<sup>128</sup> Communications lead to the establishment of the competitive range which is made up of the most highly-rated proposals and must be established before the government can enter discussions with the offerors in the competitive range.<sup>129</sup> Communications do not allow the offerors to revise their proposals.<sup>130</sup> In contrast, discussions are the only form of exchange between the government and offerors after receipt of proposals where offerors are allowed to revise their proposals.<sup>131</sup>

Discussions occur after the establishment of the competitive range and are the most detailed of the exchanges allowed under FAR Part 15 because they allow an offeror to revise its proposal.<sup>132</sup> Discussions “allow the offeror an opportunity to revise its proposal so that the government obtains the best value, based on the requirement and applicable evaluation factors.”<sup>133</sup> It is important to remember that the government has the responsibility to enter into meaningful discussions with all those within the competitive range.<sup>134</sup> As such, the government must craft ENs “tailored to each offeror’s proposal”<sup>135</sup> while being careful not to engage in the activities prohibited in FAR 15.306(f).

<sup>116</sup> CIBINIC & NASH, *supra* note 74, at 899.

<sup>117</sup> FAR 15.306(e) (2002).

<sup>118</sup> The procedures for remedying a violation of FAR 15.306(e) are beyond the scope of this article. *But see* CIBINIC & NASH, *supra* note 74, at 904-06.

<sup>119</sup> FAR 15.306(e) (2002).

<sup>120</sup> When setting a date and time for which final proposal revisions must be submitted, it is always a good practice point to make it a time certain (e.g. “1300 Eastern Standard Time”). It is best to avoid times which can confuse an offeror (e.g. “1200”) because it is unclear as to whether we are referring to noon or midnight.

<sup>121</sup> AS3, *supra* note 15, at 26 (containing a useful chart explaining the distinctions between clarifications, communications, and discussions, which is attached); *see infra* Appendix C.

<sup>122</sup> Myth-Busting, *supra* note 6, at 7.

<sup>123</sup> *Id.*

<sup>124</sup> AS3, *supra* note 15, at 26.

<sup>125</sup> FAR 15.306(a). *See also* AS3, *supra* note 15, at 26.

<sup>126</sup> AS3, *supra* note 15, at 26.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> FAR 15.306(b) (2002). *See also* AS3, *supra* note 15, at 26.

<sup>130</sup> AS3, *supra* note 15, at 26.

<sup>131</sup> FAR 15.306(d) (2002).

<sup>132</sup> *Id.*

<sup>133</sup> AS3, *supra* note 15, at 26.

<sup>134</sup> *Id.*

<sup>135</sup> FAR 15.306(d)(1) (2002).

Regarding the hypothetical discussed throughout this article, it is now November 28th, and the contracting officer briefs the commander that (1) all four offerors in the competitive range submitted timely final proposal revisions, (2) the SSEB met and reviewed all the final proposal revisions and recommended award to Offeror A, (3) he concurs with their recommendation, and (4) he plans to award the guard contract to Offeror A today.

Your brigade commander turns to you and asks, “Are we going to get any protests from this award?” You tell your boss,

Sir, procurements like this one are always subject to protest, due to their dollar value. However, the contracting officer and his team did a great job. Their willingness to enter into discussions certainly helped reduce the chances of a sustainable protest, and helped the government receive best value, as demonstrated by the revised prices, which are in line with our IGCE. I am confident we can win any protest.”<sup>136</sup>

Satisfied with your answer, the commander turns to the contracting officer and says, “Great work, now go award the contract.”

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<sup>136</sup> Myth-Busting, *supra* note 6, at 7.

Appendix A. FAR 15.306 (2002) — Exchanges With Offerors After Receipt of Proposals.

(a) *Clarifications and award without discussions.*

(1) Clarifications are limited exchanges, between the Government and offerors, that may occur when award without discussions is contemplated.

(2) If award will be made without conducting discussions, offerors may be given the opportunity to clarify certain aspects of proposals (e.g., the relevance of an offeror's past performance information and adverse past performance information to which the offeror has not previously had an opportunity to respond) or to resolve minor or clerical errors.

