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**Negotiated Procurements: Squandering the Benefit of the Bargain**

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for the degree of Master of Laws

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# I. Introduction

Thou shalt bargain! In government contract negotiations, there is no such commandment. Instead, the regulations only whisper. Some not associated with the procurement world might assume that, in obtaining its needs, the Government routinely engages in rigorous persuasive efforts involving sweeping give-and-take sessions with contractors, all in fervent pursuit of the best deal possible.[1] Aggressive bargaining in Government negotiated procurements, however, is more fiction than reality.

Yet, one cannot belittle the progress reformers have made to make hard bargaining a reality. Certainly, the regulatory guidance in the FAR Part 15 Rewrite and other reforms created a climate where bargaining is much more likely to occur. The Rewrite improved the contracting parties' communications throughout the procurement process, from the earliest point of acquisition planning. The Rewrite also removed some barriers to bargaining. Moreover, for the first time, the Rewrite affirmatively injected the idea of bargaining into the area of discussions.

Despite these reforms, zealous bargaining is uncommon. Although inserting the concept of bargaining into the negotiation process was a substantial step forward, the FAR Part 15 Rewrite states only that negotiations "may include bargaining."[2] More importantly, while the Rewrite's changes to the discussions language gave the appearance of mandating

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[1] Michael K. Love, *Why Can't Discussions be Meaningful?*, 5 NASH & CIBINIC REP. ¶ 42 (July 1991). While the commentator made a similar statement in 1991 before the FAR Part 15 Rewrite, it still has relevance under the current regulatory framework.

[2] FAR 15.306(d).

vigorous discussions, the GAO and court decisions interpreting the language have overlooked that mandate in favor of contracting officer discretion.[3] The decisions emphasize that the "scope and extent of discussions are a matter of contracting officer judgment,"[4] rather than emphasize the primary objective of discussions—"to maximize the Government's ability to obtain best value."[5] Therefore, while the forceful language in the discussions rule looked promising, the results have been disappointing.

Before the Rewrite, the Government's source selection procedures were "staid, rigid, mechanistic, inhibited, [and] artificial."[6] In many respects, the Rewrite brought about a "new, liberated, commercial-style way of doing business."[7] However, in regard to agency bargaining, the process is still often "formalistic and sterile."[8] If "[d]iscussions are the very

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[3] Ralph C. Nash, Jr. & John Cibinic, Jr., *Postscript II: Negotiation in a Competitive Situation,* 15 NASH & CIBINIC REP. ¶ 42 (Aug. 2001) (stating "it is clear that the CO has a great deal of discretion in this area and that the mandatory rule is being narrowly defined by the court and the Comptroller General.").

[4] FAR 15.306(d)(3).

[5] FAR 15.306(d)(2). See FAR 2.101 ("'Best value' means the expected outcome of an acquisition that, in the Government's estimation, provides the greatest overall benefit in response to the requirement.") See also John S. Pachter et al., *The FAR Part 15 Rewrite,* 98-05 BRIEFING PAPERS 1, 12 (Apr. 1998) (noting that commentators have often criticized this definition as "self defining and therefore not helpful.").

[6] Melanie I. Dooley, *Proposed Rewrite of FAR Part 15 Greeted with Praise, Criticism*, 66 Fed. Cont. Rep. (BNA) ¶ 10 (Sept. 16, 1996).

[7] *Id.* (quoting Bert Conklin, president of the Professional Services Council, after the release of the first proposed set of revisions to FAR Part 15).

[8] Ralph C. Nash, Jr. & John Cibinic, Jr., *Competitive Proposals: Negotiations are Discussions but Discussions are not Necessarily Negotiations*, 15 NASH & CIBINIC REP. ¶ 30 (June 2001).

heart of a negotiated procurement,"[9] the heart is still diseased and in need of treatment to open the way to more spirited negotiations. In short, agencies are not getting the benefit of the bargain, even though the Rewrite made great strides in that direction. This unforeseen occurrence has left some asking the question, "Why not try for a better deal?"[10]

This thesis will explore where acquisition reform has improved the bargaining process and where it has fallen short. In particular, the thesis will discuss how the Rewrite and other reforms created a regulatory framework much more conducive to bargaining but still overly amenable in allowing the Government to avoid or limit bargaining. Additionally, the thesis will examine how Government personnel and training shortfalls hinder meaningful bargaining. Finally, the thesis will recommend improving the bargaining process to assist the Government in obtaining "best value."

# II. Improved Communications: The Climate for Bargaining

## *A. FAR Part 15 Rewrite: Genesis of More Open Exchanges*

The Rewrite was another chapter in the executive branch's "continuous improvement approach" to acquisition procedures and policies.[11] The FAR Council initiated the process

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[9] John R. Hart, *Base-Level Negotiation: Keeping Your Client Out of Trouble*, 29 A.F.L. REV. 19, 23 (1988).

[10] Nash & Cibinic, *Competitive Proposals: Negotiations are Discussions but Discussions are not Necessarily Negotiations, supra* note 8.

[11] Ralph C. Nash, Jr. & John Cibinic, Jr., *The FAR Part 15 Rewrite: A Final Scorecard*, 11 NASH & CIBINIC REP. ¶ 63 (Dec. 1997); 62 Fed. Reg. 51224, 51224 (1997). For a major thrust behind the Rewrite effort, see VICE PRESIDENT AL GORE, REPORT OF THE NATIONAL PERFORMANCE REVIEW, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS (1993).

on January 29, 1996, by tasking a specially created interagency committee to undertake the Rewrite project.[12] The committee intended to revise FAR Part 15 in two phases. On September 12, 1996, the FAR Council published the first set of proposed changes, which covered the bulk of the source selection techniques and procedures for negotiated procurements.[13] During the comment period, the Government received 1541 comments from 100 entities or individuals. Since the comments engendered significant changes to the first set of proposed rules, the FAR Council published those changes along with the proposed changes intended under the second phase of the Rewrite.[14] During the following comment period, the Government received 841 comments from 80 entities or individuals. As with the first set of comments, the Government considered all comments before publishing the final rule, which became the official FAR Part 15 Rewrite.[15]

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[12] 62 Fed. Reg. 51224, 51224 (1997). The agencies included the Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

[13] *Id.* The first set of proposals revised the following subparts of the prior version of the FAR: 15.000, 15.1, 15.2, 15.3, 15.4, 15.6, and 15.10. See 61 Fed. Reg. 48380 (1996). See also John S. Pachter et al., *Source Selection Provisions of the FAR Part 15 Rewrite—A Train Wreck* Avoided, 39 GOV'T CONTRACTOR ¶ 578 (Dec. 10, 1997), where authors compare the first set of proposed rules to the final rule. They opined that the final rule "strikes a balance between the Government's need for flexibility and efficiency and the congressionally-mandated requirements of open competition and equal treatment."

[14] 62 Fed. Reg. 51224, 51224 (1997). The previously unpublished FAR revisions under the second phase of the Rewrite included changes to the following subparts of the prior version of the FAR: 15.5, 15.7, 15.8, and 15.9.

[15] For a comprehensive discussion of the processes which led to the Rewrite, see Paul E. Van Maldeghem, *The FAR Part 15 Rewrite: Road to the Final Rule*, 33 PROCUREMENT LAW 3 (Summer 1998).

Before discussing the particular process improvements in the Rewrite, one should note what the Rewrite sought to accomplish.[16] According to the FAR Council in its regulatory analysis, the Rewrite's goals were "to infuse innovative techniques into the source selection process, simplify the process, and facilitate the acquisition of best value."[17] Stated differently in another section of the regulatory analysis, the goals were "to ensure that the Government, when contracting by negotiation, receives the best value, while ensuring the fair treatment of offerors." In pursuit of these goals, the FAR Council declared that "[t]he rewrite emphasizes the need for contracting officers to use effective and efficient acquisition methods, and eliminates regulations that impose unnecessary burdens on industry and on Government contracting officers." The FAR Council also stressed that the Rewrite "reengineers the processes used to contract to contract by negotiation, with the intent of reducing the resources necessary for source selection and reducing time to contract award."[18] Putting these statements together, one can see that the FAR Council sought a procurement process that generates innovation, efficiency, fairness, and best value.

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[16] 62 Fed. Reg. 51224, 51225 (1997). The FAR Council asserted that "The Part 15 rewrite, like the rewrite of these other FAR parts, conforms with the general reform philosophy espoused by the Clinton- Gore Administration. Vice President Gore, in the Report of the National Performance Review: Creating a Government that Works Better & Costs Less recognized the need for deregulation in the acquisition process. The report, published in 1993, emphasized that acquisition regulations should be rewritten to provide for empowerment and flexibility. According to the report, the acquisition regulations should: shift from rigid rules to guiding principles; promote decision making at the lowest possible level; end unnecessary regulatory requirements; foster competitiveness and commercial practices; and shift to a new emphasis on choosing "best value" products." *See* VICE PRESIDENT AL GORE, REPORT OF THE NATIONAL PERFORMANCE REVIEW, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS 28-29 (1993).

[17] 62 Fed. Reg. 51224, 51224 (1997).

[18] *Id.*

To foster attainment of these objectives, the Rewrite created "more open exchanges" between offerors and Government agencies.[19] The prior FAR had produced a somewhat rigid process where open, productive communications between the contracting parties was limited, or even taboo. By permitting more open communications, the Rewrite created an atmosphere that allows "industry to better understand the [Government's] requirement and the Government to better understand industry proposals."[20] Such an environment enhances the Government's ability to obtain best value. The open environment cultivates best value not only because it promotes mutual understanding between the parties, but also because it sets the proper tone for more frank discussions during negotiations.[21]

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[19] *See* William T. Woods, *FAR Part 15: Now that the Dust has Settled, What's Changed?,* 33 PROCUREMENT LAW 30, 30-31 (Winter 1998) (declaring that such an improvement was "[o]ne of the administration's overriding goals for the rewrite.").

[20] 62 Fed. Reg. 51224, 51224 (1997). See *id.* at 51226. In comments to the proposed rule, respondents expressed their fears that these open exchanges "increased the risk of unfair practices." In addressing these fears, the FAR Council responded that the limitations on exchanges, as found in FAR 15.306(e), FAR 3.104 (Procurement Integrity), and FAR 24.2 (Freedom of Information Act), provide a sufficient check on possible abuses from contracting officers.

[21] *See* John S. Pachter et al., *supra* note 5, at 2, where authors suggest that "[p]erhaps the most significant changes to the source selection procedures in FAR Part 15 are those designed to increase dialogue between the Government and contractors and thus to create a more open atmosphere." One of the primary concerns expressed in this article is whether the more open exchanges might increase the chance of unfair treatment. In this regard, the authors point to the new language contained in FAR 1.102-2(c)(3), which states, in part, that "[a]ll contractors shall be treated fairly and impartially but need not be treated the same." The authors claim that many in the acquisition community view this guidance as "subject to abuse" and a violation of the requirements for "full and open competition" under the Competition and Contracting Act.

### *B. Oral Presentations*

The Rewrite included original guidance on the use of oral presentations.[22] While agencies used oral presentations before the Rewrite, its explicit inclusion in the FAR stems in part from the recognition that more fruitful communication often occurs when that communication is oral, rather than written.[23] Therefore, FAR 15.102 permits Government agencies to substitute oral presentations for written information.[24] Significantly, the FAR does not designate an oral presentation as an actual "exchange" between the Government and industry.[25] However, because an offeror may give an oral presentation at any stage in the procurement process, it makes the "exchanges" that occur more open. One may simply view oral presentations as an option that allows offerors to better highlight their unique capabilities and experience.[26]

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[22] For a comprehensive discussion of the use of oral presentations, see Sean Hannaway, *Oral Presentations in Negotiated Procurements: Panacea or Pandora's Box*, 29 PUB. CONT. L.J. 455 (2000).

[23] *See* Ralph C. Nash, Jr. & John Cibinic, Jr., *Oral Presentations: A Test or a Capability Assessment Process?*, 16 NASH & CIBINIC REP. ¶ 35 (July 2002) (indicating that, if properly conducted, face-to-face meetings enable Government agencies to better assess an offeror's capability than a written proposal).

[24] Nash & Cibinic, *The FAR Part 15 Rewrite: A Final Scorecard, supra* note 11. While stating the oral presentations section of the FAR is "basically sound," commentators indicated that the section was "very permissive in allowing Contracting Officers to use oral presentations as a substitute for virtually any part of a proposal (including price!). We would have been more prescriptive, but that would not have been in line with the goal of giving COs full freedom."

[25] Compare FAR 15.102 with FAR 15.201 and FAR 15.306.

[26] *See* Nash & Cibinic, *Oral Presentations: A Test or a Capability Assessment Process?*, *supra* note 23.

Although oral presentations create a better, more open format for exchange of information, the openness of oral presentation does not spring from an inherent lack of restrictions on their use. Notably, the FAR subjects oral presentations to the same restrictions as written information "regarding timing and format."[27] Oral presentations engender openness largely because of the opportunity for dialogue between agencies and offerors.[28] In that regard, FAR 15.102 explicitly rejects classifying pre-recorded presentations as oral presentations because they lack the "real-time interactive dialogue" that the oral presentations provision envisions.

Use of oral presentations, instead of a more formalistic written approach, can generate significant benefits. Oral presentations should streamline the procurement process by substantially reducing procurement lead times.[29] Moreover, they often allow the Government to better evaluate an offeror's capabilities.[30] Although streamlining and better evaluations are probably the most obvious benefits, oral presentations also create some benefits in bargaining. While not termed an "exchange" under the FAR, oral presentations create mutual understanding between the parties.[31] The parties' dialogue also promotes a

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[27] FAR 15.102(a) (citations omitted).

[28] FAR 15.102(a) (stating that "Oral presentations provide an opportunity for dialogue among the parties.").

[29] FAR 15.102(a) (stating that "Use of oral presentations as a substitute for portions of a proposal can be effective in streamlining the source selection process."). *See* Hannaway, *supra* note 22, at 476-477 (stating that most of the time savings should come from a reduction in the time needed for Government evaluation of the offeror's proposal).

[30] *See* Nash & Cibinic, *Oral Presentations: A Test or a Capability Assessment Process?*, *supra* note 23.

(continued on next page)

more open atmosphere where the give-and-take of bargaining can thrive.[32] Additionally, if oral presentations cost less to prepare than written proposals, the Government theoretically should obtain better value during negotiations.[33]

### *C. Early Exchanges*

The Rewrite sought to improve communications by encouraging "exchanges" between the Government and industry from the outset of the Government's acquisition planning.[34] The FAR does not actually define what "exchanges" mean. However, it is fairly apparent that exchanges mean a back-and-forth delivery of information between the parties. The term seems to highlight the promotion of dialogue, rather than one-sided communication.

The FAR supports the broad use of early exchanges. This support is not confined to current acquisitions. Instead, the FAR also encourages agencies to engage in early

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[31] Hannaway, *supra* note 22, at 478-479 (affirming that oral presentations improve communications between the parties and leads the Government into a better understanding of offerors' proposals. In this regard, oral presentations allow the parties to "clarify complex subjects" and allow the Government agency "to plumb the true depths of the offeror's understanding of the requirements of a contract.").

[32] *See* Nash & Cibinic, *Oral Presentations: A Test or a Capability Assessment Process?*, *supra* note 23 (indicating that the Government's successful use of oral presentations depends on "real give-and-take" with each offeror).

[33] *See* 62 Fed. Reg. 51224, 51226 (1997); see also Ralph C. Nash, Jr. & John Cibinic, Jr., *Oral Communications: Interviews, Presentations, or Discussions but not Proposals,* 10 NASH & CIBINIC REP. ¶ 63 (Dec. 1996), where commentators suggest an interview to eliminate an offeror's incentive to create expensive and elaborate oral presentations. Otherwise, the cost-saving and streamlining benefits evaporate.

[34] FAR 15.201(a) states, "Exchanges of information among all interested parties, from the earliest identification of a requirement through receipt of proposals, are encouraged."

exchanges on future procurements.[35] Notably, in promoting early exchanges, the Rewrite even condones one-on-one meetings with potential offerors.[36] Moreover, the Rewrite places few limitations on these exchanges.[37]

The prospect of unimpeded use of early exchanges caused some industry representatives to express concerns about potential unfairness, especially where the Government conducts one-on-one meetings.[38] In conducting these exchanges, the Government must exercise caution. To maintain procedural integrity and avert meritorious litigation, Government personnel must not favor one offeror over another. According to the Comptroller General, it violates a fundamental principle of competitive negotiation if information necessary for submission of proposals on an equal basis is not given to all

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[35] FAR 15.201(c) states, "Agencies are encouraged to promote early exchanges of information about future acquisitions. An early exchange of information among industry and the program manager, contracting officer, and other participants in the acquisition process 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."

[36] FAR 15.201(c)(4).

[37] FAR 15.201(a) requires exchanges to be consistent with the procurement integrity requirements under FAR 3.104. See FAR 15.306(e) for other restrictions.

[38] Pachter et al., *supra* note 5, at 5 (expressing fairness concerns involving both presolicitation and postsolicitation exchanges). *But see* John Thrasher, *Government Exchanges with Industry before Receipt of Proposals*, 99-04 BRIEFING PAPERS 1 (Mar. 1999) (stating that while contracting officers should respect the restrictions on exchanges that remain after the Rewrite, such restrictions should seldom hinder the "more open exchanges" that the Rewrite contemplates).

offerors.[39] Therefore, contracting officers must heed the following guidance: when the Government discloses vital information for the preparation of proposals to a potential offeror, the Government must publicly disclose the information as soon as possible.[40]

If Government agencies use these early exchanges fairly and properly, they can achieve the purpose for exchanges and reap substantial benefits. The FAR suggests a varied purpose:

> The purpose of exchanging information is to improve the understanding of Government requirements and industry capabilities, thereby allowing potential offerors to judge whether or how they can satisfy the Government's requirements, and enhancing the Government's ability to obtain quality supplies and services, including construction, at reasonable prices, and increase efficiency in proposal preparation, proposal evaluation, negotiation, and contract award.[41]

These exchanges benefit the Government and the offeror by enhancing mutual understanding. The offeror acquires understanding of the Government's requirements, and the Government acquires understanding of the offeror's capabilities.[42] The Government also gains insight into its own requirements. Altogether, this improved understanding enables the

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[39] EMS Dev. Corp., Comp. Gen. B-242484, May 2, 1991, 91-1 CPD ¶ 427.

[40] FAR 15.201(f) states "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 must 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." See Pachter et al., *supra* note 5, at 5 (expressing doubt that the provision in FAR 15.201(f) provides sufficient protection, given that FAR 1.102-2(c)(3) indicates that disparate treatment does not necessarily equal unfair treatment).

[41] FAR 15.201(b).

