

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.

RECOMMENDED REPORT LANGUAGE

SEC. ____. DEFINITION OF MARKET RESEARCH FOR PURPOSES OF FEDERAL ACQUISITION STATUTES.

This section would amend Chapter I, title 41, United States Code, by inserting a new section 117 to establish a definition for market research, and make conforming amendments to related sections in Title 10, United States Code. This definition would clearly include exchanges with knowledgeable individuals in both government and industry as being within the scope of market research.

The committee notes that Congress has, on several occasions, emphasized the importance of market research to the success of procurements. Most recently, section 855 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92) addressed market research and encompassed, for purposes of section 855, a definition of market research that includes government contact with knowledgeable individuals in government and industry regarding market capabilities. The committee is aware that acquisition personnel often have been hesitant to engage in exchanges with industry as part of market research because of lack of training or concerns about the proper extent to which such exchanges may occur at the buying activities, as well as fear of a protest. The market research definition would make it clear that it is both appropriate and necessary for the government to engage with industry to meet the needs of the Department of Defense. The committee notes that such emphasis on market research is appropriate as it serves as the foundation for many important procuring activity decisions such as the availability of commercial products or services to meet the agency's need; the appropriate procurement method; the likelihood of competition; and appropriate terms and conditions, and pricing.

1 **SEC. ____ . DEFINITION OF MARKET RESEARCH FOR PURPOSES OF FEDERAL**
2 **ACQUISITION STATUTES.**

3 (a) TITLE 41.—

4 (1) IN GENERAL.—Chapter 1 of title 41, United States Code, is amended by
5 inserting after section 116 the following new section:

6 **“§ 117. Market research**

7 “In this subtitle, the term ‘market research’ means obtaining information about
8 capabilities, products, and services available in the private sector through a variety of means,
9 which may include—

10 “(1) contacting knowledgeable individuals in government and industry;

11 “(2) interactive communication among industry, acquisition personnel, and
12 customers; and

13 “(3) interchange meetings or pre-solicitation conferences with potential offerors.”.

14 (2) CLERICAL AMENDMENT.—The table of sections at the beginning of such
15 chapter is amended by inserting after the item relating to section 116 the following new
16 item:

“117. Market research.”.

17 (b) TITLE 10.—Title 10, United States Code, is amended as follows:

18 (1) CHAPTER 137.—Section 2302(3) is amended by adding at the end following
19 new subparagraph:

20 “(M) The term ‘market research’.”.

21 (2) SECTION 2222.—Section 2222(i) is amended by adding at the end following
22 new paragraph:

1 “(12) MARKET RESEARCH.—The term ‘market research’ has the meaning given
2 that term in section 117 of title 41.”.

3 (3) SECTION 2366a.—Section 2366a(d) is amended by adding at the end following
4 new paragraph:

5 “(11) MARKET RESEARCH.—The term ‘market research’ has the meaning given
6 that term in section 117 of title 41.”.

7 (4) SECTION 2366b.—Section 2366b(g) is amended by adding at the end following new
8 paragraph:

9 “(9) MARKET RESEARCH.—The term ‘market research’ has the meaning given that
10 term in section 117 of title 41.”.

11 (5) CHAPTER 140.—Section 2376 is amended by adding at the end following new
12 paragraph:

13 “(4) The term ‘market research’ has the meaning given that term in section 117 of
14 title 41.”.

15 (6) SECTION 2431a.—Section 2431a(c)(2)(E)(iii) is amended by inserting “(as
16 defined in section 117 of title 41)” after “market research”.

17 (7) SECTION 2548.—Section 2548(b)(2)(A)(iii) is amended by inserting “(as
18 defined in section 117 of title 41)” after “market research”.

RECOMMENDED REGULATORY REVISIONS

FAR Subpart 2.101, Definition

“Market research” means ~~collecting and analyzing information about capabilities within the market to satisfy agency needs~~ obtaining information about capabilities, products and services available in the private sector through a variety of means, which may include contacting knowledgeable individuals in government and industry; interactive communication among industry, acquisition personnel, and customers; and interchange meetings or pre-solicitation conferences with potential offerors.

