PART 1 FEDERAL ACQUISITION REGULATIONS SYSTEM

1.102-2 Performance standards - This is an addition, but is not a change to the normal interface between Government and industry. The purpose of the second sentence is to recognize that differences do exist in the experience levels and capabilities of competitors which could lead to differences in the manner in which the Government treats an offeror. It does not mean to imply that such treatment may be prejudicial.

PART 2 DEFINITIONS OF WORDS AND TERMS

2-101 Definitions - A common definition of Best Value has been added. The definition regards best value as the expected outcome of a structured elimination process which relates performance factors to cost or price and, based on the relative importance of these factors and cost or price, makes trade offs between pre determined criteria in order to select the offer deemed most likely to satisfy the Government's needs. This approach does not alter the statutory formulation of "responsible source whose proposal is most advantageous to the United States", nor does it alter the concept that source selection decisions should be the best decision rather than a risk or litigation avoidance decision.

PART 4 ADMINISTRATIVE MATTERS

4.1001 Policy - In order to satisfy FAR drafting convention coverage was added on contract line item structure in order to accommodate FAR usage of the term Contract Line Item Number (CLIN). The term CLIN is common usage in the Defense Federal Regulation Supplement (DFARS) but has not been previously used in the FAR.

PART 5 - PUBLICIZING CONTRACT ACTIONS - Adds coverage which corresponds to the addition of electronic commerce coverage in the Part 15 rewrite.

PART 6 - COMPETITION REQUIREMENTS - The Part 15 rewrite does not alter application of CICA to negotiated procurements.

PART 7 - ACQUISITION PLANNING - Extends the requirement to include funding information in acquisition planning documents, already applicable under DFARS, to the civilian agencies.

PART 11 - DESCRIBING AGENCY NEEDS

11.801 Pre-award in-use evaluation - This section was added to cover situations where the source selection process includes a pre-award test, and a standard "one size fits all"

test procedure may not be suitable. Addition of this language is not intended to alter usage of structured test and evaluation master plans (TEMP) requirements where applicable, but rather to permit use of a manufacturer's test procedure, or some other individually structured test rocedure suitable to a commercial or non-complex item when this level of testing is reasonable and sufficient.

PART 14 SEALED BIDDING

14.404-1 Cancellation of invitations after opening - Makes editorial changes to coordinate Part 14 and the Part 15 rewrite.

PART 15 CONTRACTING BY NEGOTIATION

15.001 Definitions - There are separate definitions for "proposal modification" and "proposal revision" to distinguish changes to proposals made in response to a modification to the solicitation, and changes to proposals made as result of discussions(15.307).

15.002 Types of negotiated acquisition - Language was added to the effect that contracting by negotiation includes sole source and competitive procedures.

Subpart 15.1 Source Selection Processes and Techniques

15.101 Best value continuum - The best value continuum recognizes the availability of different approaches to reach a "best value" selection. The selection of approach will normally relate to the relative importance between cost and technical factors.

15.101-1 Tradeoff process - In negotiated procurement the approach most commonly used to achieve a best value selection is a trade off process, where dollars are traded for incremental value and cost is only one factor, and not the controlling factor.

15.101-2 Lowest price technically acceptable source selection process (LPTA) - Introduces term "non-cost factors", which means any factor (technical, key personnel, delivery, past performance, etc.) which is not cost or price. In LPTA proposal evaluation results in a rating of the non-cost factors as either acceptable or unacceptable, and offers are ranked. Communications and discussions about both the cost and non-cost factors are permitted. Award is made on the basis of the lowest price offer among those proposals rated as acceptable. The type of requirement suitable for the LPTA process, that is one where any offer rated acceptable is considered capable of providing satisfactory performance, would not necessarily require evaluation of past performance. If, however, it is decided to evaluate past

performance, the coverage cautions that under the LPTA process, where evaluation is on a pass/fair basis, past performance is not a comparative assessment and, therefor**e**, an unacceptable past performance rating of a small business entity must include, as part of the evaluation process, referral of the unacceptable rating to the Small Business Administration for a Certificate of Competency determination.

15.102 Oral presentations - The use of oral presentations is new to Part 15, but is not a new concept. When carefully constructed and properly controlled, oral presentations can serve to expedite the procurement process. There are three issues associated with use of oral presentations which must be considered. The first is that the method of documenting the oral presentation must be capable of producing a legally sufficient record of the presentation. The second is that consideration must be given to the costs associated with producing a legally sufficient record, and who will pay these costs. The third issue is the affect additional proposal preparation costs attributable to oral presentations, if any, may have on small business participation.

Subpart 15.2 Solicitation and Receipt of Proposals and Information

15.201 Exchanges with industry prior to receipt of proposals - The rewrite reflects the trend to more openly communicate with industry about the Government's requirements and there is encouragement to provide more specific acquisition information than what might have been provided in the past. Use of one-on-one meetings with potential offerors is added to the more traditional means available for providing industry with information about Government requirements. One-on-one meetings do not relieve the Government from the duty to treat all offerors equally, and the responsibility to observe restrictions concerning protected information.

15.202 Advisory-multi-step process - This is an additional pre-solicitation technique not previously covered in the FAR. It includes a preliminary step which permits the Government to provide information about a pending solicitation, receive and evaluate technical concepts, past performance and limited cost information and, based on the evaluation results, advise offerors either that they will be solicited, or that they are not considered to be a viable competitor. This is not, however, a pre-qualification process and, pursuant to CICA, no offeror may be excluded from the competition regardless of the outcome of the pre-solicitation evaluation. Also, procurement integrity rules and safeguards apply to all information received during the pre-solicitation step.

15.203 Requests for proposals - The rewrite permits the solicitation to authorize offerors to propose alternative terms and conditions, including revised contract line item numbers (CLINs) when suitable to a particular type of procurement, such as CLINs structured to conform to a performance based contract. There is no prohibition to including a solicitation notice that changes to CLIN structure is not permitted when, for instance, it could cause administrative or accounting difficulties to the Government.

Coverage has been added on oral solicitations in order to recognize the increased need for this practice in emergency, contingency and humanitarian operations either overseas or within the United States.

15.204 Contract format - The Model Contract Format, covered in the first proposed version of Part 15, has been deleted from the Part 15 final rule. The Uniform Contract Format has not been substantially changed. A number of separate clauses have been combined into a single clause (FAR 52.215) and Optional Forms have been added.

15.205 Issuing solicitations - The rewrite deletes unnecessary coverage only.

15.206 Amending the solicitation - The revised coverage is similar to that now covered as “changes in Government requirements” and addresses amending the solicitation both before and after receipt of proposals.

The standard that a change requires cancellation of the solicitation and issuance of a new one if the change “warrants a complete revision of the solicitation” has been refined by the concept of a change that is so substantial it would likely expand the pool of prospective offerors.

