

March 1, 2017

General Services Administration
Regulatory Secretariat Division
1800 F Street, N.W., 2nd Floor
Washington, DC 20405

ATTN: Hada Flowers

Re: FAR Case 2016-005: Effective Communication between Government and Industry

Dear Ms. Flowers:

On behalf of the Professional Services Council (PSC),¹ I am pleased to submit comments on the FAR proposed rule on “Effective Communication between Government and Industry” that was published in the Federal Register on November 29, 2016,² and that was subsequently extended on January 23, 2017.³ The rule seeks to implement section 887 of the National Defense Authorization Act for Fiscal Year 2016, which directs that “the Federal Acquisition Regulatory Council [the “Council”] shall prescribe a regulation making clear that agency acquisition personnel are permitted and encouraged to engage in responsible and constructive exchanges with industry, so long as those exchanges are consistent with existing law and regulation and do not promote an unfair competitive advantage to particular firms.”

As the leading national industry trade association of companies that contract with the federal government to provide technology and professional services, facilitating dialogue between government and industry is among PSC’s core missions. We resoundingly commend the Congress, the Council, and its component agencies for their ongoing commitment to enhancing communication between the public and private sectors—a commitment that has demonstrably borne fruit over the past several years. As such, we strongly support the core elements of the rule. However, more can and should be done.

Overarching Observations

We offer the following overarching observations and recommendations that we believe are foundational to improving communication between government and industry in furtherance of successful acquisition outcomes.

¹ PSC is the voice of the government technology and professional services industry. PSC’s more than 400 member companies represent small, medium and large businesses that provide federal agencies with services of all kinds, including information technology, engineering, logistics, facilities management, operations and maintenance, consulting, international development, scientific, social, environmental services, and more. Together, the trade association’s members employ hundreds of thousands of Americans in all 50 states.

² See 81 FR 85914 (November 29, 2016), available at: <https://www.federalregister.gov/documents/2016/11/29/2016-28450/federal-acquisition-regulation-effective-communication-between-government-and-industry>

³ See 82 FR 7770 (January 23, 2017), available at: <https://www.federalregister.gov/documents/2017/01/23/2017-01405/federal-acquisition-regulation-effective-communication-between-government-and-industry-extension-of>

Initiatives to improve communication must be of sufficient breadth, depth, and magnitude to make a difference; otherwise, improvements may be limited in scope and short-lived in duration.

To this end, such initiatives must:

- 1) Not focus solely on industry and government contracting personnel or select, specific portions of the acquisition process. “Government” and the “acquisition workforce” must include not just personnel directly performing designated procurement or contracting functions, but all stakeholders in the acquisition process, including agency leadership, program offices/managers, finance/budget, agency counsel, and more. Communication must be encouraged not just across public and private sector boundaries, but across these functional lines within federal agencies. Similarly, while greater emphasis may be beneficial in certain phases of the acquisition lifecycle, initiatives to improve communication should not be unnecessarily limited to discrete portions of the procurement process, except as required to maintain the independence and objectivity of government acquisition personnel. (Breadth.)
- 2) Permeate beyond agency leadership to front-line, operational levels. Otherwise, any ground gained may be lost over time, or with turnover in agency leadership and personnel. Effective communication must be ingrained in training, behavior, and culture in order to achieve any lasting effect and maintain staying power. (Depth.)
- 3) Be required, incentivized, monitored, measured and evaluated. Neither of the previous recommendations are likely to take hold if they are optional, as they will always be supplanted by more immediate concerns and requirements. Meaningful communication must be expected and even required, not merely condoned and encouraged, and measured as part of performance. This is where efforts to date, such as the “Myth-busting” memos and “Acquisition 360,” have fallen short, failing to achieve their full potential regardless of best efforts or intentions. (Magnitude.)

Specific Recommendations and Best Practices

Below, we offer more specific suggestions and identify existing agency best practices for strengthening communication and improving acquisitions. As an organizing principle, we have arranged these recommendations according to the phase or aspect of the acquisition process to which they most appropriately apply. Many of these recommendations are adapted from or build upon proposals made by PSC in previously published reports, including, but not limited to, the 2013 PSC Leadership Commission Report,⁴ 2014 PSC Acquisition & Technology Policy Agenda,⁵ PSC’s biennial Acquisition Policy Survey⁶ (the most recent of which was released in June of 2016), and PSC’s September 2016 report “PSC 45: An Agenda for the Next President of the United States,”⁷ all of which we commend to the Council for additional reference, information and context.

