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## Current Procedures for Performing Meaningful Discussions in Federal Negotiated Procurements Are Uneconomical, Inefficient, and Ineffective - A Proposal for Improvement.

Howard L. Speight

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**Current Procedures for Performing Meaningful Discussions in  
Federal Negotiated Procurements Are Uneconomical,  
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**Howard L. Speight**

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**I. INTRODUCTION**

The United States government allocates a significant portion of its annual budget toward procurement of goods and services through contracts with private entities.<sup>1</sup> To enhance this procurement process, the government has developed specific regulations to control the negotiation, formation, and per-

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1. OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT FISCAL YEAR 1990, at 10-30 (1989). The 1990 procurement budget for the Department of Defense alone is \$78 billion. *Id.* The total federal budget authorized for fiscal year 1990 is \$1.33 trillion. *Id.* at 10-14.

formance of its procurement contracts.<sup>2</sup> The goals of these regulations are to encourage economy, efficiency, and effectiveness in government agency procurements and the procurement process.<sup>3</sup> To facilitate these goals, the procurement regulations authorize three methods for acquiring goods and services.<sup>4</sup> These methods are sealed bidding,<sup>5</sup> two-step sealed bidding,<sup>6</sup> and negotiated procurements.<sup>7</sup> In sealed bid procurements, the government agency determines which bidder will receive a contract award based on bids submitted in sealed envelopes.<sup>8</sup> Two-step sealed bid procurements and negotiated procurements differ significantly from sealed bidding because they provide the contracting officer, the government employee responsible for the procurement, with the opportunity to have "meaningful discussions" with bidders.<sup>9</sup>

Meaningful discussions are meetings between the contracting officer and bidders who submit unacceptable but potentially salvageable proposals.<sup>10</sup>

2. *See generally* Federal Acquisition Regulation, 48 C.F.R. §§ 1.00 to 53.303-WH-347 (1988)(regulations governing federal procurements).

3. 41 U.S.C. § 401 (Supp. V 1987)(congressional procurement policies); *see also* 48 C.F.R. § 2.101 (1988). The Federal Acquisition Regulation (FAR) defines acquisition, which is synonymous with procurement, as the act of acquiring services or supplies by contract using appropriated funds. 48 C.F.R. § 2.01. Acquisitions and, therefore, procurements begin when the government agency defines its needs and continue until the contract is completed or terminated. *Id.*

4. *See id.* § 6.102(a)-(c). The authorized procurement methods are sealed bids, competitive procedures (negotiated procurements), and a combination of competitive and sealed bid procedures (two-step sealed bid). *Id.*

5. *See id.* §§ 14.000-.503-2 (sealed bid procurement regulations). In sealed bid procurements, the bids are opened and awarded publicly. *Id.* § 14.101.

6. *See id.* § 14.5 (two-step sealed bid procurement regulations). Two-step sealed bid procurements are most useful when complex technical specifications are involved. *Id.* § 14.501(a); *see also id.* § 14.503-1(f)(1). Because of complex technical specifications, the two step process allows discussions between bidder and contracting officer to clarify and supplement the bidder's proposals. *Id.*

7. *See id.* §§ 15.000-.1005 (negotiated procurement regulations). Negotiated procurements allow bargaining between the bidders and the government agency on price as well as technical issues. *Id.* § 15.102.

8. *See id.* § 14.101(c),(e) (procedure for submission of bids and award in sealed bid procurements). Bidders interested in competing for the contract must submit sealed bids on or before the stated deadline to the contracting officer. *Id.* § 14.101(c). The government agency awards the contract based on price and factors related to price contained within the sealed bids. *Id.* § 14.101(e). Price-related factors include transportation costs, changes requested by the bidders, the possibility of making multiple awards, taxes, and "Buy America" considerations. *Id.* § 14.201-8(a)-(e).

9. *See id.* § 14.503-1(f)(1) (authorizing discussions in two-step sealed bid procurements); *id.* § 15.610 (authorizing discussions in negotiated bidding).

10. *See id.* § 14.503-1(f)(1) (entities with whom discussions may be held). The contracting officer holds discussions with bidders whose bids are unacceptable but may be made acceptable through discussions. *Id.*; *see also id.* §§ 15.610(b) (requiring discussions in negoti-

From the government's standpoint, meaningful discussions increase competition.<sup>11</sup> Within certain limitations, the contracting officer can discuss the deficiencies in the bidder's proposal that, unless corrected, will prevent him from winning the contract.<sup>12</sup> Using information from these discussions, the bidder submits a new proposal correcting the deficiencies identified during the discussions.<sup>13</sup> In theory, these discussions assist the bidder in improving his proposal, resulting in an increased number of bidders and a corresponding enhancement in competition.<sup>14</sup>

In practice, however, meaningful discussions are an ineffective means of improving competition. First, other government regulations and procurement practices restrict competition by limiting the number of bidders for a contract.<sup>15</sup> Second, the scope of discussions is limited<sup>16</sup> and hidden costs are associated with the process.<sup>17</sup> These factors, along with the lack of motivation to solve procurement problems outside meaningful discussions, tend to defeat the regulation's goals of economy, efficiency, and effectiveness in government procurement.<sup>18</sup> This comment proposes that procurement goals could be better achieved by: (1) eliminating meaningful discussions; (2) reinterpreting the regulations to allow technical transfusions<sup>19</sup> to all bidders; (3) removing the current limitations on the contents of the discussions; and/or (4) terminating the reimbursement of contractor bid and proposal expenses.

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ated procurements with all bidders in competitive range). The competitive range is determined by the contracting officer using price and other evaluation factors related to the solicitation. *Id.* §§ 15.610(a), 406-5(c). The evaluation factors are those issues, including cost, quality and value to the government, that the contracting officer will consider when awarding the contract. *Id.*

11. *See id.* § 14.503-1(f)(1). The contracting officer is required to hold discussions if the first step of a two-step sealed bid procurement does not result in a sufficient number of bidders to ensure acceptable price competition in the second round. *Id.*

12. *See id.* § 15.610(c),(d). The contracting officer is required to discuss deficiencies, uncertainties, and mistakes in the proposals with the respective bidders. *See id.* § 15.610(c). In these discussions, the contracting officer may not disclose technical information or prices contained in other bidders' proposals. *Id.* § 15.610(d).

13. *Id.* § 15.610(c)(5). The contracting officer should provide bidders with a reasonable opportunity to correct any errors in their proposals. *Id.*

14. *See Pyatt, Procurement Competition at Work: The Navy's Experience*, 6 YALE J. ON REG. 319, 321-22 (1989)(competition improved when more than one bidder present).

15. *See* 48 C.F.R. §§ 6.302-.302-7 (1988)(sometimes less than full and open competition required).

16. *See id.* § 15.610(d). The contracting officer may not engage in technical leveling, technical transfusion, or auctioning techniques because unfairness may result. *Id.*

17. *See id.* § 31.205-18(c)(1)(i). The government pays bidder Independent Research and Development (IR & D) expenses and Bid and Proposal expenses up to a negotiated maximum. *Id.*

18. *See* 41 U.S.C. § 401 (Supp. V 1987)(congressional procurement policies).

19. *See* 48 C.F.R. § 15.610(d)(2). Technical transfusion occurs when the government discloses technical information from one bidder's proposal to another bidder. *Id.*

## II. POLICY CONSIDERATIONS

Contracts with the United States Government were first used in 1781 when General Washington purchased supplies for the Continental Army.<sup>20</sup> Revolutionary War procurements were publicized through newspaper advertisements urging interested bidders to respond with sealed bids on or before a specific date.<sup>21</sup> The advertisements stated that the bidder proposing the package most beneficial to the government would win the contract.<sup>22</sup> Additionally, the advertisements stated that only responsible bidders would be considered, and that the lowest price would not necessarily win the competition.<sup>23</sup>

The Revolutionary War contracts illustrate the relationship between the government and its bidders in a procurement environment. Each government agency outlines contract terms and conditions that protect its own interests rather than protecting the bidders' rights.<sup>24</sup> Normally, the government is perceived as a sovereign whose detached mediation resolves conflicts between its people.<sup>25</sup> When a government agency enters into contracts, however, it is no longer a neutral arbiter. The government's interest lies in limiting its own liability and securing the most beneficial contract.<sup>26</sup> Both of these interests are diametrically opposed to the bidder's interests.<sup>27</sup>

The Revolutionary War contracts also illustrate the government's use of regulations to achieve the most beneficial contract through advertisements specifying responsible bidders.<sup>28</sup> The advertisements implied a governmental need for superior products from the responsible bidders because they stated that proposals would be evaluated on considerations other than

20. J. NAGLE, *FEDERAL PROCUREMENT REGULATIONS, POLICY, PRACTICE AND PROCEDURES* 14 (1981). The first government contract was to supply food for the troops in Philadelphia beginning in 1782. *Id.*

21. *Id.* at 16. The bids were also required to disclose the maximum term and the lowest price at which the bidder would provide the supplies. *Id.*

22. *Id.* (discussing bid requirements and deadlines for submission during Revolutionary War).

23. *Id.* However, bidders were never rejected solely on the basis of irresponsibility. *Id.*

24. *Id.* at 5. Analyzing government contracts and procurement regulations using the administrative law analysis normally applied to the government has created confusion. *Id.* The confusion stems from the difference in the government's role when acting as a purchaser of goods and services. *Id.* When the government is acting as a purchaser, it should be treated as any other party in the marketplace rather than as the sovereign. *See id.*

25. *Id.* The Interstate Commerce Commission and the Federal Communications Commission are examples of the government acting in its mediation role. *Id.*

26. *Id.* The government in its contracting role is a "marketplace haggler concerned with limiting its liability and getting the best economic deal possible." *Id.*

27. *Id.*

28. *Id.* at 16. Specifically, the advertisement called for "men of caliber and experience." *Id.*

price.<sup>29</sup> Today, the government continues this tradition in contracting by pursuing economy, efficiency, and effectiveness through the following goals:

(1) the promotion of full and open competition; (2) the establishment of procurement mechanisms that produce goods and services that meet the government's requirements of quality and timeliness at a low, but reasonable cost; (3) the promotion of simple and uniform procurement procedures; (4) the encouragement of participation by small businesses; (5) the development of a professional, competent work force; (6) the elimination of procurement fraud and waste; (7) the elimination of redundant administrative burdens for both contractors and government procurement officials; (8) the promotion of equitable relationships and fair dealings with the private sector; (9) the encouragement of timely payment but only for value received; (10) the use of commercial products where available to meet government needs; (11) the procurement of personal services through hiring rather than through contract; (12) the development of procurement mechanisms that operate in times of war or emergency as well as in times of peace; and (13) the use of procurement specifications which describe government needs in terms of required performance or functions to be performed.<sup>30</sup>

The Office of Federal Procurement Policy (OFPP), part of the Office of Management and Budget (OMB), administers the government-wide endeavor to achieve these goals.<sup>31</sup> The OFPP regulations govern procurement by all government agencies<sup>32</sup> through the Federal Acquisition Regulation (FAR).<sup>33</sup> This regulation applies to all government procurements unless ex-

29. *Id.* The government advertisements stated that the contract would not necessarily be awarded to the bidder with the lowest price. *Id.* If bidder competence and quality of goods and services had not been a consideration, the government's advertisement would have simply stipulated that price alone would determine the winning bidder. *See id.*

30. 41 U.S.C. § 401(1)-(13) (Supp. V 1987). One of the goals, full and open competition, occurs when "all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement." *Id.* § 403(6); *see also* United States v. Thorson Co., 806 F.2d 1061, 1064 (Fed. Cir. 1986). In reality, full and open competition only occurs when all qualified bidders have an opportunity to bid and a sufficient number of bids are received to ensure that the government agency's requirements are fulfilled at the lowest possible price. *Id.*; Abel Converting, Inc. v. United States, 679 F. Supp. 1133, 1139 (D.D.C. 1988)(failure to request bid from current contract holder not full and open competition).

