Our **previous article** was about various attempts to get contracting officers to communicate with industry. We noted that the attempts had a fairly long pedigree, reaching back at least five years to the efforts of Dan Gordon, then OFPP Administrator. We concluded that if Mr. Gordon's efforts were ineffective, it was doubtful that revising the FAR at the direction of Congress was going to be any more effective.

We shared the article with a couple of folks we know, including Vern Edwards. Vern had some thoughts of his own that he was kind enough to share and to give permission for us to document in this follow-on article. In our 15-minute-plus discussion, it became clear that we agreed on all points. Indeed, Vern's thoughts echoed the article that we *intended* to write, before we got caught up in the idea of an acquisition leadership that kept doing the same thing over and over while expecting different results—and an acquisition workforce that had learned to ignore leadership direction.

Those thoughts:

1.

Vern noted that the original Dan Gordon Memo was vague and offered little in the way of concrete direction. It's tough to get people to follow your direction when it's not specific. It's tough to determine whether or not your direction is being followed when you aren't measuring any results. Further, Vern noted that the original focus seemed to be on market research, to get contracting officers to perform better market research by actually communicating with the industrial base. That is a different emphasis than having COs perform better communications (and/or discussions) with bidders during the solicitation and evaluation phase of a procurement. (More on this point in a bit.)

2.

He also noted that there are many good and valid reasons why a contracting officer would be reluctant to have open communication with industry.

1.

First and foremost among those reasons was a lack of time. Vern stated (and we agree) that the majority of COs are overworked and stressed with the intricacies of making the broken Federal acquisition system work. They simply do not have time to meet with and/or chat with

every potential bidder. They don't have time to explain the basics of Federal procurement to companies that want to enter the Federal marketplace, but don't know how. (Plus that's not their job, anyway.) Lack of time and an overwhelming workload keep most COs from communicating with industry.

2.

The current acquisition system is rife with lawyers scrutinizing every step of an acquisition. There are internal lawyers as well as external lawyers. Every one of them is looking to criticize a CO's decisions. Every disappointed bidder is looking to find grounds for a protest. In such an environment, everything a CO says can and will be used against them. Vern pointed to the published answers to questions submitted by potential bidders after reading solicitations as a good example of how COs and lawyers act together to say as little as possible in order to minimize grounds for a bid protest. Much better, in Vern's view, to say the minimum required and avoid legal entanglements.

3.

COs are afraid of misleading bidders. According to Vern, requirements are changing at a furious rate throughout the acquisition cycle, often right up to the issuance of a formal solicitation. Vern invited me to look at FedBizOpps and see all the solicitation amendments, changing requirements after issuance of the solicitation and right up to the proposal deadlines. Vern noted that COs are afraid that what they say will be "overcome by events" and might end up being grounds for a bid protest.

We both agreed that the recent proposed FAR revision perpetuates the problems with the Dan Gordon OFPP Memo and does nothing to address the points raised above. In addition, Vern noted some real concerns with the proposed rule. For clarity, let's quote the proposed FAR verbiage:

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. Government acquisition personnel are permitted and encouraged to engage in responsible and constructive exchanges with industry as part of market research (see 10.002), so long as those exchanges are consistent with existing laws, regulations, and promote a fair competitive environment.

Vern noted that the term “communicate” has a very specific meaning in the FAR (see 15.306), which is—“communications are exchanges, between the Government and offerors, after receipt of proposals, leading to establishment of the competitive range.” Is that what is meant by the proposed revision to FAR 1.102-2? Neither Vern nor I thought so, yet that is what the rule-drafters came up with. They are supposed to know this stuff, but apparently they didn’t see any issues with using a very specific term of art in a different manner elsewhere in the FAR. And they can’t blame Congress for the misstep, because Congress used the correct term (“exchanges”) in the 2016 NDAA. It’s just bad rule-making.

Another potential problem in the proposed rule is the use of the phrases “the commercial sector” and “the commercial marketplace”. Those phrases might be interpreted to mean that the direction only applies to acquisitions of commercial items, rather than to a basic business practice that applies to all acquisitions. This possible interpretation is reinforced by the fact that the proposed revision also adds some language just after the part we quoted above—“The Government will maximize its use of commercial products and services in meeting Government requirements.” Truly, when you add both parts of the proposed rule together it would be entirely reasonable to interpret the new “performance standards” to apply only to acquisitions of commercial items. Neither Vern nor I thought that was the intent of the rule-drafters. Again: bad rule-making.

In addition, the proposed rule suffers from all the defects of the Dan Gordon OFPP Memo. It lacks any way to measure compliance. Because there’s no means of measuring compliance, there’s no accountability for non-compliance. Speaking only for Apogee Consulting, Inc. (and not for Vern), we lack any confidence that COs will change the habits of a lifetime when there is no “stick” to be applied for continuing with the status quo. This is especially true given the impediments to open communication cited by Vern, above. The proposed FAR rule is window-dressing; nothing more.

The proposed rule also suffers from vagueness. Where in the acquisition cycle is it supposed to apply? As noted above, Vern thought the original Gordon Memo applied to market research and not to exchanges with offerors before or after issuance of a solicitation. The same lack of specificity is found in this proposed rule.

And the rule-drafters seem to openly acknowledge the aimlessness of the rule. In Section III of the Federal Register notice, the following language is found—

The Councils specifically request information regarding the following:

-

Which phase(s) of the Federal acquisition process—*i.e.,* acquisition planning/market research; solicitation/award; post award—would benefit from more exchanges with industry and what specific policies or procedures would enhance communication during these phases?

-

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?

-

Might it be beneficial to encourage, or require, contracting officers to conduct discussions with offerors after establishing the competitive range for contracts of a high dollar threshold? If so, what would be the appropriate dollar threshold?

Thus, the rule-drafters are quite open about the vagueness of the proposed rule and they are asking for public input to help them out. As always, you can submit comments and suggestions, and perhaps this time the rule-makers might actually listen. It could happen!

Here's **another link** to the Federal Register notice. If you want to submit comments, follow the link and you can find all the details, including deadlines.

Finally, we want to wrap up this article the way we originally intended to wrap up the prior article. We wanted to offer a word of advice to individuals and companies who believe that COs need to talk more.

Don't.

Vern and I agreed that there are basically two types of folks who want to bend a CO's ear: (1) people who know their way around and have a very specific question or issue that they'd like to resolve informally, without going through the disputes route, and (2) people without a clue (PWACs). PWACS don't know what they want, they don't know what the COs can do for them, and they have some strange notion that building a relationship with an individual CO can somehow help them win government work. They don't have any agenda; instead, they want to meet in person and get a primer on Government Contracting 101.

If you are a PWAC, then don't. It's a waste of the CO's time and it's a waste of your time. If you want a primer, go attend a seminar. Hire a consultant. Visit your local PTAC. (And if you don't know what a PTAC is, that's *prima facie* evidence that you are a PWAC.) Attend local industry days sponsored by your local Executive Branch agency and/or military base. Identify the local SBLO and find out about interested bidders' lists. Register in the appropriate databases. In other words, there are many more effective ways of positioning yourself to win Federal business than meeting with an individual CO in order to build a relationship. (By the way, if the CO used any relationship to steer work your way, that would be a very big problem for the CO and, perhaps, for you as well.)

So don't.

Thanks again to Vern for the typically trenchant discussion. You need to know that we didn't solicit his input. We sent him our original blog article because I thought he'd be interested. He was. He was so interested that he called me the next day and spent nearly 30 minutes discussing the issues. That's the level of his dedication to this field. I hope I represented his thoughts accurately. Any errors are mine.