

Recommendation 86: Encourage greater interaction with industry during market research.

Problem

Market research is the foundation of any successful procurement of products and services, especially commercially available products and services. Numerous statutes and regulations prescribe elements of market research, but thorough market research is often hampered by concerns about the extent to which buying activities can engage in exchanges with industry.

Background

Market research is an important component of any successful procurement in the commercial or defense marketplace. In 1994, Congress enacted FASA¹ which included landmark language in Title VIII regarding acquisition of commercial products and services, placing even greater emphasis on the need for and proper conduct of market research. Section 8104, Preference for Acquisition of Commercial Items, included a section on market research that was codified at 41 U.S.C. § 3307 and 10 U.S.C. § 2377.

Market research serves as the foundation for many important procuring activity decisions, such as the availability of commercial products or services to meet an agency's need, the appropriate procurement method, the likelihood of competition, appropriate terms and conditions, pricing, and more.

Section 887 of the FY 2016 NDAA has specific language on exchanges between government and industry personnel as part of market research. FAR case 2016-005, implementing Section 887, is currently in the proposed rule stage and proposes to amend the existing language at FAR 1.102-2 Performance Standards.² FAR 1-102-2(a)(4) currently reads as follows:

(4) 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. The Government will maximize its use of commercial products and services in meeting Government requirements.

The proposed rule would simply add a sentence to address the requirement of Section 887:

(4) 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. ~~The Government will maximize its use of commercial products and services in meeting Government requirements.~~ 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.

¹ Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (1994).

² FAR: Effective Communication Between Government and Industry, FAR Case 2016-005, Fed. Reg. Volume 81, Issue 229 (Nov. 29, 2016).

There are several issues with this proposed rule. The proposed new sentence appears in FAR Part 1, *Federal Acquisition Regulations System*. It would be unlikely for contracting officers to refer to Part 1 for guidance on how to conduct exchanges with industry. It would be particularly unlikely for other members of the acquisition team other than contracting officers to even be aware of this guidance in Part 1. This approach satisfies only the letter, but not the spirit, of Section 887 by literally repeating the language of Section 887, with no emphasis on the desirability and appropriateness of conducting such exchanges. The added language in the law expends almost as many words warning the acquisition team about the dangers of conducting exchanges with industry (“so long as those exchanges are consistent with existing laws, regulations, and promote a fair competitive environment”) as it does declaring that it is *permitted and encouraged*. Finally, having warned the acquisition team about the dangers of exchanges, it provides no guidance on their proper conduct.

Exchanges between government and industry are essential to creating knowledgeable buyers and establishing well-founded requirements. Much more than the proposed one sentence warning is in order.

Exchanges can occur under four circumstances. The proper distinction among these circumstances is critically important because conducting exchanges is different in each circumstance with the latter two being carefully controlled by the contracting officer.

- On-going exchanges with industry that occur as part of government acquisition teams’ responsibility to remain attuned to the current capabilities and future trends in their assigned area of responsibility for the procurement of products or services. Government acquisition teams, requirements teams, or even end users may conduct this type of market research for broadly defined categories of products or services, or for specific inquiries focused on the ability of the current marketplace to satisfy particular needs. They may conduct this kind of research by engaging in industry days, participating in industry technical and professional association forums, reviewing professional literature, attending product demonstrations, or holding one-on-one meetings for the general purpose of becoming more knowledgeable buyers (see FAR 10.001). These types of exchanges may, but are not required to, involve contracting officers (although in the Section 809 Panel’s vision of the dynamic marketplace, contracting officers should be *highly encouraged*, if not *required*, to become more knowledgeable of the products, services and markets that are available to satisfy customers’ needs).
- Exchanges with industry conducted during the market research phase of a *particular* procurement prior to issuance of a solicitation for a product or service. For these exchanges, the government has a specific need identified and is further refining its understanding of market place capabilities to satisfy that need through one-on-one exchanges with potential offerors or those interested in subcontract opportunities (see FAR 10.001). There is no requirement to regulate such industry exchanges through contracting or legal staffs; however, the best outcomes are achieved when the *entire* acquisition team is involved in open, flexible dialog with industry. It is not necessary to have the *same* communication with each potential offeror to have fair communication. The type of questions and answers will vary from offeror to offeror, as each firm tries to capitalize on its innovations and unique strengths. The government does not have to disclose the content of exchanges with one firm to all interested firms to maintain