(3) Award may be made without discussions if the solicitation states that the Government intends to evaluate proposals and make award without discussions. If the solicitation contains such a notice and the Government determines it is necessary to conduct discussions, the rationale for doing so shall be documented in the contract file (see the provision at 52.215-1) (10 U.S.C. 2305(b)(4)(A)(ii) and 41 U.S.C. 3703(a)(2)).

(b) *Communications with offerors before establishment of the competitive range.* Communications are exchanges, between the Government and offerors, after receipt of proposals, leading to establishment of the competitive range. If a competitive range is to be established, these communications—

(1) Shall be limited to the offerors described in paragraphs (b)(1)(i) and (b)(1)(ii) of this section and—

(i) Shall be held with offerors whose past performance information is the determining factor preventing them from being placed within the competitive range. Such communications shall address adverse past performance information to which an offeror has not had a prior opportunity to respond; and

(ii) May only be held with those offerors (other than offerors under paragraph (b)(1)(i) of this section) whose exclusion from, or inclusion in, the competitive range is uncertain;

(2) May be conducted to enhance Government understanding of proposals; allow reasonable interpretation of the proposal; or facilitate the Government's evaluation process. Such communications shall not be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, and/or otherwise revise the proposal. Such communications may be considered in rating proposals for the purpose of establishing the competitive range;

(3) Are for the purpose of addressing issues that must be explored to determine whether a proposal should be placed in the competitive range. Such communications shall not provide an opportunity for the offeror to revise its proposal, but may address—

(i) Ambiguities in the proposal or other concerns (e.g., perceived deficiencies, weaknesses, errors, omissions, or mistakes (see 14.407)); and

(ii) Information relating to relevant past performance; and

(4) Shall address adverse past performance information to which the offeror has not previously had an opportunity to comment.

(c) *Competitive range.*

(1) Agencies shall evaluate all proposals in accordance with 15.305(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 of the most highly rated proposals, 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 15.305(a) and paragraph (c)(1) of this section, the contracting officer may determine that the number of most highly rated proposals that might otherwise be included in the competitive range exceeds the number at which an efficient competition can be conducted. Provided the solicitation notifies offerors that the competitive range can be limited for purposes of efficiency (see 52.215-1(f)(4)), the contracting officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals (10 U.S.C. 2305(b)(4) and 41 U.S.C. 3703).

(3) If the contracting officer, after complying with paragraph (d)(3) of this section, decides that an offeror's proposal should no longer be included in the competitive range, the proposal shall be eliminated from consideration for award. Written notice of this decision shall be provided to unsuccessful offerors in accordance with 15.503.

(4) Offerors excluded or otherwise eliminated from the competitive range may request a debriefing (see 15.505 and 15.506).

(d) *Exchanges with offerors after establishment of the competitive range.* Negotiations are exchanges, in either a competitive or sole source environment, between the Government and offerors, that are undertaken with the intent of allowing the offeror to revise its proposal. These negotiations may include 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. When negotiations are conducted in a competitive acquisition, they take place after establishment of the competitive range and are called discussions.

(1) Discussions are tailored to each offeror's proposal, and must be conducted by the contracting officer with each offeror within the competitive range.

(2) The primary objective of discussions is to maximize the Government's ability to obtain best value, based on the requirement and the evaluation factors set forth in the solicitation.

(3) At a minimum, the contracting officer must, subject to paragraphs (d)(5) and (e) of this section and 15.307(a), indicate to, or discuss with, each offeror still being considered for award, deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond. The contracting officer also is encouraged to discuss other aspects of the offeror's proposal that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award. However, the contracting officer is not required to discuss every area where the proposal could be improved. The scope and extent of discussions are a matter of contracting office judgment.

(4) In discussing other aspects of the proposal, the Government may, in situations where the solicitation stated that evaluation credit would be given for technical solutions exceeding any mandatory minimums, negotiate with offerors for increased performance beyond any mandatory minimums, and the Government may suggest to offerors that have exceeded any mandatory minimums (in ways that are not integral to the design), that their proposals would be more competitive if the excesses were removed and the offered price decreased.

(5) If, after discussions have begun, an offeror originally in the competitive range is no longer considered to be among the most highly rated offerors being considered for award, that offeror may be eliminated from the competitive range whether or not all material aspects of the proposal have been discussed, or whether or not the offeror has been afforded an opportunity to submit a proposal revision (see 15.307(a) and 15.503(a)(1)).

