

■ b. Removing from paragraph (a) “10 U.S.C. 2324(e)(3)(A)” and adding “10 U.S.C. 3744(b)” in its place.

52.237–9 Waiver of Limitation on Severance Payments to Foreign Nationals.

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Waiver of Limitation on Severance Payments to Foreign Nationals (Dec 2022)

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- 154. Amend section 52.242–3 by—
- a. Revising the date of the clause; and
- b. Removing from paragraph (b) “10 U.S.C. 2324” and adding “10 U.S.C. 3748” in its place.

52.242–3 Penalties for Unallowable Costs.

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Penalties for Unallowable Costs (Dec 2022)

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- 155. Amend section 52.244–6 by—
- a. Revising the date of the clause; and
- b. Removing from paragraph (c)(1)(xviii) “10 U.S.C. 2302 Note” and adding “10 U.S.C. Subtitle A, Part V, Subpart G Note” in its place.

The revision reads as follows:

52.244–6 Subcontracts for Commercial Products and Commercial Services.

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Subcontracts for Commercial Products and Commercial Services (Dec 2022)

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PART 53—FORMS

- 156. The authority citation for part 53 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

53.214 [Amended]

- 157. Amend section 53.214 by—
- a. Removing from the paragraph (a) heading “(Rev. 3/2013)” and adding “(Rev. 12/2022)” in its place;
- b. Removing from the paragraph (c) heading “(Rev. 9/97)” and adding “(Rev. 12/2022)” in its place; and
- c. Removing from the paragraph (d) heading “(Rev. 8/2016)” and adding “(Rev. 12/2022)” in its place.

53.236–1 [Amended]

- 158. Amend section 53.236–1 by removing from the paragraph (d) heading “(4/85)” and adding “(Rev. 12/2022)” in its place.

[FR Doc. 2022–25958 Filed 11–30–22; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 1

[FAC 2023–01; FAR Case 2016–005; Item II; Docket No. FAR–2016–0005, Sequence 1]

RIN 9000–AN29

Federal Acquisition Regulation: Effective Communication between Government and Industry

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement a section of the National Defense Authorization Act for Fiscal Year 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: *Effective:* December 30, 2022.

FOR FURTHER INFORMATION CONTACT: Mr. Michael O. Jackson, Procurement Analyst, at 202–208–4949 or by email at michaelo.jackson@gsa.gov for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or GSARegSec@gsa.gov. Please cite FAC 2023–01, FAR Case 2016–005.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule at 81 FR 85914 on November 29, 2016, to revise the FAR to implement section 887 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2016 (Pub. L. 114–92). This provision provides that 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. Nineteen respondents submitted comments on the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule.

A discussion of the comments and the changes made to the final rule as a result of comments received are provided as follows:

A. Summary of Significant Changes From the Proposed Rule

Minor changes to the proposed rule are made as a result of public comments. At FAR 1.102–2(a)(4), first sentence, the words “the commercial sector” are deleted and replaced with the word “industry”, the word “commercial” is deleted, and FAR 1.102–2(a)(4), second sentence, the words “as part of market research (see 10.002)” are replaced with “(e.g., see 10.002 and 15.201)”. These changes are made to clarify that FAR 1.102–2(a)(4) applies to communication with all of industry.

At FAR 1.102–2(a)(4), second sentence, the text that describes examples of exchanges with industry has been abbreviated to provide citations to those descriptions in their respective parts of the FAR; and the text has been changed from “so long as those exchanges . . . promote a fair competitive environment,” to “so long as those exchanges . . . do not promote an unfair competitive advantage to particular firms,” in order to clarify the purpose of the sentence and better align with the statute.

B. Analysis of Public Comment

1. General Support for the Rule

Comment: A number of respondents that provided comments stated their support of the proposed rule change.

Response: The Councils acknowledge the support of the respondents.

2. Expansion of the Rule Beyond FAR Part 1

Comment: A number of respondents indicated that this rule should expand beyond FAR part 1.