31. 41 U.S.C. § 402. The OFPP was established to oversee government agency procurements and to encourage economy, efficiency, and effectiveness in these procurements. *Id.* § 402(a).

32. *Id.* § 405(d)(2) (Supp. V 1987). The OFPP is responsible for establishing and maintaining government-wide procurement standards. *Id.*

33. 48 C.F.R. § 1.102 (1988). The OFPP developed the FAR to achieve the government's desired objectives of economy, efficiency, and effectiveness in procurements. *See id.*

pressly excluded.<sup>34</sup> Several government agencies, however, have developed their own procurement regulations that implement, and in most cases supplement, the FAR.<sup>35</sup>

### III. METHODS OF CONTRACTING AUTHORIZED BY THE FAR

The FAR authorizes three basic methods through which government agencies contract with private entities.<sup>36</sup> First, the FAR authorizes sealed bidding.<sup>37</sup> Second, the FAR permits government agencies to contract by negotiation when the agency is willing to bargain with the bidders.<sup>38</sup> Third, the FAR provides for two-step sealed bid procurements combining the elements of both sealed bidding and negotiated procurements.<sup>39</sup>

#### A. Sealed Bid Procurements

Government contracting through sealed bidding requires the government agency to obtain competitive bids, to conduct public bid openings, and to make public awards to the winning bidders.<sup>40</sup> Sealed bidding is mandated when: (1) there is sufficient time to go through all of the associated procurement steps;<sup>41</sup> (2) the basis for award will be price or price-related factors;<sup>42</sup> (3) discussions with the bidders concerning their bids are not necessary;<sup>43</sup> and (4) the government reasonably expects more than one sealed bid.<sup>44</sup>

The sealed bidding process begins when a government agency proposes to acquire goods or services.<sup>45</sup> The government agency will prepare an Invita-

34. *Id.* § 1.103. The regulation does not include examples of excluded government procurements and the provision apparently was incorporated in the FAR in anticipation of future exclusions. *See id.*

35. *See id.* §§ 201.101-270.1405 (Department of Defense regulations); *id.* §§ 301.101-.704 (Department of Health and Human Services regulations); *id.* §§ 501.000-.770 (General Services Administration regulation).

36. *Id.* §§ 13.000-15.1005, 34.000-39.002 (outlining methods government agencies must use in procurements).

37. *See id.* §§ 14.000-.503-2 (sealed bidding procurement procedures); *see also* 1B J. MCBRIDE & I. WACHTEL, *GOVERNMENT CONTRACTS* 10.10 to 10.675 (1989)(discussion of procurement by sealed bidding).

38. *See id.* §§ 15.000-.1005 (negotiated bidding procurement procedures); *see also* 1B J. MCBRIDE & I. WACHTEL, *GOVERNMENT CONTRACTS* 9.10 to 9.219 (1989)(discussion of procurement by negotiated bidding).

39. *See* 48 C.F.R. § 14.501 (1988)(two-step sealed bidding is combination of competitive techniques and sealed bid procedures).

40. *Id.* § 14.101.

41. *Id.* § 6.401(a)(1).

42. *Id.* § 6.401(a)(2).

43. *Id.* § 6.401(a)(3).

44. *Id.* § 6.401(a)(4).

45. *See id.* § 2.101.

tion for Bids including contract specifications<sup>46</sup> as well as any contract provisions deemed to be a necessary part of the final contract.<sup>47</sup> The contracting officer mails the Invitation for Bids to prospective bidders who have indicated their willingness to provide the types of goods or services desired.<sup>48</sup> Additionally, the contracting officer advertises the upcoming procurement in the Commerce Business Daily to notify companies not receiving an Invitation for Bids where one may be obtained.<sup>49</sup>

Upon distribution of the Invitation for Bids, the contracting officer is authorized to hold a pre-bid conference to explain any complicated requirements and specifications to potential bidders under the sealed bid procurement.<sup>50</sup> Pre-bid conferences for sealed bid procurements are rare, however, because the FAR requires that the Invitation for Bids be clear and complete, rendering discussions unnecessary.<sup>51</sup> If a pre-bid conference is necessary, the contracting officer will entertain the bidder's questions at the conference.<sup>52</sup> As a result of the information exchanged at the meeting, the Invitation for Bids will be amended to eliminate any defects or ambiguities.<sup>53</sup> Thereafter, the contracting officer will distribute amended copies to the bidders.<sup>54</sup>

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46. *See id.* § 10.001. Specifications for the procurement are descriptions of the government agency's technical requirements, including standards for measuring whether the bidder has fulfilled the requirements. *Id.* § 10.0001.

47. *Id.* § 14.201-1(a)(1); *see id.* §§ 14.201-2 to -5. The invitation for sealed bids includes a schedule of required information bidders must submit in connection with their bids, and the specifications governing the procurements. *See id.* § 14.201-2. The invitation also includes a list of the documents and other attachments bidders are required to submit in the proposal. *See id.* § 14.201-4. Finally, the invitation includes a list of government representations and instructions which include evaluation factors to be used in awarding the contract. *See id.* § 14.201-5.

48. *Id.* § 14.203-1. The contracting officer must allow the bidder a reasonable time to prepare the bid. *Id.* § 14.202-1; *see also id.* § 14.205(a). Bidders that indicate via a solicitation mailing list application that they are qualified to participate in the procurement are placed on the mailing list. *Id.*; *id.* § 53.301-129. The application requests information on the types of goods or services that the bidder hopes to supply. *Id.*

49. *Id.* §§ 5.101-102. The Commerce Business Daily is the official government publication in which the government agencies identify upcoming contracts. *Id.*

50. *Id.* § 14.207.

51. 1 N. STEIGER, FEDERAL CONTRACT MANAGEMENT ¶ 3.02[7], at 3-31 (1989). Pre-bid conferences are appropriate in sealed bid procurements when the procurement was previously advertised as a negotiated procurement. *See id.*

52. *Id.* ¶ 3.03[12], at 3-67. The pre-bid conference is also useful for activities such as viewing a model of the item to be procured. *Id.*

53. 48 C.F.R. § 14.208(a) (1988). Even though the contracting officer mentions a change at the conference, he is still responsible for issuing an amendment to the Invitation for Bids. *Id.*

54. *Id.* § 14.208(c). Any information supplied to one bidder must be supplied to all bidders. *Id.*



Bidders must submit their sealed bids to the contracting officer on or before the date and time designated in the Invitation for Bids.<sup>55</sup> The contracting officer may not consider any late bids or bids with material variations from the Invitation for Bids.<sup>56</sup> On the designated date, a government official publicly opens the timely bids, reads them aloud to those present, and has the bids recorded.<sup>57</sup>

After opening the bids, the contracting officer may cancel the procurement for many reasons including inadequate specifications, elimination of the government agency's need, or insufficient bids.<sup>58</sup> If the procurement continues, the contracting officer may reject individual bids if they fail to comply with any material provision of the Invitation for Bids.<sup>59</sup> Also, under specific circumstances, a bidder may withdraw his bid or correct a mistake in

55. *Id.* § 14.304-1 (deadline for sealed bid submissions is mandatory).

56. *Id.* § 14.304-1(a)(1),(2). Although the statute seems to require mandatory rejection of late bids, the government agency will accept it if the delay resulted from the bid taking more than five calendar days to pass through the mail or the bid was mishandled by the government agency. *Id.* § 14.304(a)(1),(2).

57. *Id.* § 14.402-1(a). The bid opening officer decides when the time set for bid opening has arrived. *Id.* At that time, he publicly opens the bids that were received on or before the deadline. *Id.* Additionally, the bid opening officer is responsible for carefully guarding each original copy of a bid. *Id.*

58. *Id.* § 14.404-1 (describing the circumstances under which procurement may be terminated after receipt of bids). The procurement can be terminated if the government's agency head determines: (1) the specifications were ambiguous or inadequate; (2) revisions have been made to the specifications; (3) the goods or services are no longer required; (4) cost factors, such as transportation, were not identified in the solicitation; (5) the bids received indicate that the government procurement will be lower in cost if the specifications are changed; (6) the prices associated with the acceptable bids are unreasonably high or no responsible bids were submitted; (7) collusion or bad faith was involved in the submission of bids; (8) a cost analysis indicates that the government could perform the requirement more economically itself; or (9) cancellation of the program is in the public interest. *Id.* § 14.404-1(c)(1)-(9).

