

**EXPLOITING ACQUISITION REFORM
FOR NEW BUSINESS CAPTURE UNDER
REVISED PROPOSED FAR 15 RE-WRITE**

**Prepared for American Bar Association Annual Meeting
General Practice, Solo and Small Firm Section**

**San Francisco, California
August 3, 1997**

McAleese & Associates, P.C., 8201 Greensboro Dr., Suite 820, McLean, VA 22102 (703) 917-8900

AGENDA

- I. Opening Remarks/Introduction
- II. Acquisition Reform Initiatives (Pulling it all together)
 - Shift to Performance Specifications
 - Traditional Procurements
 - FAR 15 and the New Way of Doing Business
 - Review of Six Primary FAR 15 Re-write Changes
 - Risk Mitigation and Containment under “FAFOs”
 - Conclusion
- III. Questions & Answers (Throughout)

PERFORMANCE SPECIFICATIONS INCREASE CONTRACTOR RISK

- Inherently shifts greater risk from government to contractor
 - Contractors can no longer assert that contract requirements were met by showing MilSpecs were religiously followed
- Precludes contractors from “getting healthy” from ECPs and changes during performance (implied MilSpec warranty)
- Performance Specification = employment of a “Total Systems Performance Responsibility” (“TSPR”) clause (Blanket Warranty)
- Stepping up to increased liability: Contractor drafts own SOW
 - **FAR 15 Re-write shift from BAFOs to FAFOs will exacerbate contractor risk**

- **Contractor must adapt strategies to pre-empt, contain, share FAFO risk**

OLD FAR 15: TRADITIONAL NEGOTIATED PROCUREMENTS

- All Offerors with “reasonable chance of award” were admitted into competitive range (FAR 15.609)
- Offerors routinely expected lengthy discussions and submission of BAFOs
- Offerors previously submitted initial proposals with intentional ambiguities in key technical/business details (85% work done by initial proposal)
- This incremental strategy kept the successful offeror’s options open
 - Prevented “technical leveling”
 - Generally ensured that not too much money was “left on the table” (15% normal price drop from initial proposal to BAFO)

With FARA, significant shift in the competitive range dynamic from
“When In Doubt Keep Them In,” to “When In Doubt Throw Them Out”

FUTURE: FAR 15 RE-WRITE

- FARA constrained competition to “efficient full and open” competition
- Constriction of the competitive range to an “efficient number”
- “Competitive range” now becomes “competitive few”
- Consequently, contractors must prepare their initial proposals on “bet the company” programs as **First and Final Offers** (“FAFO”)
- Contractors will now bid according to “perceived” customer technical discriminators and “perceived” price sensitivity

- “Perceptions” of customer discriminators and price sensitivity will drive contractors to assume non-beneficial risks (short term impact on budgeted B&P is obvious -- ↑↑↑)
 - Changes particularly critical for service contractors (reliance on rapid cash flows)
 - Not as significant for production contractors and OEMs (maintain substantially larger IR&D and B&P pools)
- Long-term savings can be re-invested into other company programs, or accelerate cashflow to increase shareholder value

MAJOR FAR 15 PROPOSED CHANGES

- 1) New Pre-competitive Range “Communications”
- 2) Battle over “Constricted” Competitive Range and “Efficiency”
- 3) Fast-paced Negotiations and “hard bargaining” have arrived
- 4) Death of BAFOs
- 5) “Past Performance” driving formation of constricted competitive range
- 6) “Oral Presentations” are replacing written discussions

I. CONSTRICTED COMPETITIVE RANGE

- Old standard of admitting all offerors with reasonable chance of award (when in doubt keep them in) (15.609)
- Now only initial proposals “with greatest likelihood of award” will be admitted into competitive range
- “When in doubt kick them out” (2-4 likely)
- Government has abandoned proposed discretion to arbitrarily limit number in RFP (“chilling effect”)

- Optional 2-step competitive range formation; either;
 - review initial proposals and cull to those with “greatest likelihood of award” (2-5)

or

 - cull to initial proposals with “greatest likelihood of award,” then cut again to “efficient” number (2-3)
- Not sequential (KO can keep 1, 2, and 5)

II. NEW PRE-COMPETITIVE RANGE “COMMUNICATIONS”

- Government historically reluctant to inadvertently trigger “discussions” (if award intended on initial proposals)
- New authority for Pre-Competitive Range Communications
 - Communications cannot allow revision of proposal (15.406)
 - No communications allowed with apparent awardee on initial proposals, only (1) minor/clerical errors, or (2) rebuttal of new adverse past performance information
 - If KO forming competitive range, then communications allowed only with offerors whose inclusion is “uncertain” (ambiguities, weaknesses, errors, omissions, mistakes, new past-performance data)
- Oral presentations allowed as communications (15.103)
- Must respond fully to survive constricted competitive range cut