Response: This FAR case implements the requirement of section 887 in part 1; the Councils will carefully consider whether another FAR case would be beneficial to furthering the goal of effective communication. Regulatory coverage is just one of a number of ways in which meaningful dialogue is facilitated between the Government and contractors. For example, the Office of

Federal Procurement Policy (OFPP) has issued “myth-busting” memoranda to dispel workforce misunderstandings about what communications are allowed. The Chief Acquisition Officers Council sponsors a Governmentwide knowledge management portal, known as the Periodic Table of Acquisition Innovations, which includes tested artifacts provided by agency acquisition innovation advocates to improve communication with prospective and actual offerors. Agency industry liaisons and small business specialists assist program and acquisition personnel in developing strategies for engaging potential vendors to build and maintain the diversity and resilience of the agency’s supplier base, with small business specialists focused, in particular, on communications that can help bring socioeconomic and other small businesses to the base. OFPP has agreed to confer with agency acquisition innovation advocates, agency industry liaisons, and small business specialists, as well as program and project personnel whose programs are supported by contractors, review ideas on effective communication provided in response to crowdsourcing campaigns, and discuss feedback with the Councils.

3. Rule Should Do More To Make an Impact on Communication

a. Establish Agency Official Responsibilities

Comment: A respondent stated that the rule should incentivize officials to enhance levels of communication without fear of reprimand.

Response: The Councils believe the rule builds on existing guidance in FAR subpart 1.1 and FAR part 10, as well as the ongoing efforts by industry and Government to promote greater Government-vendor communications. Acquisition innovation advocates, industry liaisons, and OFPP’s continued efforts are expected to help encourage Government acquisition personnel to engage with industry in accordance with existing law and regulation.

b. Develop Government Communication Rules

Comment: A respondent requests that this rule should expand FAR part 10 to include rules on allowable communications.

Response: FAR 10.002(b)(2) covers market research techniques and the Councils believe that additional changes are not necessary at this time.

Comment: A respondent requests that the rule should create safe havens from bid protest for contracting officers that communicate with industry.

Response: The rule encourages communication between Government acquisition personnel and industry as long as the exchanges do not promote an unfair competitive advantage to particular firms, and are consistent with existing laws and regulations.

Comment: A respondent commented that the rule be expanded to include key stakeholders in the communications such as technical personnel.

Response: The Government acquisition personnel referenced in the rule includes key technical personnel. FAR 1.102(c) describes the acquisition team as including the technical, supply, and procurement communities and the customers they serve.

Comment: A respondent commented that before implementing this rule, the Councils should look at Community of Practice and agency communication plans, gather ideas, supplement the rule with non-exclusive list of ideas and crosswalk them to FAR parts 3, 13, 14, and 15.

Response: The Councils reviewed several parts of the FAR that provide policy on exchanges between Government and industry. The Councils determined that amending FAR part 1 was the appropriate place in the FAR for this rule. FAR part 1 sets forth basic policies and general information about the Federal Acquisition Regulations System including FAR parts 3, 13, 14, and 15.

Comment: A respondent stated that the rule should require OFPP to create a FAR-based series of practice, training, or engagement aids to assist in the communication process.

Response: The FAR provides guidance and direction to the contracting workforce and industry. While the FAR sometimes implements guidance published by OFPP, the FAR does not provide direction to OFPP.

c. Require Communication Between Government and Industry

Comment: A respondent stated that the rule should force industry and Government communication.

Response: This change to the FAR encourages effective communication between Government and industry where appropriate. The rule is not a mandate, allowing contracting officers the discretion to use business judgment and best practices.

Comment: Several respondents commented that the rule is not likely to have an impact on the Federal acquisition process as there are no required actions.

Response: The rule amends the FAR to implement section 887 of the NDAA for FY 2016. The 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. Section 887 did not require communication actions, but clarified that they be permitted and encouraged.

4. Alternative to the Rule

Comment: A respondent noted that revising FAR 1.102 would not enhance communication between Government and industry because very few contracting officers read this part of the FAR or even know that it exists.

Response: The revision in FAR 1.102 is meant to enhance communication between Government and industry when coupled with the existing guidance in FAR subpart 1.1 and the market research strategies set forth in FAR part 10. The rule will be disseminated in accordance with agency procedures to ensure that Government acquisition personnel are aware of the changes to FAR 1.102.

Comment: A respondent stated that FAR part 10 should be amended to change the title and add a new subpart containing policy about communications with industry.

Response: The rules and guidance pertaining to Government exchanges with industry already exist in the FAR, for example FAR 1.102, FAR part 10 and FAR 15.201. The Councils do not believe the requested changes to FAR part 10 are necessary.