59. *Id.* § 14.404-2 (describing circumstances under which individual bids are rejected). An individual bid may be rejected if: (1) it does not meet the Invitations for Bid essential requirements; (2) it does not meet the specifications unless the Invitations for Bids' allowed variances; (3) it does not propose to meet the required delivery schedule; (4) it proposes changes to the Invitation for Bids that would be prejudicial to the other bidders; (5) the bid price is unreasonable; (6) the bidder is in a period of suspension, debarment, or ineligibility; (7) the bidder is determined to be not responsible; (8) the bidder fails to provide a required bid guarantee; (9) a bidder's assets are transferred, in whole or in part, between bid opening and award unless the transfer is through "merger, operation of law, or other means not barred by 41 U.S.C. 15 or 31 U.S.C. 3727." *Id.* § 14.202-2(a)-(d),(f)-(i),(k); *see also* 41 U.S.C. § 15 (1982). Contracts or orders awarded to a party by the government may not be transferred to other parties unless they are transferred to a financing institution and the amount due under the contract as ordered is greater than \$1000. 41 U.S.C. § 15. Even in those special cases a contract or order initiated after October 9, 1940, may not be assigned if the contract forbids it. *Id.* § 15-2; 31 U.S.C. § 3727(b),(c) (1982). A claim against the government may only be assigned after it has become liquidated unless the contract is silent on assignment, or the assignment is for the remaining amount due and is made to a single party. *Id.* A valid assignment

his bid after submission.<sup>60</sup> Once the mistakes are corrected, the contracting officer, taking into consideration only price and price-related factors, must award the contract to the remaining responsible bidder<sup>61</sup> whose bid is most advantageous to the government.<sup>62</sup>

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must also stipulate that subsequent reassignments are not allowed. *Id.* The assignee must also send notice of the assignment to the contracting officer or agency head. *Id.*

60. 48 C.F.R. §§ 14.406-1 to -3 (1988) (describing circumstances under which a bid may be withdrawn or corrected). The contracting officer may correct clerical errors in a bidder's submission, after consulting with the bidder but before award. *Id.* § 14.406-2(a). The government agency head may permit a bidder to correct a mistake in his bid provided that "clear and convincing evidence establishes both the existence of the mistake and the bid actually intended." *Id.* § 14.406-3(a). The correction would not be allowed if the result would improve the bidder's rank among the bidders "unless the existence of the mistake and the bid actually intended are ascertainable substantially from the invitation and bid itself." *Id.* If "the evidence is clear and convincing both as to the existence of a mistake and as to the bid actually intended," and the bidder asks to withdraw from the competition and the bid, both in its original form and as corrected, would be the lowest bid, the government agency may elect to make the change indicated and accept the bid. *Id.* § 14.406-3(b). If clear and convincing evidence of the mistake exists, but not of the intended bid, or if existence of a mistake is reasonably supported but not clear and convincing, a government official ranking higher than the contracting officer may choose to allow the bidder to withdraw his bid. *Id.* § 14.406-3(c).

61. *See id.* § 9.104-1. To be considered responsible, a bidder must:

- (a) Have adequate financial resources to perform the contract, or the ability to obtain them (see 9.104-3(b));
- (b) Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;
- (c) Have a satisfactory performance record (see 9.104-3(c));
- (d) Have a satisfactory record of integrity and business ethics;
- (e) Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them (including, as appropriate, such elements as production control procedures, property control systems, and quality assurance measures applicable to materials to be produced or services to be performed by the prospective contractor and subcontractors)(see 9.104-3(b));
- (f) Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them (see 9.104-3(b)); and
- (g) Be otherwise qualified and eligible to receive an award under applicable laws and regulations.

*Id.*; *see also id.* § 9.104-3(b). As noted in section 9.104-1, the ability to obtain the resources required to qualify as a responsible competitor is demonstrated through a commitment that the necessary resources will be in place when the contract is awarded. *Id.*; *see also* § 9.104-3(c). A serious deficiency in performance is evidence of nonresponsibility. *Id.* Insufficient perseverance and tenacity to provide acceptable performance strongly suggests nonresponsibility. *Id.* When determining the successful bidder, the contracting officer also is required to take the circumstances of prior poor performance into consideration. *Id.*; 41 U.S.C. § 403(7) (Supp. V 1987)(definition of responsible source is same as FAR definition of responsible bidder).

62. 48 C.F.R. § 14.407-1(a) (1988).

### B. Two-Step Sealed Bid Procurements

Government agencies utilize two-step sealed bid or negotiated procurements when the FAR does not mandate a sealed bid procurement.<sup>63</sup> Two-step sealed bidding combines the benefits of sealed bidding with competitive procedures such as meaningful discussions which are necessary when the government does not have adequate specifications.<sup>64</sup> These same competitive procedures are also present in negotiated procurements.<sup>65</sup> Government agencies prefer two-step sealed bid procurements to negotiated procurements when: (1) discussions between the contracting officer and the bidders will be required to achieve a common understanding of indefinite or incomplete specifications;<sup>66</sup> (2) clearly defined criteria are available for evaluating the proposals;<sup>67</sup> (3) two or more technically qualified bidders are expected to bid;<sup>68</sup> (4) adequate time is available to negotiate the two-step procedures;<sup>69</sup> and (5) certain forms of contracting will be used.<sup>70</sup>

The two-step sealed bid procurement process is similar to the sealed bid procedure except that the bids are submitted in two stages. The first step requires each bidder to submit a technical proposal which describes the bidder's technical solution to the problem posed in the Invitation for Bids.<sup>71</sup> The contracting officer then removes any reference to price in the technical

63. *See id.* § 6.401(a). Sealed bidding is mandated whenever: (1) there is sufficient time to go through all of the associated procurement steps; (2) the basis for award will be price or other price-related factors; (3) discussions with the bidders concerning their bids is not necessary; and (4) the government reasonably expects more than one sealed bid. *Id.*

64. *Id.* § 14.501. One objective of two-step sealed bid procurements is to develop specifications in the course of the bidding so that future procurements of the same or similar items may be performed using sealed bid procurements. *Id.* § 14.501.

65. *See id.* § 6.401(b) (competitive proposal procedures defined in Part 15 of FAR devoted to negotiated procurements).

66. *Id.* § 14.502(a)(1).

67. *Id.* § 14.502(a)(2).

68. *Id.* § 14.502(a)(3).

69. *Id.* § 14.502(a)(4).

70. *Id.* § 14.502(a)(5).

71. *Id.* § 14.503-1(a) (description of data required to be included in requests for technical proposals). The request for technical proposals is required to include a description and technical requirements for the goods or services being procured, bid evaluation criteria, and an indication that the two-step procurement method is being utilized. *Id.* § 14.0501-1(a)(1)-(4). Additionally, the request should include a requirement that the proposals not address cost and should indicate the deadline for submission of bids. *Id.* § 14.501-1(a)(5)-(6). The request should also indicate that the first step of the procurement is to evaluate technical content, and the second step is to evaluate cost. *Id.* § 14.501-1(a)(7). Additionally, the request should state that the contract may be awarded without discussions. *Id.* § 14.501-1(a)(8). Finally, the request will indicate that the bidders will be notified if their proposals are deemed unacceptable and that bidders should submit only one proposal. *Id.* § 14.501-1(a)(9)-(10).

proposals and distributes them to agency personnel for evaluation.<sup>72</sup> Prior to distribution, however, the contracting officer can reject individual bids if they fail to comply with the essential technical provisions of the Invitation for Bids.<sup>73</sup>

The contracting officer must then determine if discussions with the bidders are necessary.<sup>74</sup> The contracting officer proceeds to step two only if enough proposals survive technical scrutiny to ensure that the second stage of the procurement, based on price only, will be competitive.<sup>75</sup> If a competitive second step is doubtful, the contracting officer may attempt to increase the number of acceptable bidders by requesting additional information from those bidders whose bids were found unacceptable.<sup>76</sup> The contracting officer, prior to the second step, may also identify deficiencies in the bidder's proposal and hold discussions with the bidders to clarify and improve the proposals.<sup>77</sup> The contracting officer is limited, however, to discussing the contents of a particular proposal with only the bidder who submitted that proposal.<sup>78</sup>

Upon completion of discussions or a determination that discussions are not necessary, the contracting officer initiates step two of the procurement procedure.<sup>79</sup> The contracting officer's second step is to solicit and evaluate the bidders' pricing.<sup>80</sup> Unlike the first step, Invitations for Bids are forwarded to only those bidders that survived step one.<sup>81</sup> Using the same bid-opening procedures followed in sealed bid procurements, the pricing is eval-

72. *Id.* § 14.503-1(c),(d). The bidders' proposals are to be evaluated within a time limit established by the contracting officer. *Id.* § 14.503-1(d). In order to expedite the evaluation process, the proposals are analyzed according to the factors defined in the Invitation for Bids. *See id.* § 14.503-1(e)(1).

73. *Id.* § 14.503-1(e)(2) (contracting officer can reject bids that modify or fail to meet essential specifications).

74. *Id.* § 14.503-1(f)(1).

75. *Id.* The contracting officer also considers whether the delay required to improve competition is warranted based upon the urgency of the procurement. *Id.*

76. *Id.* § 14.503-1(f)(1). The contracting officer is permitted to request information that will clarify or supplement the bidder's proposal. *Id.*

77. *Id.* The contracting officer holds discussions with the bidders whose proposals are potentially acceptable dependent on the outcome of the discussions. *Id.*

78. *Id.* § 14.503-1(f)(1); *see also id.* § 15.610(d)(2). Discussions in negotiated procurements are also restricted so that the contents of a particular proposal may only be discussed with the bidder that submitted it. *See id.*

79. *Id.* § 14.503-1(f)(1). The two-step procurement may also be converted into a negotiated procurement at this point if no acceptable bids were received or only one bid was received. *Id.* § 14.503-1(h)(i).

80. *Id.* § 14.503-2. The bids containing prices are submitted in sealed envelopes. *Id.* § 14.501(b).

81. *Id.* § 14.503-2(a)(1). Bidders survive step one of a two-step sealed bid procurement by submitting acceptable technical bids. *Id.*

uated by verifying compliance with the government agency's Invitation for Bids.<sup>82</sup> As in sealed bid procurements,<sup>83</sup> the contract is awarded to the remaining responsible bidder with the lowest price.<sup>84</sup>

### C. *Negotiated Procurements*

Contracting officers may request a negotiated procurement where the sealed bid criteria are absent.<sup>85</sup> Additionally, negotiated procurements are proper when the contract's performance will occur in a foreign country, and the differences in business practices, regulations and laws make negotiations necessary.<sup>86</sup>

Negotiated procurements are similar to sealed bid procurements in their period of solicitation and receipt of proposals.<sup>87</sup> The terminology is different

82. *See id.* § 14.501(b) (two-step sealed bids evaluated in same way as sealed bids). *See generally id.* § 14.3 (submission of bids in sealed bid procurements). Just as in sealed bid procurements, a two-step sealed bid must comply with all material aspects of the Invitation for Bids. *Id.* § 14.301(a). The bidder must complete, execute, and submit the bid as instructed in the Invitation for Bids. *Id.* § 14.301(c). The bidder must also indicate his acceptance of the contract provisions in the Invitation for Bids, and that if he is awarded the contract, the award will result in a binding contract. *Id.* The bids must be submitted prior to the deadline set for bid opening. *Id.* § 14.302(a). The bids may be modified or withdrawn if the bidder sends notice to the contracting officer prior to the deadline for bid opening. *Id.* § 14.303(a). The contracting officer may consider modifications received before the bid opening time. *Id.* In regard to withdrawal, a bid may be withdrawn only in person or by an authorized representative. *Id.* § 14.303(b). The contracting officer must verify the identity of the person requesting withdrawal and have the person sign a receipt for the bid. *Id.*

83. *Id.* § 14.501(b).

84. *Id.* § 14.407-1(a).