[42] See Nash & Cibinic, *The FAR Part 15 Rewrite: A Final Scorecard*, *supra* note 11, noting the new guidance on one-on-one meetings with potential offerors, draft RFPs, and site visits and commenting that FAR 15.201 is a "major improvement that should lead to better RFPs that require less clarification and amendment after they are issued."

parties to appropriately allocate their resources and efforts. Moreover, while the FAR language does not mention bargaining, certainly the increased communications promote the bargaining climate during negotiations. To successfully bargain, the Government must know its requirements, as well as what industry can reasonably deliver. Exchanges with industry before receipt of proposals increase this knowledge, which, as stated above, enhances the Government's ability to obtain goods and services at reasonable prices. Also, this knowledge boosts efficiency during negotiations because the Government and industry know where to concentrate their efforts.

### *D. Clarifications*

When it comes to clarifications, whether the Rewrite improved communications with offerors is less clear. The prior version of the FAR defined a clarification as "communication with an offeror for the sole purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes in the proposal."[43] Either on its own initiative or in response to a Government inquiry, an offeror could clarify its proposal through explanation or substantiation. However, except for correction of minor clerical errors, the parties could not treat a revised proposal as a clarification.[44]

The clarification rule derived from statutory language in the Competition in Contracting Act (CICA).[45] The language allowed the Government to engage in "discussions

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[43] FAR 15.601 (1996).

[44] *Id.*

[45] Pub. L. No. 98-369, 98 Stat. 1175 (1984). Ralph C. Nash, Jr. & John Cibinic, Jr., *Award without Discussions: The Flexibility in the New FAR*, 12 NASH & CIBINIC REP. ¶ 13 (Mar.
(continued on next page)

conducted for the purpose of minor clarification" without forfeiting its option of making award based on offerors' initial proposals.[46] However, the language confuses the reader because of the word "discussions" in the context of clarifications. To simplify matters, the FAR called these particular discussions clarifications, to distinguish them from the discussions with offerors when the Government does not make award based on initial proposals.[47] Under the FAR, if the Government progressed beyond permissible clarifications into realm of discussions, the Government could no longer make award based on initial proposals.[48]

The revised FAR states that "Clarifications are limited exchanges, between the Government and offerors, that may occur when award without discussions is contemplated."[49] While the permissive "may" possibly indicates that the FAR does not limit clarifications to the situation of making award without discussions, the next section of the FAR indicates that the FAR Council certainly was focused on that situation. As stated in FAR 15.306(a)(2), "If award will be made without conducting discussions, offerors may be given the opportunity to clarify certain aspects of proposals (*e.g.*, the relevance of an offeror's past performance information and adverse past performance information to which the offeror has not previously had an opportunity to respond) or to resolve minor or clerical errors."

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1998) (discussing the evolution of the statutory and regulatory language concerning clarifications and discussions).

[46] *See* 10 U.S.C. § 2305(b)(4)(A)(ii) and 41 U.S.C. § 253b(d)(1)(B).

[47] *See* FAR 15.601 (1996) and FAR 15.610 (1996) *See also* 10 U.S.C. § 2305(b)(4)(A)(i) and 41 U.S.C. § 253b(d)(1)(A).

[48] *See* FAR 15.610(a)(3) (1996).

[49] FAR 15.306(a)(1).

The new language raises the issue of whether it allows more exchange of information than clarifications under the prior FAR. Some assert that the new language is unclear on the scope of permissible clarifications.[50] Nonetheless, the FAR Council believed that these changes would generate more communications than the prior version.[51] In response to public comments from the first proposed revision to FAR Part 15, the FAR Council reportedly limited the scope of these exchanges.[52] In releasing the final rule, however, the FAR Council stated, "The resulting language still permits more exchange of information between offerors and the Government than the current FAR."[53] The FAR Council asserted that "[it] drafted the rule to allow as much free exchange of information between offerors and the Government as possible, while still permitting award without discussions and complying with applicable statutes."[54]

Others affirmatively declared that this "provision is substantially broader than previous coverage."[55] Under the prior FAR, to award without discussions, the contracting officer could not step beyond the bounds of minor clarifications. As noted above, offerors

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[50] Ralph C. Nash, Jr. & John Cibinic, Jr., *Communications after Receipt of Proposals: The Most Difficult Issues in the FAR Part 15 Rewrite*, 14 NASH & CIBINIC REP. ¶ 3 (Jan. 2000) (stating that the new language "contains almost no clear statements as to the extent of communications between the parties in this phase of the procurement process.").

[51] *Id.*

[52] 62 Fed. Reg. 51224, 51228-29 (1997).

[53] 62 Fed. Reg. 51224, 51229 (1997).

[54] 62 Fed. Reg. 51224, 51228 (1997). *See* 62 Fed. Reg. 51224, 51228-29 (1997).

[55] Pachter et al., *supra* note 5, at 5-6. Yet, the commentators acknowledge that the "scope of permissible dialogue where award without discussions is intended will not be known until the Rewrite is tested in application."

now can "clarify certain aspects of proposals," such as the "relevance of an offeror's past performance information and adverse past performance information to which to the offeror has not previously had an opportunity to respond."[56] The full range of permissible clarifications involving "certain aspects of proposals" is unclear. However, as under the prior rule, the coverage largely ends where discussions begin.[57] Clarifications do not allow an offeror to revise its proposal.[58] Still, if an offeror is allowed to clarify its past performance data to the satisfaction of the Government, that offeror enjoys a better opportunity to receive award of the contract.[59] Under the prior version of the FAR, the GAO would have considered this dialogue to have constituted discussions, prompting the requirement to conduct discussions with all offerors.[60]

While making award without discussions necessarily forecloses the Government's opportunity to bargain with offerors, increased communications through clarifications may

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[56] FAR 15.306(a)(2). As the FAR language indicates, whether a contracting officer actually allows such a clarification is discretionary. *See* A.G. Cullen Constr., Comp. Gen. B-284049.2, Feb. 22, 2000, 2000 CPD ¶ 45 (2000). While the contracting officer has broad discretion, for that exercise of discretion to be reasonable, a contracting officer must allow an offeror an opportunity to clarify its adverse past performance information if the offeror has not previously had an opportunity to respond and there clearly is a reason to question the validity of the information. *See also* Pachter et al., *supra* note 5, at 6 (expressing concern that contracting officers will treat offerors unfairly).

[57] For a good discussion on recent GAO decisions differentiating between clarifications and discussions, see Ralph C. Nash, Jr. & John Cibinic, Jr., *Postscript: Clarifications vs. Discussions*, 15 NASH & CIBINIC REP. ¶ 41 (Aug. 2001).

[58] FAR 15.306(a)(1): FAR 15.307(b); *See* Pachter et al., *supra* note 5, at 6.

[59] *See* Pachter et al., *supra* note 5, at 6.

[60] *Id. See* FAR 15.601 (1996) and FAR 15.610(c) (1996).

provide some benefits. First, clarifications may demonstrate the Government's need for negotiations. Second, if the Government decides to negotiate, the parties' increased understanding from clarifications may facilitate bargaining.[61] However, the level of benefits is uncertain, because the scope of permissible clarification is imprecise.[62] Some have suggested that "clarifications can delve into information submitted by offerors but cannot permit alterations of offers."[63] Recent cases support that assertion.[64] Still, the new clarifications provision remains somewhat confusing.[65]

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[61] *See* Nash & Cibinic, *Postscript: Clarifications vs. Discussions*, *supra* note 57, where commentators, in the context of award without discussions, express approval in the post-Rewrite decisions giving "Contracting Officers considerable discretion in using the [clarifications'] rule to fill out their knowledge of the capabilities of the offerors and of the details of what was being offered before making the award decision."

[62] *See* Pachter et al., *supra* note 5, at 9 (pointing out that "the regulation does not address whether an agency may seek clarification of proposals after submission of final proposal revisions to address any remaining ambiguities without triggering a requirement for another round of 'final proposal revisions.'"). *See also* Ralph C. Nash, Jr. & John Cibinic, Jr., *Award without Discussions: The Flexibility in the New FAR*, *supra* note 45 (offering an interpretation of the scope of clarifications).

[63] Nash & Cibinic, *Communications after Receipt of Proposals: The Most Difficult Issues in the FAR Part 15 Rewrite*, *supra* note 50; JOHN CIBINIC, JR. & RALPH C. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS 810-14 (3d ed. 1998); JOHN CIBINIC, JR., RALPH C. NASH, JR. & KAREN R. O'BRIEN, COMPETITIVE NEGOTIATION: THE SOURCE SELECTION PROCESS 511-17 (2d ed. 1999).

[64] Nash & Cibinic, *Postscript: Clarifications vs. Discussions, supra* note 57. In analyzing *Northeast MEP Servs., Inc.*, Comp. Gen. B-285963.9, Mar. 8, 2001, 2001 CPD ¶ 66, commentators stated that "This case seems to indicate that a CO can probe the language of an offer to ensure that he understands its meaning as long as he does not permit the offeror to change the offer." What the commentators find somewhat disconcerting about this case and *International Resources,* Comp. Gen. B-286663, Jan. 31, 2001, 2001 CPD ¶ 35, is their citation of *J.A. Jones,* Comp. Gen. B-285627.2, Sept. 18, 2000, 200 CPD ¶ 161. They cite *J.A. Jones* for the idea that if an offeror submits information essential for determining the acceptability its proposal, such a submission becomes discussions, instead of clarifications. This assertion is problematic because the Rewrite eliminated from the discussions definition "communication... that involves information essential for determining the acceptability of a

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## *E. Communications*

The last noteworthy type of exchange before discussions is "communications with offerors before the establishment of the competitive range."[66] These communications are "exchanges, between the Government and offerors, after receipt of proposals, leading to the establishment of the competitive range."[67] Unlike the clarification exchanges discussed above, the prior FAR lacked a comparable section.

These communications come with significant limitations. Only two categories of offerors benefit. First, contacting officers must hold these communications with offerors "whose past performance information is the determining factor preventing them from being placed in the competitive range."[68] Second, if an offeror does not fall within the first category, a contracting officer may hold these communications with offerors "whose

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proposal." Compare FAR 15.601 (1996) to FAR 15.306(d). See Ralph C. Nash, Jr. & John Cibinic, Jr., *Clarifications vs. Discussions: The Obscure Distinction*, 14 NASH & CIBINIC REP. ¶ 29 (June 2000) for analysis of other cases finding permissible clarifications.

[65] *See* Ralph C. Nash, Jr. & John Cibinic, Jr., *Postscript II: Clarifications vs. Discussions,* 16 NASH & CIBINIC REP. ¶ 13 (Mar. 2002), where commentators express concerns about the rationale of *Information Technology & Applications Corp. v. United States*, 51 Fed. Cl. (2001). In that case, the court uses the "Communications" provision under FAR 15.306(b) to interpret the meaning of "Clarifications" under FAR 15.306(a). See Nash & Cibinic, *Postscript: Clarifications vs. Discussions, supra* note 57 (declaring that new clarifications language is confusing).

[66] FAR 15.306(b). The prior use of the word "communications" in this section was simply the dictionary meaning of the term, not the meaning given under this particular FAR section. In an attempt to avoid confusion for this particular FAR section, I use the FAR term "exchanges." When referring to "communications" in this section, I refer to the meaning given under this particular FAR section.

[67] FAR 15.306(b).

[68] FAR 15.306(b)(1). When under that category, "Such communications shall address adverse past performance information to which an offeror has not had a prior opportunity to respond."

exclusion from, or inclusion in, the competitive range is uncertain."[69] The FAR also limits these communications substantively. The FAR makes clear that these communications "shall not be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, and/or otherwise revise the proposal."[70] Further, "[s]uch communications shall not provide an opportunity for the offeror to revise its proposal."[71] Such revisions occur only after the Government engages in discussions with those offerors selected for the competitive range.

While the FAR limits these exchanges, they nonetheless can be quite significant for those offerors that qualify. This is especially true, since the competitive range is now much more limited.[72] The exchanges may address, in addition to past performance issues, "Ambiguities in the proposal or other concerns (e.g., perceived deficiencies, weaknesses, errors, omissions, or mistakes)."[73] As with clarifications, these exchanges under the prior FAR could constitute discussions. Under the Rewrite, they would not.[74]

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[69] *Id.*

[70] FAR 15.306(b)(2).

[71] FAR 15.306(b)(3).

[72] Pachter et al., *supra* note 5, at 7.

[73] FAR 15.306(b)(3). See Pachter et al., *supra* note 5, at 6. Authors claim that "[t]his provision opens the door to unequal treatment of offerors."

[74] *See* Nash & Cibinic, *Communications after Receipt of Proposals: The Most Difficult Issues in the FAR Part 15 Rewrite*, *supra* note 50. Even if an offeror proves that communications constitute discussions, since these exchanges precede discussions, the offeror probably could not demonstrate prejudice.

These communications help the Government choose the right offerors with whom to bargain. The Government seeks to avoid excluding a worthy offeror from the competitive range. With that objective, the Government desires to resolve any misunderstanding surrounding an offeror's past performance data or proposal characteristics. Hence, the FAR states that these communications "[m]ay be conducted to enhance Government understanding of the proposal; allow reasonable interpretation of the proposal; or facilitate the Government evaluation process."[75]

The dialogue in communications also creates the climate for bargaining during the negotiations stage. As with the other exchanges, the bargaining climate partially stems from the parties' increased understanding. The Government better understands what an offeror can deliver. The offeror better understands what the Government desires. Communications also stimulate the bargaining climate because dialogue during communications breeds increased dialogue during negotiations. Significantly, communications occur only when the contracting officer determines that discussions are necessary. As such, communications particularly aid the Government in bargaining with those contractors selected for the competitive range because of the exchanges.

# III. Is the New Discussions Language Meaningful?

## *A. Old Rule: Deficiencies*

Before the Rewrite, if contracting officers did not make award without discussions, the FAR required contracting officers to "conduct written or oral discussions with all

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[75] FAR 15.306(b)(2).

responsible offerors within the competitive range."[76] The FAR defined "discussion" as "any oral or written communication between the Government and an offeror, (other than communications conducted for the purpose of minor clarification) whether or not initiated by the Government, that (a) involves information essential for determining the acceptability of a proposal, or (b) provides the offeror an opportunity to revise or modify its proposal."[77] The Government engaged in discussions to improve proposals and to foster more effective competition.[78]

Once entering into discussions, the contracting officer no longer could make award based on initial proposals, even if an offeror initiated the triggering communication.[79] Under the discussions definition, two circumstances indicated that the Government had engaged in discussions. First, discussions occurred if the communication involved information essential for determining the acceptability of an offeror's proposal. Second, discussions occurred if the Government allowed an offeror an opportunity to revise its proposal. Regarding this second prong, the GAO repeatedly declared the "acid test" for this determination was whether the Government allowed the offeror to revise its proposal.[80] This "acid test," permitted the GAO to easily determine whether discussions occurred. The decisions relying

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[76] FAR 15.610(b) (1996).

[77] FAR 15.601 (1996).

[78] Paul Shnitzer, *Discussions in Negotiated Procurements*, 91-4 BRIEFING PAPERS 1, 1-2 (Mar. 1991).

[79] Shnitzer, *supra* note 78, at 3.

[80] Hannaway, *supra* note 22, at 482. See Development Alternatives, Inc., Comp. Gen. B-279920, Aug. 6, 1998, 98-2 CPD ¶ 54; Trellclean U.S.A., Inc., Comp. Gen. B-213227, June 25, 1984, 84-1 CPD ¶ 661.

on the first prong concerning a proposal's acceptability are less plentiful and less clear.[81] In most of the cases relying on the first prong, the GAO could have just relied on the "acid test."[82] In those few cases arguably falling outside of the "acid test," the GAO engaged in questionable reasoning which made the test of little utility.[83]

While the FAR declared that "[t]he content and extent of discussions is a matter of the contracting officer's judgment, based on the particular facts of each acquisition," the FAR then proceeded with a limited list of required practices.[84] Under this mandatory discussions rule, the FAR specifically directed contracting officers to address a number of matters.[85] However, the rule's critical portion required contracting officers to "[a]dvise the

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[81] Hannaway, *supra* note 22, at 483.

[82] *Id.* The commentator mentions a number of cases. *See* Tri-State Gov't Servs., Inc., Comp. Gen. B-277315, Oct. 15, 1997, 97-2 CPD ¶ 143 (sustaining protest where agency engaged in post-BAFO communications to allow awardee to modify its pricing information); Environmental Tectonics Corp., Comp. Gen. B-225474, Apr. 9, 1987, 87-1 CPD ¶ 391 (sustaining protest where communications concerned the acceptability of awardee's proposal that contained terms and conditions and where Government improperly accepted awardee's late proposal modification which removed those terms and conditions); *see also* 4th Dimension Software, Inc., Comp. Gen. B-251936, May 13, 1993, 93-1 CPD ¶ 420 (sustaining protest under both circumstances); National Medical Staffing, Comp. Gen. B-242585.3, July 1, 1991, 91-2 CPD ¶ 1 (finding that offeror's substitution of hygienist impacted the acceptability of offeror's proposal and constituted discussions).

[83] See Hannaway, *supra* note 22, at 485, discussing *Global Assocs., Ltd*, Comp. Gen. B-271963, Aug. 2, 1996, 96-2 CPD ¶ 100 and arguing that the GAO could have sustained the protest on "less vague bases."

[84] FAR 15.610(b), FAR 15.610(c) (1996). A list of prohibited practices in FAR 15.610(d), FAR 15.610(e) (1996) also follows this provision, but another section of this thesis captures those prohibited practices.

[85] FAR 15.610(c) stated that "The contracting officer shall—(1) Control all discussions; (2) Advise the offeror of deficiencies in its proposal so that the offeror is given an opportunity to satisfy the Government's requirements;(3) Attempt to resolve any uncertainties concerning (continued on next page)

offeror of deficiencies in its proposal so that the offeror is given an opportunity to satisfy the Government's requirements."[86] The FAR defined "deficiency" as "any part of a proposal that fails to satisfy the Government's requirements."[87]

The FAR requirement to specify "deficiencies" seemed somewhat narrow. However, the GAO gave liberal interpretation to when the FAR required contracting officers to conduct discussions.[88] Instead of looking merely at the regulation, the GAO analyzed the statute requiring discussions. Although the GAO recognized that the statutory language "do[es] not define the nature, scope or extent of the required discussions," the GAO declared that "the legislative history of the law evidenced a congressional intent that negotiations be conducted under competitive procedures to the extent practicable and that they be meaningful by making them discussions in fact and not just lip service."[89]

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the technical proposal and other terms and conditions of the proposal; (4) Resolve any suspected mistakes by calling them to the offeror's attention as specifically as possible without disclosing information concerning other offerors' proposals or the evaluation process (see 15.607 and Part 24); (5) Provide the offeror a reasonable opportunity to submit any cost or price, technical, or other revisions to its proposal that may result from the discussions; and (6) Provide the offeror an opportunity to discuss past performance information obtained from references on which the offeror had not had a previous opportunity to comment. Names of individuals providing reference information about an offeror's past performance shall not be disclosed."

[86] FAR 15.610(c)(2) (1996).

[87] FAR 15.601 (1996).

[88] See Ralph C. Nash, Jr. & John Cibinic, Jr., *Postscript IV: Negotiation in a Competitive Situation*, 16 NASH & CIBINIC REP. ¶ 8 (Feb. 2002), for a good discussion on how the GAO interpreted this seemingly narrow rule as requiring more than what it seems to say.