5. Recommended Changes to the Proposed Text

Comment: Some respondents stated that the text could be viewed as limiting communication to market research and recommended that the text be more inclusive by covering all of the acquisition process.

Response: The FAR text has been revised to remove a reference to market research and instead provide citations to sections of the FAR that provide examples of communication policies and procedures located elsewhere in the FAR.

Comment: A respondent stated that the text is redundant, since FAR 10.002 encourages exchanges with industry.

Response: The rule encourages exchanges between Government and industry. FAR 10.002 provides market research procedures.

Comment: A respondent suggested the rule be revised to affirmatively state the benefits of proactive, ongoing communication with industry.

Response: There are benefits to proactive, ongoing communication with industry. However, the Councils do not believe the suggested changes are necessary to implement section 887 of the NDAA for FY 2016.

Comment: A respondent stated that the text should cover the preproposal submission industry exchanges described at FAR 15.201.

Response: FAR part 1 sets forth basic policies and general information about the Federal Acquisition Regulations System including FAR part 15.

Comment: Some respondents suggested rewording “commercial sector” unless the rule only applies to commercial items/vendors.

Response: In the first sentence of FAR 1.102–2(a)(4) the term “commercial sector” is changed to “industry”.

Comment: A respondent suggested dropping the word “commercial” from “commercial marketplace.”

Response: In the first sentence of FAR 1.102–2(a)(4), “commercial marketplace” is changed to “marketplace”.

Comment: A respondent suggested changing the word “communicate” to “exchange information”.

Response: The first sentence of FAR 1.102–2(a)(4) will not be changed to replace “communicate” with “exchange information”. The term “communicate” is used here in its normal dictionary sense, not as the technical usage at FAR 15.306. The Councils believe that the exchange of information is part of communication and that the suggested change is not needed.

Comment: A respondent suggested adding after “(see 10.002)” the phrase “under the general guidelines as provided in FAR 15.201 for all procurements, . . .”.

Response: The FAR text has been revised to remove a reference to market research and instead reference those sections of the FAR where corresponding procedures exist. In addition, the Councils reviewed several parts of the FAR that provide policy on exchanges between Government and industry. The Councils determined that amending FAR part 1 was the appropriate place in the FAR for this rule. FAR part 1 sets forth basic policies and general information about the Federal Acquisition Regulations System including FAR 15.201.

6. OFPP Myth-Busting Memos

Comment: A number of respondents raised concerns with the OFPP’s Myth-Busting memoranda referenced in the **Federal Register** Notice for the proposed rule. A respondent stated that the Myth-Busting memoranda did not

reflect a full understanding about why contracting officers are often hesitant to communicate with industry. In addition, the respondents were concerned that the memoranda did not go far enough to change the misperception that communications with industry are not endorsed by the acquisition community.

Response: The OFPP’s Myth-Busting memoranda highlight the importance of meaningful dialogue between Government and industry. Within the context of this rulemaking, the reference to the memoranda in the preamble of the proposed rule served as an invitation for interested parties to share their assessment of the impediments to effective communication during the acquisition process. It was the intent of the Councils to obtain valuable insights from the community affected most by these challenges so as to develop innovative approaches for overcoming these obstacles in the future.

7. General Concerns About Communications Between Government and Industry

a. Rigid Regulatory Structure Inhibits Communication

Comment: Some respondents stated that the acquisition workforce is constrained by regulations, policies, and procedures that limit communication and flexibility and are incompatible with modern workforce culture and technology changes.

Response: The Councils believe the rule coupled with the existing guidance in FAR subpart 1.1 will better equip Federal acquisition officials to actively engage with industry and overcome the concerns and constraints cited by the respondents.

Comment: Some respondents noted that rigid regulatory structure can cause risk averse contracting officers to shun communications with industry unless it is expressly allowed.

Response: The Councils believe the encouragement provided in the rule will assuage the concerns of risk averse contracting officers.

Comment: Several respondents remarked that contracting officers may be hesitant to engage in communications with industry because they fear saying something inappropriate or drawing a protest because of their statements.

Response: The Councils believe the encouragement provided in the rule will assuage the concerns of fearful contracting officers.

Comment: A respondent emphasized the flexibilities in the FAR.

Response: The Councils acknowledge the input provided.

b. Need for Acquisition Workforce Training

Comment: Several respondents commented that there is a need to improve and increase the communication training that is available to the acquisition workforce.