85. *Id.* § 6.401(b)(1); *see also* § 15.101. Negotiation means "contracting through the use of either competitive or other-than-competitive proposals and discussions." *Id.*

86. *Id.* § 6.401(b)(2). If discussions are not necessary and sealed bid procedures are otherwise acceptable, the contracting officer is not required to use negotiated procurement procedures. *Id.*

87. *Compare id.* § 15.4 (procedure for solicitation and receipt of proposals under negotiated bidding) with *id.* §§ 14.2-3 (procedure for solicitation and receipt of bids under sealed bidding). In negotiated bidding, the contracting officer first sends out a Request For Proposals. *Id.* § 15.400. The contracting officer then holds a pre-proposal conference. *Id.* § 15.409. Based on information from the pre-proposal conference, the contracting officer amends the request for proposals and distributes the amendment to the bidders. *Id.* § 15.410. The bidders submit their proposals to the contracting officer. *Id.* § 15.411. The bidders are permitted to modify their proposals. *Id.* § 15.412.

Similar to the negotiated procurement procedures, a sealed bid procurement is initiated when the contracting officer prepares an Invitation for Bids and mails it to the bidders. *Id.* §§ 14.201, 14.203. The contracting officer may then hold a pre-bid conference with the interested bidders. *Id.* § 14.207. Based on information received at the pre-bid conference, the contracting officer may amend the Invitation for Bids and mail the amendment to the bidders. *Id.* § 14.208. The bidders then evaluate the changes and submit their bids to the contracting of-

in that a Request for Proposal (RFP)<sup>88</sup> replaces the Invitation for Bids and bidders make “proposals”<sup>89</sup> rather than submit “bids.” Upon receipt of the proposals, however, the procedure is quite different. The contracting officer evaluates the proposals received to assess each bidder’s ability to perform the requirements of the proposed contract successfully.<sup>90</sup> Based on these assessments, the contracting officer then determines whether a given proposal can be made acceptable through discussions with that bidder.<sup>91</sup> Proposals that the contracting officer decides can be remedied through discussions are considered inside the competitive range.<sup>92</sup> Those proposals that the contracting officer determines cannot be made acceptable are deemed outside the competitive range and rejected.<sup>93</sup>

The contracting officer must next decide if subsequent negotiations are proper.<sup>94</sup> The contracting officer may immediately award the contract so long as the initial proposal is the most technically and economically beneficial contract to the government.<sup>95</sup> If the competition has been full and open or the agency has previously purchased the item to be procured and knows the proper price for the item, the condition has been fulfilled.<sup>96</sup> Otherwise, the contracting officer must hold discussions with each bidder in the competitive range.<sup>97</sup> The contracting officer can undertake discussions to facilitate an understanding of the bidder’s proposal and to identify deficiencies and mistakes before the next stage in the procurement process.<sup>98</sup>

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ficer. *Id.* § 14.302. The bidders may withdraw or modify their bids until the time of bid opening. *Id.* § 14.303.

88. *Id.* § 15.402(a).

89. *Id.* § 15.402(d).

90. *Id.* § 15.608(a). The contracting officer evaluates the bidder’s cost proposal to determine whether it is reasonable and whether the contractor understands the work being undertaken. *Id.* § 15.608(a)(1). The contracting officer also performs a technical evaluation of the proposals. *Id.* § 15.608(a)(2).

91. *Id.* § 15.609(a). The contracting officer’s determination of whether a bid is potentially acceptable is accomplished by considering the evaluation criteria included in the Request for Proposals. *Id.* Those bidders that the contracting officer concludes have a reasonable possibility of winning the contract are included in the competitive range. *Id.*

92. *Id.*

93. *Id.* § 15.609(b).

94. *See id.* § 15.610(a).

95. *Id.* § 15.610(a)(3).

96. *Id.* The contracting officer must also show the bid solicitation included a statement that the contract might be awarded without discussions and that discussions in fact did not occur. *Id.*

97. *Id.* § 15.610(b).

98. *Id.* § 15.601. Discussions are defined as:

any oral or written communication between the Government and an offeror (other than communications conducted for the purpose of minor clarification), whether or not initiated by the Government, that (a) involves information essential for determining the ac-

Upon completion of the discussions, the contracting officer must request a subsequent set of proposals—the bidder's best and final offers (BAFO).<sup>99</sup> Upon receipt of the BAFOs, the contracting officer may reopen discussions and ultimately ask for new BAFOs if the request is in the government agency's best interests.<sup>100</sup> Alternatively, the contracting officer may award the contract to the bidder whose BAFO provides the most beneficial package after considering the evaluation factors identified in the RFP.<sup>101</sup>

#### IV. MEANINGFUL DISCUSSIONS

A significant difference exists between sealed bid procurements and the two-step sealed bid or negotiated procurements.<sup>102</sup> In the latter two methods, the FAR allows a discussion period between the contracting officer and the bidders.<sup>103</sup> This difference is important because it allows the contracting officer to correct the effects of an ambiguous specification by informing the individual bidders where their resolution of the ambiguities is lacking.<sup>104</sup> The contracting officer facilitates corrections by holding discussions con-

ceptability of a proposal, or (b) provides the offeror an opportunity to revise or modify its proposal.

*Id.*; see also *id.* § 15.610(c)(2),(4) (purpose of discussions to improve proposals and to correct mistakes in proposals); *Electro-Methods, Inc. v. United States*, 7 Cl. Ct. 755, 769 (1985) (reviewing limitations on discussions). Although the discussions serve to clarify the proposal, the contracting officer is not required to spoon-feed a bidder to the technical level necessary to win the contract. *Electro-Methods*, 7 Cl. Ct. at 769.

99. 48 C.F.R. § 15.611 (1988).

100. *Id.* § 15.611(c). For a new BAFO to be requested, it must benefit the government, not just the bidder. *BMY v. United States*, 693 F. Supp. 1232, 1240 (D.D.C. 1988); see also *Marine Transport Lines v. Lehman*, 623 F. Supp. 330, 336 (D.D.C. 1985) (new BAFO properly requested after government amended solicitation).

101. 48 C.F.R. § 15.611(d); see also *Harris Corp. v. United States*, 628 F. Supp. 813, 821 (D.D.C. 1986). A bidder must be evaluated on the basis of its BAFO rather than its original bid. See *Harris*, 628 F. Supp. at 821. For a discussion of evaluation factors, see *supra* notes 8 and 90.

102. Compare 48 C.F.R. § 15.610 (written or oral discussions required in negotiated procurements to produce full and open competition) and *id.* § 14.503-1(f)(1) (discussions required in two-step sealed bid procurements when insufficient number of acceptable proposals received to ensure sufficient price competition under step two) with *id.* § 14.101(d) (sealed bids are evaluated without discussions) and *id.* § 14.404-1(e)(1) (mid-procurement switch to negotiated bidding). Discussions are necessary and the procurement may be completed through negotiation if: (1) the procurement produces no responsible bidders; (2) only one bidder responds; (3) the only acceptable bids are at unreasonable prices; or (4) the bids were collusive. See *id.* § 14.404-1(e)(1).

103. See *id.* § 15.610(b) (discussions required in negotiated procurements); § 14.503-1(f)(1) (discussions required in two-step sealed bid procurements when insufficient number of bidders present to enable competitive second step).

104. See *id.* § 15.601(c)(2),(4).

cerning deficiencies<sup>105</sup> in the bidder's proposal<sup>106</sup> and by providing an opportunity to submit a revised proposal containing the necessary corrections.<sup>107</sup> Finally, the bidder is entitled to submit any modifications resulting from the discussions to improve the revised proposal.<sup>108</sup> To obtain acceptable revised proposals, the discussions must be meaningful and convey information allowing bidders in the competitive range to correct their proposals to meet all of the government agency's specifications.<sup>109</sup> Through this discussion process, the contracting officer hopes to increase competition by qualifying more bidders for the second step of the two-step procurement or the BAFO in a negotiated procurement.<sup>110</sup>

Discussions between the contracting officer and bidders after proposal submission are not a new concept but have resulted in a dilemma for the contracting officer.<sup>111</sup> Historically, the government agency was free to compensate the bidder and use the resulting innovations or designs revealed during the discussion period.<sup>112</sup> Today, in contrast, government agencies have

105. *See id.* § 15.601. A deficiency is a failure to meet a government requirement. *Id.*; *see also* *BMY v. United States*, 693 F. Supp. 1232, 1239 (D.D.C. 1988)(deficiency is failure to meet procurement specifications); *CACI Field Serv., Inc. v. United States*, 13 Cl. Ct. 718, 731-32 (1987)(deficiency may be area in proposal requiring amplification or clarification), *aff'd*, 854 F.2d 464 (Fed. Cir. 1988).

106. 48 C.F.R. § 15.610(c)(2) (1988); *see also* *BMY*, 693 F. Supp. at 1240 (government may not identify technical deficiencies in bidder's proposal if doing so will allow bidder to improve rank among competitors).

107. 48 C.F.R. § 15.610(c)(3); *see also* *SACO Defense Sys. Div., Maremont Corp. v. Weinberger*, 606 F. Supp. 446, 452 (D. Me. 1985)(discussions to clarify bidder's proposal not required when proposal is clear); *Action Mfg. Co. v. United States*, 10 Cl. Ct. 474, 479 (1986)(contracting officer has broad discretion to use discussions to resolve uncertainties in bidder's proposal).

108. 48 C.F.R. § 15.610(c)(5).

109. *Raytheon*, 54 Comp. Gen. 169, 177 (1974)(discussions must be meaningful); *see also* *Pratt & Whitney Aircraft Corp.*, 51 Comp. Gen. 621, 622 (1972)(discussions must be more than just lip-service to procurement statute); *Materials Research Corp.*, 51 Op. Comp. Gen. 431, 433 (1972)(discussions must reveal bidder's deficiencies).

110. *See* *Pratt & Whitney Aircraft Corp.*, 51 Comp. Gen. 621, 622 (1972)(purpose of discussions is to increase competition and ensure government obtains most advantageous contract); *see also* 48 C.F.R. § 15.603(a) (negotiated procurement selection procedures designed to maximize competition); *id.* § 14.503-1(f)(1) (two-step sealed bid discussions designed to increase competition during price competition).

111. S. REP. NO. 1884, 87th Cong., 2d Sess., *reprinted in* 1962 U.S. CODE CONG. & ADMIN. NEWS 2476, 2477 (reporting on new statute requiring discussions). Prior to 1962, the Department of Defense utilized discussions as part of their negotiated procurement procedure. *See id.* at 2482-83. Furthermore, the National Aeronautics and Space Administration used discussions with bidders. *See id.* at 2487. Finally, the Comptroller General urged the adoption of discussions as essential to protecting governmental interests during negotiated procurements. *See id.* at 2493.