15.207 Handling proposals and information - The rewrite includes modifications related to use of electronic and facsimile transmissions. In contrast to the earlier version of Part 15 the final coverage on resubmittal of unreadable transmissions requires the contracting officer to notify and make arrangements with the offeror for retransmission. Provided a readable retransmission is received in accordance with the revised schedule and direction given by the contracting officer as to the means of transmission (i.e., the contacting officer may direct use of a different type of transmission from that used for the original), it may be considered as a timely submission.

15.208 Submission, modification, revision, and withdrawal of proposals - The previous versions of the Part 15 rewrite included substantial changes to the ‘late is late’ rule. The final rule reverts to the original FAR ‘late is late’ rule.

15.209 Solicitation provisions and contract clauses - The rewrite has consolidated a number of miscellaneous solicitation provisions/contract clauses into a single provision/clause(FAR 52.215-1).

15.210 Forms - This section addresses both the existing and new optional forms (Part 53). In recognition of the expanding use of electronic commerce, prescribed forms are no longer required. However, unless the procurement is being accomplished by electronic commerce means, use of standard forms is highly recommended for administrative reasons.

Subpart 15.3 Source Selection

Definitions - The rewrite relates "deficiency" and "weakness in the proposal" to contract performance risk. The concept of deficiency as an identifiable material failure is retained. Identification of weaknesses in the proposal rely on the evaluator's judgment of the degree of tolerance which may be permitted in each element of the requirement without undue risk, and when cumulatively the type and consistency of weaknesses increases the risk of performance to an unacceptable level which equates to a deficiency.

15.302 Source selection objective - The rewrite describes the source selection objective in terms of best value which does not alter the statutory formulation of selection of the "responsible source whose proposal is most advantageous to the United States".

15.303 Responsibilities - The rewrite describes, but does not alter, the primary responsibilities of the key source selection officials. The seemingly redundant reference in this part to both "source selection strategy" and "source selection plan" is needed because DoD is required to comply with both FAR procurement planning rules and the DoDI 5000 series references to acquisition strategies, while the civilian agencies need only comply with FAR.

15.304 Evaluation factors and significant subfactors - The coverage reflects the statutory requirements and case law, and the term "significant subfactors" is consistent with statutory language. The rewrite makes editorial changes, which includes moving some elements into the proposal evaluation coverage, but does not make substantial changes. The rewrite adds coverage on the contracting officer's authority as set forth in Office of Federal Procurement Policy (OFPP) Policy Letter 95-5 not to use past performance as an evaluation factor provided it is documented as "not an appropriate evaluation factor for the acquisition". The rewrite does not, however, provide the OFPP direction that the contracting officer's decision must be recorded as a

written determination and included in the contract file. **The requirements of OFPP 92-5 are policy requirements and subject to change by OFPP. While not statutory the OFPP policy is favored by Congress. Because of the difficulties associated with implementation of the policy, and the considerable concern expressed by industry about the collection and use of past performance data, there is an ongoing effort by DoD to develop uniform implementing procedures.**

15.1 Proposal evaluation - The coverage on cost or price evaluation includes the concept that competition normally establishes cost reasonableness and, in a fixed-price competitive environment it should not be necessary to perform cost or price analyses and, in a cost environment, use should be made of cost realism techniques. Past performance is cited as one indicator of an offeror's ability to successfully perform under the contract. It is stated that the comparative assessment of past performance is not a FAR Part 9.1 responsibility determination (as distinguished from the 15.101-2 LPTA process). It is also stated that the approach which will be taken to evaluate an offeror's past performance shall be provided in the solicitation.

The "neutral" past performance rating to be given to an offeror without a record of relevant past performance has been deleted and the final rule uses the statutory language "may not be evaluated favorably or unfavorably". The coverage at 15.305(2)(iii) provides guidance on types of past performance information which might be considered when a company appears to not have a past performance history.

Release of cost information to the technical evaluators is added under 15.305(a)(4). The coverage includes the qualification that such release is to be done in accordance with agency procedures. In recognition of the potential for skewing the technical evaluation by inappropriate release of cost data, and the impracticability of releasing cost data in major source selection scenarios, ABM is considering issuing policy guidance and has solicited opinions on the subject.

15.306 Exchanges with offerors after receipt of proposals - The basic structure of how the Government deals with offerors after receipt of proposals (e.g., evaluate proposals, limited interface with offerors prior to establishment of the competitive range, establish competitive range, discussions with all offerors in the competitive range, debriefing of offerors proposals) has not been substantially changed. The language has been significantly changed. The term "exchanges" is a new umbrella term under which clarifications, communications and negotiations/discussions with industry are conducted.

15.306(a) - Clarifications are confined to those situations where the evaluation results indicate award can be made without entering into discussions, but may require 'exchanges' with the apparent winning offeror to clarify minor or clerical errors, i.e., the established concept of "minor clarifications". Additionally, offerors may be provided an opportunity to clarify certain aspects of their proposal. Past performance is cited as an example. This regulatory latitude introduces an unknown into the generally understood boundaries of minor clarification as currently established by legal precedent. It is difficult to forecast how the GAO and the courts might rule on protests that question the fairness of clarifying any issue which goes beyond current, albeit undefined, standards including the example of past performance information, especially if past performance is a major evaluation factor, or if it becomes the determining factor for the award decision.

15.306(b) - Communications are held when it has been decided that a competitive range is to be established, shall be held with any offeror whose past performance is the determining factor preventing their inclusion in the competitive range, and may be held only with those offerors whose proposals are evaluated as neither being clearly in the competitive range nor clearly excluded from the competitive range. The focus of communications should be to obtain information about limited aspects of the offer which the evaluator needs in order to make a competitive range vice award decision as early as possible in the selection process.

Communications are limited to those areas of the offer where the evaluator believes there are perceived deficiencies, weaknesses, errors, omissions, or mistakes (e.g., the intent of the offer is unclear because there may be more than one way to interpret the offer, or inconsistencies in the offer indicate there may be an error, omission or mistake). Information received as the result of communications that enables the evaluation process to proceed on an informed basis without changing the offer as received may be considered in rating the proposal for competitive range purposes. The prohibition on revision of proposals in 15.306(b)(3) imposes a practical limitation on the extent of communications since issues where there is no uncertainty about the intent of the offer and a revision to the offer would be required in order to continue the evaluation would not be suitable issues for communications (but in some circumstances might be suitable for discussions).

The attempt to reach a middle ground between the statutory limitation of minor clarifications, and the statutory requirement that discussions must be held with all offerors in the competitive range, is a significant change. This newly introduced concept of communications which are not discussions has no legal precedent and there is risk

associated with this concept. It might be possible that a thoughtful and disciplined use of communications which emphasizes obtaining information necessary to fairly narrow the competitive range early in the source selection process could be linked to the new statutory language allowing reduction of the competitive range for the purposes of efficiency (15.306(c)), thereby forming a legal basis, however tenuous, for acceptance of the concept of more open communications.