[89] GTE Sylvania, Inc., Comp. Gen. B-188272, Nov. 30, 1977, 77-2 CPD ¶ 422 (referring to the predecessor of 10 U.S.C. § 2305(b)(4)(A)(i)), cited by Steven W. Feldman, *Traversing the Tightrope between Meaningful Discussions and Improper Practices in Negotiated Federal Acquisitions: Technical Transfusion, Technical Leveling, and Auction Techniques*,
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In crafting the standard for meaningful discussions, the GAO has required contracting officers to look beyond the mere regulatory requirement to point out deficiencies. Yet, in laying out the standard, the GAO enunciated a familiar barrage of seemingly inconsistent and confusing principles.[90] "In order for discussions to be meaningful, contracting officials must advise offerors of weaknesses, excesses, or deficiencies in their proposals that require amplification or correction, and afford offerors an opportunity to revise their proposals to satisfy the government's requirements."[91] Once a contracting officer initiates discussions, "the agency must point out all deficiencies in the offeror's proposal, and not merely selected ones."[92] A contracting officer must "[lead] offerors into the areas of their proposals requiring amplification."[93] "[D]iscussions should be as specific as practicable considerations will permit."[94]

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17 PUB. CONT. L.J. 211, 219-220 n.30 (1987). The article generally explores the difficulties in following both the requirement for meaningful discussions and the prohibitions against technical transfusion, technical leveling, and auction techniques.

[90] *See* Timothy J. Rollins, *A Contract Lawyer's Guide to the Requirement for Meaningful Discussions in Negotiated Procurements*, 122 MIL. L. REV. 221, 222 (1988) (stating that the GAO decisions are ostensibly difficult to harmonize). See Feldman, *supra* note 89, at 220-21 (noting the "GAO has avoided inflexible or stereotyped requirements regarding the conduct of discussions, recognizing that the statutory mandate can be defined only in the context of a particular procurement."). *See also* Nash & Cibinic, *Postscript IV: Negotiation in a Competitive Situation*, *supra* note 88 (asserting their longstanding confusion regarding GAO's guidance, as expressed in *Department of the Navy—Reconsideration*, Comp. Gen. B-250158.4, May 28, 1993, 93-1 CPD ¶ 422).

[91] Miltope Corp., Comp. Gen. B-258554, June 6, 1995, 95-1 CPD ¶ 285.

[92] B.K. Dynamics, Inc., Comp. Gen. B-228,090, Nov. 2, 1987, 87-2 CPD ¶ 429.

[93] Applied Cos., Comp. Gen. B-279811, July 24, 1998, 98-2 CPD ¶ 52. For similar language, see *LaBarge Elecs.*, Comp. Gen. B-266210, Feb. 9, 1996, 96-1 CPD ¶ 58. See *Vitro Corp.*, Comp. Gen. B-261662, Dec. 4, 1995, 96-2 CPD ¶ 201, where GAO emphasizes that the contracting officer must lead offerors "generally," not specifically. See also Love, *supra* note

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Although this language seems rather broad, the GAO established plenty of exceptions. The requirement for meaningful discussions does not mean that contracting officers "describe deficiencies in such detail that there could be no doubt as to their identity and nature."[95] Nor does it mean that a contracting officer has to point out "inherent" weaknesses in an offeror's proposal "which would require a major revision to resolve."[96] Nor does the requirement mean that the contracting officer must engage with an offeror in "all-encompassing discussions." The contracting officer need not "'spoon-feed' an offeror as to each and every item that must be revised, added, deleted, or otherwise addressed to improve a proposal."[97] Therefore, the contracting officer does not have to "conduct successive rounds

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1, where commentator states that this requirement to lead offerors "generally" makes the disclosure requirement "minimal." This minimal disclosure "has been the subject of numerous, most often unsuccessful, protests because the protester did not accurately guess what perceived deficiency prompted the Government to note that some area in the proposal needed clarification or amplification."

[94] E.L. Hamm & Assocs., Inc., Comp. Gen. B-250932, Feb.19, 1993, 93-1 CPD ¶ 156; see Shnitzer, *supra* note 78, at 6 (calling this guidance not "not too helpful since the real issue is how specific considerations permit the discussions to be. In addition, any value that the rubric may have is vitiated by the GAO position that the determination of the extent of discussions is primarily within the procuring agency's discretion, to be questioned only if it lacks a reasonable basis." *See also* Matrix Int'l Logistics, Comp. Gen. B-272388, Dec. 9, 1996, 97-2 CPD ¶ 89; Alliant Techsystems, Inc., Comp. Gen. B-260215, Aug. 4, 1995, 95-2 CPD ¶ 79.

[95] Medland Controls, Inc., Comp. Gen. B-255204, Feb. 17, 1994, 94-1 CPD ¶ 260; See Mark A. Riordan, *Meaningful Discussions—How Much is Enough?*, 61 Fed. Cont. Rep. (BNA) ¶ 20 (May 23, 1994) for a good analysis of cases involving the degree of specificity required.

[96] Miller Bldg. Corp., Comp. Gen. B-245488, Jan. 3, 1992, 92-1 CPD ¶ 21 (finding aesthetic compatibility of building design to be an inherent weakness); Tracor Flight Sys., Comp. Gen. B-245132, Dec. 17, 1991, 91-2 CPD ¶ 549 (finding offeror's staffing strategy to be an inherent weakness).

[97] Holmes & Narver, Inc., Comp. Gen. B-266246, Jan. 18, 1996, 96-1 CPD ¶ 55.

of discussions until all deficiencies are corrected."[98] The contracting officer does not have to "specifically remind an offeror during discussions to submit information that was specifically requested in the solicitation."[99] Moreover, contracting officers "need not discuss every aspect of a proposal that receives less than the maximum score."[100] Because of concern that agencies may engage in prohibited technical transfusion, technical leveling or auction techniques, the GAO affirmatively stated that an agency must not engage in "all-encompassing discussions or "spoon-feed" offerors.[101] Stated differently, "an agency is required to point out weaknesses, excesses, or deficiencies in a proposal unless doing so would result in technical transfusion or technical leveling."[102]

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[98] Ebasco Constructors, Inc., Comp. Gen. B- 244406, Oct. 16, 1991, 91-2 CPD ¶ 341; Ways, Inc., Comp. Gen. B-255219, Feb. 17, 1994, 94-1 CPD ¶ 120 (rejecting contention that meaningful discussions requires another round of discussions to resolve remaining, but previously addressed, proposal deficiencies). See Action Mfg. Co., Comp. Gen. B-222151, June 12, 1986, 86-1 CPD ¶ 546 (generally, if a proposal did not contain deficiencies, the contracting officer could satisfy the requirement for discussions by merely requesting a best and final offer (BAFO)).

[99] Wade Perrow Co., Comp. Gen. B-255332, Apr. 19, 1994, 94-1 CPD ¶ 266.

[100] Fluor Daniel, Inc., Comp. Gen. B- 262051, Nov. 21, 1995, 95-2 CPD ¶ 241.

[101] Vitro Corp., Comp. Gen. B-261662, Dec. 4, 1995, 96-2 CPD ¶ 201. In a section below, this thesis discusses how the FAR Part 15 Rewrite changed these restrictions.

[102] Stewart Title of Orange County, Inc., Comp. Gen. B-261164, Aug. 21, 1995, 95-2 CPD ¶ 75. *See* American Dev. Corp., Comp. Gen. B-251876, July 12, 1993, 93-2 CPD ¶ 49 (stating, in more permissive language, that "the need for meaningful discussions may be constrained to avoid technical leveling, technical transfusion, and an auction").

The GAO's statement that the discussions rule covered "weaknesses, excesses or deficiencies" caused some confusion among agencies.[103] Commentators observed that most agencies failed to distinguish between "deficiencies" and "weaknesses," and the GAO used the terms interchangeably in most of its decisions. The Air Force, on the other hand, did distinguish the terms. The Air Force defined "deficiencies" in relation to the solicitation requirements; "deficiencies" surfaced if a proposal failed to meet the Government's minimum standards. In contrast, the identification of "weaknesses" involved a comparative assessment among the proposals.[104]

While most GAO cases did not distinguish the terms, those decisions that did usually supported the agency position to disclose deficiencies but not weaknesses.[105] The GAO found no agency requirement to identify a proposal's relative weaknesses in technical approach if the proposal was technically acceptable.[106] These decisions applied when particular weaknesses did not preclude an offeror from having a reasonable chance for

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[103] Ralph C. Nash, Jr. & John Cibinic, Jr., *Written or Oral Discussions: Is there a Difference between "Weaknesses" and "Deficiencies,"* 5 NASH & CIBINIC REP. ¶ 35 (June 1991), where commentators assert that the "Comptroller [did] not intend this to be a firm rule." Instead, "[t]he language is merely a set of words that have a nice ring to them—so they get repeated over and over."

[104] *Id.*

[105] *Id.* (noting that the GAO's rationale was not always clear). *See* Aydin Vector Div., Comp. Gen. B-243430, July 22, 1991, 91-2 CPD ¶ 79 (finding no agency requirement to discuss the relative weakness in protester's approach). *See also* PECO Enters., Inc., Comp. Gen. B-232307, Oct. 27, 1988, 88-2 CPD ¶ 398 (stating that "while [protester's] proposal was deemed weak in this area relative to [awardee's], the weakness was not a deficiency that would render protester's proposal unacceptable.").

[106] Ralph C. Nash, Jr. & John Cibinic, Jr., *Negotiation in a Competitive Situation: The Most Radical Change Made by the Rewrite*, 12 NASH & CIBINIC REP. ¶ 54 (Oct. 1998). See SeaSpace Corp., Comp. Gen. B-225968, June 14, 1993, 93-1 CPD ¶ 462.

award.[107] In one decision, the GAO more broadly stated, "Where a proposal is considered to be acceptable and in the competitive range, an agency is not required to discuss every aspect of the proposal receiving less than the maximum rating."[108] In other words, once discussions adequately addressed deficiencies, the agency met the regulatory mandate.

However, agency attempts to hide behind the "deficiencies" language were sometimes unsuccessful. In *Eldyne, Inc.* a protester alleged that the Navy did not engage in meaningful discussions because the Navy failed to point out perceived weaknesses in protester's proposal.[109] The Navy had downgraded the protester's technical proposal for its lack of detail concerning its management and technical approach. The Navy countered that the lack of detail was a "weakness," rather than a "deficiency." There was no requirement to discuss the matter, because the protester's technical proposal was acceptable.[110] Declaring the argument "simply wrong," the GAO asserted that "[a]gencies must conduct meaningful discussions with all offerors in the competitive range, whether their proposals are acceptable, outstanding or only susceptible of being made acceptable."[111] The GAO's decision

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[107] *Id.*

[108] SEAIR Transport Servs., Inc. Comp. Gen. B-274436, Dec. 12, 1996, 96-2 CPD ¶ 224 (citing Fairchild Space & Defense Corp., Comp. Gen. B-243716, Aug. 23, 1991, 91-2 CPD ¶ 190). *See* Nash & Cibinic, *Negotiation in a Competitive Situation: The Most Radical Change Made by the Rewrite*, *supra* note 106.

[109] Eldyne, Inc., Comp. Gen. B-250158, Jan. 14, 1993, 93-1 CPD ¶ 430, recon. denied, Department of the Navy, May 28, 1993, 93-1 CPD ¶ 422.

[110] *Id.* See Ralph C. Nash, Jr. & John Cibinic, Jr., *Discussion of "Weaknesses": A Little Knowledge is a Dangerous Thing*, 7 NASH & CIBINIC REP. ¶ 59 (Oct. 1993), where commentators call this dichotomy in discussions a "goofy idea."

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indicated that agencies could not avoid meaningful discussions by labeling a material proposal flaw as a "weakness" instead of a "deficiency."[112]

GAO's splattering of contradictory guidance and restrictions did not lead to a good discussions process. Whether a contracting officer complied with the regulatory guidance was not always predictable.[113] On the one hand, the Comptroller General required general, limited discussions. On the other hand, many decisions required specific, thorough discussions.[114] Not surprisingly, as a consequence, instead of focusing on bargaining, contracting officers focused on avoiding successful protests. The unpredictability contributed to discussions consisting of "written Government questions, written contractor responses, and formalistic meetings at which deficiencies and weaknesses [were] seldom

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[111] Eldyne, Inc., Comp. Gen. B-250158, Jan. 14, 1993, 93-1 CPD ¶ 430, recon. denied, Department of the Navy, May 28, 1993, 93-1 CPD ¶ 422. *See* Nash & Cibinic, *Discussion of "Weaknesses": A Little Knowledge is a Dangerous Thing, supra* note 110. Commentators argue the decision shows that broader discussions will better withstand GAO's scrutiny than minimal discussions. They also note the decision "tends to preserve the dichotomy between deficiencies and weaknesses by stating a rule that deficiencies must be discussed while weaknesses need be discussed only when required for the discussion to be meaningful."

[112] Eldyne, Inc., Comp. Gen. B-250158, Jan. 14, 1993, 93-1 CPD ¶ 430, recon. denied, Department of the Navy, May 28, 1993, 93-1 CPD ¶ 422. The GAO noted that a technical evaluator had initially labeled the lack of detail as a "deficiency." The Navy contended that the "deficiency" was later changed to "acceptable." The GAO responded, "Regardless of the agency's description of its concerns with [protester's] proposal as constituting a weakness rather than a deficiency, the record shows that [protester's] proposal was significantly downgraded in these areas of its proposal."

[113] Ralph C. Nash, Jr. & John Cibinic, Jr., *Postscript: Negotiation in a Competitive Situation,* 13 NASH & CIBINIC REP. ¶ 19 (Apr. 1999).

[114] *Id.* (affirming that some GAO decisions required more rigorous, comprehensive discussions than others); Rollins, *supra* note 90, at 230-31, 237 (stating that GAO has two lines of cases, one requiring agency discussion of every defect as specifically as practicable, and the other requiring a more limited, general discussion of defects.

specifically discussed."[115] Contracting officers tended to avoid permissible oral discussions.[116] Contracting officers cautiously identified deficiencies and weaknesses with only the level of detail necessary to meet the regulatory requirements and to avoid the regulatory restrictions. The consequent minimal discussions diminished negotiations to a "guessing game."[117] As a result, the Government often awarded the contract to the offeror who played the game the best, instead of the best offeror.[118] Real bargaining seldom occurred.

## *B. FAR Part Rewrite: Deficiencies, Weaknesses and Other Aspects*

While the prior FAR had an outwardly clear definition of discussions, one must now cull through FAR 15.306, Exchanges with Offerors after Receipt of Proposals, to find the revised definition.[119]

> Negotiations are exchanges, in either a competitive or sole source environment, between the Government and offerors, that are undertaken with the intent of allowing the offeror to revise its proposal. These

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[115] Love, *supra* note 1.

[116] *See* FAR 15.601 (1996), definition of "discussions," and FAR 15.610(b) (1996). *See* Rollins, *supra* note 90 (indicating that a contract lawyer should review all proposed discussion questions before they are sent to the offerors).

[117] Love, *supra* note 1. See Ralph C. Nash, Jr. & John Cibinic, Jr., *Limiting Multiple Best and Finals: Cure or Disease*, 2 NASH & CIBINIC REP. ¶ 60 (Oct. 1988), where commentators affirm that it was "quite common for an offeror to come away from the discussions process without a clear picture of what the Government wants. Frequently, the CO will not even engage in face-to-face discussions but will conduct the process by submitting a set of written questions to each competitor for the submission of written answers. Such sterile procedures are not calculated to result in a BAFO that fully meets the Government's needs."

[118] *Id.*

[119] *See* Nash & Cibinic, *Postscript IV: Negotiation in a Competitive Situation*, *supra* note 88.

> negotiations may include bargaining. Bargaining includes persuasion, alteration of assumptions and positions, give-and-take, and may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract. When negotiations are conducted in a competitive acquisition, they take place after establishment of the competitive range and are called discussions.[120]

What emerges is a significantly different definition of discussions.[121] First, it eliminates the prior definition's statement that discussions are communications that involve "information essential for determining the acceptability of a proposal."[122] Second, the new definition indicates that discussions occur only after the contracting officer sets the competitive range and proceeds into negotiations with the remaining offerors.[123] Third, the new rule injects of the concept of bargaining into the discussions process.

In crafting the Rewrite's mandatory discussions rule, the FAR Council incorporated some of GAO's liberal interpretations of the prior FAR language. The Rewrite contained the following new language:

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[120] FAR 15.306(d).

[121] *See* FAR 15.601 (1996). See also 61 Fed. Reg. 48380, 48387 (1996), where in the first proposed rewrite, the drafters defined "discussions" in proposed FAR 15.401 as simply meaning "communication after establishment of the competitive range between the contracting officer and an offeror in the competitive range."

[122] FAR 15.601 (1996).

[123] Part of the reason for the change in temporal emphasis is that the Government often had a difficult time dealing with the distinction between clarifications and discussions. See Timothy Sullivan et al., *The Government's even more in "The Driver's Seat" under FAR Part 15 Proposal*, 38 GOV'T CONTRACTOR ¶ 450 (Sept. 25, 1996), where authors lament the changes under the first proposed rewrite, issued September 12, 1996. They viewed the proposed changes to the discussions definition as an attempt to avoid successful protests, which partly stemmed from the Government's difficulties in distinguishing discussions from clarifications.

> The contracting officer shall...indicate to, or discuss with, each offeror still being considered for award, significant weaknesses, deficiencies, and other aspects of its proposal (such as cost, price, technical approach, past performance, and terms and conditions) that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award. The scope and extent of discussions are a matter of contracting officer judgment.[124]

The FAR defined "deficiency" as "a material failure of a proposal to meet a Government requirement or a combination of significant weaknesses in a proposal that increases the risk of unsuccessful contract performance to an unacceptable level."[125] It defined "weakness" as "a flaw in the proposal that increases the risk of unsuccessful contract performance" and "significant weakness" as "a flaw that appreciably increases the risk of unsuccessful contract performance."[126] Other than language in FAR 15.306(d)(3), the FAR gave no indication what the "other aspects" encompassed. Significantly, in heeding GAO's call for meaningful discussions, the FAR Council incorporated other items for discussion besides deficiencies.

Moreover, the new FAR language seemingly required vigorous discussions beyond GAO's requirements. Commentators asserted that the "general, broad statement" in FAR

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[124] FAR 15.306(d)(3).

[125] FAR 15.301 (1998). The definition is currently at FAR 15.001. See 61 Fed. Reg. 48380, 48387 (1996), where in the first proposed rewrite, the drafters defined "deficiency" as "a single failure to meet a Government requirement or a single flaw that appreciably increases the risk of unsuccessful contract performance."

[126] The definition is currently at FAR 15.001. *See infra* note 125. The first proposed rewrite at 61 Fed. Reg. 48380 (1996) did not contain a separate definition of "weakness" or "significant weakness." Instead, the drafters intended to expand the meaning of "deficiency" beyond the mere failure to meet Government requirements.