112. *See* Act of July 2, 1926, PUB. L. NO. 69-446, 44 Stat. 780, 780 (amending National Defense Act, ch. 134, 39 Stat. 166 (1916)). In 1926, Congress amended the National Defense



imposed numerous prohibitions on the content of the information revealed during the discussions.<sup>113</sup> First, the contracting officer may not discuss any subjects that might result in technical leveling.<sup>114</sup> Technical leveling occurs when the contracting officer enables one bidder to improve the quality of his proposal to the level of other proposals through a series of discussions.<sup>115</sup> The FAR labels these kinds of discussions undesirable because the contracting officer wastes time and the taxpayers' dollars discussing the procurement's goals with an uninventive, incompetent or indifferent bidder.<sup>116</sup> Second, the government agency is prohibited from facilitating technical transfusion.<sup>117</sup> Even though these are two distinct concepts, technical transfusion is occasionally confused with technical leveling.<sup>118</sup> Technical transfusions occur when the contracting officer reveals one bidder's ingenious or innovative solution to the problem stated in the RFP to another bidder.<sup>119</sup>

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Act for the purpose of improving the efficiency of the Army Air Corps. *Id.* Under the amendment, the government agency, before procuring new aircraft designs, aircraft parts, or accessories, was required to invite aircraft designers to submit their designs to the government agency in sealed bids. *Id.* at 784. The government agency was to review each of the proposals and select those it deemed most advantageous. *Id.* at 785. Once the review was completed, the government agency was authorized, in a period analogous to the discussions period, to purchase the portions of the winning designs that it found useful and to incorporate them into a complete aircraft design. *Id.*

113. See 48 C.F.R. § 15.610(d) (1988)(FAR limits discussions by prohibiting technical transfusions, technical leveling, or auctioning).

114. *Id.* § 15.610(d)(1); see also *Pratt & Whitney*, 51 Comp. Gen. at 622 (contracting officer must avoid technical leveling); Feldman, *Traversing the Tightrope Between Meaningful Discussions and Improper Practices in Negotiated Federal Acquisitions: Technical Transfusion, Technical Leveling, and Auction Techniques*, 17 PUB. CONT. L.J. 211, 238-39 (1987). Technical leveling, which can occur inadvertently, is the improper coaching of a bidder by the government. Feldman at 238-239.

115. 48 C.F.R. § 15.610(d)(1); *M. W. Kellogg Co. v. United States*, 10 Cl. Ct. 17, 25 (1986)(successive BAFOs not necessarily technical leveling). In *Kellogg*, the court found technical leveling did not occur even though the government requested a series of BAFOs because there was no indication that any bidder received information which gave it an advantage over the others. See *id.*

116. 48 C.F.R. § 15.610(d)(1). But see *Pratt & Whitney Aircraft Corp.*, 51 Comp. Gen. 621, 622 (1972)(example of where discussions were not technical leveling). Technical leveling does not occur when the government informs a bidder that it has reasonably placed the emphasis in its proposal on the wrong area of the solicitation. *Id.* The court reasoned that otherwise without the information, the bidders would not be competing on the same basis as other bidders. *Id.*

117. 48 C.F.R. § 15.601(d)(2).

118. See *Pratt & Whitney*, 51 Comp. Gen. at 622. The Comptroller General incorrectly defined technical leveling as occurring when the contracting officer communicates the technical contents of one bidder's proposal to another bidder. *Id.*

119. *Id.* In *Pratt & Whitney*, the losing bidder complained that his discussions with the contracting officer were not meaningful because deficiencies in the bidder's proposal were not adequately discussed. *Id.* The Comptroller General reasoned that many of the deficiencies

This disclosure usually occurs when the contracting officer communicates technical information contained in one bidder's proposal to a second bidder, thus improving the second bidder's proposal.<sup>120</sup>

The final prohibition is against auction techniques.<sup>121</sup> Auctioning occurs in three situations: (1) when the contracting officer communicates a price that the bidder must meet to be considered further;<sup>122</sup> (2) when the contracting officer reveals a bidder's rank, in terms of relative price, among the competitors;<sup>123</sup> and (3) when the contracting officer reveals information about one bidder's price to another bidder.<sup>124</sup> In each of these situations, bidders bid against another competitor's price or technical information rather than negotiating the issue with the government.<sup>125</sup> Auctioning has been allowed, however, when it is necessary to equalize competition by distributing information unfairly obtained by one bidder to the other bidders.<sup>126</sup>

These prohibitions, with minor exceptions, result in the contracting officer being authorized to use only a single bidder's innovations as opposed to a

were only deficiencies relative to the winning bidder's proposal, and, if they had been discussed, then technical transfusion would probably occur. *Id.* at 623. As a result, the Comptroller General decided that the contracting officer was correct in limiting the extent of the discussions because of the danger of technical transfusions. *Id.*

120. *CACI Field Serv., Inc. v. United States*, 13 Cl. Ct. 718, 733 (1987)(discussions with government agency would have resulted in technical transfusion), *aff'd*, 854 F.2d 464 (Fed. Cir. 1988). In *CACI* representatives of the government agency explained their failure to hold exhaustive discussions with *CACI* was proper because the government itself was technically bidding on the contract. *Id.* Therefore, when the government contracts with itself, extensive discussions could constitute technical transfusions. *Id.*

121. 48 C.F.R. § 15.610(d)(3) (1988). Auctioning is also commonly referred to as "bid shopping."

122. *Id.* § 15.610(d)(3)(i) (price communications constitute auctioning).

123. *Id.* § 15.610(d)(3)(ii). The contracting officer is allowed to indicate the bidder's price is too high or is unrealistic. *Id.*; see also *NOA Airscrew Howden, Inc. v. Department of the Army*, 622 F. Supp. 984, 992 (E.D. Mich. 1985)(regulations allow communications to bidder that price is too high).

124. 48 C.F.R. § 15.601(d)(3)(iii) (1988)(revelation of one bidder's price to another constitutes auctioning).

125. 1B J. McBRIDE & I. WACHTEL, *GOVERNMENT CONTRACTS* § 9.10[14][D], at 9-83 (1989)(auctioning indicates lack of negotiation between bidder and government agency).

126. See *Honeywell Information Sys.*, 56 Comp. Gen. 505, 511-12 (1977)(auctioning preferable to competition on unequal basis). In *Honeywell*, a procurement award had been successfully contested in an earlier court opinion because of an unfair advantage given to one of the bidders. *Id.* at 511. The *Honeywell* court imposed the requirement that the bidder with the unfair advantage would be allowed to compete in the subsequent procurement if the government disclosed to the other bidders the information that bestowed the unfair advantage. *Id.* at 511-12. While the Comptroller General recognized that this requirement might constitute auctioning, the requirement for competition on an equal basis outweighed the negative implications of auctioning. *Id.* at 512.

composite of all innovations revealed.<sup>127</sup> Because of these prohibitions, the contracting officer resorting to discussions in a negotiated procurement or a two-step sealed bid procurement is in a difficult position.<sup>128</sup> The difficulty results from the contracting officer being given the responsibility to negotiate the most favorable contract for the government agency<sup>129</sup> while simultaneously being prohibited from initiating technical transfusions that would produce the most favorable contract for the government.<sup>130</sup>

## V. COST/BENEFIT ANALYSIS

### A. *Theoretical Benefits of Meaningful Discussions*

#### 1. Increase in Competition

The idea that an increase in the number of bidders will increase competition in the marketplace and result in production of higher quality, lower cost goods is a commonly accepted truth.<sup>131</sup> Based on this premise, the justification for meaningful discussions seems clear—if the contracting officer is able, through meaningful discussions, to revise a bidder's proposal and make it acceptable, then the number of bidders has increased.<sup>132</sup> In theory, the additional bidder promotes competition and improves the quality of the product the government agency is seeking to procure.<sup>133</sup> In practice, however, the

127. *Compare* Act of July 2, 1926, PUB. L. NO. 69-446, 44 Stat. 780, 785 (amending National Defense Act, ch. 134, 39 Stat. 166 (1916))(authorizing government to purchase design ideas from bidders to use for itself or to supply to industry) with 48 C.F.R. § 15.601(d) (government may not engage in discussions resulting in technical leveling, technical transfusion, or auctioning).

128. *See* Feldman, *Traversing the Tightrope Between Meaningful Discussions and Improper Practices in Negotiated Federal Acquisitions: Technical Transfusion, Technical Leveling, and Auction Techniques*, 17 PUB. CONT. L.J. 211, 215 (1987)(contracting agency faced with traversing tightrope between technical leveling and meaningful discussions to obtain most beneficial contract).

129. 48 C.F.R. § 15.610(a)(3) (1988)(contracting officer required to hold discussions unless most beneficial contract already apparent).

130. *See id.* § 15.610(d) (discussions may not include technical transfusion, technical leveling, or auctioning).

131. *See* A. NEALE, *THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA* 1-2 (2d ed. 1970)(primary virtue of private economic enterprise is competition). Competition stimulates development of improved methodologies and guards against the seller's indifference of the purchaser's wishes. *Id.* at 2.

132. *See* 48 C.F.R. § 15.610(c) (goals of discussions). The contracting officer should undertake discussions with the bidders that are within the competitive range to allow them the opportunity to resubmit an acceptable proposal with revisions. *See id.*

133. *See* Pyatt, *Procurement Competition at Work: The Navy's Experience*, 6 YALE J. ON REG. 319, 320-22 (1989)(analysis of benefits of competition to weapons systems procurements). Contractors, faced with new competitive government procurement regulations, are forced to concentrate on methods to cut costs and improve quality. *Id.* *But see* Augustine & Trimble, *Procurement Competition at Work: The Manufacturer's Experience*, 6 YALE J. ON

benefit of increased bidder numbers is often countered by the FAR's limits on competition or by other, less visible, means.<sup>134</sup> For example, the FAR specifies circumstances when full and open competition is not required such as when only one source exists for the goods or services that the government agency desires.<sup>135</sup> In these circumstances, the contracting officer is free to limit the number of competitors for a given procurement.<sup>136</sup> The FAR also allows the government agency to limit the number of bidders when its need for the goods or services is unusually and compellingly urgent.<sup>137</sup> Additionally, the government can inhibit competition by advertising a procurement in a manner that limits the contemplated contract to a particular company or group of companies.<sup>138</sup> For example, the advertisement can specify office location, personnel experience, and company experience so as to limit the procurement to a small number of companies.<sup>139</sup> The contracting officer's ability to limit bid competition, however, tends to run counter to the meaningful discussions' purpose of promoting competition to increase product

REG. 333, 340 (1989)(disadvantages of competition). Competition has disadvantages including disruption of new system development and destroying supplier relationships because suppliers frequently become competitors. *Id.* Disadvantages of competition also include reduced capital investment, uneconomical investment, reduction of design-agent responsibility, destroying economy of scale, and unacceptable rates of return. *See id.*

134. *See* J. HANRAHAN, GOVERNMENT BY CONTRACT 28 (1983)(winner of procurement often chosen before Invitation for Bids or RFP sent out).