15.306(c) Competitive range - There are two significant changes in the coverage on competitive range. The first significant change is associated with use of the words “most highly rated proposals” vice “reasonable chance for being selected for award”. This shifts the previous rule from “when in doubt leave them in” to “when in doubt leave them out”. This change is significant to both Government and industry. The Government must be more willing than in the past to exercise its’ right to eliminate proposals as early as possible when the price is too high or the proposal doesn’t adequately address the requirements and clearly state how the work will be accomplished. In order not to be eliminated on this basis industry must now submit an initial proposal which is fully responsive, realistically priced, and clearly states the offeror’s intent.

The second significant change is implementation of the statutory change allowing for reduction of the competitive range for the purposes of efficiency. The statute does not relieve the Government from performing an initial evaluation of all proposals and establishing the competitive range based on the resultant ratings. The statute does permit the competitive range established in accordance with the initial evaluation results to be further reduced for the purposes of efficiency. The further reduction does not constitute establishment of a second competitive range.

The decision to further reduce the competitive range is a judgment call by the contracting officer which takes into consideration whether the number of highly rated proposals in the competitive range exceeds the number needed to make the source selection decision, whether further reduction is either necessary or desirable given the circumstances of the acquisition and whether further reduction would introduce additional efficiency in the remaining stages of the selection process. It is anticipated the need to further reduce the competitive range for the purposes of efficiency will be minimized if the expanded opportunity to communicate with offerors for the purpose of narrowing the competitive range (15.306(b) is successful.

The statutory change does not preclude elimination of all but the most highly rated proposals, irrespective of the closeness of the ratings, provided the reason for the

reduction in offerors supports an increase in efficiency. In spite of its' statutory base "efficiency" is situational rather than definable and there is considerable risk associated with implementation of any "efficiency" decision. Also, since major parts of the selection process have already been completed in order to reach the point of determining the competitive range, the means of obtaining further efficiencies are likely to be quite limited.

There may still be situations where a further reduction for efficiency might be considered necessary and supportable. A supportable efficiency decision might be one where, at the conclusion of the evaluation, such a large number of "most highly rated proposals" remains in the competitive range that discussions with all qualified offerors would be burdensome and unduly prolong the selection process with little likelihood of affecting the selection decision. More important than the situation, however, is that the efficiency decision be measured against such an extremely high standard of competitive integrity that it can survive challenges from offerors eliminated from a competition in spite of a rating which is otherwise qualifying.

15.306(d) - The coverage of discussions with offerors in the competitive range has been substantially changed, but the basic statutory requirement and associated legal precedents concerning holding meaningful discussions with all offerors in the competitive range are not altered. The introduction of the term 'bargaining' is not intended to alter the manner in which negotiations or discussions are conducted.

New coverage has been added about giving evaluation credit for technical solutions exceeding mandatory minimums and negotiating with offerors for increased performance beyond mandatory minimums. Also, the Government is permitted to suggest to offerors that have exceeded mandatory minimums that their proposals would be more competitive if the excesses were removed and the price decreased. This coverage might be beneficial if the Government has either failed to properly define its requirements or to use appropriately structured step-ladder quantities when appropriate.

The revised coverage also permits, after discussions have begun, the Government to eliminate an offeror from the competitive range if the offeror is no longer considered to be among the most highly rated "whether or not all material aspects of the proposal have been discussed, or whether or not the offeror has been afforded an opportunity to submit a proposal revision." There is risk associated with the elimination of an offeror "whether or not all material aspects of the proposal have been discussed" as it could be ruled as a deviation from an undefined but generally understood standard of "meaningful discussions". The ability of the Government to eliminate an offeror from the

competitive range “whether or not the offeror as been afforded an opportunity to submit a proposal revision” is not a change to the selection process, but in the past it has been a general practice to permit offerors to submit revisions even when an offeror has not satisfied the Government’s concerns during discussions.

15.306(e) - Limits on exchanges, provides guidance on prohibitions in the conduct of discussions. These prohibitions are not new.

15.307 Proposal revisions - The practice of requesting a “best and final” offer has been replaced with a process that permits the contracting officer to request, or the offeror to submit, proposal revisions throughout the period covered by discussions. Multiple proposal revisions may be submitted for consideration at any time during this period and the number of revisions need not be the same for each offeror. While multiple proposal changes may result in positive technical or cost revisions, it could also disrupt the evaluation process. At the conclusion of the discussion period the contracting officer is required to establish a common cut-off date for receipt of final proposal revisions from those offerors still in the competitive range, to notify offerors that final revisions must be in writing, and that it is intended to make award without obtaining further revisions.

15.308 Source selection decision - The term “independent comparative assessment” is new, but the duty of the source selection authority to independently make the selection decision based on proposals which have been evaluated against the selection criteria has not been altered. The independent comparative assessment may be based on the information provided in the proposal evaluation reports and analyses prepared by other persons, including a report on the ranking of the offers, or a recommendation relative to the award decision, if such information was included as an element of the proposal evaluation effort.

The factors considered in reaching the source selection decision must be documented, but supporting rationale relative to the trade offs made by the selection authority in reaching the award decision does not need to be quantified or rated in any numerical of other manner.

Subpart 15.4 Contract Pricing - The coverage in 15.4 has been edited but not substantially changed.

15.401 Definitions - There have been some additions and deletions but there are no substantial changes. There is no change in the definition of “Cost and pricing data”, which refers to data which is subject to certification, or “Other than cost of pricing data”, which can be identical data that, because of an exception, is not subject to certification.

15.402 Pricing policy - There are no changes to the current coverage.

15.403 Obtaining cost or pricing data - The rewrite updates and edits coverage, but does not substantially alter the coverage.

15.403-1 Prohibition on obtaining cost or pricing data - The coverage adds the prohibition to obtaining cost or pricing data for acquisitions at or below the simplified acquisition threshold. The coverage adds an exception to cost or pricing data requirements to modifications of a contract or subcontract for commercial items. However, the language at 15.403-3(c) makes the commercial item definition of FAR 2.101 applicable. Pursuant to this definition you would be permitted to obtain cost or pricing data for a contract modification which does not meet the criteria of 2.101(c)(1) or (2), e.g., the modification is *not* of a type customarily available in the commercial market place, or is not a *minor* modification made to meet Federal Government requirements. Therefore, obtaining cost or pricing data is not necessarily prohibited for a contract modification to a contract for a commercial item when the standards for obtaining cost and pricing data are met.

15.403-2 Other circumstances where cost or pricing data are not required - The rewrite includes exercise of a priced option and funding increases to cover overruns or interim billing adjustments as contract actions for which cost and pricing data is not required.

15.403-3 Requiring information other than cost or pricing data - The rewrite coverage includes editorial changes but not changes of substance.