15.306(d)(3) replaced the "specific, narrow statement" from the prior version of the FAR.[127] The FAR Council explained that the first proposed rewrite contained the prior FAR's guidance on the scope of required discussions. Reacting to the public comments on the first proposed rewrite, the FAR Council made the above-mentioned changes to the discussions rule. The FAR Council highlighted the changes' significance by declaring that the new proposed rule "requires a more robust exchange of information during discussions."[128] The FAR Council then pointed out that "[t]he language requires the Government to identify, in addition to significant weaknesses and deficiencies, other aspects of an offeror's proposal that could be enhanced materially to improve the offeror's potential for award."[129] Therefore, the FAR Council seemed to emphasize that the "more robust" discussions would flow from the requirement to engage in discussions on a proposal's "other aspects."[130] Notably, the GAO had not previously required that agencies discuss these "other aspects."

The new discussions rule significantly improved the prior rule. The greater exchange of information would help both parties. It would help the Government better obtain its

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[127] Nash & Cibinic, *Negotiation in a Competitive Situation: The Most Radical Change Made by the Rewrite*, *supra* note 106.

[128] 62 Fed. Reg. 51224, 51229 (1997). *See id.* at 51224-25 (specifically citing the increased scope of discussions as an integral part of the Rewrite's reengineering of the acquisition process).

[129] 62 Fed. Reg. 51224, 51229 (1997).

[130] See Nash & Cibinic, *Negotiation in a Competitive Situation: The Most Radical Change Made by the Rewrite*, *supra* note 106, where commentators speculate on what those "other aspects" might encompass. In trying to decipher the discussions rule from the splattering of GAO guidance, the commentators offered the following: "[A]gencies must discuss all correctable elements of a proposal that have been negatively evaluated if those elements play a role in the selection decision. Elements that involve an approach that is consciously chosen and relatively inferior to another offeror's approach would be excluded from this rule."

needs, and it would help contractors better understand how to improve their proposals. The new rule also gave better guidance on what contracting officers had to discuss. Under the new language, contracting officers clearly had to proceed beyond deficiencies. The prior rule's guidance was not overly helpful. Instead, its lack of meaningful guidance left contracting officers scurrying to the confusing GAO decisions for answers. At least the new rule gave contracting officers a better starting place.

The apparent creation of more robust discussions seemed to solidly advance the bargaining process. Under the prior rules, the procurement community had often complained that there was an "absence of real negotiations in 'negotiated' procurements."[131] This absence of bargaining partially proceeded from the prior FAR's restrictive guidance on what constituted permissible discussions.[132] The concept of bargaining, however, is not entirely new to the Rewrite. The prior FAR stated the following:

> Negotiation is a procedure that includes the receipt of proposals from offerors, permits bargaining, and usually affords offerors an opportunity to revise their offers before award of a contract. Bargaining--in the sense of discussion, persuasion, alteration of initial assumptions and positions, and give-and-take--may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract."[133]

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[131] Pachter, et al., *supra* note 5, at 5.

[132] *See* FAR 15.610 (1996). For a discussion of the restrictions, see Pachter et al., *supra* note 5, at 8.

[133] FAR 15.102 (1996). See Nash & Cibinic, *Negotiation in a Competitive Situation: The Most Radical Change Made by the Rewrite*, *supra* note 106. Concerning the prior FAR's provision, commentators state, "While this general guidance appeared to cover competitive negotiations, we are aware of no agencies that interpreted the guidance to require 'bargaining' in the process of written or oral discussions. Rather the focus was on the disclosure of deficiencies..."

Yet, in stark contrast to the prior version, the Rewrite places bargaining within the context of discussions.[134] This placement has great importance, especially since discussions' primary purpose is "to maximize the Government's ability to obtain best value."[135]

Altogether the Rewrite "call[ed] for full scale bargaining."[136] The stronger mandatory rule, coupled with reduced limitations on discussions, definitely enabled contracting officers to bargain. One might even argue that the new rules meant that contracting officers should bargain. Importantly, "as a culmination of this negotiation process," the FAR states that "[t]he contracting officer may request or allow proposal revisions to clarify and document understandings reached during negotiations."[137] As commentators have asserted, "[t]he FAR seems to contemplate negotiations with each competing offeror until agreement is reached on the best deal obtainable from that

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[134] Compare FAR 15.102 (1996), FAR 15.610 (1996) with FAR 15.306(d); Nash & Cibinic, *Postscript II: Negotiation in a Competitive Situation*, *supra* note 3 (indicating that the Rewrite's inclusion of bargaining in the discussions rule attempts to encourage contracting officers to engage in more robust discussions). Notably, the discussions rule authorizes contracting officers to negotiate beyond mandatory minimums. *See* Nash & Cibinic, *Negotiation in a Competitive Situation: The Most Radical Change Made by the Rewrite*, *supra* note 106 (stating that the FAR Council included this language "[t]o make it clear that bargaining was really anticipated."). See also Pachter et al., *supra* note 5, at 8 (stating that "This provision has the potential, if abused, to result in awards based not on stated evaluation criteria but on information divulged during negotiation.").

[135] FAR 15.306(d)(2).

[136] Nash & Cibinic, *Negotiation in a Competitive Situation: The Most Radical Change Made by the Rewrite*, *supra* note 106 (stating that "Agencies have every reason to be very open in disclosing every aspect of a proposal that the evaluators do not like.").

[137] *Id.* FAR 15.307(b).

offeror."[138] The injection of bargaining into discussions seemed to break the shackles of meaningless formalities in negotiated procurements.

### *C. Slouching from "Robust" to Bust*

However, much of the excitement surrounding the newly invigorated rule was fleeting. The first sign that the discussions language lacked real meaning emerged from one of first post-Rewrite protests on discussions.[139] In *MCR Federal,* the Defense Finance and Accounting Service (DFAS) issued a solicitation for contract reconciliation services from accounting firms. In making the "best value" award decision, the agency used an evaluation scheme that placed an offeror's technical ability and past performance as more important than price.[140] After DFAS made award to the two most highly rated offerors, the protester contended that the Government engaged in inadequate discussions during the negotiations

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[138] Nash & Cibinic, *Negotiation in a Competitive Situation: The Most Radical Change Made by the Rewrite*, *supra* note 106.

[139] MCR Fed., Inc., Comp. Gen. B-280969, Dec. 14, 1998, 99-1 CPD ¶ 8. See I.T.S. Corp., Comp. Gen. B-280431, Sept. 29, 1998, 98-2 CPD ¶ 89, where in the first post-Rewrite decision concerning discussions, the GAO denied a protest in which the protester alleged that the Government engaged in prejudicially unequal and misleading discussions. The GAO stated, "Notwithstanding the revisions in the FAR language, we do not view the rewrite as having changed the prior legal requirements governing discussions in any way relevant to this case." The GAO found that the discussions were fair, because the Government gave the pivotal information to all offerors.

[140] MCR Fed., Inc., Comp. Gen. B-280969, Dec. 14, 1998, 99-1 CPD ¶ 8 The solicitation had three criteria: technical, past performance, and price. In descending order of importance, the technical subfactors included the offeror's technical approach, key personnel, and management plan. An offeror's past performance was equal to the technical approach subfactor. When combined, the non-cost/price factors were significantly more important than cost/price.

process.[141] The protester complained that DFAS should have discussed those aspects of its proposal where it could have received a higher score. The protester contended that the consequent improvements to its proposal would have materially improved its chances for award. The protester also argued that DFAS had unfairly engaged in discussions with awardees by discussing their "marginal" areas, while avoiding discussions on its merely "acceptable" areas. As a result, the awardees' ratings on those areas either matched or surpassed the protester's.[142]

After acknowledging the new discussions rule, the GAO announced that the protester's allegations lacked merit. The GAO reasoned that the protester "is essentially arguing that, since this is an area where its proposal received less than a perfect rating (even though not a "marginal" one), it should have been discussed to place its proposal in a more advantageous competitive position for award." Without any analysis, the GAO then affirmed that it "do[es] not read the revised Part 15 language to change the legal standard so as to require discussion of all proposal areas where ratings could be improved."[143]

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[141] *Id.* The protester also contended that the Government's technical evaluation was inconsistent with the solicitation's evaluation scheme. On that issue, the GAO partially sustained the protest.

[142] *Id.* As stated in footnote 2 of the decision, "The RFP provided the following adjectival ratings: "outstanding" (proposal very significantly exceeds most or all solicitation requirements); "better" (proposal fully meets all solicitation requirements and significantly exceeds many of the solicitation requirements); "acceptable" (proposal meets all solicitation requirements); "marginal" (proposal is deemed less than acceptable, but has a reasonable chance of becoming at least acceptable after discussions); and "unacceptable" (proposal has many deficiencies or gross omissions)."

[143] *Id.*

Shortly thereafter, the GAO reiterated this view in *Du.*[144] In this case, the Department of Housing and Urban Development (HUD) issued a solicitation for multifamily real estate assessment and analysis services. In making the "best value" decision, the Government used an evaluation methodology that set technical merit above price.[145] Along with allegations that HUD misevaluated its proposal, the protester contended that HUD failed to engage in meaningful discussions before eliminating the protester from the competitive range.[146] The protester complained that HUD failed to discuss its reservations concerning the protester's personnel experience and subcontractor management abilities. The GAO rejected the argument: "We recognize that the FAR rewrite could be read to limit the discretion of the contracting officer by requiring discussion of all aspects of the proposal 'that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award."[147] Despite recognizing the FAR's plain language, GAO declared, "We do not believe, however, that it was the intention of the rewrite to limit the contracting officer's discretion in this manner."[148] Following that declaration, GAO asserted, "The rule thus remains that, while an agency is required to conduct meaningful discussions leading an offeror into the areas of its proposal requiring amplification or revision, the

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[144] Du & Assocs., Inc., Comp. Gen. B-280283.3, Dec. 22, 1998, 98-2 CPD ¶ 156.

[145] *Id.* The technical factors, in descending order of importance, were "Prior Experience," "Past Performance," and "Management Capability and Quality Control."

[146] *Id.*

[147] *Id.* FAR 15.306(d)(3) (1998).

[148] *Id.*

agency is not required to 'spoon-feed' an offeror as to each and every item that could be revised so as to improve its proposal."[149]

Reaction to GAO's interpretation of the new discussions language was mixed, but mostly negative. Some within the Government believed that the decisions were consistent with the Rewrite's broad grant of discretion to contracting officers, while some representing industry thought GAO annulled the changes to the discussions language.[150] Daniel I. Gordon, GAO Associate General Counsel for Procurement, stated that "We do not view these two cases as the last word on what the Part 15 rewrite requires by way of discussions."[151] Practitioner, John Pachter, retorted that the "spoon-feeding" argument against more robust discussions was a "straw man." He maintained no one had ever asserted that the new language required "spoon-feeding."[152] However, "If the GAO decisions really mean the FAR 15 rewrite brought about no change after all, neither the government nor offerors may benefit from all of the effort that went into the rewrite."[153]

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[149] *Id.* (citing *Applied Cos.,* Comp. Gen. B-279811, July 24, 1998, 98-2 CPD ¶ 52, which the GAO decided under the prior discussions rule)

[150] Martha A. Matthews, *GAO Rejects Protesters' Interpretation of Revised FAR Part 15, Says Agencies are not Required to Conduct Expanded Discussions with Offerors*, 71 Fed. Cont. Rep. (BNA) ¶ 11, 375 (Mar. 15, 1999).

[151] *Id.*

[152] *Id.*

[153] *Id.* ; see *FAR Proposal Underscores CO Discretion Regarding Scope of Discussions in Negotiated Procurements*, 42 GOV'T CONTRACTOR ¶ 143 (Apr. 12, 2000).

Professors Ralph Nash and John Cibinic were especially critical. They dubbed the *MCR Federal* and *Du* decisions as the "The Miraculous Transformation."[154] Under the prior FAR, which seemed to only require limited discussions of deficiencies, the GAO sometimes declared that agencies had to engage in broad discussions. Under the new rule, which seemed to require broad discussions, the GAO, in issuing these decisions, declared that contracting officers could engage in limited discussions.[155]

They further directed their disdain at *Du.*. They seemed somewhat baffled by the idea "that the new FAR does not change the regulatory rule!" As they attested, "this decision contains the remarkable statement that while the new FAR could be read to mean what it says, it does not mean that because, in the opinion of the Comptroller, that wasn't the intention of the drafters."[156] To counter the assertion that the Rewrite's intent was merely to give contracting officers more discretion, they highlighted the Rewrite's regulatory analysis which indicated the FAR Council's intent to instill "more robust" discussions.[157] They contemptuously concluded: "It is no wonder that COs and agency lawyers are deathly afraid of protests. These decisions indicate that there is no predictability in the [GAO's] decisions...Rules seem to be...ad hoc...and clear words...can be disregarded at will. The procurement community deserves better...."[158]

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[154] Nash & Cibinic, *Postscript: Negotiation in a Competitive Situation, supra* note 113.

[155] *Id. See* Ralph C. Nash, Jr. & John Cibinic, Jr., *Negotiation in a Competitive Situation: The Most Radical Change Made by the Rewrite, supra* note 106.

[156] Nash & Cibinic, *Postscript: Negotiation in a Competitive Situation, supra* note 113.

[157] *Id.*

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Amazingly, rather than reaffirming the Rewrite's intent to create more robust discussions, the FAR Council proposed a rule change on April 3, 2000 consistent with these GAO's post-Rewrite decisions.[159] The proposed rule retained the prior rule's mandate to discuss deficiencies and significant weaknesses, but it erased the mandate for all remaining areas. As finally adopted, the mandatory discussions rule reads:

> At a minimum, the contracting officer must...indicate to, or discuss with, each offeror still being considered for award, deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond. *The contracting officer also is encouraged to discuss other aspects of the offeror's proposal* that could...be altered or explained to enhance materially the proposal's potential for award. *However, the contracting officer is not required to discuss every area where the proposal could be improved.* The scope and extent of discussions are a matter of contracting officer judgment.[160]

Unlike the post-Rewrite version, the new rule merely encourages contracting officers to engage in discussions on a proposal's "other aspects." Additionally, the new language expressly frees the contracting officer from having to discuss every improvable element of a proposal.[161]

Therefore, in contrast to the seemingly strong mandatory discussions rule in the Rewrite, both the protest decisions and the new discussions rule elevate contracting officer

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[158] *Id. See* Ralph C. Nash, Jr. & John Cibinic, Jr., *The Rules of the Competitive Negotiation Game: Who Makes Them?*, 13 NASH & CIBINIC REP. ¶ 36 (July 1999) (demonstrating how the GAO made up the rules on whether the FAR mandates cost realism analysis).

[159] 65 Fed. Reg. 17582 (2000); *Proposed FAR Change would Clarify Scope of Discussions in Acquisitions*, 73 Fed. Cont. Rep. (BNA) ¶ 14, 380 (April 4, 2000).

[160] FAR 15.306(d)(3) (emphasis added).

[161] See Nash & Cibinic, *Postscript IV: Negotiation in a Competitive Situation*, *supra* note 88. Commentators also discuss the replacement of the word "shall" with "must" and the addition of the past performance language.

discretion over the discussions' objective of maximizing the Government's ability to obtain best value. As a result, the "radical change" that some envisioned in the discussions area has failed to materialize.[162] Given this emphasis on discretion, not surprisingly contracting officers have not "tak[en] the bait and follow[ed] the guidance" of maximizing the Government's ability to obtain best value.[163] Little evidence suggests that contracting officers are engaging in robust discussions or bargaining.[164]

## IV. Freedom to Discuss/Bargain

Despite these failures with the discussions rule itself, the Rewrite nonetheless loosened many of the regulatory bonds impeding contracting officers from fully engaging in discussions with offerors.[165] The most prominent restrictions were those against technical leveling, technical transfusion and auctions. Some of these restrictions apparently tempted some contracting officers into improperly avoiding discussions altogether and making award

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[162] *See* Nash & Cibinic, Jr., *Negotiation in a Competitive Situation: The Most Radical Change Made by the Rewrite*, *supra* note 106.

[163] Nash & Cibinic, *Postscript II: Negotiation in a Competitive Situation*, *supra* note 3. While the commentators state that the discussions language is "only radical if COs take the bait...," arguably what made the discussions rule radical was its broad scope and mandatory nature.

[164] *Id.* Professor Nash states, "In numerous classes I have asked the students whether this [i.e., robust discussions during negotiations] is happening, and the answer is almost always No! The court and Comptroller decisions seem to indicate the same thing. Most COs seem to be conducting minimal discussions, and both the Court of Federal Claims and the Comptroller General are going along with this by interpreting the mandatory discussions rule narrowly."

[165] *See* Nash & Cibinic, *Communications after Receipt of Proposals: The Most Difficult Issues in the FAR Part 15 Rewrite*, *supra* note 50.

without discussions.[166] Moreover, during the negotiation stage, the restrictions caused contracting officers to limit discussions. While the prior FAR did not preclude bargaining, contracting officers believed that the restrictions prevented "open dialogue" with offerors.[167] Further, the GAO itself "recognized the tension between the requirement for meaningful discussions with all responsible sources whose proposals are within the competitive range, and the admonitions in the FAR against technical leveling, technical transfusion, and auctions."[168] Instead of focusing on bargaining, contracting officers attempted to walk the "fine line" between the required meaningful discussions and the prohibited practices.[169] The Rewrite's many changes eased the tension and promoted bargaining.

### *A. Removal of Prohibition on Technical Leveling*

The old FAR prohibited the contracting officer and other Government personnel from engaging in technical leveling. The FAR defined technical leveling as "helping an offeror to bring its proposal up to the level of other proposals through successive rounds of discussion, such as by pointing out weaknesses resulting from the offeror's lack of diligence, competence, or inventiveness in preparing the proposal."[170] Some described technical

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[166] *See* Hart, *supra* note 9, at 30 (indicating that the fear of technical leveling caused some contracting officers to improperly make award without discussions).

[167] Pachter et al., *supra* note 5, at 4. However, the authors contend that such perception was unfounded, because the restrictions "were modest and simply did not bar the type of discussions normally sought." Nevertheless, the authors observe that the "rewrite seeks to chart a new course."

[168] Geo-Centers, Inc., Comp. Gen. B-276033, May 5, 1997, 97-1 CPD ¶ 182.

[169] Feldman, *supra* note 89.

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leveling as improper "coaching," in the sense that the Government was "giving answers to problems rather than merely identifying the problems."[171] Moreover, while some commentators noted that successive rounds of discussions should not have been a prerequisite for a finding of technical leveling, the GAO, in issuing its opinions, often tracked the statutory language.[172] Unquestionably, the rule engendered confusion.[173]

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[170] FAR 15.610(d) (1996); Nash & Cibinic, *Written or Oral Discussions: Is there a Difference between "Weaknesses" and "Deficiencies," supra* note 103 (calling the FAR definition "ridiculous.").