III. HIGH SPEED NEGOTIATIONS AND “HARD BARGAINING”

- Occurs after formation of competitive range
- Traditional legal requirement of “meaningful discussions” retarded true “best value” awards
- “Meaningful discussions” will be replaced with “negotiations” which permit “bargaining” (15.001)
- “Bargaining” will facilitate true “best value” selection (includes persuasion, changing of assumptions, “give and take” on price, schedule, technical solution contract type, and T&C’s proposed)
- RFP may authorize alternative T&C’s, including alternative pricing CLINS (15.203) (huge opportunity for agile contractor)
- KO shall conduct one round of discussions with each offeror (but scope and extent of discussions are at KO’s judgment) (15.406)

- If RFP allows, KO can “negotiate” for superior performance beyond mandatory minimums, and also “suggest” that “excess” solutions be removed and price dropped (15.406)
- “Auction techniques” implicitly encouraged, but “technical leveling” is expressly prohibited
 - KO cannot favor one offeror over another
 - KO cannot reveal offeror technical solutions (“intellectual property” and “innovative use of commercial items”)
 - KO cannot reveal offeror price without permission
 - KO can inform offeror that price is too high or low and disclose analysis
 - KO can disclose IGCE to all offerors
- “Orals” are most likely vehicle for evolving negotiations
- **High speed/low drag approach requires real-time management elections (harness legal assets in sync)**

BAFO's ARE DEAD, LONG LIVE ORALS/REVISED PROPOSALS

- Offeror historically tendered best offer at BAFO
- Now, offerors will live or die by “Orals” (Offerors may be eliminated without full discussions or even opportunity to submit revised proposal) (15.407)
- KO can designate Senior Management or Technical Staff to present Orals (lie detector test)
- KO may request multiple revised proposals during negotiations
- At conclusion of negotiations, each remaining offeror shall submit final revised proposal (common cut-off date perceived as baby-BAFO)
- Offerors should expect purge of peripheral players just prior to call for final revised proposals
- KO retains discretion to re-open negotiations even after common cut-off date for revised proposals (perceived as “BARFO”)

IV. MECHANICS OF PAST PERFORMANCE EVALUATION

- Focuses primarily on two issues of (1) risk of proposed technical solution, and (2) “good corporate hygiene”
- Includes Federal, state, local and private contracts similar to government request (15.405)
- KO shall consider contractor-furnished data on corrective actions to adverse past performance problems
- Firms lacking ANY relevant past performance history shall receive “neutral” evaluation
- “Neutral” evaluation is controversial (“one that neither rewards nor penalizes new offerors”)
- Best interest of both government and contractors to avoid “neutral” rating (use key proposed personnel or subcontractors with relevant experience)

- Inventory past performance as relates to forecasted procurements
- Re-visit potential of asserting declaratory claims, pursuing ADR or ROMs as last resort
- Thorough review of **all existing relationships** with business partners to determine whether they should be **maintained, severed, or restructured**

PRE-EMPT/SHARE RISK VIA RISK MITIGATION PLANS

- The new constriction of the competitive range on initial proposals fosters early drafting of risk-mitigation plans (encourage use of IPTs)
 - Maintain Customer Goodwill
 - Total Systems Performance Responsibility clauses
 - “Interface Agreements” for future undefined systems
 - “Associated Contractor Agreements”
 - “Requirements Creep”
 - Accelerate definitization of Teaming Agreements (50¢/\$1)
 - Hazards are even greater in classified and developmental programs (mission-unique requirements, “need to know” sister programs, integration requirements, or software-intensive development complexities)

- **Needs to be legally “shaped” during (1) draft RFP phase, (2) alternative T&C’s, and (3) alternative CLIN pricing during negotiations**

WAKE UP AND SMELL THE COFFEE

- Revised FAR 15 re-write will probably stand with minor revisions
- Expect effective date 30-120 days (on or before Jan. 1, 1998)
- Management must adapt existing business strategies on imminent “bet the company” competitors
- Expect greater risk to be assumed by contractors from performance specifications under FAFO (↑ budgeted B&P)
- Harness Legal assets to protect bottom line from FAFO mistakes and over-reaching commitments during “orals” (use Legal to shape alternative Terms & Conditions and pricing for true customer best value)

This information is offered only for general informational and educational purposes. It is not offered as and does not constitute legal advice or legal opinions. You should not act or rely upon this information without seeking the advice of an attorney.