15.403-4 Requiring cost or pricing data - The rewrite adds language applicable to final pricing type actions, but does **[not?]** substantially change the current language.

15.403-5 Instructions for submission of cost or pricing data or information other than cost or pricing data - The basic coverage has not been substantially altered but more latitude is permitted in the format for submitting data and the cost forms have been moved to the end of Part 15.

15.404 Proposal analysis

15.404-1 Proposal analysis techniques - The rewrite includes editorial and organizational changes and adds coverage on cost realism analysis, but does not alter the manner in which proposals are analyzed. Updated information

is provided about obtaining the Contract Pricing Resource Guides.

15.404-2 Information to support proposal analysis - The rewrite makes changes which reflect the more flexible field pricing coverage resulting from organizational and administrative changes at Defense Contract Management Command (DCMC). There should be more direct interface between DCMC and the buying commands and the information and level of detail requested from DCMC should be confined to the minimum needed to perform the technical and cost analysis. The buying commands are to place greater dependence on information already available within the command and DCMC reports will no longer include as much detail and analysis. There is also a more direct interface with the Defense Contract Audit Agency (DCAA).

15.404-3 Subcontract pricing considerations - The rewrite includes editorial changes but does not substantially change the coverage.

15.404-4 Profit - By agreement between the Director Defense Procurement(DDP) and the Office of Federal Procurement Policy(OFPP), the coverage on profit was excluded from the Part 15 rewrite. Nevertheless, the rewrite does revise the coverage on fee limitations to match current law. The statutory limitations on fee paid under cost-plus-fixed-fee (CPFF) contracts, which were previously also applied by regulation to cost-plus-incentive-fee (CPIF) contracts, have been removed from the latter. Also, the language at 15.404-4(c)(4)(ii) permits the determination that CPFF fee limits have not been exceeded to be included in the business clearance, thereby eliminating the need for a separate determination.

15.405 Price negotiation - The rewrite expands on the concept of developing a pre-negotiation objective but does not alter the process.

15.406 Documentation - The rewrite edits and reorganizes the coverage on negotiation memorandums and records but does not basically change the requirements.

15.407 Special cost or pricing areas - The rewrite reorganizes and edits the coverage on defective cost or pricing data, make-or-buy programs, forward pricing rate agreements, should-cost reviews and estimating systems but does not make changes of substance.

15.408 Solicitation provisions and contract clauses - The coverage provides guidance on the provisions applicable to solicitations. The standard formats for providing cost and pricing data, and other than cost or pricing data have been relocated to this section from the profit section.

Subpart 15.5 Pre-award, Award, and Postaward Notifications, Protests, and Mistakes

15.501 Definition - The rewrite does not change the definition of “day”.

15.502 Applicability - The rewrite has edited the language for consistency with the other parts of the rewrite.

15.503 Notifications to unsuccessful offerors - The rewrite does not change existing coverage.

15.504 Award to successful offeror - The coverage has been extended to accommodate electronic commerce.

15.505 Pre-award debriefing of offerors - The rewrite has ~~been~~ modified the language to include the contractor’s right to request a delay in the pre-award debriefing until after award. The coverage cautions that delayed debriefings could affect the timeliness of any protest filed subsequent to the debriefings. If the Government refuses to provide a pre-award debriefing as requested, the refusal must meet the standard of a “compelling reason” and the rationale for delaying the debriefing must be documented in the file.

15.506 Post-award debriefing of offerors - The rewrite has modified the language to include coverage on delayed pre-award requests for debriefings. The coverage has been edited and reorganized**, but** the substance has not been changed.

15.507 Protests against award - The rewrite makes editorial changes and adds coverage on alternative dispute resolution procedures as a means of resolving disputes.

15.508 Discovery of mistakes - The rewrite is limited to mistakes discovered after award which has not been changed. Mistakes before award are covered in 15.6.

15.509 Forms - The rewrite addresses use of the new Optional Form 307 and Standard Form 26.

Subpart 15.6 - Unsolicited Proposals - The rewrite revises the coverage to reflect the existence of a number of new programs and solicitation methods designed by the Government to seek out industry participation in development of unique ideas for either Government or joint Government-industry use. The policy emphasis is modified to encourage submission in response to these Government initiated programs and solicitation methods prior to submission of unsolicited proposals. The language provides for inclusion of future similarly Government designed programs and solicitation methods under FAR 15.6. Administration of unsolicited proposals is predominately an internal procurement activity

function and the rewrite coverage should be reviewed to determine whether current activity practices may be affected.

PART 16 TYPES OF CONTRACTS

16.306 Cost-plus-fixed-fee contracts - The rewrite deletes the requirement for a separate determination and findings relative to CPFF contract fee (see 15.404-4(c)(4)(ii).

PART 36 CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

36.520 Contracting by negotiation - The rewrite adds a cross reference to 52.236-28, which is a new solicitation provision required to be included in construction contracts when contracting by negotiation.

PART 42 CONTRACT ADMINISTRATION - Changes are made to correspond with Part 15 revisions.

PART 43 CONTRACT MODIFICATIONS - Change made to cover the new optional forms.

PART 52 SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.212-1 Instructions to Offerors-Commercial Items - The rewrite revises the late rule with respect to commercial item offers to the standard negotiated procurement late rule.

52.215-1 Instruction to Offerors-Competitive Acquisition - The rewrite has consolidated a number of standard solicitation provisions into a single provision.

52.215-2 Audit and records - Administrative changes have been made which correspond to the Part 15 revisions.

52.215-3 Request for information or solicitation for planning purposes - Administrative and editorial changes have been made which correspond to the Part 15 revisions.

15.215-4 Type of Business Organization - The rewrite has renumbered and revised the provision but there are no substantive changes.

15.215-5 Facsimile proposals - The rewrite has renumbered and revised the coverage to correspond to the Part 15 revisions including retransmission of unreadable facsimile proposals.

15.215-6 Place of performance - The rewrite has renumbered and revised the provision but there are no substantive changes.

15.215-7 Annual representations and certifications - Negotiation - The rewrite has renumbered and revised the provision but there are no substantive changes.

52.215-8 Order of precedence - uniform contract format - The rewrite renumbered the provision without change.

52.215-9 Changes or additions to make-or-buy program - The rewrite has renumbered and revised the coverage to correspond to Part 15 revisions. There are no substantive changes.

52.215-10 Price reduction for defective cost or pricing data - The rewrite renumbers and modifies references to correspond with Part 15. The rewrite also deletes the words
"the date of agreement on the price of the contract (or price of the modification)" under(c)(2)(i)(B) and inserts in lieu thereof "the "as of" date specified on its Certificate of Current Cost or Pricing Data". This change was made for the purpose of clarification.

52.215-11 Price reduction for defective cost or pricing data - modifications - The rewrite renumbers and modifies the references to correspond with Part 15. The identical change in words relative to the date when cost or pricing data were made available is as in 52.215-10.