⁴ Available at:

http://www.pscouncil.org/i/a/The_PSC_Commission/c/p/2013_Commission_Report/The_2013_PSC_Leadership_Commission_Report.aspx

⁵ Available at http://www.pscouncil.org/c/b/Policy_Issues.aspx or

https://issuu.com/professionalservicescouncil/docs/the_psc_acquisition_and_technology_/2?ff=true&e=4503160/10117195

⁶ Available at:

http://www.pscouncil.org/i/p/Procurement_Policy_Survey/c/p/ProcurementPolicySurvey/Procurement_Policy_S.aspx

⁷ Available at: http://www.pscouncil.org/c/other_content/An_Agenda_for_the_45th_President.aspx

Pre-Solicitation—Acquisition Planning, Requirements Development, and Market Research

Proposed FAR 1.102-2(a)(4) rightfully states that, “The Government must not hesitate to communicate with the commercial sector *as early as possible in the acquisition cycle* to help the Government determine the capabilities available in the commercial marketplace” (emphasis added). Early communication provides a solid foundation to maximize benefits and minimize issues downstream, providing the greatest overall benefits to the acquisition process as a whole, and to both government and potential offerors. In light of this importance, we recommend that the proposed language be revised to affirmatively state the benefits of proactive, ongoing communication with industry. For example, “It is in the best interest of Government to have early, robust and continuous communications with the commercial sector in order to understand the capabilities available in the commercial sector and to communicate the requirements the Government is seeking to meet.”

Irrespective of the language used, pre-solicitation conversations can provide the government valuable insight into the contract type, terms and conditions, and schedules that will maximize the number of offerors that may respond to a solicitation. For industry, it provides an opportunity to suggest acquisition plan characteristics that will maximize potential vendors’ ability to perform the contract in a cost-efficient and effective manner, and alert government to potential issues with proposed technical requirements. Establishing lines of communication and processes at the outset to track and share information and responsibility, before and during requirements generation, helps ensure transparency, accountability, and measurable results. However, language should be added to ensure that communication with industry is not unnecessarily or inappropriately limited to only the market research phase of acquisition; see “[Other Considerations](#)” below.

Specific recommendations:

While many of these recommendations encompass actions to be taken throughout the acquisition lifecycle, we have included them in the pre-solicitation phase to emphasize the importance of implementing them at the inception of the process. To this end, PSC, through our Outcomes-Oriented Acquisition Working Group, issued a white paper detailing how early, meaningful engagement with industry suppliers, internal agency customers, and other agency buyers during market research helps to maximize the value and effectiveness of the acquisition process.⁸

- Cross-functional communication and collaboration must be structurally enabled, affirmatively required, and appropriately incentivized. Potential steps to achieve this include:
 - Holistically define the federal “acquisition workforce” and explicitly provide the Office of Federal Procurement Policy (OFPP) with authority to manage it, including clear authority and responsibility over program managers and other related functions.
 - Establish and empower qualified agency Chief Management Officers (CMOs) with the authority and responsibility to optimize business processes and functional alignment across agencies, including internal and external communication and collaboration.
 - Require all significant programs be led and managed by an “Integrated Accountability Chain,” based on Integrated Project Team (IPT), Joint Requirements Council (JRC) or similar models, that includes lead participants with functional decision making authority from all key internal stakeholder components (customer/operator, contracting, engineering, legal, budget, etc.) Industry should be engaged with, though not necessarily an official part of, this body.

