

# COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS

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June 8, 2000  
CODSIA Case No. 8-00 P

Ms. Laurie Duarte  
General Services Administration  
FAR Secretariat (MVRs)  
1800 F Street, N.W.  
Room 4035  
Washington, D.C. 20405

Re: FAR Case 1999-022; Discussion Requirements

Dear Ms. Duarte:

The undersigned members of the Council of Defense and Space Industry Associations (CODSIA) appreciate the opportunity to offer comments on the proposed rule regarding "Discussion Requirements" as published in 65 Fed. Reg. 17582 on April 3, 2000. After reviewing the proposed regulation, we conclude we cannot support the new language because it appears to dilute the discussion requirements presently in effect.

Formed in 1964 by industry associations with common interests in the defense and space fields, CODSIA is currently composed of eight associations representing over 4,000 member firms across the nation. Participation in CODSIA projects is strictly voluntary. A decision by any member association to abstain from participating in a particular activity is not necessarily an indication of dissent.

The proposed language for FAR 15.306(d)(3), underlined for ease of identification, reads as follows:

At a minimum, the contracting officer must, subject to paragraphs (d)(5) and (e) of this section and 15.307(a), indicate to or discuss with each offeror still being considered for award significant weaknesses, deficiencies, 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 (such as cost, price, technical approach, past performance, and items and conditions) that could, in the opinion of the contracting officer, 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.

CODSIA members' concern focuses on the proposed sentence that begins: "The contracting officer is *also encouraged to discuss* other aspects of the offeror's proposal ...." Emphasis supplied. 65 Fed. Reg. 17582. Compared to the present FAR language, the proposed scope of discussions has been diluted from a mandatory requirement ("shall ... discuss significant weaknesses, deficiencies, and other aspects of its proposal (such as cost, price, technical approach, past performance, and terms and conditions)") to mere "encouragement." Indeed, this encouragement appears as a regulatory afterthought. Our "afterthought" observation is further supported by the proposed sentence "However, the contracting officer is not required to discuss every area where the proposal could be improved." In other words, the contracting officer is no longer directed to specific proposal elements (*i.e.*, price, technical approach, etc.), as significant weaknesses and deficiencies, but only to general and unspecified "significant weaknesses and deficiencies."

From the perspective of CODSIA members, discussions must be conducted with all offerors still being considered for award and must include communications regarding significant weaknesses or deficiencies that could "be altered or explained to enhance materially the proposal's potential for award." FAR 15.306(d)(3). This provision is useful to the contractor community because an offeror knows exactly what type of information (*i.e.*, cost, price, technical approach, etc.) must be discussed with those in the competitive range as a significant weakness or deficiency.

The proposed language reverses the efforts of the FAR 15 Rewrite by placing the contractor in the former circumstance of having to assume (for purposes of proposal revisions) that if an element of the proposal is not discussed, then it is not a "significant weakness" or "deficiency." The FAR 15 Rewrite did not envision, nor does the GAO countenance, such a reversion. As noted by the GAO (in a case more recent than the two identified in the *Federal Register* notice),

In discussions, an agency "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. FAR § 15.306(d)(3). As an initial matter, discussions are not meaningful where the agency does not inform an offeror of the central deficiency in its proposal. Voith Hydro, Inc., B-277051, Aug. 22, 1997, 97-2 CPD ¶ 68 at 3. It is a fundamental concept of negotiated procurement that discussions, when conducted, *must be meaningful and must not prejudicially mislead*

*offerors. SRS Techs.*, B-254425.2, Sept. 14, 1994, 94-2 CPD ¶ 125 at 6.; *Ranor, Inc.*, B-255904, Apr. 14, 1994, 94-1 CPD ¶ 258 at 4. Specifically, an agency may not mislead an offeror – through the *framing of a discussion question or a response to a question – into responding in a manner that does not address the agency's concerns; misinform the offeror concerning a problem with its proposal; or misinform the offeror about the government's requirements. Price Waterhouse*, B-254492.2, Feb. 16, 1994, 94-1 CPD ¶ 168 at 9-11; *DTH Management Group*, B-252879.2, B-252879.3, Oct. 15, 1993, 93-2 CPD ¶ 227 at 4.