52.215-12 Subcontractor cost or pricing data - The rewrite has renumbered and revised the coverage to correspond to Part 15 revisions. There are no substantial changes.

52.215-13 Subcontractor cost or pricing data - modifications - The rewrite has renumbered and revised the coverage to correspond to Part 15 revisions. There are no substantial changes.

52.215-14 Integrity of unit prices - The rewrite renumbers and makes editorial revisions to correspond to Part 15. It also makes the provision a flow-down with specified exceptions.

52.215-15 Termination of defined benefit pension plans -
The rewrite has renumbered and revised the coverage to correspond to Part 15 revisions. There are no substantial changes.

52.215-30 Facilities capital cost of money - The rewrite renumbers this provision to 52.215-16.

52.215-31 Waivers of facilities capital cost of money - The rewrite renumbers this provision to 52.215-17.

52.215-18 Reversion or adjustment of plans for post-retirement benefits (PRB) other than pensions - The rewrite renumbers and revises this provision. The revisions do not make a substantive change.

52.215-19 Notification of ownership changes - The rewrite has renumbered and revised the coverage to correspond to Part 15 revisions. There are no substantial changes.

52.215-20 Requirements for cost or pricing data or information other than cost or pricing data - The rewrite has renumbered and revised the coverage to correspond to Part 15 revisions. There are no substantial changes.

52.215-21 Requirements for cost or pricing data or information other than cost or pricing data - modifications - The rewrite has renumbered and revised the coverage to correspond to Part 15 revisions. There are no substantial changes.

52.236-28 Preparation of proposals - construction - A new clause is added to require construction proposals to be submitted using Government provided forms.

PART 53 FORMS - The rewrite makes modifications to correspond to Part 15 revisions.

FEDERAL REGISTER SUPPLEMENTARY INFORMATION

Background

On January 29, 1996, the FAR Council tasked an ad hoc interagency committee to rewrite FAR Part 15, Contracting by Negotiation. The rewrite originally was to be accomplished in two phases. Phase I, consisting of the rewrite of FAR 15.000, 15.1, 15.2, 15.3, 15.4, 15.6, and 15.10, covering acquisition techniques and source selection, was published for public comment in the Federal Register at 61 FR 48380 on September 12, 1996. In the interest of increasing outreach to small entities, two public meetings were held to discuss the proposed rule: in Washington, DC, on November 8, 1996, and in Kansas City, MO, on November 18, 1996. The public comment period closed on November 26, 1996. The Government received 1541 comments from 100 respondents and considered all comments in drafting revisions to the rule. Due to the significant changes made as a result of public comments, the FAR Council decided to publish a revised proposed rule, that included previously unpublished, Phase II, proposed changes covering Subparts 15.5, 15.7, 15.8, and 15.9, and that incorporated changes made as a result of public comments submitted in response to FAR Case 96-303, Competitive Range Determinations. The revised proposed rule was published in the Federal Register on May 14, 1997 (62 FR 26639). The public comment period closed on July 14, 1997. The Government received 841 comments from 80 respondents and considered all the comments in drafting the final rule.

Case Summary

This final rule modifies concepts and processes in the current FAR Part 15, introduces new policies, and incorporates changes in pricing and unsolicited proposal policy. In addition, the sequence in which the information is presented has been revised to facilitate use of the regulation. The final rule does not alter the full and open competition provisions of FAR Part 6. The goals of this rewrite are to infuse innovative techniques into the source selection process, simplify the process, and facilitate the acquisition of best value. The 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 following were considered in drafting this final rule: information received in connection with public meetings held on January 25, 1996, November 8, 1996, and November 18, 1996; public comments received in response to three advance notices of proposed rulemaking (60 FR 63023, December 8, 1995; 60 FR 65360, December 19, 1995; and 60 FR 67113, December 28, 1995); public comments received in response to

publication of the Phase I proposed rule in the Federal Register (61 FR 48380, September 12, 1996); public comments received in response to publication of the revised proposed rule in the Federal Register (62 FR 26639, May 14, 1997); public comments received in response to publication of the Competitive Range Determinations proposed rule in the Federal Register (61 FR 40116, July 31, 1996); inputs received over the Acquisition Reform Network (an Internet forum); inputs received from members of Congress and Congressional staff, Government agencies, the Defense Acquisition Regulations Council, the Civilian Agency Acquisition Council, and the Office of Federal Procurement Policy (OFPP); inputs received in response to other notices of the rewrite in various print media and conferences; and inputs received from Government fora such as the Front-Line Professional's Forum and the Federal Procurement Executive Association.

Summary of Changes

This final rule reengineers the processes used to contract by negotiation, with the intent of reducing the resources necessary for source selection and reducing time to contract award. The goals of the FAR Part 15 Rewrite are to ensure that the Government, when contracting by negotiation, receives the best value, while ensuring the fair treatment of offerors. The final rule reengineers the acquisition process in the current FAR and incorporates changes to the proposed rule by:

- Supporting more open exchanges between the Government and industry, allowing industry to better understand the requirement and the Government to better understand industry's proposals;
- Reestablishing the "late is late" rule for receipt of proposals, responses to requests for information, and modifications;
- Emphasizing that no offeror, otherwise eligible to submit a proposal in response to a Government solicitation, will be excluded from the competitive range without its proposal being initially reviewed and evaluated solely against all the evaluation factors and significant subfactors in the solicitation;
- Reiterating that all proposals received will be evaluated based upon the criteria in the solicitation;
- Reducing the bid and proposal costs for industry by providing early feedback as to whether a proposal is truly competitive;
- Eliminating mandatory forms currently used as cover sheets for submitting cost or pricing data (SF 1411) and information other than cost or pricing data (SF 1448);
- Simplifying the exception to obtaining cost or pricing data for modifications to contracts for commercial items;

- Revising guidance pertaining to field pricing to reflect the need for greater flexibility and teamwork in today's acquisition environment;
- Simplifying guidance pertaining to unbalanced pricing to reflect its use as a proposal analysis technique designed to assess risk and protect the Government's economic interest;
- Eliminating the requirement for a separate determination and findings supporting cost-plus-fixed-fee contracts;
- Realigning fee limitations with statute, and permitting the contracting officer's signature on the price negotiation memorandum or other documentation of the negotiated price to serve as a determination that fee limits have not been exceeded;
- Increasing the scope of discussions;
- Requiring that adverse past performance to which an offeror has not had an opportunity to respond be brought to the offeror's attention before it can be the determining factor for exclusion from the competitive range;
- Requiring that all adverse past performance information be brought to the offeror's attention during discussions, if the offeror is placed in the competitive range;
- Changing the standard for admission into the competitive range (to "all proposals most highly rated") and implementing Section 4103 of the Clinger-Cohen Act of 1996 (Public Law 104-106); and
- Streamlining the post-competitive range process by enhancing the ability of the parties to communicate and document understandings reached during discussions.