transparency. It is likely that truly innovative approaches will involve proprietary information that offerors would want protected, and the government may give assurances it will be. Only if an exchange in this phase results in the government changing its requirement does the agency have to provide the reason for such a change to all potential offerors.

- Exchanges with industry subsequent to the issuance of a government solicitation and prior to the government's receipt of proposals or quotations are tightly regulated. (See FAR 15.201.)
- Exchanges with industry subsequent to the receipt of proposals and prior to the subsequent contract award are also tightly regulated. (See FAR 15.306.)

Discussion

The importance of market research to DoD is clear. Exchanges between government and industry are an essential component of market research. The government cannot shut itself off from these necessary exchanges by policy, fear, or lack of training, and then expect to emerge as *knowledgeable* buyers when a specific requirement is identified. This assertion is particularly true in the market for commercial products and services. Market research is a continuous and engaged activity common and essential to any entity's procurement of products or services.

Comparisons are frequently made between government procurement and commercial industry procurement. In industry, buyers tend to be more specialized than their government counterparts. Frequently, buyers in commercial businesses focus on a particular industry, commodity, product, or service and conduct continuous market research to ensure they are best positioned to meet their business's needs in that specialized area. This continuous research is key to becoming a *knowledgeable* buyer and necessarily includes exchanges with others in that specialized market.

Government acquisition personnel are hesitant to engage in the kind of one-on-one exchanges common in the commercial marketplace and encouraged by Congress. The reason for this reluctance is unclear, but anecdotal evidence points to concerns that such exchanges are either inappropriate or will eventually lead to a protest.

The effect of this reluctance to engage in market research is apparent in a recent Government Accountability Office (GAO) report that focused on the steps DoD is taking to better engage with companies that do not typically do business with DoD.³ GAO identified six challenges that deter these companies from selling their products and services to DoD, one of which was the "inexperienced DoD contracting workforce." General inexperience, coupled with inexperience with the details of a particular product or service and how it is typically procured in the marketplace can lead to a variety of issues later in the process. Market research is key to overcoming this experience in a given marketplace for products or services.

³ GAO, *DoD is Taking Steps to Address Challenges Faced by Certain Companies*, GAO-17-644, accessed October 25, 2018, <https://www.gao.gov/assets/690/686012.pdf>.

Conclusions

Policy guidance is helpful, but not widely used. OFPP took an important step in addressing these questions through a series of *myth-busting* memoranda.⁴ These memoranda, though widely applauded by both government and industry, appear to have received little attention beyond the Washington, D.C. area and higher headquarter staffs.⁵ The proposed rule implementing the direction in Section 887 of the FY 2016 NDAA is also useful, but it is unlikely to draw much attention in a little-read section of FAR Part 1. Despite this laudable guidance, contracting officers remain reluctant to talk to industry as part of market research, especially in one-on-one meetings. Important elements of the *myth-buster* memorandum related to market research should be incorporated into a new FAR Subpart 10.1, Exchanges With Industry During Market Research.⁶

Market research is not well defined for the broad purpose of conducting acquisition. Market research is defined in Section 855 of the FY 2016 NDAA, for purposes of that section only. Market research is also defined in 10 U.S.C. 2410n, applicable only to that section on products of federal prison industries. FAR Part 2, Definitions, defines market research for the FAR, but does so very narrowly and in a manner that suggests market research can be conducted as a solicitation-specific activity without exchanges or interaction with *knowledgeable* experts in the government and industry. A more inclusive definition of market research is needed at 41 U.S.C. § 117, 10 U.S.C. § 2302, and FAR 2.101.

