



March 2, 2017

General Services Administration
Regulatory Secretariat Division
ATTN: Ms. Flowers
1800 F Street NW., 2nd Floor
Washington, DC 20405

Re: FAR case 2016–005, Federal Acquisition Regulation (FAR): Effective Communication between Government and Industry

Dear Ms. Flowers:

On behalf of the leading providers of ICT hardware, software, services, and solutions to the public sector that are members of the IT Alliance for Public Sector,¹ we appreciate the opportunity to provide comments on the proposed rule on Effective Communication between Government and Industry published on Tuesday, November 29, 2016 at page 85914 of the Federal Register and to further urge a shift by the parties towards a collaborative communications model.

Introduction

We applaud the Federal Acquisition Regulation (FAR) Council for the issuance of the proposed rule as it continues to clarify the extent to which communication is allowed between government and industry. The rule is required by Section 887 of the Fiscal Year (FY) 2016 National Defense Authorization Act (NDAA), Effective Communication between Government and Industry, but is part of a much broader policy initiative to address systemic problems with how the acquisition workforce can increase dialogue with industry and create a culture of meaningful exchanges throughout the acquisition process. In its entirety, Section 887 states:

Not later than 180 days after the date of the enactment of this Act, the Federal Acquisition Regulatory Council shall prescribe a regulation making clear that agency acquisition personnel are permitted and encouraged to engage in responsible and constructive exchanges with industry, so long as those exchanges are consistent with existing law and regulation and do not promote an unfair competitive advantage to particular firms. (emphasis added)

ITAPS notes that the plain language of Section 887 reflects a desire by Congress to expand beyond the current communications framework as interpreted and manifested in the FAR and urge new collaborative behaviors by agency acquisition personnel with industry stakeholders.

As a threshold matter, the current acquisition workforce is constrained by a regulatory culture, training policies, and procedures that limit communications and flexibility. Despite supportive efforts of discretion

¹ **About ITAPS.** ITAPS, a division of the Information Technology Industry Council (ITI), is an alliance of leading technology [companies](#) building and integrating the latest innovative technologies for the public sector market. With a focus on the federal, state, and local levels of government, as well as on educational institutions, ITAPS advocates for improved procurement policies and practices, while identifying business development opportunities and sharing market intelligence with our industry participants. Visit itaps.itic.org to learn more. Follow us on Twitter [@ITAlliancePS](#).



by leadership at some agencies, the reward system reinforces that bias in the promotion and retention system. These regulatory structures are incompatible with a modern workforce culture, a mission objective approach, and technology changes that encourage all manner of constant communications.

As the background states, the proposed rule revises the performance standard articulated in FAR 1.102(b)(1) as:

“Satisfy the customer in terms of cost, quality, and timeliness of the delivered product or service.”

This is one of several governing principles used to describe the fundamental purpose of the FAR in acquiring goods and services for use by federal agencies to fulfill their missions. FAR Part 1 has long been the policy and legal touchstone to understand the scope and scale of acquisition authority. It contains the basic information needed for stakeholders to comprehend their roles, duties, and authorities within the system.

Throughout the 1990’s, the organizing principle at FAR 1.102(d) was commended for use as a best practice by agency executives and contracting officials and as primary guidance to the procurement workforce and asserts that:

“The role of each member of the Acquisition Team is to exercise personal initiative and sound business judgment in providing the best value product or service to meet the customer’s needs. In exercising initiative, Government members of the Acquisition Team may assume if a specific strategy, practice, policy or procedure is in the best interests of the Government and is not addressed in the FAR, nor prohibited by law (statute or case law), Executive order or other regulation, that the strategy, practice, policy or procedure is a permissible exercise of authority.”

At the time, such flexibility, innovative behavior, and rational risk taking were encouraged and fostered by many agencies; therefore, federal acquisition executives encouraged risk taking and bred creativity into the acquisition process. Such efforts led to many creative contracting innovations, including developing a more open communications culture than existed up to that time, establishing recurring external outreach activities, creating new guidance documents, and leveraging industry collaboration to facilitate an open culture. For a period of time extending into the early 2000’s, a collaborative relationship developed between the contracting stakeholders that had not been seen previously.