FINAL REGULATORY FLEXIBILITY ANALYSIS (EXERPTS)

Succinct statement of the need for, and the objectives of, the rule.

Historically, the executive branch has undertaken a continuous improvement approach to the acquisition process, particularly since the end of World War II. In 1947, the National Security Act established an acquisition process for the Department of Defense. Since that time, at least six major executive branch commissions have separately examined the problems of effectively managing Federal acquisition. In 1972, the Commission on Government Procurement recommended that a consolidated Federal Acquisition Regulation (FAR) be established. Later, the Packard Commission called for a simpler and clearer acquisition framework. In addition, the FAR System, composed of the Defense Acquisition Regulations Council, the Civilian Agency Acquisition Council, and the Federal Acquisition Regulatory Council, has been active in the maintenance and continuous improvement of the FAR for many years now.

Congress has also participated substantially in the reform of Federal acquisition practices. Section 800 of Public Law 101-510 (the National Defense Authorization Act for Fiscal Year 1991) directed the Department of Defense to establish the "DoD Advisory Panel on Streamlining and Codifying Acquisition Laws." The panel recommended changes to acquisition statutes in order to improve the efficiency and effectiveness of the acquisition process, while keeping in mind the need to provide a fair and open acquisition system. The panel's recommendations, published in January 1993, formed the basis of the reforms contained in the Federal Acquisition Streamlining Act of 1994 and the Clinger-Cohen Act of 1996.

The Part 15 rewrite is a normal product of the continuous improvement process employed for maintenance of the FAR. It is worth noting that in the past few years several other parts of the FAR have also been rewritten, including Part 13, Simplified Acquisition Procedures; Part 37, Service Contracting; and Part 45, Government Property. 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.

We decided to revise Part 15 for several reasons. In 1995, DoD conducted a survey of the defense industry, military departments, and defense agencies to ascertain which parts of the FAR were most in need of revision. The responses indicated a general consensus that Part 15 was one of the parts that would most benefit from such an effort. Secondly, within the Government, the preponderance of contracting expenditures are accomplished using Part 15 procedures. Finally, the results of a 1991 FAR Improvement Study conducted by the General Services Administration indicated that Subparts 15.6, Source Selection, and 15.8, Price Negotiation, were the most difficult parts of the FAR to use.

On January 29, 1996, the FAR Council tasked an ad hoc interagency committee to rewrite FAR Part 15, Contracting by Negotiation. The rewrite was to be accomplished in two phases. Phase I, consisting of the rewrite of FAR Subparts 15.000, 15.1, 15.2, 15.3, 15.4, 15.6, and 15.10 covering acquisition techniques and source selection, was published for public comment in the Federal Register at 61 FR 48380 on September 12, 1996. In the interest of increasing outreach to small entities, two public meetings were held to discuss the proposed rule: in Washington, DC, on November 8, 1996, and in Kansas City, MO, on November 18, 1996. In addition, the opportunity for an evening public meeting was publicized in the September 12, 1996, Federal Register notice to accommodate schedule constraints that may prevent small entities from being represented at the public meetings. The public comment period closed on November 26, 1996. We received 1541 comments from 100 respondents. Due to the significant changes made as a result of analyzing and resolving public comments, we decided to publish a second proposed rule. All of the comments received were considered in drafting the second proposed rule. The rule was expanded to include the Phase II proposed changes, covering Subparts 15.5, 15.7, 15.8, and 15.9. The revised rule also subsumed FAR Case 96-303, Competitive Range Determinations, and addressed the related public comments. The second proposed rule was published in the Federal Register on May 14, 1997 (62 FR 26639). We received 841 comments from 80 respondents and considered all the comments in drafting the final rule.

The goal of the rewrite is to infuse innovative techniques into the source selection process, simplify the acquisition process, incorporate changes in pricing and unsolicited proposal policy, and facilitate the acquisition of best value products and services. The rewrite emphasizes the use of effective and efficient acquisition methods and eliminates unnecessary burdens imposed on industry and Government. Elimination of burdens and creation of a simplified, efficient, and impartial acquisition process benefits all participants in Government contracting, especially small businesses. In addition, the rule revises the sequence in which Part 15 information is presented to facilitate use of the regulation.

Summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments

Several significant issues were raised by the public comments. We have addressed these issues as follows:

- Competitive range determinations. Some respondents expressed concern that the shift in competitive range policy to encourage retaining only those offerors rated most highly rather than all those with a reasonable chance of award may inhibit awards to small entities. This revision is consistent with the philosophy of Section 4103 of the Clinger-Cohen Act of 1996. The competitive range guidance in the final rule indicates that contracting officers shall establish a competitive range comprised of only those proposals most highly rated. In contrast, the current FAR advises contracting officers "when there is doubt as to whether a proposal is in the competitive range, the proposal should be included." We considered retaining the existing FAR standard for inclusion in the competitive range, but ultimately rejected it because there are readily discernible benefits from including only the most highly rated offers in the competitive range. First, those included will know that they have a good chance of winning the competition--making it in their best interests to compete aggressively. Second, those eliminated from the range are spared the cost of pursuing an award they have little or no chance of winning. Retaining marginal offers in the range imposes additional, and largely futile, effort and cost on both the Government and industry. We also note that comments received from Government agencies indicate that award is nearly always made to one of the three most highly rated offerors in the competitive range. Therefore, including an offeror that is not most highly rated in the competitive range would not likely impact the final award decision. This final rule ensures that offerors with little probability of success, are advised early on that their competitive position does not merit additional expense in a largely futile attempt to secure the contract. This knowledge will benefit both large and small entities, but will be especially beneficial to small entities that have constrained budgets. These entities will be able to conserve scarce bid and proposal funds and employ their resources on more productive business opportunities. In addition, the new standard has the derivative benefit of encouraging offerors to submit better, more robust initial proposals in recognition of the fact that only the most highly rated proposals will be included in the competitive range.

- Limiting the competitive range in the interest of efficiency. Some respondents expressed concern that allowing the

contracting officer to limit the competitive range in the interest of efficiency would provide a level of discretion to contracting officers that could lead to abuses. The comments expressed a concern that offerors might be excluded from the competitive range for arbitrary reasons unrelated to the actual procurement. In addition, one small business submitted a public comment in support of the efficient competitive range.

This language implements the requirements of Section 4103 of the Clinger-Cohen Act of 1996 to permit contracting officers, in certain circumstances, to reduce the number of proposals in the competitive range to the "greatest number that will permit an efficient competition among the offerors rated most highly." Under this final rule, source selection officials will continue to establish evaluation factors and identify them in the solicitation, including any preferences for small entities. The contracting officer may further reduce the number of proposals that would otherwise be in the competitive range to the greatest number that will permit an efficient competition among the most highly rated offerors only if offerors have been advised of this possibility in the solicitation, and only after evaluating all proposals received in accordance with the criteria specified in the solicitation.