⁸ See “White Paper: Enhanced Market Research Drives Better Acquisitions,” February 2017, available at: http://www.pscouncil.org/Downloads/documents/PSCWhitePaper-MarketResearchDrivesBetterAcquisitions_02-10-17.pdf

- Establish metrics and incentives for acquisition personnel with respect to 1) internal and external communication and 2) delivery of successful mission outcomes, to be evaluated as part of performance reviews.
- Track and share information to meaningfully enable informed decision making by all stakeholders:
 - Create an acquisition dashboard tool to track both procurement lead times (PALT) and sources of delay, and make it available to industry—ideally on a real-time basis, or quarterly at minimum. Doing so will better enable industry to make informed bid decisions, provide recommendations for potential process improvements and efficiencies to government, and better respond to solicitations. To our knowledge, only a few agencies currently do so (e.g. DHS, USAID, and NAVAIR).
 - Create a cost culture in government, using honest and rigorous business case analyses that assesses total costs for comparing government and industry performance, to pave the way for better outcomes, more effective decision-making and increasing the use of share-in-savings.
 - Develop and distribute acquisition strategic plans for industry feedback, as recently undertaken by the Center for Medicare and Medicaid Services’ (CMS) Office of Acquisition and Grants Management (OAGM). PSC provided extensive feedback to CMS on their strategic plan.⁹
 - Publish forecasts of upcoming acquisitions, to be updated regularly, and shared with industry. Again, only a few agencies currently do so well.
 - Provide historical spending data for strategic sourcing and other acquisition vehicles used by the agencies.
- Use Requests for Information (RFIs) and Draft Requests for Proposal (dRFPs) to solicit constructive input on acquisition strategies, timing, expectations and outcomes. Doing so opens a line of communication, enables time for ample proposal preparation, and identifies potential pitfalls while they may still be easily avoided.

Solicitation, Evaluation and Award

While it is generally understood that communication with offerors must be constrained during an agency’s evaluation to avoid conflicts and maintain objectivity, solicitations may be structured to enable more meaningful responses from bidders. Solicitation and evaluation techniques, contract type and other elements must be specifically calibrated to the level of risk and complexity of work to be performed. This calibration can only be successful with ample communication among all stakeholders. While overly prescriptive solicitations and non-value added requirements may hamper industry’s ability to compete for work and deliver innovative solutions, more open-ended methods can unleash contractor creativity to deliver effective solutions with respect to both cost and capabilities. Mission outcomes must be the central focus driving all acquisition decisions.

Specific recommendations:

- Statements of Objectives (SOOs) with specific, measurable goals tied to acquisition outcomes should be the default solicitation technique for all but the most basic procurements, and especially for major Information Technology (IT) and complex services acquisitions.

⁹ See “PSC Civilian Agencies Council Health and Human Services Task Force Feedback for CMS OAGM Strategic Plan,” December 2016, available at: http://www.pscouncil.org/CommitteesandTaskForces/HealthandHumanServicesTaskForce/HHSTFResources/HHSTF_Feedback_on_CMS_OAGM_Strat_Plan_Final.aspx

- When SOOs are not used, requests for proposals (RFPs) should explicitly allow contractors to offer an alternative solution or strategy that differs from the specific prescriptions included in the RFP, as long as the proposed solution or strategy still meets the desired outcome.
- When innovation is a goal for an acquisition, an “innovation template” should be added as an addendum to the RFP. Such a template signals agencies’ desire or receptivity to innovative solutions, and can be populated by bidders to call-out specific innovations included in their proposal, their individual and collective costs, and expected returns on investment. PSC developed a model for such a template as a resource for federal agencies.¹⁰
- Require the disclosure of absolute weights of all evaluation factors (cost, technical performance, risk, etc.) in solicitations and task order requests that include evaluation factors.

Post-Award/Performance

Commitment to successful acquisitions necessitates that communication and collaboration continue during contract performance. Actions taken after award are vital to achieving mission outcomes as well as to improving future acquisitions. Steps must be taken to ensure that successful bidders and government customers continue to share information and maintain common expectations throughout the lifespan of the contract. Doing so helps enable course correction and technology refresh over the course of the contract, mitigate disputes, and enhance past performance information.