The current FAR guidance does not adequately make distinctions in industry exchanges.⁷ FAR Part 10, Market Research, lays out the responsibilities and steps to be taken in conducting market research. It does not distinguish *market research* and related exchanges with industry from exchanges conducted after issuance of solicitations and receipt of proposals. This important distinction is not well described in the FAR. The FAR also does not adequately address the concerns contracting officers frequently express with regard to the timing and appropriateness of one-on-one exchanges with industry.

FAR 15.201, Exchanges with Industry Before Receipt of Proposals, confuses the important distinction between exchanges before and after the issuance of the formal solicitation. Further confusing the matter, much of 15.201 duplicates the list of “techniques to promote early exchanges of information with industry” already found in FAR 10.001 and 10.002 and related to exchanges conducted before release of a solicitation. FAR 15.201(f) compounds the confusion by beginning with a sentence about the release of general information, followed by a sentence focused on control of exchanges after release of the solicitation, and a subsequent sentence pertaining to general release of information to the public.

⁴ OFPP Memorandum, “Myth-Busting: Addressing Misconceptions to Improve Communication with Industry During the Acquisition Process,” February 2, 2011, accessed October 25, 2018, <https://interact.gsa.gov/document/%E2%80%9Cmyth-busting%E2%80%9D-addressing-misconceptions-improve-communication-industry-during-acquisition->. Two subsequent memoranda dated May 7, 2012, and January 5, 2017, addressed related policy.

⁵ Nash & Cibinic Report, “Enhancing Communications During the Acquisition Process: Proposing the Wrong Fix,” 31 No. 1 (2015).

⁶ The recommended language in FAR Subpart 10.1 draws heavily on OFPP Memorandum, “Myth-Busting: Addressing Misconceptions to Improve Communication with Industry During the Acquisition Process,” February 2, 2011, accessed October 25, 2018, <https://interact.gsa.gov/document/%E2%80%9Cmyth-busting%E2%80%9D-addressing-misconceptions-improve-communication-industry-during-acquisition->.

⁷ Nash & Cibinic Report, “Enhancing Communications During the Acquisition Process: Proposing the Wrong Fix,” 31 No. 1 (2015).

Clear distinctions are needed among exchanges conducted prior to release of a solicitation (FAR Part 10), exchanges after issuance of a solicitation (FAR 15.201), and exchanges after receipt of proposals (FAR 15.306).

Market research information in Part 15 is misplaced. Market research applies to all types of procurement methods, including commercial products and services (Part 12), micro-purchases and simplified acquisitions (Part 13), sealed bidding (Part 14), and contracting by negotiation (Part 15). Including policies on market research in Part 15, speaks too narrowly to the importance of market research to all these methods.

FAR 15.201 should be focused on exchanges after issuance of a solicitation and all market research information should be placed in FAR Part 10.

Implementation

Legislative Branch

- Revise Title 41 at 41 U.S.C. § 117, to define *market research* to include exchanges among knowledgeable government and industry personnel.
- Revise Title 10 to reference the definition of market research at 41 U.S.C. § 117.

Executive Branch

- Revise FAR Part 2.101, Definitions, to incorporate the statutory definition of market research.
- Revise FAR Part 10, to add Subpart 10.1, Exchanges with Industry During Market Research.
- Revise FAR Part 15.2 and 15.201 to eliminate duplication with FAR 10.001 and to clarify the distinction between exchanges with industry during market research, after issuance of a solicitation, and after receipt of proposals.

Implications for Other Agencies

- These recommended changes to the U.S. Code and FAR will affect all government agencies that use the FAR. This widespread applicability is necessary, appropriate, and aligns with the existing governmentwide application of the OFPP policies referenced in this recommendation.