[171] Nash & Cibinic, *Discussion of "Weaknesses": A Little Knowledge is a Dangerous Thing, supra* note 110. Feldman, *supra* note 89, at 239 (setting forth the elements that a protester must prove to show technical leveling or "coaching."). Ralph C. Nash, Jr. & John Cibinic, Jr., *Postscript: Understanding the Meaning of "Technical Leveling,"* 4 NASH & CIBINIC REP. ¶ 62 (Nov. 1990), citing, Ultrasystems Defense, Inc., Comp. Gen. B-235351, Aug. 31, 1989, 89-2 CPD ¶ 198 (stating "[t]echnical leveling (or "coaching") in discussions is prohibited by Federal Acquisition Regulation...and is defined as helping an offeror bring its proposal up to the level of a higher-rated proposal through successive rounds of discussions."). *See also* Voith Hydro, Inc., Comp. Gen. B-277051, Aug. 22, 1997, 97-2 CPD ¶ 68 (referring to technical leveling as "impermissible coaching.").

[172] Nash & Cibinic, *Discussion of "Weaknesses": A Little Knowledge is a Dangerous Thing, supra* note 110, where commentators called such a prerequisite "stupid regulatory guidance" and a "crazy notion that is entirely out of touch with reality." According to the commentators, technical leveling could occur in the first round of discussions. See *Telos, Corp.*, Comp. Gen. B-279493, July 27, 1998, 98-2 CPD ¶ 30 (stating "Technical leveling occurs where an agency, through successive rounds of discussions, helps to bring a proposal up to the level of another proposal by pointing out weaknesses that remain in a proposal due to an offeror's lack of diligence, competence, or inventiveness after having been given an opportunity to correct them."); Rollins, *supra* note 90, at 240, citing, *Price Waterhouse*, Comp. Gen. B-222562, Aug. 18, 1986, 86-2 CPD ¶ 190 (emphasizing that technical leveling only occurs as the result of successive rounds of discussion).

[173] *See* Nash & Cibinic, *Postscript: Understanding the Meaning of "Technical Leveling," supra* note 171; Ralph C. Nash, Jr. & John Cibinic, Jr., *Technical Leveling: Confusion and Clarification*, 1 NASH & CIBINIC REP. ¶ 2 (Jan. 1987).

The confusion stemmed from the difficulty in deciphering where meaningful discussions ended and technical leveling began.[174] If the contracting officer did not point out an offeror's deficiencies and weaknesses because of fears of technical leveling, the offeror would claim a lack of meaningful discussions. If the contracting officer did point out those deficiencies and weaknesses, that offeror's competitor might allege that the deficiencies and weaknesses resulted from the offeror's lack of "diligence, competence, or inventiveness."[175]

In trying to pinpoint when a contracting officer might trigger the prohibition, commentators and the Comptroller General sent conflicting and vague messages. "The government will cross the border between meaningful discussions and technical leveling when the government provides so much assistance to an offeror in proposal preparation that the government assists the offeror to the detriment of its competitors."[176] Conversely, "[a]ny discussion that alerts an offeror to deficiencies helps it and consequently necessarily hurts its competitors because then the offeror can compete more effectively."[177] GAO offered little guidance, other than asserting that contracting officers did not have to identify an offeror's weaknesses and deficiencies if it presented a "reasonable possibility" of technical leveling.[178]

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[174] *See* Feldman, *supra* note 89, at 243-244. Commentator cites *Tidewater Consultants, Inc.*, GSBCA 8069-P, 85-2 BCA ¶ 18387 (1985) as the only successful protest on an agency's use of technical leveling. In that case, the agency gave explicit directions to two offerors on how to improve their proposals but did not give the same information to the protester.

[175] FAR 15.610(d) (1996).

[176] *See* Feldman, *supra* note 89, at 243-244.

[177] Love, *supra* note 1.

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At the same time, the GAO stated that contracting officers should not limit discussions based on "abstract or theoretical concerns."[179]

While the current FAR retained the prior prohibition on technical transfusion, it totally eliminated the prohibition on technical leveling.[180] Now the FAR only prohibits conduct that "[r]eveals an offeror's technical solution, including unique technology, innovative and unique uses of commercial items, or any information that would compromise an offeror's intellectual property to another offeror."[181] This prohibition is conceptually comparable to the prior FAR's prohibition on technical transfusion, defined as "Government disclosure of technical information pertaining to a proposal that results in improvement of a competing proposal."[182]

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[178] Feldman, *supra* note 89, at 244. As an example, author cites Physicon, Inc., Comp. Gen. B-219967, Dec. 27, 1985, 85-2 CPD ¶ 723.

[179] Feldman, *supra* note 89, at 244-45. *See id.* at 241 n.145, citing Price Waterhouse, Comp. Gen. B-222562, Aug. 18, 1986, 86-2 CPD ¶ 190 (rejecting agency concerns that offeror's proposal could not be improved without repeated rounds of discussions. *See id.* at 221 n.38, citing Harbridge House, Inc., Comp. Gen. B-195320, Feb. 8, 1980, 80-1 CPD ¶ 112 (asserting that undue fears of technical transfusion and technical leveling should not have prevented the Navy from at least posing some clarification questions on matters related to a proposal's weaker areas).

[180] *See* Shnitzer, *supra* note 78, at 7 (noting that under the prior rules, the prohibition on technical leveling and technical transfusion only addressed proposal aspects that were technical in nature).

[181] FAR 15.306(e)(2).

[182] FAR 15.610(e)(1) (1996), which defined it as "Government disclosure of technical information pertaining to a proposal that results in improvement of a competing proposal."[182]; see Feldman, *supra* note 89, at 227-246, for a good discussion on the distinctions between technical transfusion and technical leveling.

The current FAR contains fewer restrictions on exchanges of technical information.[183] This new flexibility should promote the more robust discussions contemplated by the Rewrite.[184] Removing the technical leveling prohibition should at least encourage contracting officers to engage in more vigorous discussions without an undue fear of a successful protest.[185] A few post-Rewrite cases provide some solace to those contracting officers still worried about protests on this area. In *Synetics, Inc. v. United States,*[186] a disappointed offeror protested Army action concerning its contract for an information technology service. The protester assailed the propriety of contract award, contending that the Army had engaged in improper technical leveling by "coaching" the contract awardee during discussions.[187] In rejecting that contention, the court emphasized that "the FAR encourages [contracting officers] to discuss areas of an offeror's proposal that might be enhanced 'to maximize the Government's ability to obtain best value.'"[188] The court disagreed that the FAR still prohibited technical leveling. Although noting that the prior

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[183] *See* Pachter et al., *supra* note 5, at 9.

[184] *See id.* (stating that "While this relaxation may invigorate discussions, it may give offerors more cause for concern that their technical proposal may be compromised.").

[185] *See* Love, *supra* note 1 (indicating that, under the prior version of the FAR, procuring officials were possibly more concerned about avoiding technical leveling and technical transfusion than about obtaining the best deal).

[186] Synetics, Inc. v. United States, 45 Fed. Cl. 1 (1999). See Nash & Cibinic, *Postscript II: Negotiation in a Competitive Situation, supra* note 3.

[187] Synetics, 45 Fed. Cl. at 5-16. The protestor had alleged the following: that the Army conducted a flawed evaluation of technical and past performance; that the Army and the contract awardee had violated the Procurement Integrity Act; that the awardee had engaged in a material misrepresentation; and that the Army had engaged in improper discussions.

[188] *Id.* at 16, citing FAR 15.306(d)(2).

FAR prohibited technical leveling, the court stated that "the FAR now only prohibits "favoring one offeror over another."[189] Finally, even if technical leveling were still prohibited, the court stated that no leveling took place. Instead, the Army engaged in required discussions concerning a proposal weakness which the awardee could turn into a strength.[190] Notably, the court upheld discussions even though the agency provided a specific solution to the offeror on how to improve its proposal.[191]

In *Mantech Telecommunications and Information Systems, Corp. v. United States,* the court reviewed the plaintiff's challenge to the Government's continuous discussions with the awardee.[192] The court acknowledged that prior FAR provisions, such as technical leveling, "had been read to limit drastically the extent to which agencies could conduct ongoing discussions with an offeror."[193] In rejecting the plaintiff's challenge, the court stated, "The current FAR provisions do not discourage agencies from resolving a given proposal's weakness or deficiency by means of multiple rounds of discussions with offerors, provided the discussions are not conducted in a fashion that favors one offeror over another."[194] Instead, the court pointed out that both the discussions' objective and the definition's

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[189] Synetics, 45 Fed. Cl. at 16-17; *See* FAR 15.306(e)(1).

[190] Synetics, 45 Fed. Cl. at 16-17. *See* FAR 15.306(d)(3).

[191] Synetics, 45 Fed. Cl. at 16-17.

[192] Mantech Telecommunications and Info. Sys., Corp. v. United States, 49 Fed. Cl. 57 (2001). See Nash & Cibinic, *Postscript II: Negotiation in a Competitive Situation, supra* note 3.

[193] Mantech Telecommunications and Info. Sys., Corp., 49 Fed. Cl. at 60-61.

[194] *Id.* at 62.

inclusion of bargaining, "presuppose that there may be multiple rounds of discussions regarding a single issue."[195]

The GAO has also rejected persistent allegations of technical leveling. In a recent decision, the GAO stated, "The short answer is that technical leveling is no longer specifically prohibited by the FAR."[196] Yet, the GAO has indicated that protesters may shape similar arguments based on the remaining FAR limitations.[197] For instance, in another case, the GAO stated, "We assume [protester] is aware that the concept of technical leveling is no longer part of the regulatory framework governing federal procurements and is referring solely to the FAR's prohibition against favoring one offeror over another, found at FAR § 15.306(e)(1)."[198] Nevertheless, utilizing the remaining limitations may offer a protester little chance for a success, especially since the FAR now proclaims that "All contractors and prospective contractors shall be treated fairly and impartially but need not be treated the same." [199]

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[195] *Id.* at 62.

[196] Imagine One Technology & Manpower, Ltd., Comp. Gen. B-289334, Jan.10, 2002, 2002 CPD ¶ 18; WorldTravelService, Comp. Gen. B- 284155.3, Mar. 26, 2001, 2001 CPD ¶ 68 ("While technical leveling was once prohibited under the Federal Acquisition Regulation (FAR), this concept is no longer part of the regulatory framework governing federal procurements.").

[197] See FAR15.306(e).

[198] Biospherics, Inc., Comp. Gen. B-285065, July 13, 2000, 2000-CPD ¶ 118

[199] FAR 1.102-2(c)(3); *See* Pachter et al., *supra* note 5 at 3, 8.

### *B. Authorizing Auctions*

The prior version of the FAR listed three types of prohibited auction techniques. First, contracting officers could not state a cost or price that an offeror had to match to gain further consideration for contract award.[200] Second, the contracting officer could not inform an offeror of its price standing compared to other offerors. However, a contracting officer could reveal to an offeror that the Government considered its price to be too excessive or unrealistic.[201] Third, the contracting officer could not reveal an offeror's pricing information to another offeror.[202] These warnings on auction techniques were at least partially responsible for "hesitancy on the part of some agencies to conduct meaningful cost or price negotiations.[203]

Contracting officers feared that protest decisions would classify their discussions as a prohibited auction. Under the pre-Rewrite FAR, the GAO and the courts viewed the prohibited auction techniques as basically "consist[ing] of government personnel furnishing information about one offeror's price to another offeror during negotiations, thereby promoting direct price bidding between offerors."[204] The auction rule also meant that a contracting officer could not reveal offerors' competitive standing during negotiations. The

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[200] FAR 15.610(e)(2)(i) (1996).

[201] FAR 15.610(e)(2)(ii) (1996).

[202] FAR 15.610(e)(2)(iii) (1996).

[203] JOHN CIBINIC, JR. & RALPH C. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS 891 (3d. ed. 1998).

[204] M.E.E. Inc., Comp. Gen. B-265605, Feb. 22, 1996, 96-1 CPD ¶ 109.

above statements flowed logically from the FAR language. However, a call for multiple rounds of discussions or best and final offers (BAFOs) could also constitute an illegal auction if such call lacked sufficient justification.[205] Consequently, a contracting officer's use of extensive discussions to obtain a better deal would stimulate scrutiny.

There was a significant but limited exception to the auction prohibition. If circumstances necessitated the reopening of discussions, the reopening did not constitute an improper auction, even when offerors possessed knowledge of each other's prices.[206] This rule seeks to balance competing interests. "The possibility that a contract may not be awarded on the basis of fair and equal competition has more harmful effect on the integrity of the competitive procurement system than the fear of an auction; the statutory requirement for competition takes priority over the regulatory prohibitions on auction techniques."[207]

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[205] Timothy D. Palmer et al., *Can the Government Go Fast Forward on Reverse Auctions,* 42 GOV'T CONTRACTOR ¶ 263 (July 12, 2000), citing Action Mfg. Co., Comp. Gen. Dec. B-222151, June 12, 1986, 86-1 CPD ¶ 546 (indicating that calling for a second round of BAFOs merely to give an offeror a competitive advantage would constitute an illegal auction technique). *See also* CMI Corp., Comp. Gen. B-209938, Sept. 2, 1983, 83-2 CPD ¶ 292, (stating that multiple calls for BAFOs do not automatically constitute an illegal auction."). See FAR 15.611(c) (1996) (stating, "After receipt of best and final offers, the contracting officer should not reopen discussions unless it is clearly in the Government's interest to do so.").

[206] M.E.E. Inc., Comp. Gen. B-265605, Feb. 22, 1996, 96-1 CPD ¶ 109. *See* Palmer et al., *supra* note 205, citing The Faxon Co., Comp. Gen. B-227835, Nov. 2, 1987, 87-2 CPD ¶ 425 (stating "there is nothing inherently illegal in the conduct of an auction in a negotiated procurement.").

[207] M.E.E. Inc., Comp. Gen. B-265605, Feb. 22, 1996, 96-1 CPD ¶ 109. *See* IMS Servs., Inc. v. United States, 33 Fed. Cl. 167 (1995) (finding no prohibited auction when the Government reopened discussions after pricing disclosure, because the potential prejudice "[did] not outweigh the broader goal of maintaining procurement integrity."). *See also* Logicon, Inc. v.
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The current FAR authorizes a much greater information exchange on price. It only prohibits Government personnel from "[r]eveal[ing] an offeror's price without that offeror's permission."[208] Moreover, the provision affirmatively permits a contracting officer to "inform an offeror that its price is considered by the Government to be too high, or too low, and reveal the results of the analysis supporting that conclusion."[209] It also permits a contracting officer to "indicate to all offerors the cost or price that the Government's price analysis, market research, and other reviews have identified as reasonable."[210]

A few cases have explored lingering post-Rewrite allegations that the Government used improper auction techniques. *DGS Contract Service, Inc. v United States* provides a

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United States, 22 Cl. Ct. 776 (1991) (explaining when a prohibited auction was secondary to the Government's need to reopen discussions).

[208] FAR 15.306(e)(3).

[209] *Id.*

[210] *Id.* *See* Palmer et al., *supra* note 205, stating that FAR 15.306(e)(3)'s permissive statements arguably "support rather than restrict the use of auction techniques." Still, they opined that the "propriety of auction techniques under the new FAR Part 15 appears to turn on obtaining advance consent form all participants to release bid prices." They also read the current rule as consistent with the Procurement Integrity Act. 41 U.S.C. § 423(a)(1) forbids, "other than as provided by law," knowing disclosure, of "contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates." Among a list of things, "source selection information" would include proposed costs or prices as well as a Government evaluation of the proposed costs or prices. 41 U.S.C. § 423(f). However, 41 U.S.C. 423(h)(1) states that the prohibition does not "restrict the disclosure of information to, or its receipt by, any person or class of persons authorized, in accordance with applicable agency regulations or procedures, to receive that information." The article's authors that this latter provision is consistent with the consensual disclosure of prices under FAR 15.306(e)(3). Interestingly, they also raise the issue of whether a contractor's compliant response to an agency requirement to disclose is truly consensual.

good example.[211] In that case, a disappointed offeror on an Internal Revenue Service (IRS) contract brought a post-award bid protest action. Through its solicitation, the IRS sought security guard services.[212] The agency had originally conducted discussions with four offerors in the competitive range, one of which was the plaintiff-protester. After receiving the offerors' final proposal revisions, the contracting officer notified the plaintiff that he intended to award the contract to one of the plaintiff's competitors.[213] After obtaining a debriefing that revealed the winning contractor's price and technical score, the plaintiff threatened to protest award based on the lack of meaningful discussions.[214] The contracting officer reportedly disagreed but still decided to reopen discussions.[215] During the renewed discussions, to counterbalance the debriefing's disclosure, the contracting officer revealed the offerors' relative price standing.[216] After the contracting officer proceeded with contract award, the plaintiff protested the content of the renewed discussions.

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[211] DGS Contract Service, Inc. v United States, 43 Fed. Cl. 227 (1999). *See* Nash & Cibinic, *Communications after Receipt of Proposals: The Most Difficult Issues in the FAR Part 15 Rewrite*, *supra* note 50. *See Griffy's Landscape Maintenance v. United States,* 51 Fed. Cl. 667 (2001) (rejecting allegation of illegal auction where the contracting officer had revealed plaintiff's pricing information during debriefings, canceled the negotiated procurement and then used a Request for Quotes instead).

[212] DGS Contract Service, Inc., 43 Fed. Cl at 229.

[213] *Id.* at 230-31.

[214] *Id.* at 231-32. *See* FAR 15.506(d).

[215] DGS Contract Service, Inc., 43 Fed. Cl. at 232.

[216] *Id.* at 233, 235-36.

The plaintiff alleged an illegal auction. Despite the Rewrite's change in language, the protester contended that the Rewrite's drafters still intended to prohibit auction techniques.[217] The court disagreed. First, the court noted the obvious—the removal of the auctions language from the Rewrite. Second, the court asserted that nothing in the FAR expressly bans auction techniques.[218] "[A]n agency theoretically could conduct an auction and disclose prices of each offeror in the competitive range provided it obtained their consent."[219] Third, even under pre-Rewrite cases, an improper auction did not occur unless there was "direct bidding of price between two competing offerors."[220] Here, there was no such direct bidding. While the contracting officer revealed the offerors' relative price standing, the contracting officer did not reveal any offeror's price. Finally, a remedial disclosure would not have constituted an improper auction even if the contracting officer had revealed the offerors' individual prices.[221]

Several post-Rewrite GAO cases have addressed allegations of impermissible auction techniques. All of the protests on this issue have failed.[222] In the first post-Rewrite case, the

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[217] *Id.* at 239.

[218] *Id.* citing FAR 15.306(e).

[219] *Id.* In support, the court cited JOHN CIBINIC, JR. & RALPH C. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS 892 (3d. ed. 1998), where Nash & Cibinic state that "Since the language prohibiting auctions was removed, it would not be improper for the agency to conduct an auction provided that it received the permission of all offerors to have their prices disclosed."

[220] DGS Contract Service, Inc., 43 Fed. Cl. at 239.

[221] *Id.* at 240.