Such flexibility, however, was never embraced fully at all agencies. Thus, with the turnover of experienced acquisition personnel over time and the re-growth of a rigid, new, rules-driven culture focused on oversight and not stakeholder value, a flexible approach dependent on communications has mostly fallen into disuse.

To combat the erosion of a collaborative, communicative culture, agencies and industry attempted to achieve clarity and periodically tried to reverse the trend towards risk aversion with initiatives aimed at expanding communications, including reminding officials about the guidance in FAR 1.102(d). For the most part, those efforts have been met with skepticism and/or disdain by the federal acquisition workforce because of a lack of organizational support. Some policy efforts to improve communications, however, have been noteworthy. One such initiative was the creation of a set of “Myth-Busters” guidance documents by the Office of Federal Procurement Policy (OFPP), which were greeted with enthusiasm by the



procurement community, but not operationalized to any measurable degree, nor implemented in revised regulations.

Despite that minor blemish, the OFPP Myth-Busting campaign has done much to address some of the misconceptions that were held by both the government and vendors with regards to communication and is to be commended. The need for these memoranda, as well as the proposed rule, reinforce the point that the ability to communicate is not being utilized by the acquisition community to its fullest extent available. All three variants of the Myth-Busters guidance² were well-intentioned groundwork and have been hallmarks for positive actions taken by government to enhance the quality and quantity of communications between industry and federal agency employees.

The first Myth-Busting memo included requirements for CFO Act agencies to submit annual Communications Plans to insure that each organization was taking steps to encourage communications and to increase awareness by calling for training, an open engagement forum, and the establishment of an on-line Community of Practice (CoP) to host success stories and FAQs, among other things. Myth-Busting 2 took additional steps to build out the electronic collaboration tool kit and involve the Chief Acquisition Officers Council (CAOC) in developing relevant policies. It contained some success stories, but pointed out that communications needed to be two-way and would require culture change. It also identified the limited amount of resources in government to accomplish these goals and thus would only target activities that would prioritize the effects of more communications. Myth-Busting 3 repeated some of the messages about fostering best practices and continued engagement, but focused on debriefings as their priority target of opportunity.

Although Myth-Busters generated much initial enthusiasm, as mentioned above, they are centered on building bureaucracies within organizational structures to report on agency progress rather than actively building regulatory mechanisms that might have broader effects on CO behavior. These are all helpful steps in creating an atmosphere for engagement and dialogue during the acquisition process. There are positive agency stories of change occurring in individual programs and by individual executives, but those efforts now need to be cross-walked throughout government from organizational planning requirements to rank and file procurement processes in the FAR.

Regardless of these efforts, communications generally are shunned by CO's and others in the acquisition workforce for a multitude of reasons. These include, but are not limited to, a rigid regulatory structure, the disincentive to talk to contractor personnel, the lack of training, and the presumption that communications are not allowed, which is more often than not also the behavioral policy fostered and rewarded by agency ethics, oversight, and legal officials, whose interest are not always linked with agency missions in delivering goods and services to stakeholders.

Further, acquisition personnel primarily learn the lessons about communications through the chain of command and through GAO bid protest decisions, which focus on missteps in communications at various points in the process. Contracting officials and other acquisition personnel are dissuaded from engaging by legal decisions that appear to discourage, if not prohibit, communications because of the fear of saying something inappropriate. If anything, acquisition leaders should go out of their way to reward those that

² OMB/OFPP Memorandum: Myth-Busting, February 2, 2011; OMB/OFPP Myth-Busting 2, May 7, 2012; OMB/OFPP Myth-Busting 3, January 5, 2017;



engage with industry or at least not punish those whose communications may occasionally impact an acquisition in the form of a protest.

This eco-system has created a sense of inertia in the stakeholder community. One symptom of which is a tendency to disengage from most communications with industry during the acquisition process, except where regulations expressly allow for them, such as where FAR Part 15 narrowly regulates the language used in negotiations process. Accordingly, such disengagement led to the enactment of Section 887, which Congress intended to counteract the expansion of a rules-driven culture and to foster a new sense of allowable engagement between the parties.