- Expanded exchanges throughout the acquisition process. Some respondents expressed concerns that the increased exchanges between the Government and industry throughout the acquisition process increased the risk of unfair practices. The final rule encourages earlier and more meaningful exchanges of information between the Government and potential contractors to achieve a better understanding of the Government's requirements and the offerors' proposals. This rule contains limits on exchanges that preclude favoring one offeror over another, revealing offerors' technical solutions, revealing prices without the offerors' permission, and knowingly furnishing source selection information. In addition, the guidance in the final rule has been revised to alert contracting officers of the safeguards contained at 3.104, Procurement Integrity, and 24.2, Freedom of Information Act.

- Use of neutral past performance evaluations. Some respondents expressed concerns that neutral past performance evaluations are not adequately defined, and that the rule does not contain sufficient implementing guidance. One respondent suggested that, to avoid abuses of neutral rating, offerors granted such ratings should be required to submit a record of their lack of opportunity to acquire a record of relevant past performance. The second proposed rule contained a definition of neutral rating, and asked respondents to provide suggestions for a better definition. We received only one such suggestion, and, upon analysis, we found that the suggestion did not actually provide a definition of neutral rating but, rather, provided a way to limit the application of neutral ratings. Instead, the final rule includes language based on 41 U.S.C. 405(j)(2)

providing offerors, without a previous performance history, a rating that neither rewards nor penalizes the offeror. We selected this alternative to allow the facts of the instant acquisition to be used in determining what rating scheme would satisfy requirements of the statute.

- Ability of offerors to address adverse past performance information before it can be used in a source selection. Respondents, especially the small business community, expressed concerns that offerors might be excluded from a competition on the basis of incorrect past performance information that they have not had the opportunity to address. In response to this concern, the final rule provides that, when conducting communications prior to establishing the competitive range, offerors, including small entities, shall be granted the opportunity to explain situations that contributed to an adverse past performance rating to which they have not had a previous opportunity to respond, before such ratings can be the determining factor for exclusion from the competitive range.

- Impact of oral presentations on small entities. Respondents expressed concerns that the use of oral presentations may present barriers to the participation of small entities in Government procurement because they may be costly and require skills that small entities may not easily attain. The final rule requires contracting officers to consider, among other factors, the impact on small businesses, including cost, before using oral presentations. In fact, based on a recommendation from the Small Business Administration, the final rule also contains guidance on selecting alternatives to in-person presentations (e.g., teleconferencing). Generally, oral presentations are expected to be less costly to prepare than formal written proposals. Experience accumulated by agencies that have already used oral presentations indicates that use of this technique has either improved participation by small entities, or has had no adverse impact on their level of participation.

- The Nuclear Regulatory Commission (NRC) and the Departments of the Army, Energy, HHS, and Treasury submitted comments describing their experiences in using oral presentations. The Department of Energy (DoE) indicated that small businesses that had not previously participated in DoE procurements, competed on procurements using oral presentations. Ft. Sam Houston in San Antonio indicated that by using oral presentations, the lead time on a recent procurement for outpatient clinics was five months, compared to a lead-time of l3-l5 months on previous procurements that did not use oral presentations. They further indicated that proposals that previously required “at least two trips with a two-wheel dolly” were reduced to one envelope as a result of using oral presentations. The Centers for Disease Control (CDC) stated that in using oral presentations they have always been able to award the contract

ahead of their 180-day lead-time target and have been able to save the Government thousands of dollars. The CDC has used oral presentations almost exclusively on small business set-asides, and comments from the offerors have been very positive. The NRC reports that in no case did a large business receive an award for work that was previously performed by a small business.

· Competitive range policy. We considered alternatives in the following areas in order to minimize the impact on small entities—

(a) Total bid and proposal costs borne by offerors, including small entities. As an alternative to the language contained in the final rule, we considered whether the potential payoff of receiving an award outweighed the additional cost to an offeror of staying in a competition without having a realistic chance of winning, i.e., whether the long shots came in often enough to make it worth the extra cost of taking the chance. We also note that information provided by agencies in public comments responding to the proposed rule indicates that award is nearly always made to one of the three most highly rated offerors. We have received no comments that contradict this understanding. The benefits to offerors of including only the most highly rated offers in the competitive range are that those included will know that they have a good chance of winning the competition, making it in their best interests to compete aggressively, and those eliminated from the range are spared the cost of pursuing an award when they have little, if any, chance of winning.

(b) Impacts on resources and cash flow. A smaller competitive range enables faster progress toward contract award. Therefore, all offerors excluded from the competitive range expend less resources on a competition they have little or no chance of winning. The resources of these offerors can then be applied to the pursuit of other more promising business opportunities. Successful offerors receive contract awards faster, thereby improving their cash flow. Therefore, we decided not to retain the current FAR standard of including all proposals with a reasonable chance of being selected for award, and including any proposals for which there is doubt, i.e., "when in doubt, leave them in," because this standard prolongs the award process and increases the costs to offerors with little or no chance of winning.

(c) Perception of barriers to submitting a proposal. The initial proposed rule contained a solicitation provision that identified a target number of offerors to be included in the competitive range. Public comments indicated that this created a perception that proposals would not be properly evaluated against the evaluation criteria in the solicitation prior to establishment of the competitive range. Respondents indicated

that they would view this as a barrier to submitting proposals and competing on Government contracting opportunities. Therefore, we have revised the final rule to eliminate this solicitation provision, and to emphasize that all proposals received are evaluated against all the evaluation factors and significant subfactors in the solicitation before the competitive range is established.

(d) Limiting the competitive range in the interest of efficiency. The language in the final rule implements Section 4103 of the Clinger-Cohen Act of 1996, that allows contracting officers, in certain circumstances, to reduce the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated offerors. We considered three alternatives to the language contained in the final rule—

(1) Include at least one small business proposal in the competitive range. At the suggestion of the Small Business Administration Office of Advocacy, we considered imposing a requirement to have at least one small business in the competitive range whenever any small businesses submit proposals. We did not adopt this alternative for two reasons. First, as noted above, public comments from agencies indicate that awards are nearly always made to the one of the three most highly rated proposals going into the competitive range. This is true even when small businesses win full and open competitions. The incidence of award to an offeror other than one of the three such proposals is so small that it does not support keeping any business, particularly a small business with limited bid and proposal resources, in a competition that the business has virtually no chance of winning. Second, this recommendation could conflict with the requirements of Section 4103 of the Clinger-Cohen Act to include the most highly rated proposals in the competitive range, if the small business proposal is not among the most highly rated.