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protester alleged an improper auction where discussions revealed to an offeror that the Government considered its price too high.[223] In rejecting the argument, the GAO simply noted that the current FAR does not contain a specific provision restricting auction techniques.[224]

Although the initial post-Rewrite cases departed from prior precedent, commentators indicated that these decisions "[fell] short of unequivocal disavowal of all pre-rewrite auctioning precedent."[225] The early decisions noted the removal of the auctions language and rejected the protest allegations, but they did not dismiss the idea that improper auctions could still occur.[226] Yet, the more recent cases are clearer on this subject. In *Clearwater Instrumentation*, the GAO stated that "FAR 15.306(e)(3) does not prohibit auctions."[227] In *Alatech Healthcare,* the GAO stated, "We note that there currently is no regulatory or

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[222] *See* Alatech Healthcare, LLC, Comp. Gen. B- 289134.3, Apr. 29, 2002, 2002 CPD ¶ 73; Korrect Optical, Inc., Comp. Gen. B-288,128, Sept. 21, 2001, 2001 CPD ¶ 171; Clearwater Instrumentation, Inc., Comp. Gen. B- 286454.2, Sept. 12, 2001, 2001 CPD ¶ 151; RS Info. Sys., Inc., Comp. Gen. B- 287185.2, May 16, 2001, 2001 CPD ¶ 98; Nick Chorak Mowing, Comp. Gen. B-280011, Oct. 1, 1998, 98-2 CPD ¶ 82; *see also* Rel-Tek Sys. & Design, Inc., Comp. Gen. B-280463.7, July 1, 1999, 99-2 CPD ¶ 1, where, although GAO analyzes protester's auction allegation under the prior version of the FAR, the GAO noted, in dicta, the Rewrite's removal of the language preventing use of auction techniques.

[223] Nick Chorak Mowing, Comp. Gen. B-280011,Oct. 1, 1998, 98-2 CPD ¶ 82; Palmer et al., *supra* note 205.

[224] Nick Chorak Mowing, Comp. Gen. B-280011,Oct. 1, 1998, 98-2 CPD ¶ 82.

[225] Palmer et al., *supra* note 205.

[226] *Id.*

[227] Clearwater Instrumentation, Inc., Comp. Gen. B- 286454.2, Sept. 12, 2001, 2001 CPD ¶ 151.

statutory proscription against the use of auction techniques."[228] Therefore, it appears fairly clear that the GAO will continue to reject these protests.

Agencies celebrated the auction prohibition's demise, as demonstrated by their use of the reverse online auction technique.[229] In contrast to a normal online auction, the reverse auction's "price is driven by the seller's desire to sell an item or service, rather than a buyer's desire to buy."[230] First, an agency publicizes its desire to bid for certain supplies or services. Then, those contractors wishing to sell the supplies or services compete online by bidding their prices. Competing contractors see each other's bids. The consequent competitive pressure drives down prices so that the Government obtains the best deal possible.[231]

Interestingly, the reverse auction classifies the auction process as discussions.[232] Because discussions require the contracting officer to identify a proposal's deficiencies and significant weaknesses, the reverse auction works best when the agency seeks commercial supplies.[233] The required discussions flowing from a technical evaluation might hamper the

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[228] Alatech Healthcare, LLC, Comp. Gen. Dec. B- 289134.3, April 29, 2002, 2002 CPD ¶ 73.

[229] See Phillip M. Gillihan, *Reverse Auctions: A Case Study*, 15 NASH & CIBINIC REP. ¶ 35 (July 2001), for a good discussion of how a particular reverse auction worked for the Coast Guard. *See also* Thomas F. Burke, *Online Reverse Auctions,* 00-11 BRIEFING PAPERS 1 (Oct. 2000).

[230] Palmer et al., *supra* note 205, where commentators thoroughly explore the reverse auction's place within the current regulatory scheme.

[231] *Id.*

[232] *Id.* Commentators note the Navy's use of such a classification in May 2002.

[233] *Id.* FAR 15.306(d)(3).

effectiveness of the reverse auction.[234] Theoretically, however, reverse auctions could be productively used in more complicated procurements.[235] If an acquisition required discussions on technical matters or past performance, the agency possibly could substitute the reverse auction for normal price negotiations.[236]

### *C. Changes in Competitive Range*

The competitive range determination allows contracting officers to narrow the list of prospective contractors based on an assessment of the contractors' initial proposals. Like the current rule, the pre-Rewrite's discussions rule generally required contracting officers to engage in discussions with all offerors in the competitive range.[237] However, the prior FAR contained a different standard for determining which proposals made the competitive range.

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[234] Palmer et al., *supra* note 205. *See* Ralph C. Nash, Jr. & John Cibinic, Jr., *Auctions: Some Thoughts,* 14 NASH & CIBINIC REP. ¶ 33 (July 2000). While commentators believe that auctions may be appropriate for procuring commercial "off-the-shelf" items, they have "reservations about using them for procuring services and complex items."

[235] Palmer et al., *supra* note 205.

[236] Palmer et al., *supra* note 205. The commentators note that some current initiatives contemplate using auctions in complex procurements. "[S]ome may view the reverse auction process as little more than a price-reduction mechanism with only minimal impact on the best value determination."

[237] FAR 15.610(b) (1996) (stating that the "contracting officer shall conduct written or oral discussions with all responsible offerors who submit proposals within the competitive range"). FAR 15.610(a) (1996) allowed the contracting officer to avoid discussions for acquisitions—"(1) In which prices are fixed by law or regulation; (2) Of the set-aside portion of a partial set-aside; or (3) In which the solicitation notified all offerors that the Government intends to evaluate proposals and make award without discussion, unless the contracting officer determines that discussions (other than communications conducted for the purpose of minor clarification) are considered necessary...."

It required contracting officers to resolve any doubts in favor of inclusion.[238] The contracting officer could only exclude a proposal if it lacked a reasonable chance for award.[239]

Implementing § 4103 of the Clinger-Cohen Act,[240] the Rewrite significantly changed which proposals made the competitive range. The FAR no longer required contracting officers to include all proposals with a reasonable chance for award and to resolve any doubt in favor of inclusion. Instead, the FAR required contracting officers to "establish a competitive range comprised of all of the most highly rated proposals."[241] The contracting officer could further reduce the competitive range for efficiency reasons.[242] Because the

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[238] FAR 15.609(a) 1996 ("When there is doubt as to whether a proposal is in the competitive range, the proposal should be included."). *See* Caldwell Consulting Assocs., Comp. Gen. B-252590, July 13, 1993, 93-2 CPD ¶ 18.

[239] FAR 15.609(b) (1996).

[240] Clinger-Cohen Act, Pub. L. No. 104-106, 110 Stat. 643-44 (1996) (codified as amended at 10 U.S.C. § 2305(b)(4)(B) and 41 U.S.C. § 253b(d)(2)). This statute was formerly known as the Federal Acquisition Reform Act (FARA).

[241] FAR 15.306(c)(1).

[242] FAR 15.306(c)(2) states that "After evaluating all proposals...the contracting officer may determine that the number of most highly rated proposals that might otherwise be included in the competitive range exceeds the number at which an efficient competition can be conducted. Provided the solicitation notifies offerors that the competitive range can be limited for purposes of efficiency...the contracting officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals...." See 62 Fed. Reg. 51224, 51226 (1997). Critics complained that this provision gave contacting officers too much discretion. They feared that contracting officers would exclude offerors from the range for reasons wholly unrelated to the solicitation requirements. But see Columbia Research Corp., Comp. Gen., B-284157, Feb. 28, 2000, 2000 CPD ¶ 158 (an agency generally "cannot reasonably exclude a proposal from the competitive range where the strength and weaknesses found in that proposal are similar to those found in proposals included in the competitive range."). If the competitive range is limited purely for efficiency, not only is notice required under FAR 15.306(c)(2), but also some impartial method of exclusion. The contracting officer cannot limit the
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competitive range now only includes the most highly rated proposals, some have aptly dubbed the new rule as "when in doubt, leave them out."[243]

The new standard offers tangible benefits.[244] First, understanding that only the most highly rated proposals make the competitive range, offerors must either "submit better, more robust initial proposals" or face elimination.[245] Second, limiting the competitive range relieves eliminated offerors of the "cost of pursuing an award they have little or no chance of winning."[246] In practice, offerors outside the top three going into the competitive range never obtained award.[247] Finally, because the proposals remaining after the cutoff have a good chance for award, the offerors will vigorously compete for contract award.[248]

The Rewrite also provides contracting officers significant authority to eliminate proposals from the competitive range. If a contracting officer places a proposal among the

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competitive range for efficiency reasons until he/she has evaluated the proposals against the solicitation requirements.

[243] Pachter et al., *supra* 5, at 7.

[244] 62 Fed. Reg. 51224, 51226 (1997). Although the FAR Council considered retaining the prior FAR's standard, it "ultimately rejected it because there are readily discernible benefits from including only the most highly rated offers in the competitive range."

[245] *Id.*

[246] *Id.* Some complained that the new rule would prevent small businesses from obtaining Government contracts. The FAR Council countered that the new rule particularly benefits small businesses because they often have less resources to waste on fruitless ventures.

[247] *Id.* While emphasizing the contractors' cost, the FAR Council also contended that "[r]etaining marginal offers in the range imposes additional, and largely futile, effort and cost" on the Government as well.

[248] *Id.* (With only the most highly rated proposals remaining, "it is in [the offerors'] best interest to compete aggressively.")

most highly rated going into the competitive range, the contracting can still eliminate the proposal once discussions begin.[249] This is true "whether or not all material aspects of the proposal have been discussed, or whether or not the offeror has been afforded and opportunity to submit a proposal revision."[250] As indicated above, under the prior rule, the contracting officer could eliminate an offeror only if the offeror no longer had "a reasonable chance of being selected for contract award."[251]

Although not mentioned in the Rewrite's regulatory analysis, the new competitive range rule retains some benefits of the prior prohibition on technical leveling while it discards its detriments. Stated differently, the new rule extinguishes any perceived need for a prohibition on technical leveling. Since the prior FAR required contracting officers to include borderline proposals in the competitive range, the contracting officer often faced the issue of whether to conduct continued discussions with an offeror whose proposal contained "weaknesses resulting from the offeror's lack of diligence, competence or inventiveness."[252] Under those circumstances, the contracting officer could point to the technical leveling prohibition to justify cutting off discussions.[253] Unfortunately, the prohibition stifled

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[249] FAR 15.306(c)(3).

[250] FAR 15.306(d)(4).

[251] FAR 15.609(b) (1996).

[252] FAR 15.610(d) (1996).

[253] *See* E-Systems, Inc., Comp. Gen. B-191346, Mar. 20, 1979, 79-1 CPD ¶ 192; Matrix Int'l Logistics, Inc., Comp. Gen. B-395627, Dec. 30, 1992, 92-2 CPD ¶ 452.("[I]n a case where it might have been preferable for an agency to have informed an offeror in the request for BAFOs of continuing concerns about a weakness identified during discussions, we found that there was nothing improper about not doing so, given the agency's reasonable concerns about (continued on next page)

contracting officers from engaging in robust discussions out of fear of crossing the line between meaningful discussions and technical leveling.[254] Under the new rule, the contracting officer will not likely face the prospect of pointless discussions with inept offerors, because those inept offerors will not make the competitive range cutoff. Moreover, as set forth above, if inept offerors somehow make the initial cutoff, contracting officers can still eliminate them later.[255]

These dramatic changes to the competitive range rule make discussions much more worthwhile. Because the prior FAR ushered marginal proposals into the competitive range, the discussions process had become more of a procedural hurdle than a bargaining opportunity. Contracting officers often focused on getting through discussions without inciting a protest action. However, with these changes, Dr. Steven Kelman, former Administrator of the Office of Federal Procurement Policy (OFPP), predicted fewer protests on lack of meaningful discussions.[256] Since the competitive range only includes the most highly rated offerors, Dr. Kelman affirmed that the Government "will have every reason to want to hold discussions with those offerors, unlike the [previous] process where being included in the competitive range [was] often a fiction."[257] In other words, since contracting officers can limit the competitive range to the real competition, contracting officers can

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technical leveling."); see also Nash & Cibinic, *Discussion of "Weaknesses": A Little Knowledge is a Dangerous Thing, supra* note 110.

[254] *See* Feldman, *supra* note 89, at 243-244.

[255] FAR 15.306(c)(3).

[256] Dooley, *supra* note 6.

[257] Dooley, *supra* note 6 (paraphrasing Dr. Kelman).

worry less about protests and focus more on best value. Additionally, since discussions should be less formalistic and more beneficial, contracting officers' desire to award on initial proposals may diminish.[258]

### *D. Increased Emphasis on Past Performance*

One of the acquisition reform's more successful initiatives has been the increased use of past performance as a critical evaluation factor.[259] Subject to a limited exception, contracting officers must evaluate past performance in all negotiated source selections exceeding $100,000 in price.[260] This provision was not the Rewrite's product.[261] The prior FAR included a similar provision as a result of an OFPP policy letter issued in 1993.[262]

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[258] *See* Hart, *supra* note 9, at 30. *See* Ralph C. Nash, Jr. & John Cibinic, Jr., *Competitive Range of One: Is there Special Scrutiny*, 13 NASH & CIBINIC REP. ¶ 61 (Nov. 1999) (pointing out that the change to the new competitive range rule has even led the GAO into abandoning its previous practice of closely scrutinizing competitive range determinations which leave only one offeror in the range). Compare *Corporate Strategies*, Comp. Gen. B-239219, Aug. 3, 1990, 90-2 CPD ¶ 99, cited by commentators, with *SOS Interpreting, Ltd,* Comp. Gen. B-287505, June 12, 2001, 2001 CPD ¶ 104. The recent GAO decisions highlight that contracting officers can move into the bargaining arena without wasting time with borderline proposals.

[259] See Nathaniel Causey, *Past Performance Information, De Facto Debarments, and Due Process: Debunking the Myth of Pandora's Box,* 29 PUB. CONT. L.J. 637 (2000) for a thorough discussion on the increased use of past performance information in negotiated procurements.

[260] *Id.* at 639; FAR 15.304(c)(3)(i). FAR 15.304(c)(3)(iv) contains the exception: "Past performance need not be evaluated if the contracting officer documents the reason past performance is not an appropriate evaluation factor for the acquisition." *See, e.g.,* FAR 15.101-2(b)(1), where in discussing the lowest price technically acceptable source selection process, it specifically mentions the possibility of not using past performance as an evaluation factor.

[261] Causey, *supra* note 259, at 638-39 (indicating that the provision stemmed from a slow-forming "consensus" among advocates that source selection officials should use past

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Using past performance as an evaluation factor offers many advantages. Experience demonstrates that a contractor with an excellent past performance record will generally outperform a competitor with a substandard record.[263] Certainly, a contractor with excellent past performance presents less risk of failure and more promise of success.[264] Consequently, if the Government takes fewer remedial actions to overcome contractors' poor performance, the Government will save money.[265] Past performance evaluation motivates contractors to perform well. Contractors know their performance on the current contract may negatively or positively impact future Government business opportunities.[266] Lastly, reliance on past performance streamlines the acquisition process.[267] Before past performance evaluations, agencies relied more on offerors' elaborate written proposals as an indicator of successful performance.[268] As a result, the competition was often reduced to an "essay contest,"[269]

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performance information in negotiated procurements); as an example of the building consensus, commentator cites, STEVEN KELMAN, PROCUREMENT AND PUBLIC MANAGEMENT: THE FEAR OF DISCRETION AND THE QUALITY OF GOVERNMENT PERFORMANCE 40 (1990) (indicating that the use of past performance information could be pivotal in making the best source selection).

[262] Causey, *supra* note 259, at 645, 649-653; OFPP Policy Letter 92-5, 58 Fed. Reg. 3573 (1993); *see* FAR 15.605(b)(1) (1996). After the policy letter was implemented into the FAR, the policy letter was rescinded. *See* OFPP Proposed Rescission of Various Policy Letters, 64 Fed. Reg. 50108, 50111 (1999). *See also* Ralph C. Nash, Jr. & John Cibinic, Jr., *Postscript: Past Performance*, 8 NASH & CIBINIC REP. ¶ 33 (June 1994).

[263] Causey, *supra* note 259, at 639.

[264] *Id.*

[265] *See Id.*

[266] *Id.* at 639-40.

[267] *Id.* at 640.

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which had little positive correlation to actual successful performance.[270] With past performance evaluations, offerors can focus less on expensive written proposals, and agencies can focus more on offerors' demonstrated abilities.[271]

Past performance evaluations protect the Government when it engages in aggressive bargaining. Even if contract negotiators understand that adequate profit stimulates successful performance, there is a possibility during the "give-and-take" bargaining process that the contractor gives and the Government takes too much.[272] Certainly, it is no one's interest to bargain the contractor into inevitable performance problems and financial harm.[273] Yet, to

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[268] *Id.*

[269] *Id. See* Vernon J. Edwards, *Streamlining Source Selection by Improving the Quality of Evaluation Factors*, 8 NASH & CIBINIC REP. ¶ 56 (1994) (asserting that the typical RFP induces an "essay-writing" contest, which consequently makes discussions unproductive because the focus is more on grading the essay than on the offeror's ability to perform).

[270] Causey, *supra* note 259, at 640.

[271] *Id.*

[272] FAR 15.404-4(a)(2) states "It is in the Government's interest to offer contractors opportunities for financial rewards sufficient to stimulate efficient contract performance, attract the best capabilities of qualified large and small business concerns to Government contracts, and maintain a viable industrial base." FAR 15.404-4(a)(3) cautions that "Both the Government and contractors should be concerned with profit as a motivator of efficient and effective contract performance. Negotiations aimed merely at reducing prices by reducing profit, without proper recognition of the function of profit, are not in the Government's interest. Negotiation of extremely low profits, use of historical averages, or automatic application of predetermined percentages to total estimated costs do not provide proper motivation for optimum contract performance."

[273] See Nash & Cibinic, *Competitive Proposals: Negotiations are Discussions but Discussions are not Necessarily Negotiations, supra* note 8, where commentators advocate more aggressive bargaining but "make it clear that [they] are not suggesting that agencies squeeze the last drop of profit out of an offeror's price." *See also* Nash & Cibinic, *Auctions: Some Thoughts, supra* note 234, making the comment, in the context of an auction, that
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obtain best value, the Government arguably must proceed under the assumption that the contractor will adequately safeguard its own business interests. Nevertheless, to avoid causing financial problems during bargaining, contracting officers should not fixate solely on price, but instead should focus on the whole proposal.[274] Focusing on best value makes sense because an offeror may make appealing promises that have little relation to its proposed price. Past performance evaluations partially ensure that contractors will deliver on their attractive promises. As indicated above, knowing the business consequences surrounding future performance, an offeror will unlikely make unrealistic promises. Consequently, the Government will more likely realize the benefits of its bargain. However, if an offeror performs poorly, then for future acquisitions, the offeror will be judged less favorably and will probably not obtain contract award. Therefore, if the Government does not fully realize the benefits of its bargain, the Government, nevertheless, increases its future chances that it will.

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"where performance is to occur in the future, vendor prices that are too low often have the result of depriving the Government of the benefit of its imagined bargain."