It is clear that the FAR currently allows for such communication during the acquisition process. For instance, as noted in the first Myth-Busters released by OFPP, Section 10.002(b)(2) of the FAR already authorizes both interactive and online communication with industry when conducting market research and expressly authorizes communications between federal requirements owners and industry. While we recognize that there are limitations to this tool, those limitations are in place to avoid unfair advantages in the competition process, not prohibit communication in its entirety. Yet, many contracting officials continue to interpret these as complete prohibitions to communications, and not manageable limits.

Comments

The proposed new language revises FAR 1.102-2(a)(4) to add the following:

“...Government acquisition personnel are permitted and encouraged to engage in responsible and constructive exchanges with industry as part of market research, so long as those exchanges are consistent with existing laws, regulations, and promote a fair competitive environment.” (emphasis added)

The statute states that the FAR Council should permit responsible and constructive exchanges consistent with the law, without establishing any further limits to timing, form or content. The rule, however, inexplicably narrows implementation of that broad mandate by limiting communications to exchanges about market research, which is inconsistent with the statute. It fails to align with policy initiatives over the past 5 years to increase communications and does nothing new to enhance communications. Unfortunately, the proposed rulemaking thus perpetuates the perception that communications between buyers and sellers requires imposition of more express limits because they are bad.

As constructed, the FAR does not contain ample information about the allowableness of communications between parties except where such dialogue is heavily regulated, discouraged or presented in a negative context. FAR 15.306, Exchanges with Offerors after receipt of proposals, relies on highly prescriptive and often confusing language about communications that limit interactions after offers are submitted and cause the majority of bid protests. FAR Part 3 is a shopping list of bad behaviors and strict controls on industry-government relationships, while FAR Part 10 offers scant guidance on communications, except for market research during the planning phases of an acquisition.

While each of these parts of the FAR may correctly address specific attributes of the acquisition system affecting the arms-length relationship between government and industry personnel, they do not fashion a



unified regulatory system that fosters communications, and subsequently they act more as barriers to communications, which affects market entry and impedes effective competition.

Given the statutory language, it is clear that the proposed rule does not go far enough to encourage the use of communication by acquisition personnel. There is no new mandate or requirement for contracting officers to conduct discussions with the vendors. Though ITAPS is not advocating for such a requirement, we do not believe the proposed rule as written will provide acquisition personnel, including contracting officials, with the impetus needed to change their behavior as to when and how often discussions and other types of communications are conducted with industry.

The imposition of a communications requirement to all contracts may unnecessarily slow down the acquisition process. Even if imposed on contracts worth a certain value, there will still be certain actions when communications are superfluous. ITAPS, therefore, continues to believe that communications should be conducted at the discretion of acquisition personnel, and that the final rule should dovetail with the broader vision of flexibility in FAR 1.102(d). Conversely, acquisition personnel should be held accountable for the lack of communications between themselves and industry. One example of such a measure includes adding the extent of communications conducted between the acquisition personnel and industry to performance evaluations.

Furthermore, it is the recommendation of ITAPS that, in addition to this proposed rule, steps should be taken to increase the training of acquisition personnel on the ability to communicate with industry. While the first “Myth-Busting” memorandum indicated that OFPP would work with the Federal Acquisition Institute (FAI) and others to conduct an awareness campaign and that FAI would develop a continuous learning module for acquisition personnel, almost six years later, there only appears to be one elective webinar on effective communication available through the FAI website. Until there is comprehensive and required training for acquisition personnel on communication between government and industry aimed at fostering allowable communications, acquisition personnel will continue to shy away from its use.

As such, it is not sufficient to implement a rule that provides another limit to open communications contrary to Congressional intent, and then label that implementation successful. Likewise, it is also insufficient to rely on more Myth-Busters memos to guide the way.

We thus recommend that the FAR Council take further actions before finalizing this rulemaking, including leveraging existing guidance memos to build on agency Myth-Busters activities and communication structures. Those include mining the CoP and agency vendor plans for actionable ideas about communications, identifying tested examples of agency communications in FAR Part 10, supplementing the proposed rule with a list of non-exclusive actions derived from those activities and agency efforts that could be inserted under FAR 1.102(a)(4) and/or FAR Part 10 to give those the sheen of approved behaviors and concurrently crosswalk those behaviors or tactics to FAR 3, 13, 14 and 15. In the alternative to shoe-horning rules about communications into various FAR Parts, the FAR Council should consider adding a stand-alone set of rules and guidance about communications as part of FAR Part 10 and re-label Part 10 as Communications with Industry, of which market research and negotiations rules may be distinct subsets.