(e) *Limits on exchanges.* Government personnel involved in the acquisition shall not engage in conduct that—

(1) Favors one offeror over another;

(2) Reveals an offeror's technical solution, including unique technology, innovative and unique uses of commercial items, or any information that would compromise an offeror's intellectual property to another offeror;

(3) Reveals an offeror's price without that offeror's permission. However, the contracting officer may inform an offeror that its price is considered by the Government to be too high, or too low, and reveal the results of the analysis supporting that conclusion. It is also permissible, at the Government's discretion, to indicate to all offerors the cost or price that the Government's price analysis, market research, and other reviews have identified as reasonable (41 U.S.C.2102 and 2107);

(4) Reveals the names of individuals providing reference information about an offeror's past performance; or

(5) Knowingly furnishes source selection information in violation of 3.104 and 41 U.S.C. 2102 and 2107.

(a) *Definitions.* As used in this provision—

“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.

“In writing,” “writing,” or “written” means any worded or numbered expression which can be read, reproduced, and later communicated, and includes electronically transmitted and stored information.

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

“Proposal revision” is a change to a proposal made after the solicitation closing date, at the request of or as allowed by a Contracting Officer as the result of negotiations.

“Time,” if stated as a number of days, is calculated using calendar days, unless otherwise specified, and will include Saturdays, Sundays, and legal holidays. However, if the last day falls on a Saturday, Sunday, or legal holiday, then the period shall include the next working day.

(b) *Amendments to solicitations.* If this solicitation is amended, all terms and conditions that are not amended remain unchanged. Offerors shall acknowledge receipt of any amendment to this solicitation by the date and time specified in the amendment(s).

(c) *Submission, modification, revision, and withdrawal of proposals.*

(1) Unless other methods (e.g., electronic commerce or facsimile) are permitted in the solicitation, proposals and modifications to proposals shall be submitted in paper media in sealed envelopes or package (i) addressed to the office specified in the solicitation, and (ii) showing the time and date specified for receipt, the solicitation number, and the name and address of the offeror. Offerors using commercial carriers should ensure that the proposal is marked on the outermost wrapper with the information in paragraphs (c)(1)(i) and (c)(1)(ii) of this provision.

(2) The first page of the proposal must show—

(i) The solicitation number;

(ii) The name, address, and telephone and facsimile numbers of the offeror (and electronic address if available);

(iii) A statement specifying the extent of agreement with all terms, conditions, and provisions included in the solicitation and agreement to furnish any or all items upon which prices are offered at the price set opposite each item;

(iv) Names, titles, and telephone and facsimile numbers (and electronic addresses if available) of persons authorized to negotiate on the offeror’s behalf with the Government in connection with this solicitation; and

(v) Name, title, and signature of person authorized to sign the proposal. Proposals signed by an agent shall be accompanied by evidence of that agent’s authority, unless that evidence has been previously furnished to the issuing office.

(3) *Submission, modification, revision, and withdrawal of proposals.*

(i) Offerors are responsible for submitting proposals, and any modification, or revisions, so as to reach the Government office designated in the solicitation by the time specified in the solicitation. If no time is specified in the solicitation, the time for receipt is 4:30 p.m., local time, for the designated Government office on the date that proposal or revision is due.

(ii)(A) Any proposal, modification, or revision received at the Government office designated in the solicitation after the exact time specified for receipt of offers is “late” and will not be considered unless it is received before award is made, the Contracting Officer determines that accepting the late offer would not unduly delay the acquisition; and —

(1) If it was transmitted through an electronic commerce method authorized by the solicitation, it was received at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of proposals; or

(2) There is acceptable evidence to establish that it was received at the Government installation designated for receipt of offers and was under the Government's control prior to the time set for receipt of offers; or

(3) It is the only proposal received.

(B) However, a late modification of an otherwise successful proposal that makes its terms more favorable to the Government, will be considered at any time it is received and may be accepted.

(iii) Acceptable evidence to establish the time of receipt at the Government installation includes the time/date stamp of that installation on the proposal wrapper, other documentary evidence of receipt maintained by the installation, or oral testimony or statements of Government personnel.