135. 48 C.F.R. §§ 6.300, .302-1, -Z (1988). Full and open competition is not required when: (1) the government's need for a product is urgent; (2) its interest would be compromised unless it is able to limit the number of bidders; (3) the bidders are determined by treaty or by agreement with a foreign government; (4) waived by statute; and (5) when the national security is at risk. 48 C.F.R. § 6.302-2 to -7 (1988). The competitive bidding requirement is also limited when the public interest is at stake. *Id.* § 6.302-7.

136. *See id.* § 6.302-1(a)(2)(i) (procurement when only one source can meet government requirements). When only one source exists that can supply the services or supplies that the government agency requires, then it can limit the procurement to that source. *Id.*; *see also id.* § 6.302-1(a)(2)(ii) (describing when single source procurement allowed). The government agency may also limit the number of bidders when the procurement is for the continued development of a large system, and the cost of changing contractors during development would be prohibitive. *Id.*; *id.* § 6.302-2(a)(2) (government may limit sources solicited when need is urgent). When the government agency's requirement is of unusual and compelling urgency, it may limit the number of bidders from which it solicits bids. *Id.*

137. *Id.* § 6.302-2(a)(2) (dispensing with competitive bidding in event of compelling or usual urgency).

138. *See* J. HANRAHAN, GOVERNMENT BY CONTRACT 30 (1983). The government agency can effectively limit competition by describing the qualifications of the desired contractor in such a way that only a single contractor meets them. *See id.* *But see* 48 C.F.R. § 10.004(b)(2) (restriction on specifications for products). The government, however, is prohibited from specifying a product in such a way that only one manufacturer can meet the specification unless the desired specification is essential to the government's interest. *Id.*

139. *See* J. HANRAHAN, GOVERNMENT BY CONTRACT 30 (1983)(illustrating limitations on competition through overly detailed description of qualified bidder).

quality.<sup>140</sup>

## 2. Benefits When Unambiguous Specifications Not Available

In spite of their harmful effects, another justification for promoting meaningful discussions is their utility in situations where the government agency is unable to prepare and distribute a complete and unambiguous set of specifications of its needs.<sup>141</sup> In these situations, meaningful discussions allow the government agency to refine specifications or to resolve ambiguities using the bidder's information.<sup>142</sup> In theory, after meaningful discussions the government agency may move to the procurement's second step with an upgraded set of specifications.

In practice, however, meaningful discussions detract from the government's efforts to develop adequate specifications. Because meaningful discussions are available, the government agency may seize the opportunity to rely on bidders to supply the necessary specifications rather than to produce its own specifications prior to the initial bid solicitation. In addition, the government agency may be unable to utilize the bidder's information gleaned from meaningful discussions because of the danger of technical leveling or technical transfusion.<sup>143</sup> Finally, the bidders may intentionally conceal ideas that would improve the specifications until the final BAFOs are requested to defeat the government agency's efforts to attain complete and unambiguous specifications.<sup>144</sup>

## B. Costs of Meaningful Discussions

### 1. Bidders Paid to Participate

In addition to technical considerations, meaningful discussions have a fi-

140. See 48 C.F.R. § 15.610(a)(3) (1988).

141. See *id.* § 14.502(a)(1). If the procurement specifications are inadequate or ambiguous, the government agency may undertake either a two-step sealed bid procurement or a negotiated procurement. See *id.* These procurement processes provide for discussions to alleviate the inadequacies or ambiguities. See *id.*

142. See *id.* § 15.610(c). The regulation requires discussions so the contracting officer may explore deficiencies, ambiguities, or mistakes in the bidder's proposal. See *id.* These discussions also can resolve problems with the government agency's specifications. See *id.*; see also *id.* § 14.503-2(f)(1). Discussions are held to clarify or improve a bidder's proposal, but can be used to resolve deficiencies in the government agency's specifications. See *id.*

143. See *id.* § 15.610(d)(1),(2) (prohibiting contracting officer from participating in technical transfusion and technical leveling).

144. Cf. S. REP. NO. 1884, 87th Cong., 2d Sess., reprinted in 1962 U.S. CODE CONG. & ADMIN. NEWS 2476, 2477 (reporting on new statute, 10 U.S.C. § 2304(g) (1982), requiring discussions). The Government Accounting Office was concerned that the inflexible requirement for discussions would result in bidders not submitting their best prices in the early rounds. See *id.* As a result, the GAO recommended that discussions be at the contracting officer's discretion. See *id.*

nancial impact because the government agency reimburses the bidders for their bid and proposal (B & P) expenses.<sup>145</sup> The FAR defines B & P expenses as those incurred in the preparation, submission, and support of bids and proposals on prospective governmental or non-governmental contracts which include meaningful discussions.<sup>146</sup> Each bidder is entitled to be reimbursed for Independent Research & Development (IR & D) expenses and B & P expenses, but the annual reimbursement is limited by the amount that the contractor has spent on IR & D and B & P in past years.<sup>147</sup> The bidder's B & P expenses are absorbed by the government agency by allocating a pro rata share of the B & P expenses to each billing.<sup>148</sup> For example, assume that a bidder's sales for a given year are anticipated to be \$1,000,000 and its

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145. See L. ANDERSON, ACCOUNTING FOR GOVERNMENT CONTRACTS, FEDERAL ACQUISITION REGULATION § 14.04, at 14-12 (1989)(bid and proposal expenses are indirect costs). Government contractors bill indirect costs to the government agency in the same manner as they bill direct costs such as labor or material costs. See *id.* at 8-2. However, indirect costs are pooled, and then pro-rated in the billings to the government agency on direct cost billings rather than being directly billed. See *id.* at 8-2; see also 48 C.F.R. § 15.610(b) (1988). Meaningful discussions are considered part of the bidder's bid and proposal effort. 48 C.F.R. § 15.610(b) (1988).

146. 48 C.F.R. § 31.205-18(a); see also L. ANDERSON, ACCOUNTING FOR GOVERNMENT CONTRACTS, FEDERAL ACQUISITION REGULATIONS § 14.01, at 14-2 (1989).

147. 48 C.F.R. § 31.205-18(c)(1)(i) (negotiation of ceiling on IR & D and B & P expenses required when previous year's expenses exceeded \$4.4 million); see also *id.* § 31.205-18(c)(2). To determine the bidders IR & D and B & P expense limitation, the ratio that IR & D and B & P expenses bear to the contractor's total sales for the preceding three years is first computed. *Id.* § 31.205-18(c)(2)(i). The average of the two highest of these ratios is defined as the "historical ratio." *Id.* § 31.205-18(c)(2)(i). The average annual IR & D and B & P expense is then computed by averaging the two highest of the previous three years. *Id.* § 31.205-18(c)(2)(ii). The historical ratio is then multiplied by the contractor's actual total sales for the current year to derive the amount of the bidder's allowable IR & D and B & P costs. *Id.* § 31.205-18(c)(2)(iii). This amount, if less than 120 percent of the average B & P and IR & D expense computed earlier, is the bidder's annual IR & D and B & P expense. *Id.* If this amount is less than 80 percent of the average, then 80 percent of the average is the bidder's annual allowed IR & D and B & P expense. *Id.* § 31.205-18(c)(2)(iii). Finally, if the bidder persuades the contracting officer that the allowable IR & D and B & P amount is clearly inequitable, then an agreement may be negotiated between them establishing the annual allowed IR & D and B & P costs. *Id.* § 31.205-18(c)(2)(iv). See generally L. ANDERSON, ACCOUNTING FOR GOVERNMENT CONTRACTS, FEDERAL ACQUISITION REGULATION § 14.03[2], at 14-6 to 14-9 (1989)(describing methods for determining B & P budgets and providing examples).

148. See 48 C.F.R. § 31.203(c). Allocation of indirect costs, including general and accounting (G & A) expenses, are made on a pro rata basis based on sales. See *id.*; see also *id.* § 31.001. "Allocate" means "to assign an item of cost, or a group of items of cost, to one or more cost objectives. This term includes both direct assignment of cost and the reassignment of a share from an indirect cost pool." *Id.* "Cost objective" means "a function, organizational subdivision, contract, or other work unit for which cost data are desired and for which provision is made to accumulate and measure the cost of processes, products, jobs, capitalized projects, etc." 48 C.F.R. § 31.001 (1988); *Id.* § 31.202(a). A "direct cost" is "any cost that can be identified specifically with a particular cost objective." *Id.*; *id.* § 31.201-1. The total

B & P budget has been set at \$100,000.<sup>149</sup> If the bidder submits a bill to the government agency for \$50,000 under an existing contract, then a premium of \$5,000 ( $\$50,000/\$1,000,000 \times \$100,000$ ) is added as B & P expenses.<sup>150</sup> The resulting total bill would be \$55,000. The additional \$5,000 that the bidder receives may be used to support his current or future proposal activities including meaningful discussions.<sup>151</sup>

The financial impact of meaningful discussions, however, can be nullified by eliminating the meaningful discussion period. Elimination of meaningful discussions dispenses with the need for bidders to expend the time and materials necessary to submit additional BAFOs.<sup>152</sup> The benefit in terms of savings in time and materials on bidder proposals and BAFOs would result in reduced B & P expense billings on existing contracts.<sup>153</sup> Because of the enormous number of bidders on government contracts, the cumulative savings in terms of dollars and time would be significant.<sup>154</sup>

The government's expense associated with meaningful discussions could also be nullified by eliminating the government's practice of reimbursing bidders for their bid and proposal expenses. If B & P reimbursement were eliminated, the FAR's prohibition against technical transfusions would be reasonable because the government would have no property interest in the bidder's innovations.<sup>155</sup> Additionally, eliminating reimbursements would terminate the costly spiral of proposal costs. The FAR creates this spiral by

cost of a contract is defined as the sum of the direct costs and indirect costs that can be allocated to the contract less any credits. *Id.*

149. *See* L. ANDERSON, ACCOUNTING FOR GOVERNMENT CONTRACTS, FEDERAL ACQUISITION REGULATION § 8.02[5], at 8-14.1 to 8-18 (1989)(example of how G & A, which is allocated same way as B & P, is allocated to contracts).

150. *Cf. id.* Bidder G & A expenses are computed by taking a percentage of labor and material expenses. *See id.* B & P expenses are computed in the same manner as G & A expenses. 48 C.F.R. § 31.205-18(b)(2)(i)(1988). In this example, the \$50,000 is established through negotiations between the bidder and the contracting officer or pursuant to the formula for determining the contractor's allowable annual B & P and IR & D expenses. *Id.* § 31.205-18(c)(1)(i),(c)(2); *see also supra* note 147 and accompanying text.

