

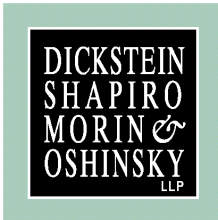


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EXCHANGES WITH INDUSTRY: AN UNDERUTILIZED MARKETING TOOL

With the passage of procurement reform legislation (Federal Acquisition Streamlining Act and Federal Acquisition Reform Act), Congress changed the face of Government contracting. While Government contracting practices cannot yet be equated to commercial contracting standards, significant advances have been made, including those concerning communications between industry and the Government. In the past, when such communications occurred just prior to a procurement, allegations of "improper discussions" and "technical leveling" would arise, and protesters would contend that the Government had provided one contractor with information that gave that contractor an unfair advantage. While improper discussions and technical leveling are still valid protest grounds, Congress and the Federal Acquisition Council have encouraged Government purchasing offices and contractors to act more like the commercial world in terms of pre-acquisition communications.

Part 15 of the Federal Acquisition Regulation (FAR) governs negotiated procurements, including solicitation and receipt of proposals and source selection. In 1997, Part 15 was revised (the so-called "Part 15 Rewrite") to "infuse innovative techniques into the source selection process, simplify the process, and facilitate the acquisition of best value."

The purpose of exchanging information "is to improve the understanding of Government requirements and industry capabilities."

The changes were intended to reduce Government resources necessary for source selection and reduce time to contract award. One of the new provisions, the "exchanges with industry" provision, greatly expanded contractors' abilities to present information to the Government and the contracting officer. This revision created a new marketing tool that is currently underutilized by contractors.

FAR 15.200 describes the policies and procedures for exchanges of information between industry and the Government prior to release of a solicitation or request for proposals (RFP) and describes the techniques and timing for exchanging information. Many contractors are familiar with some of these techniques, including draft RFPs, requests for information (RFIs), and pre-solicitation or pre-proposal conferences. See FAR 15.201(c)(6), (7), (8). However, the regulation does not limit industry or the Government to these techniques, and contractors

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should take full advantage of their ability to provide information in support of marketing efforts.

The purpose of exchanging information "is to improve the understanding of Government requirements and industry capabilities." See FAR 15.201(b). As a result, the regulation specifically encourages the Government to promote early exchanges of information related to future acquisitions. Program managers, contracting officers, and other "participants" in the acquisition process may exchange information regarding a wide variety of issues. For example, the parties can "identify and resolve concerns regarding the acquisition strategy, including proposed contract type, terms and conditions, and acquisition planning schedules; the feasibility of the requirement, including performance requirements, statements of work, and data requirements; the suitability of the proposal instructions and evaluation criteria, including the approach for assessing past performance information; the availability of reference documents; and any other industry concerns or questions." See FAR 15.201(c). To effect this exchange of information, the regulation explicitly encourages "one-on-one meetings with potential offerors" and suggests that any meetings "that are substantially involved with potential contract terms and conditions" should include the contracting officer. In summary, prior to release of a solicitation or RFP, there appears to be almost no limitation on industry's ability to engage program managers and contracting officers in substantive conversations.

After release of a solicitation or RFP, the regulation requires that the contracting officer be the focal point of any exchanges with potential offerors. During the rule-making process leading to the revision of FAR Part 15, some commenters expressed con-

cern that more exchanges between industry and the Government during the actual acquisition process could increase the risk of unfair practices. The FAR Council responded as follows:

The final rule encourages earlier and more meaningful exchanges of information between the Government and potential contractors to achieve a better understanding of the Government's requirements and the offerors' proposals. This rule contains limits on exchanges that preclude favoring one offeror over another, revealing offerors' technical solutions, revealing prices without the offerors' permission, and knowingly furnishing source selection information. In addition, the guidance in the final rule has been revised to alert contracting officers of the safeguards contained at 3.104, Procurement Integrity, and 24.2, Freedom of Information Act.

Stated differently, exchanges of information between industry and the Government are encouraged and, apparently, are only prohibited if the exchanges would create an unfair competitive advantage. In this regard, the regulation specifically contemplates that if, during an exchange with one offeror, information that would be relevant to other offerors is provided, that information should be disclosed:

When specific information about a proposed acquisition that would be necessary for the preparation of proposals is disclosed to one or more potential offerors, that information shall be made available to the public as soon as practicable, but no later than the next general release of information, in order to avoid creating an unfair competitive advantage.
FAR 15.201(f).

Thus, prior to issuance of a solicitation or RFP, there is very little restriction on the ability of a contractor to exchange information with Government officials regarding agency needs and requirements and

on the contractor's ability to meet those needs. Even after a solicitation or RFP has been issued, industry retains the ability to present information to the contracting officer. This ability is somewhat more limited and must be balanced with concerns for treating all offerors fairly. Contractors should take full advantage of this new provision and endeavor to maintain active communications with contracting officers, program managers, and other Government decisionmakers. ♦



The Government Contracts Practice of the Technology Group of Dickstein Shapiro Morin & Oshinsky LLP assists clients in obtaining and maintaining a competitive edge in government procurements.

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