[274] *See* FAR 9.103(c), stating, "The award of a contract to a supplier based on lowest evaluated price alone can be false economy if there is subsequent default, late deliveries, or other unsatisfactory performance resulting in additional contractual or administrative costs. While it is important that Government purchases be made at the lowest price, this does not require an award to a supplier solely because that supplier submits the lowest offer." *See* Nash & Cibinic, *Competitive Proposals: Negotiations are Discussions but Discussions are not Necessarily Negotiations, supra* note 8, where commentators state that "The aim should be to get the best combination of price and value."

# V. Too Much Discretion, Too Little Oversight

## *A. Award without Discussions*

Contracting officer can avoid discussions altogether by making award without discussions. Before making such an award, the Government must first give offerors notice of its intent in the solicitation.[275] Significantly, the FAR contemplates award without discussions "as the norm."[276] Additionally, the official OFPP guidance has been that contracting officers should make award without discussions "whenever feasible."[277]

In terms of efficiency, and sometimes cost to the Government, there are clearly some advantages in utilizing this option.[278] First, award without discussions can significantly

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[275] FAR 15.306(a)(3); FAR 52.215-1(f)(4)'s notice provision states, "The Government intends to evaluate proposals and award a contract without discussions with offerors (except clarifications as described in FAR 15.306(a)). Therefore, the offeror's initial proposal should contain the offeror's best terms from a cost or price and technical standpoint. The Government reserves the right to conduct discussions if the Contracting Officer later determines them to be necessary."

[276] Causey, *supra* note 259, at 667 (noting that if the contracting officer initially determines that discussions are necessary, the contracting officer must use "Alternate I" to FAR 52.215-1(f)(4)).

[277] *Id.* For this OFPP guidance, the commentator cited OFFICE OF FED. PROCUREMENT POLICY, OFFICE OF MGMT. & BUDGET, A GUIDE TO BEST PRACTICES FOR PAST PERFORMANCE (Interim Edition, May 1995). While there is no apparent policy shift within the OFPP, there is no such guidance in OFFICE OF FED. PROCUREMENT POLICY, OFFICE OF MGMT. & BUDGET, BEST PRACTICES FOR COLLECTING AND USING CURRENT AND PAST PERFORMANCE INFORMATION (May 2000).

[278] H.R. REP. NO. 101-665, 101st Cong., 2d Sess., reprinted in 1990 U.S.C.C.A.N. 2931, 3027, setting forth a number of advantages: 1) discussions are sometimes not needed when award is based on technical merit instead of price; 2) significant reduction in acquisition lead-time; 3) reduction in chance for wrongful disclosure of source selection information; and 4) reduction of overall acquisition costs. See Ralph C. Nash, Jr. & John Cibinic, Jr., *An*

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shorten the time needed to procure a product or service.[279] Second, facing the prospect of no discussions, offerors have the incentive to put forward their best offerors first.[280] Putting these advantages together may lead to the additional advantage of procuring the product or service at the best value to the Government. This is the case because, in theory, both the Government and contractors spend less money on the procurement process. Certainly, it does not make sense to spend a dime during negotiations for every nickel of savings in contract price.

One problem with making award without discussions is that, in practice, there is little oversight over whether the technique is producing the best value for the Government. While disappointed offerors may protest the Government's award without discussions, those protests have little likelihood of success.[281] First, in upholding the Government's decision to

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*Excellent Procurement*, 14 NASH & CIBINIC REP. ¶ 42 (Aug. 2000), where commentators lauded the procurement practices in *Sabreliner Corp.,* Comp. Gen. B-284240.2, Mar. 22, 2000, 2000 CPD ¶ 68. In that case, the agency rejected an offeror's price as unrealistic and then made award to another offeror on the basis of initial proposals. By not moving to the discussions stage, the "agency greatly reduced the time needed to award the contract with a commensurate reduction in the proposal costs incurred by the competing offerors." While acknowledging that the agency may have been able to negotiate a lower price, the commentators speculated that significant reductions in price could have led to performance problems.

[279] *Id.*

[280] See Ralph C. Nash, Jr. & John Cibinic, Jr., *Pre-"Competitive Range" Communications During Best Value Procurement: The New Proposed Rule,* 11 NASH & CIBINIC REP. ¶ 43, stating that one advantage of awarding without discussions is the avoidance of the "most pernicious effect of the BAFO—the percentage cut in price to be 'competitive.'...It is this last cut that frequently squeezes the contractor's budget to the point where effective performance becomes difficult..." The current FAR encourages an offeror to hold back nothing in its initial proposal because the first proposal may be the final one.

[281] *See* John Cosgrove McBride & Thomas J. Touhey, 1B Gov't Cont. L. Admin. Proc. (MB) § 9.30[4] (Aug. 1998).
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make award on initial proposals, GAO places particular emphasis on the procedural notice requirements. "There is generally no obligation that a contracting agency conduct discussions where...the RFP specifically instructs offerors of the agency's intent to award a contract on the basis of initial proposals."[282] Second, GAO emphasizes the contracting officer's broad discretion. While recognizing that the contracting officer's decision to award without discussions "is not unfettered," the GAO will only "review the exercise of such discretion to ensure that it was reasonably based on the particular circumstances of the procurement."[283] Additionally, the GAO has noted that the contracting officer's discretion "is quite broad, and in recent years, has been expanded."[284] Because of this expansion in discretion, GAO will not overturn the contracting officer's decision to award without discussions even where there is a possibility that negotiations could have led to a better price or technical proposal.[285]

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[282] Robotic Sys. Tech., Comp. Gen. B-278195.2, Jan. 7, 1998, 98-1 CPD ¶ 20 (1998). The following decisions use the same or similar language: *McDonald Constr. Servs., Inc.,* Comp. Gen. B-285980, Oct. 25, 2000, 2000 CPD ¶ 183; *NV Servs.*, Comp. Gen. B-284119.2, Feb. 25, 2000, 2000 CPD ¶ 64; *McShade Enters.,* Comp. Gen. B-278851, Mar. 23, 1998, 98-1 CPD ¶ 90.

[283] Robotic Sys. Tech., Comp. Gen. B-278195, Jan. 7, 1998, 98-1 CPD ¶ 20; *see* NV Servs., Comp. Gen. B-284119.2, Feb. 25, 2000, 2000 CPD ¶ 64; McShade Enters., Comp. Gen. B-278851, Mar. 23, 1998, 98-1 CPD ¶ 90.

[284] Robotic Sys. Tech., Comp. Gen. B-278195, Jan. 7, 1998, 98-1 CPD ¶ 20.

[285] JOHN CIBINIC, JR. & RALPH C. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS 867 (3d. ed. 1998). Authors cite a list of cases for this proposition, including OMNIPLEX World Servs. Corp., Comp. Gen. B-278105, Nov. 13, 1997, 97 CPD ¶ 147, which upheld a contracting officer's decision to award without discussions to an offeror with a marginal, but acceptable, proposal.

This recent expansion of discretion partially stems from the problematic lack of guidance on when award without discussions is appropriate.[286] Until 1990 for the defense agencies and until 1994 for the civilian agencies, before a contracting officer could make award without discussions, there had to be a clear demonstration that the proposal's acceptance would result in the lowest overall cost to the Government.[287] This more stringent requirement in the Competition in Contracting Act[288] was replaced with broad authority to make award "unless discussions are determined to be necessary."[289] Therefore, while the prior statutory language was quite clear on what it required, the new language offers little guidance.[290] The FAR also does not offer additional guidance, but instead only paraphrases the statutory language.[291] In amending the law, Congress intended to allow agencies to

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[286] *Id.* at 865 (stating "the lack of statutory or regulatory direction leaves the agency with broad discretion in determining whether or not negotiations should be conducted either in advance or after offers are received.").

[287] *Id.*; Pub. L. No. 101-510, 104 Stat. 1588 (1990) (codified as amended in 10 U.S.C. § 2305(b)(4)(A)(ii)); Pub. L. 103-355, 108 Stat. 3267 (1994) (codified as amended in 41 U.S.C. § 253b(d)(1)(B)). *See* Schreiner, Legge & Co., Comp. Gen. B-244680, Nov. 6, 1991, 91-2 CPD ¶ 432 (sustaining a protest where agency did not award to the offeror with the lowest priced, technically acceptable proposal); Hall-Kimbell Envtl. Servs., Inc., Comp. Gen. B-224521, Feb. 19, 1987, 87-1 CPD ¶ 187 (sustaining a protest for making award to offeror based on initial proposals when the offeror was not the lowest considering only cost and cost related factors).

[288] Pub. L. No. 98-369, 98 Stat. 1175 (1984).

[289] 10 U.S.C. § 2305(b)(4)(A)(ii) (2001); 41 U.S.C. § 253b(d)(1)(B) (2001). *See* Hart, *supra* note 9, at 27 (setting forth the reasons why the "shortcut" of award without discussions " was irresistibly attractive" to contracting officers even under the more stringent standard).

[290] Ralph C. Nash, Jr. & John Cibinic, Jr., *Postscript: Award without Discussions,* 5 NASH & CIBINIC REP. ¶ 1 (Jan. 1991) (noting with interest that the change in the statutory language "contains no standard for when award without discussion can be made).

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consider technical merit when making award without discussions, since technical merit is often more important than cost.[292] However, Congress seemed to anticipate that agencies would promulgate appropriate guidance in the FAR.[293] Instead, the FAR Council has left the current void, where efficiency thrives but not necessarily the attainment of best value.

### *B. Minimal Discussions, Little Bargaining*

The Rewrite's discussions rule contemplated full and meaningful discussions, but GAO has allowed contracting officers to proceed under minimal discussions.[294] Nowhere is this more apparent than in the GAO cases concerning discussions on pricing.[295] The common theme is that the protester has a competitive, often highly rated, proposal, but the

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[291] FAR 15.306(a)(3) states that "Award may be made without discussions if the solicitation states that the Government intends to evaluate proposals and make award without discussions. If the solicitation contains such a notice and the Government determines it is necessary to conduct discussions, the rationale for doing so shall be documented in the contract file...."

[292] *See* H.R. REP. NO. 101-665, 101st Cong., 2d Sess., reprinted in 1990 U.S.C.C.A.N. 2931, 3026-27.

[293] *See Id.* at 3028 ("The committee does not recommend a preference for conducting discussions or not conducting discussions, believing that this is more appropriately dealt with in regulation.").

[294] Nash & Cibinic, *Competitive Proposals: Negotiations are Discussions but Discussions are not Necessarily Negotiations*, *supra* note 8; Nash & Cibinic, *Postscript II: Negotiation in a Competitive Situation, supra* note 3.

[295] Nash & Cibinic, *Competitive Proposals: Negotiations are Discussions but Discussions are not Necessarily Negotiations*, *supra* note 8 (noting that, although the FAR Council contemplated "more robust discussions" under the Rewrite, "[r]ecent Comptroller General decisions indicate that many agencies have not received that message as it relates to pricing."). For a discussion on minimal discussions in areas other than price, *see* Nash & Cibinic, *Postscript II: Negotiation in a Competitive Situation, supra* note 3.

awardee's proposal has a better price, which often is the decisive factor.[296] The consequent complaint among protesters is that the Government engaged in minimal or no discussions with them regarding their higher prices. In reviewing those complaints, GAO has made clear that contracting officer discretion takes precedence over discussions' primary objective—"to maximize the Government's ability to obtain best value."[297]

While the discussions rule requires a contracting officer to identify a proposal's "significant weaknesses" and "deficiencies," GAO asserts that a higher price often does not fall within that requirement. Under FAR 15.306(e)(3), "the contracting officer may inform an offeror that its price is considered by the Government to be too high, or too low, and reveal the results of the analysis supporting that conclusion." Noting the permissive "may," the GAO has stated that "[w]hile FAR 15.306(e)(3) gives the contracting officer the discretion to inform an offeror that its price is too high, it does not require that the contracting officer do so, especially where...the proposed price reflected an acceptable technical approach and the agency did not consider the pricing a significant weakness or deficiency."[298] The contracting officer's discretion controls even when contracting officer ultimately bases the contract award on an offeror's lower price.[299]

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[296] Nash & Cibinic, *Competitive Proposals: Negotiations are Discussions but Discussions are not Necessarily Negotiations*, *supra* note 8, citing Cherokee Info. Sys., Comp. Gen. Dec. B-287270, Apr. 12, 2001, 2001 CPD ¶ 77 (upholding agency decision not to engage in any price discussions with the protester because its price was "competitive and not unrealistically high.").

[297] FAR 15.306(d)(2).

[298] HSG Philipp Holzmann Technischer Serv. GmbH, Comp. Gen. B-289607, Mar. 22, 2002, 2002 CPD ¶ 67. For similar language, *see Uniband, Inc.*, Comp. Gen. B-289305, Feb. 8,
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On assessments of whether an offeror's pricing information constitutes a significant weakness or deficiency, the GAO gives agencies considerable deference.[300] The GAO rarely sustains protests in these cases and only when the agency somehow has acknowledged that the offeror's higher prices constituted a significant weakness or deficiency.[301] Typically, there is no such acknowledgment. The problem is that, as some commentators have stated, what constitutes an unreasonably high price "appears to be in the eye of the beholder, and many of the beholders have myopia."[302] For instance, the GAO denied a protest where, the contracting officer did not consider a unit price as unreasonably high unless it exceeded the Government estimate by over 200 percent.[303] Another protest denial involved a 60% pricing differential between the awardee and protester, which the source selection authority viewed as "staggering," but not "'inherently unreasonable' such that the firm's proposal was

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2002, 2002 CPD ¶ 51; *SOS Interpreting, Ltd,* Comp. Gen. B-287477.2, May 16, 2001, 2001 CPD ¶ 84.

[299] *See* SOS Interpreting, Ltd, Comp. Gen. B-287477.2, May 16, 2001, 2001 CPD ¶ 84 (stating "Since the CO reviewed proposed prices and determined that [protester's] price was competitive and not unrealistically high, [agency] had no duty to advise [protester] during discussions that its prices was high compared to that of [awardee's].").

[300] *See* Uniband, Inc., Comp. Gen. B-289305, Feb. 8, 2002, 2002 CPD ¶ 51 (declaring that "Contracting agencies have wide discretion in determining the nature and scope of discussions, and [the GAO] will not question their judgments unless shown to be without a rational basis."). S*ee* FAR 15.306(d)(3) ("The scope and extent of discussions are a matter of contracting officer judgment.").

[301] *See* Matrix Int'l Logistics, Inc., Comp. Gen. B-272388, Dec. 9, 1996, 97-2 CPD ¶ 89, where the agency indicated that the offeror's overall price was too high, but GAO found the discussions not meaningful because the agency failed to identify the specific area of concern. *See also* Price Waterhouse, Comp. Gen. B-220049, Jan. 16, 1986, 86-1 CPD ¶ 54.

[302] Nash & Cibinic, *Competitive Proposals: Negotiations are Discussions but Discussions are not Necessarily Negotiations*, *supra* note 8.

[303] *Id.,* citing Biospherics, Inc., Comp. Gen. B-285065, July 13, 2000, 2000 CPD ¶ 118.

unacceptable."[304] These cases show that the GAO will generally allow contracting officers to ignore price discussions with a higher-priced but otherwise favorably rated offeror.

GAO's deference to contracting officer discretion has resulted in minimal price discussions. These minimal discussions lack a real bargaining component and fail the test of legitimate price negotiations.[305] In one case, the agency merely advised the protesting offeror that it "need[ed] to take a look at [its] prices [because] they were way too high."[306] In another case, the agency only "invited the firm to revise its price to make it more favorable to the agency."[307] Finally, in a different case, the agency "advised [protester] that it should consider lowering its proposed prices." In a "face-to-face" meeting, the agency told the protester that it should "learn from experiences gained" from other contracts and "review sharpening its pencil."[308] These cases, paying undue homage to discretion, suggest that "[i]gnoring a higher-priced offer or merely engaging in minimum required discussions may pass muster with the Comptroller General but it is not good procurement."[309]

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[304] *Id.,* citing Hydraulics Int'l, Inc. Comp. Gen. B-284684, May 24, 2000 CPD ¶ 149. Commentators call the source selection authority's statements "double talk."

[305] Nash & Cibinic, *Competitive Proposals: Negotiations are Discussions but Discussions are not Necessarily Negotiations*, *supra* note 8.

[306] *Id.,* citing WorldTravelService, Comp. Gen. B-284155.3, Mar. 26, 2001, 2001 CPD ¶ 68.

[307] *Id.*, citing Wackenhut Int'l, Inc., Comp. Gen. B-286193, Dec. 11, 2000, 2001 CPD ¶ 8.

[308] *Id.*, citing WinStar Fed. Servs., Comp. Gen. B-284617, May 17, 2000, 2000 CPD ¶ 92.

[309] Nash & Cibinic, *Competitive Proposals: Negotiations are Discussions but Discussions are not Necessarily Negotiations*, *supra* note 8.

The GAO's approval of minimal discussions is not limited to cases involving only price discussions.[310] For example, in *Cherokee Information Systems*, the protester contended that the Government should have engaged in discussions concerning its technical proposal.[311] The Government countered that, while a few of the proposal's aspects received less than the highest color rating, it rated all aspects of the protester's proposal positively. In accepting the Government's position, GAO stated that the lower-rated aspects of the protester's proposal met the Government's requirements. The protester's proposal did not contain any significant weaknesses or deficiencies. Therefore, the discussions rule did not require the Government to identify the areas where the protester could have improved its proposal.[312]

The recent change to the mandatory discussions rule which merely encourages contracting officers to discuss "other aspect" of proposals only exacerbates the problem. The change has prompted even "great believers" in discretion to declare that that the reform "seems a bit much."[313] The FAR Council is pulling contracting officers further away from robust discussions where bargaining can occur. As long as a contracting officer can classify a proposal feature as something other than a deficiency or significant weakness, the contracting officer can avoid discussing the matter, even if discussions would materially enhance a proposal's potential for award.[314] The change seems contrary to the discussions' goal of maximizing the attainment of "best value."

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[310] See Nash & Cibinic, *Postscript II: Negotiation in a Competitive Situation, supra* note 3.

[311] Cherokee Info. Servs., Comp. Gen. B-287270, Apr. 12, 2001, 2001 CPD ¶ 77.

[312] *Id.*

[313] Nash & Cibinic, *Postscript IV: Negotiation in a Competitive Situation, supra* note 88.

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# VI. Barrier to Bargaining: Depletion of the Acquisition Workforce

In addition to unchecked discretion, another significant barrier to bargaining is the depletion of the Government's acquisition workforce, in both numbers and adequate training. There is little debate that the Government's decade-long downsizing in the 1990s particularly impacted acquisition workforce levels.[315] For example, in the Department of Defense (DOD), the Government's largest procurement agency, downsizing in the 1990s reduced acquisition personnel from 460,516 to 230,556. At the same time, however, there was only about a 3 percent reduction in procurement dollars spent. More importantly, the number of overall procurement actions increased about 12 percent, and the number of procurement actions involving contracts over the simplified acquisition threshold of $100,000 increased 28 percent.[316]

When personnel resources are low and the number of procurement actions is high, agencies may lack the capacity to maximize the Government's ability to obtain best value. Instead of focusing on bargaining for value, agencies may have more pressing concerns. According to an audit report in 2000, the Office of the Inspector General for the Department of Defense revealed some of its organizations experienced the following problem areas in need of a solution: "increased backlog in closing out completed contracts;" "increased

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[314] *See id.* Although conceding that they are unsure what those "other aspects" of a proposal might be, they affirm that "there is a sense of unfairness in this process."