Response: Training for the Federal acquisition workforce is developed and provided in accordance with agency procedures.

Comment: A respondent suggested including industry speakers at training events and forums. Another respondent recommended instituting cross-functional training and an industry exchange program. A respondent asserted that communication training should be comprehensive and required for contracting personnel.

Response: Training for the Federal acquisition workforce is developed and provided in accordance with agency procedures.

c. Lack of Support for Communicating With Industry

Comment: A respondent commented that industry is ignorant of Government rules and processes surrounding communication.

Response: It is incumbent on industry to ensure their workforces are educated in the rules and processes involved with communicating with the Government.

Comment: A respondent commented that some agencies have not implemented vendor communication plans and are not participating in the “vendor engagement collaboration community of practice.”

Response: OFPP has called for vendor communication plans and oversees their implementation Governmentwide. Participation in the “vendor engagement collaboration community of practice” is encouraged, but not required, by OFPP.

Comment: A respondent commented that effective communication must be ingrained across an organization to achieve any lasting effect.

Response: The Councils agree that wide-spread adoption of effective communication techniques is warranted and believe the rule will further that goal.

Comment: A respondent recommended that the Government establish agency industry liaisons/ombudsmen to facilitate communication.

Response: In its Myth-Busting #4 Memorandum, “Strengthening Engagement with Industry Partners Through Innovative Business Practices”, issued April 30, 2019, OFPP asked each Chief Financial Officer Act agency to name an industry liaison. Further

establishment of an agency industry liaison or ombudsman is done in accordance with each agency's procedures.

Comment: A respondent recommended expanded use of collaboration tools and technology.

Response: The use of collaboration tools and technology is in accordance with agency procedures.

Comment: A respondent recommended creation of opportunities to exchange information not related to specific procurements, such as reverse industry days and scenario-based role-playing opportunities.

Response: Opportunities to exchange information not related to specific procurements are in accordance with agency procedures.

Comment: A respondent noted that the Government has improved the availability of information.

Response: The Councils acknowledge the input provided.

Comment: A respondent commented that communication with industry is becoming a "check the box" exercise.

Response: The Councils do not agree that communication with industry is a "check-the-box" exercise. The rule encourages Government acquisition personnel to have engagement with industry.

Comment: A respondent commented that Government should increase the amount of communications with industry and ensure that communications with industry result in better solutions and value.

Response: The purpose of the rule is to have more effective communication with industry that results in better solutions and greater value.

Comment: A respondent recommended that the Government ensure contracting officers have management support to be innovative in their communications and collaborations with industry.

Response: Contracting officers already have the authority to be innovative in their communication with industry (see FAR 1.102-4).

Comment: A respondent suggested that a lack of organizational support undermines efforts toward improved industry communications.

Response: The Councils do not believe that there is a lack of Government organizational support for increased communications with industry and believe the rule will bolster the level of organizational support for improved industry communications.

Comment: A respondent commented that the acquisition community is not

utilizing the ability to communicate with industry to the fullest extent.

Response: The rule encourages communication with industry. The Councils believe it will result in more extensive interaction.

d. Industry/Government Working Group

Comment: Some respondents urge that an industry/Government working group be established to determine how rules governing communications can be strengthened.

Response: The rule will be implemented by each agency. As agencies deem appropriate, implementation may include any number of collaborative methods.

8. Public Feedback

In addition to the text of the proposed rule, the Councils welcomed, in the preamble, public feedback suggestions on: which phases of the acquisition process would benefit from more exchanges with industry and what specific policies or procedures would enhance communication during these phases; whether any current Federal acquisition policies inhibit communication, and if so, how such policies may be revised to remove barriers to effective communication; and whether it may 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. The public feedback will be valuable when developing further initiatives to address effective and efficient communications during the acquisition process. The Councils extend their appreciation for the input provided by the public regarding further enhancing open communication between industry and the Federal acquisition community. A discussion of the public input is as follows:

a. Enhanced Communication—All Phases

Comment: Several respondents stated that all phases of the acquisition lifecycle would benefit from enhanced communication and that communication is essential during all three phases of the acquisition process and should not be limited to a specific phase.