Specific recommendations:

- Require post-award “kick-off meetings” between all key government stakeholders and the contractor as a means of ensuring a common understanding of requirements and expectations of both contract transition and execution.
- Revitalize the past performance reporting system by requiring the thorough and timely completion of past performance evaluations by government offices coupled with timely notice to affected contractor(s). While full-scale utilization of the Contractor Performance Assessment Reporting System (CPARS) would potentially address this recommendation, PSC developed streamlined past performance information collection forms as both an interim step and as a means for improving the information collection elements.¹¹
- Require that post-award debriefings to contractors contain all information that would otherwise be releasable in the course of a legal discovery process, including a detailed description of how the contractor was rated in each of the evaluation criteria. While PSC welcomed the Defense Department’s March 2016 Source Selection Procedures memorandum,¹² which included an appendix on debriefing best practices, and OFPP’s January 2017 memo “Myth-busting 3: Further Improving Industry Communication with Effective Debriefings,”¹³ which cited other recommendations previously offered by PSC, neither went far enough in establishing mandatory minimum requirements for post-award debriefings to offerors, whether or not the offeror was successful.
- Mandate the collection of protest data regarding all protests filed and resolved by agencies, including data on evaluation technique and contract type.

¹⁰ See PSC Innovation Template, August 2015, available at:

http://www.pscouncil.org/PolicyIssues/ABPC_Resources/PSC_Innovation_Template.aspx

¹¹ See PSC Past Performance Information Collection Forms, April 2016, available at:

http://www.pscouncil.org/PolicyIssues/ABPC_Resources/PSC_Past_Performance_Information_Collection_Forms.aspx

¹² Available at: <http://www.acq.osd.mil/dpap/policy/policyvault/USA004370-14-DPAP.pdf>

¹³ Available at: <https://hallways.cap.gsa.gov/app/#/gateway/category-management/4721/ofpp-myth-busting-3>

- Every agency or component should form a protest review committee, comprised exclusively of government legal and contracting experts, which can be called upon immediately after a protest is filed for a large procurement to perform an independent review of the record and oversee any corrective action.
- Institute *true* “360-degree” assessments of the acquisition process. While OFPP’s March 2015 “Acquisition 360” pilot program¹⁴ was a step in the right direction in that it created a formal communication channel for government and industry to mutually assess acquisition processes, it fell short by applying to only a limited number of agency-selected acquisitions, failing to publicly report out the information acquired from such evaluations, and not including acquisition outcomes in the evaluation, instead focusing only on the steps leading up to contract award.

Additional Actions

In addition to actions on specific procurements, a number of steps can be taken to encourage government-industry communication, build trust among stakeholders, and lay the groundwork for successful acquisitions.

Specific recommendations:

- Establish agency industry liaisons/ombudsmen as dedicated points of contact for industry and additional resources for government acquisition personnel, and to facilitate communication between them. Several agencies already have them.
- Institute new acquisition workforce requirements to include mandatory cross-functional rotations and training, including an industry exchange program, to provide a better understanding of different functions and perspectives. Such programs must be implemented carefully to avoid any potential conflicts of interests.
- Regularly include industry guest speakers at DAU, FAI, HSAI, VAAA and other training institutions and forums to provide industry perspectives on topics of the training. PSC has been pleased to have such an opportunity at DAU for its CON360 and ISA301 courses, and welcomes additional opportunities for industry participation.
- Expand agencies’ use of communications and collaboration technology and tools (e.g., GSA Interact, etc.).
- Create structured opportunities for information exchange not tied to a specific procurement, such as reverse industry days and scenario-based role playing opportunities. VA, DHS and Treasury are but a few examples of agencies that have successfully conducted such programs recently.
- Emphasize flexibilities available within the FAR in acquisition workforce training.
- Agency Performance Improvement Officers should be empowered and required to create and report on metrics that indicate progress toward meeting agency strategic objectives.
- Launch Government/Industry Working Groups with specific deliverables, i.e. DHS’ Acquisition Innovation Roundtables on pricing, security, and more. Such groups are designed to study an identified issue, promote mutual understanding, and deliver a defined output (e.g. market research guide, updated processes, new manuals, etc.).