(iv) If an emergency or unanticipated event interrupts normal Government processes so that proposals cannot be received at the office designated for receipt of proposals by the exact time specified in the solicitation, and urgent Government requirements preclude amendment of the solicitation, the time specified for receipt of proposals will be deemed to be extended to the same time of day specified in the solicitation on the first work day on which normal Government processes resume.

(v) Proposals may be withdrawn by written notice received at any time before award. Oral proposals in response to oral solicitations may be withdrawn orally. If the solicitation authorizes facsimile proposals, proposals may be withdrawn via facsimile received at any time before award, subject to the conditions specified in the provision at 52.215-5, Facsimile Proposals. Proposals may be withdrawn in person by an offeror or an authorized representative, if the identity of the person requesting withdrawal is established and the person signs a receipt for the proposal before award.

(4) Unless otherwise specified in the solicitation, the offeror may propose to provide any item or combination of items.

(5) Offerors shall submit proposals in response to this solicitation in English, unless otherwise permitted by the solicitation, and in U.S. dollars, unless the provision at FAR 52.225-17, Evaluation of Foreign Currency Offers, is included in the solicitation.

(6) Offerors may submit modifications to their proposals at any time before the solicitation closing date and time, and may submit modifications in response to an amendment, or to correct a mistake at any time before award.

(7) Offerors may submit revised proposals only if requested or allowed by the Contracting Officer.

(8) Proposals may be withdrawn at any time before award. Withdrawals are effective upon receipt of notice by the Contracting Officer.

(d) *Offer expiration date.* Proposals in response to this solicitation will be valid for the number of days specified on the solicitation cover sheet (unless a different period is proposed by the offeror).

(e) *Restriction on disclosure and use of data.* Offerors that include in their proposals data that they do not want disclosed to the public for any purpose, or used by the Government except for evaluation purposes, shall —

(1) Mark the title page with the following legend:

This proposal includes data that shall not be disclosed outside the Government and shall not be duplicated, used, or disclosed — in whole or in part — for any purpose other than to evaluate this proposal. If, however, a contract is awarded to this offeror as a result of — or in connection with — the submission of this data, the Government shall have the right to duplicate, use, or disclose the data to the extent provided in the resulting contract. This restriction does not limit the Government's right to use information contained in this data if it is obtained from another source without restriction. The data subject to this restriction are contained in sheets [insert numbers or other identification of sheets]; and

(2) Mark each sheet of data it wishes to restrict with the following legend:

Use or disclosure of data contained on this sheet is subject to the restriction on the title page of this proposal.

(f) *Contract award.*

(1) The Government intends to award a contract or contracts resulting from this solicitation to the responsible offeror(s) whose proposal(s) represents the best value after evaluation in accordance with the factors and subfactors in the solicitation.

(2) The Government may reject any or all proposals if such action is in the Government's interest.

(3) The Government may waive informalities and minor irregularities in proposals received.

(4) The Government intends to evaluate proposals and award a contract without discussions with offerors (except clarifications as described in FAR 15.306(a)). Therefore, the offeror's initial proposal should contain the offeror's best terms from a cost or price and technical standpoint. The Government reserves the right to conduct discussions if the Contracting Officer later determines them to be necessary. If the Contracting Officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, 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.

(5) The Government reserves the right to make an award on any item for a quantity less than the quantity offered, at the unit cost or prices offered, unless the offeror specifies otherwise in the proposal.

(6) The Government reserves the right to make multiple awards if, after considering the additional administrative costs, it is in the Government's best interest to do so.

(7) Exchanges with offerors after receipt of a proposal do not constitute a rejection or counteroffer by the Government.

(8) The Government may determine that a proposal is unacceptable if the prices proposed are materially unbalanced between line items or subline items. Unbalanced pricing exists when, despite an acceptable total evaluated price, the price of one or more contract line items is significantly overstated or understated as indicated by the application of cost or price analysis techniques. A proposal may be rejected if the Contracting Officer determines that the lack of balance poses an unacceptable risk to the Government.

(9) If a cost realism analysis is performed, cost realism may be considered by the source selection authority in evaluating performance or schedule risk.