Response: The FAR authorizes a broad range of opportunities for vendor communication; the acquisition workforce is encouraged to engage industry early and frequently throughout an acquisition in accordance with applicable statutes, ethics regulations, procurement integrity requirements, and other statutes or

regulations that govern communication and information sharing.

b. Enhanced Communication—Market Research

Comment: Several respondents stated that Government acquisition personnel should use market research to communicate agency needs and to obtain input in requirements development, although the communication should not be limited only to market research phase. Some respondents stated that the Government should respond to industry input during market research including submissions of read-receipts and analysis of respondents.

Response: The acquisition workforce is encouraged to use the wide range of techniques for conducting thorough market research as identified in the FAR and additional agency guidance. Market research is a critical step that informs key decisions in acquiring best value goods and services—while an effective and informed market research practice is important, it is only a building block that plays a part in the acquisition and affects future outcomes and practices. Effective market research enables agencies to gain an understanding of the marketplace and helps inform agencies on requirements development which in turn help drive strategy and future interactions with potential vendors.

Comment: Several respondents recommended that Requests for Information be used to solicit input and that that input and response should be publicly shared. A respondent stated that Government acquisition personnel should share information with industry including strategic plans, acquisition dashboard, and acquisition forecasts.

Response: Issuing an RFI enables agencies to not only understand the capabilities of industry, but to also develop and improve acquisition strategy regarding contract type, performance requirements, performance work statements/statements of work, and performance metrics. Agencies are encouraged, to the allowable extent, to share relevant procurement materials and information to support better industry engagement.

Comment: A respondent stated that some agencies have not implemented vendor communication plans.

Response: As part of the ongoing Governmentwide effort to improve vendor communication, and in accordance with OFPP myth-busting guidance, agencies maintain vendor communication plans for the purpose of reducing barriers to communication, incorporating more industry input into agency acquisitions, publicizing

engagement events, and providing training and awareness to employees and vendors.

Comment: The respondent added that Chief Management Officers (CMOs) should be empowered to optimize business processes across Federal agencies.

Response: Successful acquisitions that deliver best value are dependent on the work of various participants ranging from the program office, to the acquisition personnel, to executives leading the process, to the policy and strategic office, legal counsel, and many more. As an example, the Category Management Leadership Council (CMLC) is a council of representatives that come from the agencies who comprise the majority of Federal procurement spending. The Council representatives are agency Category Managers who are empowered to manage, structure, and help guide agency spending to make Federal procurements more efficient and cost effective.

Comment: A respondent stated that OFPP should define the Federal acquisition workforce roles and responsibilities and should be granted the authority to manage the acquisition workforce and related roles.

Response: OFPP statutory authorities and responsibilities are set forth in the Office of Federal Procurement Policy Act, which is generally codified within subtitle I of title 41 of the United States Code. OFPP sets qualification training standards and certification standards for the civilian acquisition workforce and sets the requirements for and oversees the Federal Acquisition Institute (FAI). Having skilled, competent, and professional personnel is essential to agency success.

Comment: A respondent stated that all significant programs be led and managed by an “Integrated Accountability Chain” similar to the Integrated Project Team, and industry should be engaged by such teams.

Response: Successful acquisitions that deliver best value are dependent on the work of various participants ranging from the program office, to the acquisition personnel, to executives leading the process, to the policy and strategic office, legal counsel, and many more. This multidisciplinary team that collaborates and communicates throughout the process is collectively responsible for leveraging the Government’s buying power.

Comment: The respondent recommended that Government should create a cost focused culture by using rigorous business case analyses that

assess total costs for decision making and use of share-in-savings.

Response: OFPP recognizes that the Federal Government, in its procurement activity, should leverage its buying power to the maximum extent as well as achieve administrative efficiencies and cost savings. OMB memorandum M–19–13, Category Management: Making Smarter Use of Common Contract Solutions and Practices dated March 20, 2019, provides guidance on the use of category management to eliminate redundancies, increase efficiency, and deliver more value and savings from the Government’s acquisition programs.

c. Enhanced Communication—Solicitation/Award

Comment: A respondent stated that lack of discussions during the solicitation phase can cause cost increases and program performance issues and recommended that more conversations, webinars, question/answer sessions be conducted during the proposal response phase.