151. 48 C.F.R. § 31.205-18(a). Bid and proposal expenses include the expenses related to developing, submitting, and supporting proposals to either the government agency or other government entities. *Id.*

152. *See id.* § 15.611(a) (requirement for BAFOs). When the contracting officer requests BAFOs, meaningful discussions are, by definition, complete. *Id.*

153. *See id.* § 31.205-18(b)(2)(i) (payment of B & P expenses). Bid and proposal expenses are allocated using the same method as G & A expenses. *Id.*

154. *Cf. J. BEVERIDGE, THE ANATOMY OF A WIN 139* (1979)(discussing total costs of some proposals). The total cost of the efforts of all the bidders and their subcontractors on a contract competition often approaches a significant percentage of the cost of the total program. *Id.*

155. *Cf. Act of July 2, 1926, PUB. L. NO. 69-446, 44 Stat. 780, 785* (amending National Defense Act, ch. 134, 39 Stat. 166 (1916))(government agency purchased any design ideas that it desired to use in 1926 aircraft design initiative).

encouraging bidders to spend their entire annual B & P budgets.<sup>156</sup> The bidders know that expenditure of all of their B & P budget in one year results in an increase in their B & P budget for the following year.<sup>157</sup> Eliminating B & P reimbursement would likely result in bidders being more selective in their RFP responses because B & P expense recoupment could occur only through contract awards. In order to obtain the award, the bidder must present the most beneficial contract to the government agency.<sup>158</sup> As a result, elimination of B & P expense reimbursement facilitates the government agency's goal of economy, efficiency, and effectiveness<sup>159</sup> by prompting bidders to propose the most beneficial contract because recoupment of all expenses becomes dependent on the contract award.<sup>160</sup>

## 2. Encouragement of Technical Transfusion

In addition to cost increases, meaningful discussions furnish the contracting officer with an opportunity for technical transfusion.<sup>161</sup> Occasionally, the information the bidder receives will be the result of technical transfusions.<sup>162</sup> The contracting officer, either inadvertently or intention-

156. *See* 48 C.F.R. § 31.205-18(c)(2) (1988)(formula to determine B & P budget uses preceding year's B & P expenses as factor). The historical ratio, one of the factors used to determine a company's B & P budget, is dependent on B & P expenditures in previous years. *Id.* § 31.205-18(c)(2)(i).

157. *See id.* § 31.205-18(c)(2)(i),(ii) (method of computation for B & P ceiling). Average annual B & P expenses are used to compute the B & P expense ceiling. *Id.*

158. *See id.* § 15.611(d) (basis for contract award is most beneficial contract). The contracting officer awards the contract to the bidder with the BAFO that provides the most advantage to the government. *Id.*

159. 41 U.S.C. § 401 (Supp. V 1987) (congressional procurement policies). The government goals for procurement are economy, efficiency, and effectiveness. *Id.*

160. *Cf.* 48 C.F.R. § 31.205-18(c)(1)(i). If B & P expense reimbursements were eliminated, bidders could only recover B & P expenses through income from normal operations based on contract awards. *Id.* Because contracts are awarded to the bidder who provides the most beneficial proposal, to recoup B & P expenses the bidder must submit the most beneficial bid proposal. *Id.* § 15.611(d).

161. *See id.* § 15.610(c)(4) (government has access to other bidders' proposals). During discussions, the contracting officer should inform the bidders of mistakes in their proposals without disclosing any information from the other bidders' proposals. *Id.*

162. *See* Comptek Research, Inc., 68 Comp. Gen. 118, 120-21 (1988). Comptek Research, Inc. (Comptek) protested the award of a government contract contending that illegal activities on the part of a government official during the competition should render the contract invalid. *Id.* at 120. The FBI and the Naval Investigative Service conducted a public probe which produced allegations that one of Comptek's competitors had received confidential procurement information including initial proposal evaluations and pricing data. *Id.* The Comptroller General refused to rescind the contract because the transfusion had not influenced the final contract award. *Id.* at 122. In a recent case, Litton Systems contended that its proprietary information had been revealed to a competitor. Litton Sys. Inc., 68 Comp. Gen. 422, 422 (1989). The Air Force urged that the contract be confirmed because no proof existed



ally, communicates one bidder's ingenious or innovative proposal to another.<sup>163</sup> These unauthorized communications harm the government agency by creating a perception of unfairness in federal procurement practices, and by potentially requiring that the resulting contract be disallowed.<sup>164</sup> The financial loss associated with recompeting a contract because of the disallowance has a negative impact on the government agency by increasing the overall procurement cost.<sup>165</sup>

The problems associated with technical transfusions could be eliminated by eliminating meaningful discussions, thereby eliminating the prohibition against technical transfusions.<sup>166</sup> Eliminating the discussion period would also eliminate BAFOs and the possibility of the contracting officer influencing a bidder's BAFO through conveyance of information contained in one bidder's proposal to another.<sup>167</sup> With that opportunity eliminated, the possibility of technical transfusions is reduced tremendously.<sup>168</sup>

A second solution to the technical transfusion problem is to eliminate the

that the competitor had been able to take advantage of the information. *Id.* at 425. The Comptroller General recommended that the contract be recompeted when it was proven that materials describing one bidder's proposal had been revealed by a government official to another bidder before issuance of the RFP. *Id.* at 424-25. The Comptroller General ordered the resolicitation in spite of the fact that the information revealed did not affect the receiving bidder's proposal. *Id.* at 425. The Comptroller General stated that the correctness of a procurement award should not be decided by the ultimate usefulness of the improperly obtained information. *Id.*

163. See *Comptek Research*, 68 Comp. Gen. at 122. Fraudulent activities of government officials erode the public's faith in the integrity of the government agencies that perform procurements. *Id.*

164. *Cf. Hayes Int'l Corp. v. United States*, 7 Cl. Ct. 681, 684 (1985). The government agency has an implied-in-fact contract with its bidders to consider each proposal openly and fairly. *Id.*

165. See *Litton Sys. Inc.*, 68 Comp. Gen. 422, 426 (1989). The Litton case is a prime example of the financial impact of technical transfusions. See *id.* The Comptroller General recommended that the contract be recompeted. *Id.*; see also Bond, *Litton Gets Share of ALR-56M Program in Ill Wind Plea Agreement by Loral*, AVIATION WEEK AND SPACE TECH., Dec. 18, 1989, at 115. If the government agency had been required to recompet a contract that had been successfully contested on the grounds of government fraud, the cost would have been \$300 to \$400 million and a delay of three to four years in delivery. Bond, *Litton Gets Share of ALR-56M Program in Ill Wind Plan Agreement by Loral*, AVIATION WEEK AND SPACE TECH., Dec. 18, 1989, at 115.

166. 48 C.F.R. § 15.610(d)(2) (prohibition of technical transfusions). Technical transfusions occur when the government communicates one bidder's technical information to another bidder. *Id.*

167. See *id.* § 15.610(a)(3) (if discussions not held, contracting officer can award contract without BAFOs).

168. *But see Litton Sys.*, 68 Comp. Gen. at 424-25 (technical transfusion occurred before RFP issued). Litton Systems, Inc. successfully contested a contract award after alleging that the contracting officer gave one bidder technical information gleaned from another bidder before issuance of the RFP. *Id.*

prohibition against technical transfusion totally.<sup>169</sup> Using this approach, the contracting officer could take innovative ideas from one bidder's proposal and communicate them to all other responsible bidders.<sup>170</sup> The government would then be using meaningful discussions to achieve the most beneficial contract by incorporating the various innovations into a single concept.<sup>171</sup> To offset the financial impact of technical transfusions on bidders, the government agency would be required to reimburse bidders for their innovations through B & P reimbursement.<sup>172</sup>

Finally, the technical transfusion problem could be solved by reinterpreting the FAR to prohibit communication of technical information from one proposal to a single bidder and to allow such communications to all bidders.<sup>173</sup> The regulation reads in part: "(d) The contracting officer and other Government personnel involved shall not engage in — . . . (2) Technical transfusion (i.e., Government disclosure of technical information pertaining to a proposal that results in improvement of a *competing proposal*)."<sup>174</sup> The use of the singular "a competing proposal" rather than the plural "competing proposals" indicates that the regulation was drafted to prohibit the contracting officer from transferring information from one bidder to only *one* other bidder.<sup>175</sup> Using this interpretation, transferring information to all of the bidders would be acceptable, and each bidder would gain access to the technical innovations of the others.<sup>176</sup> As a result, the government agency's pursuit of the most beneficial contract would be encouraged because all bidders would be on the same technical level and competition would be increased accordingly.<sup>177</sup>

If the FAR were amended to allow technical transfusion and/or leveling, some bidders would lose the exclusive right to profit from their technical

169. See 48 C.F.R. § 15.610(d)(2) (prohibition of technical transfusion).

170. Cf. Act of July 2, 1926, PUB. L. No. 69-446, 44 Stat. 780, 784 (amending National Defense Act, ch. 134, 39 Stat. 166 (1916)). The government agency was allowed to select features from each bidder's designs to produce a composite aircraft design. *Id.*

171. Cf. *id.* The statute authorized the government agency to produce an aircraft design integrating the best features of the proposals provided by design competitors. *Id.*

172. See *id.* The government was required to purchase any of the the bidders' ideas used in the government's final design. *Id.*

173. See 48 C.F.R. § 15.610(d)(2) (1988)(prohibition of technical transfusion).

174. *Id.* (emphasis added).

175. See *Harward v. Commonwealth*, 330 S.E.2d 89, 91 (Va. 1985)(limiting interpretation of "a" to mean "one"). *But see* 2A N. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47.34, at 249 (4th ed. 1984). Statutory phrases introduced by "a" are usually found to be plural unless the contrary result can be reasonably understood. *Id.*

176. See 48 C.F.R. § 15.610(d)(2) (prohibiting communication of one bidder's information that improves competing proposal).

177. See *id.* § 15.611(d) (contracting officer must select most advantageous BAFO for award).

innovations. The technical innovations in issue, however, are only those developed in connection with the bidder's proposal in a two-step sealed bid or negotiated procurement. Bidders develop these proposals after the government agency supplies a portion, if not all, of the specifications in its Invitation for Bids or Request for Proposals.<sup>178</sup> The resulting innovations are developed while the bidder is in the government agency's employ and are purchased through B & P expense reimbursement and, therefore, become the government agency's property.<sup>179</sup> Because the government agency reimburses the bidder's B & P expenses, bidders are employed in a situation analogous to a contract for hire.<sup>180</sup> In these situations, an employee's technical innovations become the property of the hiring employer.<sup>181</sup> Bidders intent on protecting a technical innovation should not propose the idea to the government or seek reimbursement for B & P expenses associated with its development but should take steps to protect it under intellectual property law. When bidders utilize intellectual property they have developed outside of the procurement process, the property is protected by the applicable regulations regarding trade secrets, copyrights, and patents.<sup>182</sup> If the government agency uses an idea not protected as intellectual property, it is not denying the bidders the opportunity to profit from their technical innovations. Rather, the government is appropriating an idea developed by one of its employees<sup>183</sup> on government time and at government expense.<sup>184</sup>

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178. See *id.* § 14.201-2(c) (requirement for specification in sealed bid procurements); see also *id.* § 15.406-2(c) (requirement for specifications in negotiated contracts).