FAR – Part 10 Market Research

Subpart 10.1 – Exchanges with Industry During Market Research

(a) The purpose of exchanging information is to improve the understanding of Government requirements and industry capabilities, thereby allowing potential offerors to judge whether or how they can satisfy the Government’s requirements and enhancing the Government’s ability to obtain quality supplies and services, including construction, at reasonable prices, and increase efficiency in proposal preparation, proposal evaluation, negotiation, and contract award.

(b) As part of the continuous process of market research, agencies are encouraged to promote early exchanges of information about general government needs and future acquisitions. Such exchanges are particularly useful for understanding the commercial market place for a given product, service or technology. 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 a more knowledgeable buyer (See FAR 10.001). These types of exchanges may, but aren’t required to, involve contracting officers.

(c) For specific acquisitions, an early exchange of information among industry and the program manager, contracting officer, and other participants can identify and resolve concerns regarding matters such as the feasibility of the requirement, the acquisition strategy, proposed contract type; key terms and conditions; acquisition planning schedules; including performance requirements, statements of work; the suitability of the proposal instructions and evaluation criteria, including the approach for assessing past performance information; the availability of reference documents; and any other industry concerns or questions.

(d) Government officials – including the program manager, subject matter technical experts, users, and/or contracting officer – may meet with potential offerors to exchange general information and conduct market research related to an acquisition. Exchanges of information are encouraged with interested parties during the pre-solicitation process, ending with issuance of the solicitation. To make it clear that one-on-one communication is available to all potential offerors, the contracting officer should consider publicizing the Government’s interest in meeting with potential offerors on a one-on-one basis as part of the agency’s market research.

(e) There is no requirement that the meetings include all possible offerors, nor is there a prohibition on one-on-one meetings. Government ethics rules and Competition in Contracting Act, (10 U.S.C. § 2304), prohibit preferential treatment of one vendor over another. Any information that is shared in a meeting that could directly affect proposal preparation must be shared in a timely manner with all potential offerors to avoid providing any offeror with an unfair advantage. Where vendor interaction is expected to include contract terms and conditions, any one-on-one meetings should include, or at a minimum be coordinated with, the contracting officer.

(f) Industry involvement in pre-solicitation discussions should not lead to exclusion resulting from organizational conflict of interest (OCI) concerns. While a vendor who, as part of contract performance, drafts the specification for a future procurement will almost certainly be barred by OCI rules from competing for that future procurement, pre-solicitation communications are generally less structured, less binding, and much less problematic. In the presolicitation context, the government is not looking for impartial advice from one source but is instead looking for a variety of options from a variety of sources, each one understandably, and reasonably, attempting to demonstrate the value of its own approach. These marketing efforts, in themselves, do not raise OCI concerns.

(g) Agency personnel have a responsibility to protect any information that is received in confidence from a potential offeror. While the protections of the Procurement Integrity Act do not apply prior to source selection, other protections remain. In many cases, the Trade Secrets Act (18 U.S.C. §1905) will prohibit Federal employees from divulging protected information, including confidential commercial or financial data, trade secrets, operations, processes, or style of work. Also, the Freedom of Information Act (FOIA) allows agencies to protect commercial or financial information that is privileged or confidential. In cases where a vendor is concerned that existing protections are insufficient and engaging in pre-solicitation communication will be beneficial, agencies should consider the use of appropriate non-disclosure agreements (NDAs) to ensure that proprietary information will be kept from potential competitors.

(h) Disclosure is an important tool that ensures public trust in our contracting process, but it should not be an impediment to meeting with contractors and is not required in every circumstance. In the case of meetings where registered lobbyists are employed, contractors are required to track the costs and activities of their lobbying activities, as required by FAR Part 31, but that obligation places the disclosure burden on the contractor and does not require the

government to take any steps. Where registered lobbyists are not involved, additional communication with contractors will not involve an additional disclosure burden, though conduct of all communications should be consistent with the principles of fairness and accountability.