Response: A well-planned solicitation process is a valuable opportunity for agency acquisition personnel and potential vendors to interact and exchange information on the procurement. Industry days, as well as presolicitation and preproposal conferences, directly benefit the government by promoting a common understanding of the procurement requirements, the solicitation terms and conditions, and the evaluation criteria. Agency acquisition personnel are encouraged, when appropriate, to use interactive web-based technology to expand the reach of the exchange, such as a live webinar with streaming video to immediately address questions. Agency acquisition personnel are encouraged to combine such an approach with additional meetings available to all potential vendors to make solicitation engagements more useful, especially for large, complex requirements.

Comment: A respondent stated that Government acquisition personnel use more innovative solicitation techniques including open-ended solicitation methods that allow industry to provide alternative solutions, using Statement of Objective as default solicitation method, and disclosing the weights of all evaluation factors. Another respondent noted that FAR 15.206 already permits amending the solicitation to change the evaluation criteria, when the solicitation no longer meets the Government’s needs.

Response: Agency acquisition workforce is encouraged to use the broad range of FAR techniques to

pursue innovative techniques throughout the acquisition process, including the solicitation phase.

Comment: A respondent stated that information on Federal Business Opportunities (FBO) is not up to date, is not being updated by Government officials, and many Government platforms are antiquated. The respondent also stated that it is difficult to make contact with Government contracting officers when an offeror has a question regarding the status of a solicitation.

Response: The Federal Business Opportunities site has been moved to the System for Award Management and is now known as Contract Opportunities.

d. Enhanced Communication—Post Award

Comment: A respondent stated that post award continued communication enables mitigation of disputes, enables course correction, and enhances past performance information. The respondent recommended that post award “kick-off” meetings be required between key Government personnel and the incoming contractor to ensure common understanding of requirements and expectations of contract transition and execution.

Response: A post-award orientation, also known as a “kick-off meeting,” enables both acquisition personnel and contractor to have a complete understanding of their roles and responsibilities. This post-award orientation aids both Government and contractor personnel to (1) achieve a clear and mutual understanding of all contract requirements, and (2) identify and resolve potential problems. When deciding whether post-award orientation is necessary, and if so, what form it will take, the agency acquisition personnel must consider factors such as type, value, and complexity of the contract; length of the planned production cycle; complexity and acquisition history of the product or service, and complex financing arrangements.

Comment: A respondent stated that thorough past performance evaluations be required with a full-scale utilization of the Contractor Performance Assessment Reporting System (CPARS).

Response: In accordance with FAR subpart 42.15, Contractor Performance Information, agencies are responsible for recording and maintaining contractor past performance information, including relevant ratings and supporting narratives. Assessments of a contractor’s performance and contractor adherence to Federal rules and regulations are

critical to informing source selection and award decisions and ensuring the government builds relationships with high-performing suppliers. OFPP concurs that improving the collection and use of this information will increase agencies' ability to deliver better outcomes and increase productivity. OFPP has worked and will continue to work with agency Chief Acquisition Officers (CAOs) and Senior Procurement Executives (SPEs) to improve the value of contractor performance assessments and increase the transparency of data about contractor integrity.

Comment: A respondent stated that post-award debriefings should be required to contain all information that would otherwise be releasable in the course of a legal discovery process, including a detailed description of how the offeror was rated in each of the evaluation criteria.

Response: The current FAR contains a satisfactory description of the information to be disclosed, at FAR 15.506(d). In January 2017, OFPP released general guidance and best practices on debriefings via the "myth-busting" memorandum "Myth-busting 3—Further Improving Industry Communication with Effective Debriefing." As stated in the memorandum, "the debriefing is meant to provide a thorough explanation of the basis for the award" and should comply with the requirements in accordance with FAR 15.506, including an explanation of deficiencies and strengths of offeror proposal; ratings of debriefed offeror's proposal and successful offeror's proposal; past performance ratings of the offeror; overall general ranking of proposals when any ranking was developed by the agency during the source selection; and reasonable responses to relevant questions.

Comment: A respondent stated that continued, consistent communication is needed after an award has been announced. The respondent cited instances where respondent requested post-award debriefings and level of response from contracting officers varied from responsive to no response.

Response: FAR 15.506, Post-award debriefing of offerors provides for the timely debriefing of offerors as well as the information a contracting officer is required to include when a timely request for debriefing is received. In January 2017, OFPP released general guidance and best practices on debriefings via the "myth-busting" memorandum "Improving Industry Communication with Effective Debriefing" which includes guidance on

promptly responding to requests for debriefings.