*Cotton & Company, LLP*, B-282808 (Aug. 30, 1999), 99-2 CPD ¶ 48. Emphasis supplied. It is well known that the *conduct* of discussions is a matter of agency discretion. *See ACRA, Inc. v. United States*, 44 Fed. Cl. 288 (1999) (under FAR 15.306(d)(3), the conduct of discussions ultimately is a matter of agency discretion). However, the proposed rule appears to improperly expand the *scope* of agency discussions and contracting officer judgment when the GAO specifically states that discussions must be meaningful *and* must not prejudicially mislead an offeror. In other words, contracting officer judgment cannot result in meaningless or prejudicial discussions because of a failure to discuss proposal elements that were in fact significantly weak or deficient.

CODSIA members believe that the required scope of discussions *must* be nothing less than on “significant weaknesses, deficiencies, and other [identifiable and specified] aspects of its proposal (such as cost, price, technical approach, past performance, and terms and conditions).” Mere “encouragement” is insufficient for purposes of the FAR 15 Rewrite because “encouragement” will not demand from the contracting officer the desired level of communications that constitute the reason for the Rewrite. Under the present FAR language, discussions can conclude with the offeror knowing that if an element of the proposal was not discussed, it was because the contracting officer identified and discussed those elements (in terms of cost, price, technical approach, etc.) that were in fact significant weaknesses or deficiencies. This present requirement (and our recommended language set forth below) is consistent with the contracting officer not being obligated to “discuss every area of the proposal that could be improved.” 65 Fed. Reg. 17582.

The proposed language also requires the contracting officer to discuss “past performance information to which the offeror has not had the opportunity to respond.” 65 Fed. Reg. 17582. CODSIA members favor this language be retained. Even though it is somewhat redundant (*see, e.g.*, FAR 15.306(b)(1)(i) regarding communications prior to establishing the competitive range), CODSIA members believe that any adverse past performance information must be addressed by the offeror before that information can be used for evaluation purposes.

Based on the above, CODSIA members recommend the proposed language be changed. We recommend the following:

(3) At a minimum, the contracting officer must, subject to paragraphs (d)(5) and (e) of this section and 15.307(a), indicate to or discuss with each offeror still being considered for award any adverse past performance information to which the offeror has not yet had an opportunity to respond **in addition to significant weaknesses and deficiencies** (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 contracting officer also is encouraged to discuss other aspects of the offeror's proposal (such as cost, price, technical approach, past performance, and items and conditions) that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award.~~ However, **except as provided above**, the contracting officer is not required to discuss every **other** area where the proposal could be improved. The scope and extent of discussions are a matter of contracting officer judgment.

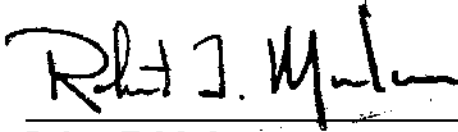
In the above paragraph, the boldface language is the recommended language from CODSIA members. The lined through language is language from the proposal that CODSIA members recommend be stricken from the proposal. Otherwise, the proposed language has simply been rearranged to attain the focus during discussions that CODSIA members believe should remain in the FAR.

If you have any questions on the above recommendation, please contact David Dempsey, who is the Project Officer for this CODSIA case. He can be reached at 202.861.6480.

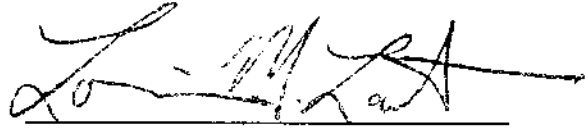
Thank you for consideration of our comments.

Sincerely,

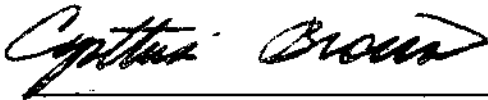
(SEE ATTACHED CODSIA SIGNATORIES)



Robert T. Marlow  
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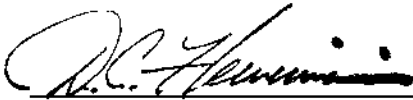
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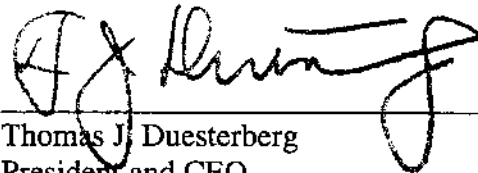
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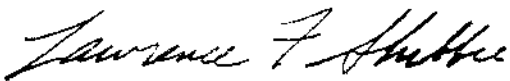
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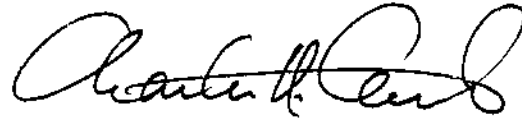
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