Other assorted, non-inclusive procedures could be undertaken to encourage agency acquisition personnel to collaboratively communicate with industry. Some examples include:



1. The final rule should require agency guidance to concurrently encourage the workforce to use the flexibilities in FAR 1.102(d) and/or discourage higher level officials from issuing guidance that stifle innovative approaches or needlessly infringe on enhanced levels of communications throughout an acquisition;
2. The final rule should incentivize officials financially and career-wise to have enhanced levels of communications without fear of being reprimanded and reward collaborative behavior between industry and government personnel in the acquisition process;
3. The final rule should require agency acquisition executives to do more direct outreach to their acquisition workforce as a way to reinforce the message that communication is encouraged and/or appoint an agency Industry Communications Officer to train and monitor contracting officials actions to communicate more;
4. The final rule should create safe harbors from bid protest for contracting officials that communicate more or provide for a presumption that all communications are authorized under the flexibility and discretion in FAR 1.102(d) in the absence of reasonable evidence of bias for, or prejudice against, any single offeror;
5. The final rule should clarify that professional conference attendance is authorized so that dialogue between industry and government personnel can take place on specific topics either to boost market research or to facilitate broader conversations to enhance competition;
6. Expand FAR part 10 to include specific rules on allowable communications or refer personnel to pertinent federal guidance on communications between industry and government or stakeholder communications best practices and not restrict Part 10 to market research only, but see also above;
7. The final rule should require OFPP to create a FAR-based series of practice, training or engagement aids to assist in the open engagement and communications process; these could be based on complexity or dollar threshold of the acquisition, but could include:
 - a. A “pre-proposal” debriefing and/or a public or private recitation of all industry questions and government answers submitted during the pre-proposal process to clarify requirements, gaps or business challenges prior to offers being submitted that offerors may be hesitant to disclose early in the acquisition process, rather than the current practice of simply amending solicitations to include everything asked by everybody, whether relevant or not;
 - b. Continue government-wide efforts to build out and publicize transactional wikis or FAQ sites in relevant electronic forums and allow industry to have access to those tools;
 - c. Reverse debriefings by offerors after award to allow industry to evaluate the actions of the acquisition team in communicating requirements and to evaluate negotiations tactics and techniques.

Industry recognizes also that these communications have to be two-way to be successful, and that many will find ways to undermine open communications in any given transaction. Many acquisition system



commentators will also acknowledge that changing employee behavior in the federal civil service and encouraging open dialogue by industry representatives will require constant executive diligence and may require additional funding to incentivize new ways of performing the acquisition process.

As such, in addition to the recommendations above about building out a set of communications rules and practices in the FAR, ITAPS recommends that OFPP convene a working group consisting of agency and industry stakeholders on a rotating basis, possibly including stakeholders like the Chief Acquisition Officers Council (CAOC), the National Contract Management Association (NCMA), and relevant trade associations to determine how the rules governing communications can be strengthened and expanded in ensuring engagement by both parties that do not run afoul of ethics or negotiation process rules.

Moreover, this group could work to build on Myth-Busters requirements and tools to develop a definitive set of best practices for effective communication that could be utilized in the acquisition process. As proposed, this rulemaking does not advance communication policy as Congress intended in Section 887 nor address stakeholder needs for open dialogue on broader cultural, transactional, business and requirements issues.

Effective communication between the government and the vendor community is vital to the success of the acquisition process. As the need for innovative solutions to government requirements expands, this tool will become even more important for acquisition personnel. We once again would like to applaud the FAR Council for the release of the propose rule. However, we do not believe the rule will be effective in increasing communication without complementary measures, such as those above, taken to inform and engage relevant stakeholders.

We appreciate the opportunity to include these comments for your consideration of the proposed rule. Should you have any questions, please contact Eminence Griffin at egriffin@itic.org.

Respectfully submitted,



A.R. "Trey" Hodgkins, III, CAE
Senior Vice President, Public Sector