Comment: A respondent recommended that the Government institute a "360-degree" assessment of the acquisition process. The respondent stated that the OFPP "Acquisition 360" assessment only applies to a limited number of agency acquisitions and only focuses on the pre-award process.

Response: The final rule for FAR Case 2017–014, Use of Acquisition 360 to Encourage Vendor Feedback, will encourage the use of a standardized survey instrument to facilitate feedback from industry on their experience with the Federal marketplace.

e. Communication Inhibitors

Comment: Several respondents identified that FAR 15.201, which addresses exchanges with industry before receipt of proposals could be further revised for clarification regarding presolicitation and postsolicitation communication, protecting submitted industry information, and providing scenarios on how acquisition personnel may engage with industry.

Response: OFPP has identified improved communication with industry as a core element for driving better return from each dollar spent on acquisitions. To maximize the return on its acquisition investment and to ensure access to high-quality solutions, the acquisition workforce must ensure it conducts productive interactions with its industry partners. OFPP, in consultation with the Councils, will continue to evaluate the relevant FAR sections to ensure clear and accurate information.

Comment: Several respondents identified that FAR 15.306 which addresses exchanges with offerors after receipt of proposals could be further revised and clarified with definitions. Some respondents stated that the section should be revised to allow communication to better understand proposals prior to establishing a competitive range and/or prior to contract award. Several respondents identified additional FAR sections that could be further revised for clarification (including FAR part 3, part 10, 15.307, 15.505, 15.506). Several respondents stated that Government agencies should be more explicit about industry communication rules. A respondent stated that further public feedback and input is needed as such changes to the FAR may have unintended consequences.

Response: Improved communication with industry is a core element for driving better return from each dollar

spent on acquisitions. To maximize the return on its acquisition investment and to ensure access to high-quality solutions, the acquisition workforce must ensure it conducts productive interactions with its industry partners and maximizes the guidance and instructions provided in the FAR. OFPP, in consultation with the Councils, will continue to evaluate the relevant FAR sections to ensure clear and accurate information. The Councils will carefully consider whether another FAR case is necessary to expound on communication beyond what is included in this FAR case.

f. Encourage/Require Discussions

Comment: A respondent supported that encouraging or requiring discussions after establishing the competitive range could be beneficial to the procurement process to the extent that doing so would not further impede the procurement process or create unequal discussions. Another respondent supported the encouraging or requiring of discussions for contracts valued at twenty million dollars and above. Other respondents stated that encouraging or requiring discussions after establishing the competitive range could be beneficial and this decision should be based on complexity of the contract.

Response: While agencies do not have the resources, and are not required, to meet with every vendor at every step of the acquisition process, information gathered from industry sources plays an invaluable role in the acquisition process. Industry partners are often the best source of information, so productive interactions between Federal agencies and the private sector are encouraged to ensure that the Government clearly understands the marketplace and can award a contract or order for an effective solution at a reasonable price. The Federal Government's ability to achieve successful program outcomes, effectively and efficiently, depends upon agencies establishing effective strategies for industry engagement and supporting those strategies with senior-level commitment.

Comment: A respondent stated that imposition of a communication requirement on all contracts may unnecessarily slow the acquisition process. A respondent stated that further steps should be taken to address contract review processes for lower cost contracts.

Response: While discussions may add time to the acquisition schedule, the contracting officer should make a thoughtful decision as to whether to

conduct discussions and, if so, what the scope and extent of discussions required should be. Schedule pressures should generally not be the primary, or even a strong, driver in the contracting officer's decision on whether or not to hold discussions. One consideration the contracting officer should take into account is that conducting robust presolicitation communications with industry may actually minimize the need for discussions and result in a better technical solution and improved contract performance. Other considerations include the complexity of the procurement, and the history of change orders on previous or related contracts that were due to lack of a clear understanding of the requirements, and contract terms and conditions by the parties.

9. Issues Outside the Scope of the Rule

Comment: A respondent commented that the rule should clarify that professional conference attendance is authorized so industry and Government dialogue can take place. A respondent encouraged Government to host procurement-related training conferences and tradeshow and have Government employees attend those events.

Response: Government acquisition personnel host and or attend professional conferences consistent with existing laws and regulations and in accordance with agency procedures. The respondent's suggested changes are outside the scope of this case.