(2) Provide examples of the factors to be considered in limiting the competitive range. The proposed rule contained a list of factors for the contracting officer to consider in establishing the competitive range. As a result of public comments raising concerns about the list, we revised the final rule to delete the list of factors. This permits the facts of the instant acquisition to guide the judgment of the contracting officer in exercising this authority, instead of attempting to impose a static list on all circumstances. Both small and large offerors should benefit from this flexibility. The goal of our final rule language is to allow all participants in the process, both industry and Government, to optimize their resources.

(3) Provide a definition of efficiency. The proposed rule did not define an efficient competition. We received several public comments suggesting that such a definition be provided. Our assessment is that the definition of an efficient competition depends on the facts of the instant acquisition. Instead of imposing a definition that may not be appropriate in certain circumstances, we chose to describe the process for limiting the competitive range for the purpose of efficiency. This enables the contracting officer to exercise this authority appropriately in varying circumstances--all offerors should benefit from this approach.

(e) Responding to adverse past performance information. We considered alternatives relating to two issues in this area.

(1) Prohibition on the use of certain types of past performance information. The proposed rule did not prohibit the use of adverse past performance information. Several public comments suggested that past performance information on contracts in litigation or dispute should not be used until the litigation or dispute is resolved. The rule requires the contracting officer to evaluate the currency, relevance, source, context, and general trend of the past performance information. We did not adopt this alternative because the requirement to evaluate the context of the information already addresses this concern. In addition, we were concerned that the suggested alternative may encourage litigation for the purpose of avoiding the inclusion of adverse past performance information in future acquisitions.

(2) Responding to adverse past performance information. The proposed rule did not require contracting officers to allow offerors to respond to adverse past performance information prior to discussions. Some public comments recommended that contracting officers identify any adverse past performance information to the offeror immediately upon receiving the information. They further suggested that the offeror be allowed to respond to such information regardless of the stage of the acquisition. Other public comments recommended that offerors be afforded an opportunity to respond to adverse past performance information on which they had not previously had an opportunity to respond. We revised the final rule to accommodate these recommendations. The initial proposed rule authorized communication regarding adverse past performance information. In the second proposed rule, we revised this guidance to state that contracting officers, when conducting communications with offerors before establishment of the competitive range, shall address adverse past performance information on which the offeror

has not previously had the opportunity to comment. We revised the final rule to require that offerors, including small entities, shall be granted the opportunity to explain situations that contributed to an adverse past performance rating to which they have not had a previous opportunity to respond before such ratings can be the determining factor for exclusion from the competitive range. These revisions, together with the requirement to discuss all deficiencies and significant weaknesses with those offerors in the competitive range, ensure that adverse past performance to which an offeror has not had the opportunity to respond will be addressed any time it can affect the outcome of the acquisition. We did not revise the rule to permit offerors to address past performance information to which they have already had an opportunity to respond because the solicitation provides offerors with the opportunity to address problems encountered on previous contracts and related corrective actions. In addition, FAR Subpart 42.15, Contractor performance information, already contains formal rebuttal procedures. We did not revise the rule to permit all offerors to address past performance information to which they have not had a previous opportunity to comment because it would prolong the evaluation process by allowing such exchanges when they will not make a difference in the source selection decision.

(f) Neutral past performance evaluations. We considered alternatives relating to two aspects of neutral past performance ratings—

(1) Definition of neutral past performance evaluations. The proposed rules provided a definition of neutral past performance evaluations. Public comments recommended that we revise the definition and provide detailed instructions on how to apply neutral past performance ratings in any source selection. 41 U.S.C. 405(j)(2) requires offerors without a previous performance history, to be given a rating that neither rewards nor penalizes the offeror. We did not adopt the public comment recommendations, opting instead to revise the final rule to reflect the statutory language, so that the facts of the instant acquisition would be used in determining what rating scheme is appropriate. This alternative provides for flexible compliance to satisfy requirements of the statute.

(2) Limiting the instances of neutral evaluations. The proposed rule listed examples of information that may be considered to avoid assigning neutral past performance ratings. One public comment recommended that, in the interest of fairness to all businesses, as well as the minority contractors represented by the respondent, the Government should assign neutral past performance ratings

only where the preponderance of the evidence demonstrates that the offeror lacked an opportunity to acquire a record on relevant past performance. In order to minimize the use of neutral past performance ratings, we revised the final rule to indicate that contracting officers "should" (rather than "may") take into account a broad range of information related to past performance when performing past performance evaluations.

(g) Providing for increased exchanges between the Government and industry throughout the acquisition process.

(1) Clarifications. We 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. The proposed rule did not differentiate between exchanges of information when award without discussions was contemplated versus when a competitive range would be established. Public comment pointed out that the proposed rule language may allow exchanges beyond what is permitted by applicable statute when making award without discussions. In drafting the second proposed rule, we limited these exchanges. The resulting language still permits more exchange of information between offerors and the Government than the current FAR. This policy is expected to help offerors, especially small entities that may not be familiar with proposal preparation, by permitting easy clarification of limited aspects of their proposals.

(2) Communications. Public comments indicated that the second proposed rule did not establish a "bright line" distinction between when communications conducted in order to establish a competitive range end, and when discussions begin. Small businesses were concerned that the Government may conduct inappropriate communications with selected offerors prior to the establishment of the competitive range to the detriment of small businesses. We revised the final rule to accommodate this concern by clearly defining when discussions begin. We adopted this alternative to preclude the occurrence of the inappropriate communications that concerned small businesses.

(3) Discussions. The initial proposed rule contained the existing FAR guidance regarding the type and amount of information that should be exchanged during discussions. In response to public comments, the second proposed rule requires a more robust exchange of information during discussions. The 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. This change should benefit all offerors, including small businesses, because it permits offerors to develop a better understanding of the Government's evaluation of their proposal, and permits them to optimize their potential for award.

(h) Oral presentations. The existing FAR does not address oral presentations. The proposed rule included general guidelines for the use of oral presentations to provide consistent and impartial Governmentwide application of this technique. We considered alternatives in two aspects of oral presentations.

(1) Methods for recording oral presentations. Some public comments in response to the second proposed rule recommended that the rule should require the Government to prepare a formal, verifiable record of each oral presentation, to place the record in the source selection files, and to provide copies of their own records to offerors. We revised the final rule to allow contracting officers to provide each offeror a copy of that offeror's record, but did not require the Government to make a verifiable record. A requirement for the Government to make a verifiable record of each presentation is not consistent with the objective of this rule to streamline the acquisition process.

(2) Oral presentations and award without discussions. The second proposed rule text on oral presentations did not refer users to the limits on communications set forth elsewhere in the rule. Public comments expressed concerns that the oral presentations might be detrimental to small businesses because, depending on the stage of the acquisition, the atmosphere of oral presentations could be conducive to inappropriate exchanges of information between selected offerors and the Government. We revised the final rule to help users of this technique understand the limits on exchanges of information during the conduct of oral presentations.