(i) After issuance of the solicitation, the contracting officer shall be the focal point for exchanges with offerors or potential offerors. See FAR 15.201

(j) After receipt of proposals, the contracting officer shall be the focal point for exchanges with offerors. See FAR 15.306

FAR Part 15 – Contracting by Negotiation

Subpart 15.2 – Solicitation and Receipt of Proposals and Information

15.200 – Scope of Subpart

This subpart prescribes policies and procedures for –

- (a) Exchanging information with industry ~~prior to receipt of proposals~~ after issuance of a solicitation;
- (b) Preparing and issuing requests for proposals (RFPs) and requests for information (RFI); and
- (c) Receiving proposals and information.

15.201 -- Exchanges with Industry before receipt of proposals after Issuance of the Solicitation

~~(a) Exchanges of information among all interested parties, from the earliest identification of a requirement through issuance of the solicitation receipt of proposals, are encouraged. Any exchange of information must be consistent with procurement integrity requirements (see [3.104](#)). Interested parties include potential offerors, end users, Government acquisition and supporting personnel, and others involved in the conduct or outcome of the acquisition.~~

~~(b) The purpose of exchanging information is to improve the understanding of Government requirements and industry capabilities, thereby allowing potential offerors to judge whether or how they can satisfy the Government's requirements, and enhancing the Government's ability to obtain quality supplies and services, including construction, at reasonable prices, and increase efficiency in proposal preparation, proposal evaluation, negotiation, and contract award.~~

~~(c) Agencies are encouraged to promote early exchanges of information about future acquisitions. An early exchange of information among industry and the program manager, contracting officer, and other participants in the acquisition process can identify and resolve concerns regarding the acquisition strategy, including proposed contract type, terms and conditions, and acquisition planning schedules; the feasibility of the requirement, including performance requirements, statements of work, and data requirements; the suitability of the proposal instructions and evaluation criteria, including the approach for assessing past performance information; the availability of reference documents; and any other industry concerns or questions. Some techniques to promote early exchanges of information are—~~

~~(1) Industry or small business conferences;~~

~~(2) Public hearings;~~

~~(3) Market research, as described in [Part 10](#);~~

~~(4) One-on-one meetings with potential offerors (any that are substantially involved with potential contract terms and conditions should include the contracting officer; also see paragraph (f) of this section regarding restrictions on disclosure of information);~~

~~(5) Presolicitation notices;~~

~~(6) Draft RFPs;~~

~~(7) RFIs;~~

~~(8) Presolicitation or preproposal conferences; and~~

~~(9) Site visits.~~

~~(d) The special notices of procurement matters at [5.205\(c\)](#), or electronic notices, may be used to publicize the Government's requirement or solicit information from industry.~~

~~(e) RFIs may be used when the Government does not presently intend to award a contract, but wants to obtain price, delivery, other market information, or capabilities for planning purposes. Responses to these notices are not offers and cannot be accepted by the Government to form a binding contract. There is no required format for RFIs.~~

~~(f) General information about agency mission needs and future requirements may be disclosed at any time. (a) After release of the solicitation, the contracting officer must be the focal point of any exchange with potential offerors. When specific information about a proposed acquisition that would be necessary for the preparation of proposals is disclosed to one or more potential offerors, that information must be made available to the public as soon as practicable, but no later than the next general release of information, in order to avoid creating an unfair~~

competitive advantage. Information provided to a potential offeror in response to its request must not be disclosed to others if doing so would reveal the potential offeror's confidential business strategy, and is protected under 3.104 or Subpart 24.2. When conducting a ~~presolicitation or~~ preproposal conference, material distributed at the conference should be made available to all potential offerors, upon request.

(b) See FAR 10.1 regarding exchanges with industry during market research. See FAR 15.306 regarding exchanges with offerors after receipt of proposals.