[315] *See* Office of the Inspector General, Department of Defense, *DOD Acquisition Workforce Trends and Impacts,* Report D-2000-088 (Feb. 29, 2000) (declaring that Congress "singled out" the acquisition workforce for personnel reductions).

[316] *Id.*

program costs resulting from contracting out for technical support versus using in-house technical support;" "insufficient personnel to fill-in for employees on deployment;" "insufficient staff to manage requirements;" "reduced scrutiny and timeliness in reviewing acquisition actions;" "personnel retention difficulty;" "increase in procurement action lead time;" "some skill imbalances;" and "lost opportunities to develop cost savings initiatives."[317] Surely, with problems like these, agencies will concentrate on the minimum requirements needed to survive as a functioning organization. Under these circumstances, the mere processing of procurements to meet short-term needs becomes the Government standard. What will not show up in any authoritative statistic is the loss of value resulting from the lack of resources necessary to bargain aggressively.

The Rewrite aspired to create innovation in Government contracting.[318] As previously discussed, one such innovation that sprung from the Rewrite was the reverse auction technique. Yet, as recently noted, not all of the cost savings from this technique stem from the technique itself.[319] "Instead, the common ingredient in many successful reverse auctions may well be experienced procurement and technical people focused on a common goal with time to think about the process."[320] The cuts in procurement staff and training threaten the technique's continued success, because "[p]rocurement tools like the reverse

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[317] *Id.*

[318] See *infra*, note 17.

[319] Gillihan, *supra* note 229.

[320] *Id.* *See* Nash & Cibinic, *Auctions: Some Thoughts*, *supra* note 234 (calling the auction technique "merely another procurement tool," where "its use requires a certain degree of skill and knowledge on the part of the user.").

auction can only be as good as the skill of the hands that use them."[321] Therefore, the Government needs a vibrant acquisition workforce to advance the innovative ideas and techniques that can bring better value to the Government.

The acquisition workforce's behavior during post-Rewrite contract negotiations indicates that the workforce may have some problems, particularly in the quality of the Government's procurement training. In contemplating why Government agencies are not engaged in serious bargaining, Professors Nash and Cibinic offer numerous potential explanations. First, perhaps Government agencies do not understand how to conduct adequate negotiations without first engaging in a complete cost analysis.[322] Second, agencies may worry about complaints that they favored one offeror over another during negotiations.[323] Third, the lack of bargaining may stem from "[r]emnants of the anti-coaching bugaboo," previously embodied in the prohibition on technical leveling.[324]

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[321] Gillihan, *supra* note 229. *See* 39 GOV'T CONTRACTOR ¶ 466 (October 1, 1997), where in articulating industry reaction to the Rewrite, practitioner John Pachter stated, "With the rules more relaxed, offering more discretion, contractors will depend more than ever on the judgment, skill, and sophistication of contracting officials...Those officials may be surprised to find that increased discretion places greater demands on them, making their work more difficult."

[322] Nash & Cibinic, *Competitive Proposals: Negotiations are Discussions but Discussions are not Necessarily Negotiations*, *supra* note 8.

[323] *Id.* *See* FAR 15.306(e)(1), prohibiting conduct that "Favors one offeror over another." Training could emphasize that fairness to contractors does not mean that contracting officers must treat them the same. *See* FAR 1.102-2(c)(3).

[324] *Id.* *See* Ralph C. Nash, Jr. & John Cibinic, Jr., *Price Increases after Discussions: Is the Government to Blame?*, 14 NASH & CIBINIC REP. ¶ 50 (Oct. 2000). Sometimes agency discussions leave an impression that an offeror's price is unrealistically low. In this article, commentators explore whether these agency discussions mislead offerors into needlessly increasing their prices. While offerors often are to blame, commentators assert that agencies (continued on next page)

"Although the FAR specifically requires discussions aimed at improving a proposal, some personnel may still believe—mistakenly—that such efforts are improper."[325] Fourth, acquisition personnel may "view their responsibility as merely to comply with the mandatory minimums."[326] Finally, there is a lingering, but somewhat unjustified, fear of protests.[327] All of these explanations, if true, point to potential deficiencies in training. Although the mindset of complying with the bare minimum requirements may flow from a general apathetic attitude, there is a real likelihood that it flows from cuts in the acquisition workforce. As stated by Nash and Cibinic, "attempting to do a better job may simply involve more effort than they have the time or desire for."[328] The depletion of the acquisition workforce is preventing the Government from taking full advantage of the available bargaining opportunities.

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are also culpable. "The Government often conducts written or oral discussions with offerors in such a circumspect fashion that there is a 'failure to communicate.'" Commentators provide the following advice: "Rather than conducting discussions through formalistic written communications, the use of skillful oral discussions by the Government might lead to the discovery that the low price is realistic. Why should the Government pay more than it has to?"

[325] Nash & Cibinic, *Competitive Proposals: Negotiations are Discussions but Discussions are not Necessarily Negotiations*, *supra* note 8.

[326] *Id.*

[327] See Ralph C. Nash, Jr. & John Cibinic, Jr., *Postscript III: Negotiation in a Competitive Situation*, 15 NASH & CIBINIC REP. ¶ 60 (Dec. 2001), where commentators respond to a letter blaming continued minimal discussions on contracting officer's fear of protests. While commentators acknowledge that contracting officers must balance rigorous discussions against the risk of unfair treatment of offerors, they also note the lack of successful protests in this area.

[328] Nash & Cibinic, *Competitive Proposals: Negotiations are Discussions but Discussions are not Necessarily Negotiations*, *supra* note 8.

# VII. Recommendations: Restoring the Benefit of the Bargain

## *A. Limit Award without Discussions*

To get contracting officers into the bargaining arena, the FAR Council should tighten the language that allows contracting officers to make award without discussions. Right now, contracting officers need only enter the bargaining arena when they determine that discussions are "necessary." As set forth above, this is a change from the prior language which first required an assessment that the Government would receive the lowest overall price.[329] Rather than completely abandoning that model, the FAR Council should instruct contracting officers that discussions are "necessary" unless there is clear evidence that awarding the contract without discussions would lead to "best value" for the Government.[330] While additional expenditure of resources can sometimes make contract negotiations

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[329] *See* Metron Corp., Comp. Gen. B-227014, June 29, 1987, 87-1 CPD ¶ 642, recon. denied, Metron Corp.-Reconsideration, Sept. 25, 1987, 87-2 CPD ¶ 299 ("We think that if an agency determines that there is even a remote chance of obtaining a better price by conducting discussions and requesting best and final offers, it should do so"). See Ralph C. Nash, Jr. & John Cibinic, Jr., *Award without Discussions: Congress Strikes Out*, 4 NASH & CIBINIC REP. ¶ 1 (Jan. 1990), where commentators expressed their disapproval with that restriction. When it was in the Government's interest to award without discussions, it was often in the Government's interest to make award based on proposal aspects other than price. They advocated that the prior "fair and reasonable price" standard be reestablished in place of the "lowest overall cost to the Government" standard. To support that contention, the commentators stated that contracting officer discretion worked for 21 years prior to the adoption of the CICA standard.. However, one could argue that for those 21 years and for the years since the passage of the current standard, the award without discussions rule has sometimes allowed the Government to unjustifiably avoid discussions where bargaining could occur.

[330] *See* Ralph C. Nash, Jr. & John Cibinic, Jr., *Improving the Procurement Process: Some Good Suggestions*, 3 NASH & CIBINIC REP. ¶ 62 (Sept. 1989), where commentators indicated that changing the standard from "the lowest over cost to the Government" to "best value" would improve the procurement process.

counterproductive, if there is a reasonable possibility that discussions would lead to a better value, contracting officers should proceed to negotiations.[331] Such a change would avoid the Government's prior problem of fixating on price when a lowest-price award was often contrary to its interest.[332] The change would also push the contracting officer into the mindset of always viewing the process in terms of what will bring the best value.

Those opposing such a change might argue that it would undermine the advantages of using award without discussions as a streamlining tool. Such an argument is somewhat unjustified. While making award without discussions might become less common, it would not disappear. If the Government stated an intent to award without discussions under the proposed standard, there would still be a good chance that the contracting officer could proceed in that direction. Moreover, the change to the competitive range rule arguably diminishes the advantages of making award without discussions. Since the competitive range is limited to the most highly rated proposals, a good portion of the necessary streamlining can occur at that stage in the negotiations process. Additionally, one noted advantage of the Government making award without discussions after stating this intent is that it provided an overwhelming incentive for offerors to put forward their best offers initially. If the Government often proceeded to negotiations after stating such intent, some

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[331] For a different view, see Nash & Cibinic, *Postscript: Award without Discussions*, note x. In countering the "prevalent concern" that award without discussion might cause the Government to forgo better deals, commentators assert that "Discussions conducted solely to get a 'better' deal for the Government should not be the agenda." They did, however, make these comments before the FAR explicitly established the discussions' goal as maximizing the Government's ability to obtain best value. *See* FAR 15.306(d)(2).

[332] *See infra* note 329.

expressed concern that offerors would provide some cushion in their proposals.[333] The new competitive range rule lessens that concern. The fear of exclusion from the much more limited competitive range provides the same powerful incentive for offerors to put forward their best offers.

### *B. Facilitate Discussions*

"Surely some movement in the direction of fuller discussions is the right course of action."[334] However, rather than just encourage more discussions during negotiations, the FAR should mandate them. Despite fewer restrictions on the content of discussions, the current regulatory framework allows contracting officers to too easily terminate discussions before the Government obtains the best deal possible. While the Rewrite intended to grant increased discretion to contracting officers, if discussions' primary goal is truly to "maximize the Government's ability to obtain best value," then the discussions rule itself must be conducive to that end.[335]

The FAR Council should reform the discussions language to coincide with the interpretation of the Rewrite that the GAO rejected in *Du*.[336] In other words, the FAR should simply state that the "contracting officer shall discuss with each offeror still being considered

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[333] *See* H.R. REP. NO. 101-665, 101st Cong., 2d Sess., reprinted in 1990 U.S.C.C.A.N. 2931, 3027.

[334] Nash & Cibinic, *Postscript II: Negotiation in a Competitive Situation*, *supra* note 3, where commentators make this statement in the context of encouraging contracting officers to proceed beyond the minimum amount of discussions that the law requires.

[335] FAR 15.306(d)(2).

[336] Du &Assocs., Inc., Comp. Gen. B-280283.3, Dec. 22, 1998, 98-2 CPD ¶ 156.

for award, all aspects of its proposal that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's chance for award."[337] Such a rule would dispense with the confusing requirement that contracting officers determine whether a particular proposal aspect falls within the category of a deficiency or significant weakness.[338] It would also prevent contracting officers from avoiding beneficial discussions on proposal aspects not falling within either category.

Contrary to the interpretation of *Du*, such a rule does not mean that the Government must spoon-feed offerors. While the language does provide some nourishment to the discussions process, it includes an important check against the ever-feared, "all-encompassing" discussions. To trigger the discussions requirement, the contracting officer would first have to believe that the offeror could change its proposal in a manner to materially enhance its chances for award. The key word here is "materially." Therefore, if a contracting officer reasonably believed that discussions would be fruitless in terms of affecting the award outcome, the contracting officer could forgo those discussions.

Critics would undoubtedly warn that mandating discussion of "all aspects" in this manner would inevitably lead to more protests. Such cries ring hollow. Although the proposed language limits contracting officer discretion, the language does not eliminate that discretion. The contracting officer would still have the central role of determining what proposal aspects might materially affect the award decision. Even if a disappointed offeror

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[337] *Id.* Compare with FAR 15.306(d)(3) (1998) and FAR 15.306(d)(3) (2002).

[338] *See* Nash & Cibinic, *Postscript IV: Negotiation in a Competitive Situation*, *supra* note 88, where commentators state, "It strikes us that it will be far easier for COs to discuss all correctable elements of proposals than to try to figure out this semantic tangle."

brought a protest, as long as the contracting officer's opinion was reasonably grounded, the GAO would uphold the contracting officer's decision. On the other hand, if the decision was not reasonably grounded, then the agency would deserve a protest.[339] To the extent that these protests were successful, they would provide an overall benefit to the Government by prodding the future pursuit of best value.

Other changes to the FAR language may help. Instead of merely stating that "negotiations may include bargaining," the FAR should declare that "under normal circumstances, negotiations should include bargaining."[340] Additionally, because written discussions seem to hinder, rather than promote, meaningful discussions, the FAR should clearly state a preference for oral discussions. While these latter two suggestions seem minor, they might help promote a bargaining mindset among contracting officers.

### *C. Arm the Acquisition Workforce*

Substantive acquisition reform measures have often placed vital workforce issues as a secondary concern, rather than as an integral part of the reforms themselves. In other words, the reforms and the workforce reductions seemed to proceed on divergent paths. Dr. Steven Kelman, in describing the Rewrite's new source selection process as "an example of business process reengineering," stated, "The government, faced with a downsized acquisition workforce and budget constraints, simply cannot afford to squander resources on processes

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[339] *See* Nash & Cibinic, *Postscript IV: Negotiation in a Competitive Situation*, *supra* note 88, where the commentators suggest that contracting officers inform offerors of all correctable aspects of their proposals that could affect the award decision. "If COs try to reduce their discussions to the bare minimum—whatever that is—they deserve a protest and they deserve to be found to have treated the offeror unfairly."

[340] *See* FAR 15.306(d).

that don't add value."[341] While few would find fault with that statement, it provides some indication of the lack of concurrent analysis involved in the reform process.[342] The statement gives the impression that a diminished acquisition workforce and budgetary constraints were driving many of the reform measures. Moreover, to compound the problems with the reform process, the workforce "reductions occurred despite a complete absence of any empirical evidence supporting such a policy."[343] To achieve more successful reform, the Government's goal of obtaining best value should drive personnel levels. Since the Rewrite was supposed to be about "business process reengineering," one must recognize that businesses do not usually strive for maximum profits based on an unreasonably low and static workforce level. Instead, businesses usually acquire a workforce level optimally suited for obtaining maximum profits.

Likewise, the Government needs to acquire a contracting workforce optimally suited for obtaining best value. As some in the procurement community have suggested, the

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[341] Dooley, *supra* note 6.

[342] *Cf.* David E. Cooper, *Contract Management: Trends and Challenges in Acquiring Services, Testimony Before the Subcomm. on Technology & Procurement Policy of the House Comm. on Government Reform*, May 22, 2001, available at <http://www.gao.gov/new.items/d01753t.pdf> (stating that in resolving difficulties in service contracting, Congress and executive agencies "must face the twin challenges of improving acquisition of services while simultaneously addressing human capital issues. One cannot be done without the other").

[343] *See* Steven L. Schooner, *Testimony in Hearing on H.R. 3832 Before the Subcomm. on Technology & Procurement Policy of the House Comm. on Government Reform,* March 7, 2002, available at <http://www.law.gwu.edu/facweb/sschooner/pubs.html> (addressing the inadequacies of a proposed training fund provision in The Service Acquisition Reform Act of 2002 (SARA). *See also* Cooper, *supra* note 342 (affirming that "the initial rounds of downsizing were set in motion without considering the longer term effects on agencies performance capacity").

Government needs to invest the necessary resources into adequately equipping the acquisition workforce, both in numbers and training.[344] Given the existing level of resources, one could hardly fault overworked contracting officers and other contracting personnel for keeping the amount of discussions and bargaining to a minimum.[345]

The composition of the acquisition workforce is critical for the bargaining environment. As noted above, the current FAR provides the means for contracting officers to limit or even eliminate discussions altogether. Even if the FAR Council were to amend the rules involving discussions to foster more bargaining, that would not remedy the problem. Without an adequately equipped workforce, many contracting officers will continue to look for ways to avoid beneficial, but often time-consuming, bargaining. Problems in implementing the proposed reforms would arise and persist. The end result is that if the existing workforce level is not conducive towards encouraging bargaining, all reform measures may look promising on paper, but they will never reach their full potential.

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[344] *See* Schooner, *supra* note 343. *See* Frank J. Baltz & J. Russell Morrissey, *'Bargaining' in Federal Construction Contracting,* 33 PROCUREMENT LAW 16 (Spring 1998) (suggesting that agencies provide "negotiation and bargaining training to their contracting officers"). *See also* Office of the Secretary of Defense, *Shaping the Civilian Acquisition Workforce of the Future* (Oct. 11, 2000) available at <http://www.acq.osd.mil/yourfuture/report1000.pdf> The report declares that 11 consecutive years of downsizing has resulted in "serious imbalances in the skills and experience" in the acquisition workforce. To "manage the crisis" resulting from downsizing and projected retirements, the report sets forth a number of recruiting and retention initiatives.

[345] Schooner, *supra* note 343 (declaring that "at a macro level, our current workforce is overwhelmed, under-trained, and retirement eligible.").

# VIII. Conclusion

The FAR Part 15 Rewrite and other acquisition reforms dramatically improved the procurement process. More open information exchanges permit the Government to better articulate its requirements. Contractors are better able to fulfill them. Because of the increased dialogue between the parties, the exchanges are less formal, and more meaningful. Additionally, the FAR Council eliminated many of the regulatory restrictions on those exchanges.

Altogether, the FAR Council created a regulatory environment where discussions can be meaningful and bargaining can be fruitful. The Government no longer has to waste its time with marginal, borderline proposals, because the contracting officer can exclude them from the competitive range. Consequently, only the most highly proposals are candidates for discussions. Because of the more open exchanges, the parties can begin negotiations based more on mutual understanding than ignorance. As those negotiations proceed, the contracting officer can engage in vigorous discussions. The contracting officer is no longer shackled with the restrictions on technical leveling and auction techniques. As a result, the contracting officer can engage in extensive negotiations that provide helpful advice to offerors on technical and price-related matters. Finally, past performance considerations provide some assurances that the Government will realize the benefits of its negotiated bargain.

Unfortunately, however, there is a disconnect between potential and performance. Contracting officers are not using all of the available procurement tools to their advantage. They have continued to engage in minimal discussions. Bargaining is present in the rule, but absent in practice. Although there may be numerous reasons for the lack of bargaining, two

reasons appear most prominent. One, the current rules make it too easy for contracting officers to stop the procurement process before ensuring that they have received the best value for the Government. Second, the depletion of the acquisition workforce provides incentive to and possibly forces contracting officers to take the easy path.

In the continuous improvement approach to acquisition policy and procedures, the Government must provide some additional reform. If, as suggested, the FAR Council tightens the use of making award without discussions and improves the discussions rule, the Government will more likely obtain better value for its procurement dollar. However, as with any reform measure, the Government must ensure that it is adequately equipping the acquisition workforce. Only by reforming both will the Government maximize the attainment of best value.