¹⁴ See <https://obamawhitehouse.archives.gov/blog/2015/03/18/acquisition-360>

Other Considerations – Proposed Language and Responses to Questions

A conservative reading of proposed FAR 1.102-2(a)(4) might lead an agency to conclude that the exchanges with industry that the rule encourages are limited to market research activities. In particular, the second sentence makes specific reference to market research and could be viewed as limiting the encouraged exchanges between government and industry to those associated with market research as defined in FAR 10.002. However, the FAR and the OFPP “Myth-busting” memoranda encourage exchanges and interactions between government and industry for more than just market research. FAR 15.201 encourages exchanges between the government and industry on a wider array of topics, including “acquisition strategy, including proposed contract type, terms and conditions, and acquisition planning schedules; the feasibility of the requirement, including performance requirements, statements of work, and data requirements; the suitability of the proposal instructions and evaluation criteria, including the approach for assessing past performance information; the availability of reference documents; and any other industry concerns or questions.” (See FAR 15.201(c).) The “Myth-busting” memoranda describe interactions between government and industry that include not only market research but also industry feedback regarding terms and conditions, pricing structure, performance metrics, evaluation criteria, and contract administration matters. (See, e.g., Myth-busters #1 at Question 8.) If the purpose of proposed FAR 1.102-2(a)(4) is to cover the interactions the “Myth-busting” memoranda describe in addition to market research, we recommend that the proposed language not specifically reference only market research as the purpose of exchanges between government and industry but be more inclusive.

The proposed language may not substantially expand upon the current version of FAR 1.102-2(a)(4), which already encourages the government to communicate with the commercial sector “to help the Government determine the capabilities available in the commercial marketplace,” *i.e.*, to perform market research. FAR 10.002(a) describes market research as intended to “determine if commercial items or nondevelopmental items are available to meet the Government’s needs or could be modified to meet the Government’s needs.” Therefore, while the proposed added sentence to FAR 1.102-2(a)(4) further encourages government personnel to have exchanges with industry as part of market research (as defined in FAR 10.002), it is to some degree redundant. We would recommend that, to capture the spirit of the “Myth-busters” documents, FAR 1.102-2(a)(4) also cover the types of pre-proposal submission industry exchanges that FAR 15.201 describes. Alternatively, in making revisions to FAR 1.102-2(a)(4), it would be beneficial to make reference to FAR 15.201(c) in order to expand upon what these exchanges could include and are intended to address.

Is there a current FAR policy that may inhibit communication? If so, what is the policy, and how could this policy be revised to remove barriers to effective communication?

Although the FAR encourages contracting officers to engage industry before releasing a solicitation, contracting officers remain concerned about taking steps that might appear to promote unfair competition. For example, contracting officers may be concerned that if they engage some potential vendors but not others, some may view the vendors the contracting officer engaged with as having had an unfair competitive advantage in the procurement. There are many legitimate and appropriate circumstances for a contracting officer not engaging a particular vendor. However, a more explicit industry engagement policy or procedure that, if followed, provides a safe harbor for contracting officers against allegations of promoting unfair competition may give them greater comfort in engaging industry. For example, the FAR could establish a procedure under which contracting officers that choose to engage industry are required to hold a publicly announced Industry Day or publish an announcement on FedBizOpps for interested offerors as a catch-all to ensure that any potential offerors that the

contracting officer may not have previously engaged with have an opportunity to engage with the government. If such events were video recorded and posted online, there would be additional assurance that access by interested parties to the same level of information would be achieved.

A second concern might be that the more detailed the discussion of technical requirements between the government and potential vendors, the greater the risk that the discussion would create an OCI (if, for example, the government designed around particular technical specifications or characteristics of a particular vendor). Although Question 1 of Myth-busters No. 1 states that vendor marketing efforts and market research do not create an OCI, it may be valuable to develop additional guidance that, if followed by a contracting officer, provides a safe harbor against unfair competition or biased ground rules OCIs.

Conclusion

Thank you for your attention to these comments. We once again applaud the Council and its members for your commitment to enhancing communication and improving federal acquisition. If you have any questions or need any additional information about PSC's recommendations or any related topics, please do not hesitate to let me know. I can be reached at (703) 875-8059 or at chvotkin@pscouncil.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Alan Chvotkin". The signature is fluid and cursive, with the first name "Alan" being more prominent than the last name "Chvotkin".

Alan Chvotkin
Executive Vice President and Counsel