



This document is scheduled to be published in the Federal Register on 11/29/2016 and available online at <https://federalregister.gov/d/2016-28450>, and on FDsys.gov

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 1

[FAR Case 2016-005; Docket No. 2016-0005, Sequence No.1]

RIN: 9000-AN29

**Federal Acquisition Regulation: Effective Communication between
Government and Industry**

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement a section of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2016. This rule clarifies 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.

DATES: Interested parties should submit comments to the Regulatory Secretariat Division at one of the addresses shown below on or before **[Insert Date 60 days after**

publication in the Federal Register] to be considered in the formulation of a final rule.

ADDRESSES: Submit comments in response to FAR case 2016-005 by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by entering "FAR Case 2016-005" under the heading "Enter Keyword or ID" and selecting "Search." Select the link "Comment Now" that corresponds with "FAR Case 2016-005." Follow the instructions provided on the screen. Please include your name, company name (if any), and "FAR Case 2016-005" on your attached document.

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

Instructions: Please submit comments only and cite "FAR Case 2016-005: Effective Communication between Government and Industry" in all correspondence related to this case. Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Michael O. Jackson, Procurement Analyst, at 202-208-4949. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755. Please cite "FAR Case 2016-005."

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA (the "Councils") are proposing to amend the FAR to implement section 887 of NDAA for FY 2016. The rule clarifies that agency acquisition personnel are permitted and encouraged to engage in responsible and constructive exchanges with industry, in a manner that is consistent with existing law and regulation, and does not promote an unfair competitive advantage.

FAR 1.102 establishes the guiding principles within the FAR to—

- (1) Satisfy the customer in terms of cost, quality, and timeliness of the delivered product or service;
- (2) Minimize administrative operating costs;
- (3) Conduct business with integrity, fairness, and openness; and
- (4) Fulfill public policy objectives.

FAR 1.102-2 provides the requirements or "performance standards" for transforming these principles into positive,

results-oriented acquisition strategies. A communication policy that takes into account a range of approaches for effectively describing the Government's requirements to private industry is an essential component of the Federal acquisition process. This concept is in keeping with the direction expressed by Congress in section 887 of the NDAA for FY 2016.

II. Discussion and Analysis

The proposed rule will amend FAR 1.102-2(a)(4) to specifically state that Government acquisition personnel are permitted and encouraged to engage in responsible and constructive exchanges with industry, so long as those exchanges are consistent with existing laws and regulations, and promote a fair competitive environment. This revision, coupled with the existing guidance in the FAR subpart 1.1 and the market research strategies set forth in FAR part 10, will better equip Federal acquisition officials with the information needed to issue high-quality solicitations.

III. Public Feedback

In the winter of 2011, the Office of Federal Procurement Policy (OFPP) launched a campaign to address misconceptions commonly held by industry and Government regarding the role of communication during the acquisition process in order to encourage early, frequent, and constructive engagement with industry to achieve better

acquisition outcomes. The first of two "myth-busting" memoranda, issued in February 2011, focused on misconceptions on the part of Federal agencies and a second memorandum, issued in May 2012, addressed misconceptions that may be held by some in the vendor community. Both memoranda described best practices for effective communication that have been put into use by the acquisition community, with good results. Copies of these memoranda, "Myth-Busting: Addressing Misconceptions to Improve Communication with Industry during the Acquisition Process" and "Myth-Busting 2: Addressing Misconceptions and Further Improving Communication During the Acquisition Process," are available at https://www.whitehouse.gov/omb/procurement_index_memo.

The Councils seek to continue the conversation initiated by these memoranda and welcome any suggestions from the public to further enhance open communication between industry and the Federal acquisition community. The Councils specifically request information regarding the following:

- Which phase(s) of the Federal acquisition process -- i.e., acquisition planning/market research; solicitation/award; post award -- would benefit from more exchanges with industry and what specific policies or procedures would enhance communication during these phases?

- Is there a current FAR policy that may inhibit communication? If so, what is the policy, and how could this policy be revised to remove barriers to effective communication?
- Might it be beneficial to encourage, or require, contracting officers to conduct discussions with offerors after establishing the competitive range for contracts of a high dollar threshold? If so, what would be the appropriate dollar threshold?

IV. Executive Order 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect the proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act 5 U.S.C. 601, et seq., because the proposed changes relate to internal Government business practices. However, an Initial Regulatory Flexibility Analysis (IRFA) has been prepared and is summarized as follows:

DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement section 887 of the National Defense Authorization Act (NDAA) for FY 2016, which provides that agency acquisition personnel are permitted and encouraged to engage in responsible and constructive exchanges with industry. Any effect to small businesses should be positive in that industry, including small business, will benefit from better communication with the Government. Based on data obtained from the Federal Procurement Data System - Next Generation (FPDS-NG) on June 21, 2016, approximately 112,150 businesses received Federal contracts during fiscal year 2015, and of these, approximately 75,000 or 67 percent were small businesses.

This rule does not impose any new reporting, recordkeeping or other compliance requirements. The rule does not duplicate, overlap, or conflict with any other Federal rules.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA and NASA invite comments from small business concerns and other interested parties on the expected impact of this proposed rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by this proposed rule consistent with 5

U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2016-005) in correspondence.

VI. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 1

Government procurement.

Dated: November 21, 2016.

William F. Clark,
Director,
Office of Governmentwide
Acquisition Policy,
Office of Acquisition Policy,
Office of Governmentwide Policy.

Therefore, DoD, GSA, and NASA are proposing to amend 48 CFR part 1 as set forth below:

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1. The authority citation for 48 CFR part 1 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

2. Amend section 1.102-2 by—

- a. Revising paragraph (a)(4);
- b. Redesignating paragraphs (a)(5) through (7) as paragraphs (a)(6) through (8), respectively; and
- c. Adding a new paragraph (a)(5).

The revision and addition read as follows:

1.102-2 Performance standards.

(a) * * *

(4) The Government must not hesitate to communicate with the commercial sector as early as possible in the acquisition cycle to help the Government determine the capabilities available in the commercial marketplace. Government acquisition personnel are permitted and encouraged to engage in responsible and constructive exchanges with industry as part of market research (see 10.002), so long as those exchanges are consistent with existing laws, regulations, and promote a fair competitive environment.

(5) The Government will maximize its use of commercial products and services in meeting Government requirements.

* * * * *

Billing Code: 6820-EP

[FR Doc. 2016-28450 Filed: 11/28/2016 8:45 am; Publication Date: 11/29/2016]