Comment: A respondent stated that the rule should encourage the workforce to use the flexibilities in FAR 1.102(d) and/or discourage officials from issuing guidance that stifles innovation.

Response: The rule encourages communication between Government acquisition personnel and industry. The respondent is suggesting changes to FAR 1.102(d) concerning the use of acquisition initiatives; the suggested changes are outside the scope of this case.

Comment: A respondent commented that the rule should clarify that professional conference attendance is authorized so industry and Government dialogue can take place.

Response: Government acquisition personnel attend professional conferences consistent with existing laws and regulations and in accordance with agency procedures. The respondent's suggested change is outside the scope of this case.

Comment: A respondent advocated that agencies should be required to create and report on metrics to indicate progress towards strategic objectives.

Response: The respondent's suggestion is outside the scope of the case.

Comment: A respondent recommended mandatory collection of data on all protests filed and resolved by agencies, including data on evaluation technique and contract type. The respondent recommended that Government agencies or components form a protest review committee comprised exclusively of Government legal and contracting experts to perform an independent review of the protest record and oversee any corrective action.

Response: Protest processes and procedures are described in the FAR. Agencies may supplement these processes, as necessary and proper. The remainder of the comment is outside the scope of this case.

Comment: A respondent pointed out that in bill H.R. 1735, the National Defense Authorization Act appears to have been vetoed by the President on October 2, 2016, and does not see any action to override the veto. The respondent questioned whether it is appropriate to issue regulations in anticipation of a veto override.

Response: The President signed into law S. 1356, Public Law 114–92, the “National Defense Authorization Act for Fiscal Year 2016”, on November 25, 2015, that contains Sec. 887 on which the rule is based.

Comment: A respondent commented that the FAR Council, Defense Acquisition Regulations System (DARS), Defense Procurement and Acquisition Policy (DPAP) circumvent the Small Business Act and Organizational Conflicts of Interest. This proposed illegal change to the Federal Acquisition Regulations should be scrapped.

Response: This comment is outside the scope of the current rule.

Comment: A respondent provided statements on the West Virginia House Bill #2339; that it may impact relations with the coal industry. The bill declares that when coal is mined and used in West Virginia, coal mines do not have to be permitted by the Environmental Protection Agency.

Response: This comment is outside the scope of the current rule.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Products, Including Commercially Available Off-the-Shelf (COTS) Items, or for Commercial Services

This final rule does not create any new provisions or clauses, nor does it change the applicability of any existing provisions or clauses included in

solicitations and contracts valued at or below the SAT, or for commercial products, including COTS items, or for commercial services.

IV. Expected Impact of the Rule

The rule is expected to benefit both the Government and industry by encouraging more constructive communication during the Government's market research efforts.

V. Executive Orders 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.

VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801–808) before an interim or final rule takes effect, DoD, GSA, and NASA will send the rule and the “Submission of Federal Rules Under the Congressional Review Act” form to each House of the Congress and to the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget has determined that this is not a major rule under 5 U.S.C. 804.

VII. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601–612. The FRFA is summarized as follows:

This rule implements section 887 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2016 (Pub. L. 114–92), which provides that agency acquisition personnel are permitted and encouraged to engage in responsible and constructive exchanges with industry. The objective of the rule is to encourage Government acquisition personnel to communicate with industry to determine the capabilities available in the marketplace in a manner that complies with existing laws and regulation.

There were no significant issues raised by the public in response to the Initial

Regulatory Flexibility Analysis provided in the proposed rule.

DoD, GSA, and NASA do not expect this 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. 601–612, *et seq.* Data obtained from the Federal Procurement Data System for FY 2019 through 2021, indicates that an average of 2,559,356 new awards were awarded to an average of 61,797 small entities annually.

This rule does not impose any new reporting, recordkeeping or other compliance requirements.

There are no known alternative approaches to the rule that would accomplish the objectives of the statute.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VIII. 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. 3501–3521).

List of Subjects in 48 CFR Part 1

Government procurement.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA 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 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); 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), 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 industry as early as possible in the acquisition cycle to help the Government determine the capabilities available in the marketplace. Government acquisition personnel are permitted and encouraged to engage in responsible and constructive exchanges with industry (*e.g.*, see 10.002 and 15.201), so long as those exchanges are consistent with existing laws and regulations, and do not promote an unfair competitive advantage to particular firms.

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

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