(10) A written award or acceptance of proposal mailed or otherwise furnished to the successful offeror within the time specified in the proposal shall result in a binding contract without further action by either party.

(11) If a post-award debriefing is given to requesting offerors, the Government shall disclose the following information, if applicable:

(i) The agency's evaluation of the significant weak or deficient factors in the debriefed offeror's offer.

(ii) The overall evaluated cost or price and technical rating of the successful and the debriefed offeror and past performance information on the debriefed offeror.

(iii) The overall ranking of all offerors, when any ranking was developed by the agency during source selection.

(iv) A summary of the rationale for award.

(v) For acquisitions of commercial items, the make and model of the item to be delivered by the successful offeror.

(vi) Reasonable responses to relevant questions posed by the debriefed offeror as to whether source-selection procedures set forth in the solicitation, applicable regulations, and other applicable authorities were followed by the agency.

(End of Provision)

*Alternate I (Oct 1997).* As prescribed in 15.209(a)(1), substitute the following paragraph (f)(4) for paragraph (f)(4) of the basic provision:

(f)(4) The Government intends to evaluate proposals and award a contract after conducting discussions with offerors whose proposals have been determined to be within the competitive range. If the Contracting Officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, 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. Therefore, the offeror's initial proposal should contain the offeror's best terms from a price and technical standpoint.

*Alternate II (Oct 1997).* As prescribed in 15.209(a)(2), add a paragraph (c)(9) substantially the same as the following to the basic clause:

(c)(9) Offerors may submit proposals that depart from stated requirements. Such proposals shall clearly identify why the acceptance of the proposal would be advantageous to the Government. Any deviations from the terms and conditions of the solicitation, as well as the comparative advantage to the Government, shall be clearly identified and explicitly defined. The Government reserves the right to amend the solicitation to allow all offerors an opportunity to submit revised proposals based on the revised requirements.

• **Types of Exchanges**

After receipt of proposals, there are three types of exchanges that may occur between the Government and offerors – clarifications, communications and negotiations or discussions. They differ on when they occur, their purpose and scope, and whether offerors are allowed to revise their proposals as a result of the exchanges. All SSEB exchanges must be accomplished through the use of evaluation notices (ENs). Figure 3-5 provides a side-by-side comparison of the three types of exchanges.

**Figure 3-5  
Comparison of Types of Exchanges (After Receipt of Proposals)**

	<b>Clarifications</b>	<b>Communications</b>	<b>Negotiations/Discussions</b>
<b>When They Occur</b>	Limited exchanges, between the Government and offerors when award WITHOUT discussions is contemplated	When award WITH discussions is contemplated – prior to establishing the competitive range  May only be held with those offerors (other than offerors under <a href="#">FAR 15.308 (b)(1)(ii)</a> ) whose exclusion from the competitive range is uncertain.	After establishing the competitive range  <b>Note:</b> The term "negotiations" applies to both competitive and non-competitive acquisitions. In competitive acquisitions, negotiations are also called discussions.
<b>Scope of the Exchanges</b>	Most limited of the three types of exchanges	Limited; similar to fact finding	Most detailed and extensive
<b>Purpose</b>	To clarify certain aspects of proposals	To enhance the Government's understanding of the proposal by addressing issues that must be explored to allow a reasonable interpretation of the offeror's proposal to determine whether a proposal should be placed in the competitive range	To allow the offeror an opportunity to revise its proposal so that the Government obtains the best value, based on the requirement and applicable evaluation factors
<b>Examples of Topics of Exchanges</b>	<ul style="list-style-type: none"> <li>• Relevance of an offeror's past performance</li> <li>• Adverse past performance information</li> <li>• Resolution of minor or clerical errors.</li> </ul>	<ul style="list-style-type: none"> <li>• Ambiguities or other concerns (e.g., perceived deficiencies, weaknesses, errors, omissions, or mistakes)</li> <li>• Relevance of an offeror's past performance</li> <li>• Adverse past performance information</li> </ul>	Examples of potential discussion topics include the identification of all evaluated deficiencies, significant weaknesses, weaknesses, and any adverse past performance information to which the offeror has not yet had an opportunity to respond.
<b>Are Resultant Proposal Revisions Allowed?</b>	No	No	Yes