179. See *id.* § 31.205-18(c)(1)(i) (government agencies pay bidder B & P expenses). The FAR requires those bidders who received payments exceeding \$4.4 million for their B & P and IR & D expenses in a fiscal year to negotiate a B & P and IR & D ceiling for the following fiscal year. *Id.*

180. Cf. 17 U.S.C. § 201(b)(1988) (copyright ownership of works made for hire). The author of a work made for hire is considered to be the person for whom the work was performed in copyright cases. *Id.*

181. Cf. *Wommack v. Durham Pecan Co.*, 715 F.2d 962, 965 (5th Cir. 1983)(shop rights doctrine gives employer rights in employee's invention). A shop right accrues when the employee develops an invention on the employer's time or using the employer's facilities, equipment, or labor. *Id.* A shop right gives the employer the right to use an invention for his own purposes. *Id.*

182. See 48 C.F.R. § 27.104(g) (1988). The government recognizes patent and copyright property rights as well as rights in data. *Id.*

183. Cf. *Q-Co. Indus. v. Hoffman*, 625 F. Supp. 608, 619 (S.D.N.Y. 1985)(work made for hire belongs to party paying for work to be performed). In *Q-Co.*, an individual contractor developed software for a company. *Id.* The contractor later tried to sell similar software without going through the company. *Id.* at 613. The court held that the individual was actually an employee since he had used the company's equipment and supplies when he developed the software. *Id.* at 615. The court maintained that because the software development was within the scope of the individual's employment, the software was a work made for hire and the resulting copyright was the property of the company. *Id.*

184. See 48 C.F.R. §§ 14.201-.202 (contracting officer prepares and mails Invitation for

### 3. Impact on Other Means of Solving Procurement Problems

Meaningful discussions also reduce the government agency's ability to avoid RFP or specifications problems through other means.<sup>185</sup> Bidders attending a pre-bid conference will be less likely to ask questions that could solve an RFP problem if they know that the opportunity to ask the question privately will exist during meaningful discussions.<sup>186</sup> The bidder's motivation would either be to gain an advantage by concealing a weakness in the RFP which he can later identify in the proposal, or to avoid revealing his ignorance about the subject matter of the procurement.<sup>187</sup> As a result, the government agency's procurement is allowed to continue with a defective RFP or a confused competitor, either of which could have been corrected at the pre-bid conference.<sup>188</sup> In both cases, the government's pursuit of the most beneficial contract is hindered.<sup>189</sup>

Additionally, meaningful discussions inhibit resolution of RFP problems because they reward the bidders who conceal their innovative ideas until the final BAFO.<sup>190</sup> Bidders, confident that the contracting officer will request BAFOs, may conceal a technical innovation for fear of its revelation to other bidders during meaningful discussions, even though the government has previously purchased the innovation through B & P reimbursement.<sup>191</sup> Fur-

Bids in sealed bid procurement); *see also id.* §§ 15.402-.412 (contracting officer prepares and mails Request for Proposals); *id.* § 31.205-18(c)(1)(i) (government pays contractor IR & D and B & P expenses).

185. *See id.* § 15.610(c)(1)-(4). Meaningful discussions allow bidders to correct deficiencies, resolve uncertainties, and correct mistakes in their proposals. *Id.* The bidder is also allowed to submit revisions to its proposal to correct the problems identified in the discussions. *Id.* § 15.610(c)(5).

186. *See id.* § 15.409(b)(2). One purpose of the pre-bid conference is to answer questions submitted in advance by bidders. *Id.*

187. *See id.* § 15.409(c). The regulation requires that each bidder attending the pre-bid conference receive the same information. *Id.*

188. *See id.* § 14.207 (government agencies use pre-bid conferences to explain complicated RFPs).

189. *See J. NAGLE, FEDERAL PROCUREMENT REGULATIONS, POLICY, PRACTICE AND PROCEDURES* 5 (1981). When the government is in its procurement role its interest is in securing the "best economic deal possible." *Id.*

190. *See J. BEVERIDGE, THE ANATOMY OF A WIN* 102-04 (1979)(suggesting that contractors conceal ideas until negotiations). Bidders should propose a solution to the government's RFP that is completely responsive but nothing more. *Id.* at 102. The bidder should list ideas that reflect what the government truly desires rather than what is literally asked for. *Id.* These ideas should be brought to the contracting officer's attention during final negotiations. *Id.* at 104.

191. *See Litton Sys., Inc.*, 68 Comp. Gen. 422, 424 (1989). The justification for the bidder's fear of technical transference during meaningful discussions is demonstrated in *Litton* where one of the bidders in a negotiated procurement presented viewgraphs to the contracting officer detailing his competitor's current efforts on the program. *Id.* at 424 n.2. *Litton* alleged a government official provided this information to a competing contractor prior to the RFP's

thermore, bidders may develop an innovative RFP interpretation that is concealed from the contracting officer and other bidders until later BAFO submissions.<sup>192</sup> In the latter case, the contracting officer's knowledge of an innovative interpretation would be advantageous because other bidders could be informed, resulting in enhanced competition.<sup>193</sup> Meaningful discussions, however, discourage the bidders from revealing their innovations at a time when the contracting officer could convey the information to all bidders because of the possible benefits the bidders will receive by concealing their innovations.<sup>194</sup>

Meaningful discussions also encourage bidders to inflate their prices during the early rounds of proposals in order to reduce their prices during later rounds.<sup>195</sup> This practice is a reaction, at least partially, to the possibility that the contracting officer will divulge one bidder's price to another.<sup>196</sup> Understanding that possibility, bidder X may inflate his early bids to avoid the effect of information concerning his price being divulged to bidder Y.<sup>197</sup> The

issuance. *Id.* at 424. *But see* 48 C.F.R. § 15.610(d)(2) (1988)(prohibition against providing technical information from one bidder's proposal to another bidder).

192. *See* Union Carbide Corp., 55 Comp. Gen. 802, 805-06 (1976)(contractor found innovative interpretation of RFP). In a procurement for liquid hydrogen fuel for the space shuttle, NASA awarded the contract to a bidder who had proposed an innovative financing scheme which involved the government agency reimbursing the contractor for interest expenses incurred because of production expansion necessary under the contract. *Id.* The Comptroller General held that the government agency should have informed the other bidders of its willingness to accept such an arrangement. *Id.* at 807.

193. *See id.* at 809 (important that new interpretations of RFP be communicated to the bidders). If the government agency decides to accept an innovative interpretation of the RFP that changes the procurement's "ground rules," then all bidders should be informed of the change. *Id.*

194. *See* J. BEVERIDGE, THE ANATOMY OF A WIN 102-04 (1979)(suggesting that bidders conceal ideas until negotiations occur).

195. S. REP. NO. 1884, 87th Cong., 2d Sess., *reprinted in* 1962 U.S. CODE CONG. & ADMIN. NEWS 2476, 2477 (bidders might pad proposals if discussions were always required). The FAR provision allowing awards of contracts without discussions was encouraged because the provision prevented bidders from artificially inflating their initial proposal costs. *Id.*

196. *See* Fairchild Hiller Corp., 50 Comp. Gen. 1, 6-7 (1970)(government accused of revealing one bidder's price to another bidder). Fairchild submitted an early bid because of a miscommunication between Fairchild and the contracting officer. *Id.* at 6. Fairchild alleged that its price was leaked to the other bidders. *Id.* at 7. The Comptroller General recommended that the contract award be reconsidered even though there was no evidence of an information leak because it could not be conclusively shown that a leak did not occur. *Id.*

197. *See* J. HANRAHAN, GOVERNMENT BY CONTRACT 154 (1983)(describing situation where bidders bid high in early rounds and dropped price in last round). In a negotiated procurement, E-Systems bid \$799.50 per unit for 6,990 radio units in the first round of bidding. *Id.* Subsequently, E-Systems was able to drop its price by \$150 per unit in the final round of bidding. With this new price, E-Systems' bid dropped \$5 per unit below the previous low bidder's bid and E-Systems won the contract. However, the change in the proposal that resulted in lower cost should have caused the unit cost to increase. *Id.*

problem with this practice is the contracting officer will also receive an inaccurate picture of the true procurement costs during the early stages of bidding.<sup>198</sup> Because of the inflated bids, the government agency may change its RFP's scope or quality requirements to reduce the procurement cost.<sup>199</sup> As a result, bidders use of meaningful discussions to reduce pricing further frustrates the government's pursuit of the most beneficial contract.<sup>200</sup>

Elimination of meaningful discussions is the most productive way to encourage resolution of procurement problems in the interval before the RFP is released. If meaningful discussions are eliminated, the pre-bid conference becomes a period of problem solving and ambiguity resolution because the bidders are unable to depend on private discussions with the contracting officer to reveal their concerns about the RFP.<sup>201</sup> Elimination of meaningful discussions enhances the possibility that the contracting officer will learn about a bidder's innovative technical ideas early in the procurement process because the bidders could not depend on discussions to test their ideas on the contracting officer.<sup>202</sup> Finally, elimination of meaningful discussions would reduce the possibility of bid inflation because the bidder knows that the first bid is also the only bid.<sup>203</sup>

## VI. AGENCY ANALYSIS

The contracting officer must pursue the most beneficial contract because of his agency relationship with the government.<sup>204</sup> Under common law agency principles, the contracting officer's status as an employee of the government<sup>205</sup> creates an agency relationship.<sup>206</sup> The agent owes a duty of good

198. *See id.* at 154 (describing drop in cost from first round of bids to last). In a procurement involving several rounds of bids, the lowest bid dropped from \$3,726,284 to \$2,884,992. *See id.*

199. *See id.* In order to reduce the program cost from \$3,726,284 to \$2,884,992, the government agency was forced to delete some quality assurance provisions, which determine the quality of the product that the contractor delivers, and reduced the number of radio units that it proposed to purchase from 6,990 to 5,464. *Id.*

200. *See* J. NAGLE, FEDERAL PROCUREMENT REGULATIONS, POLICY, PRACTICE AND PROCEDURES 5 (1981)(describing government's goal of most beneficial contract).

201. *See* 48 C.F.R. § 15.409(a) (1988)(purpose of pre-bid conference is to explain complicated RFPs); *see also id.* § 15.409(b)(2)(government authorized to answer written questions at pre-bid conference).

202. *See* J. BEVERIDGE, THE ANATOMY OF A WIN 102-04 (1979)(proposing bidders list RFP improvements to be suggested during negotiations).

203. S. REP. NO. 1884, 87th Cong., 2d Sess., *reprinted in* 1962, U.S. CODE CONG. & ADMIN. NEWS 2476, 2477. If the discussion period is guaranteed, bidders might inflate their proposed costs in order to lower them after discussions. *Id.*

204. *See* 48 C.F.R. § 15.611(d). The contracting officer has a responsibility to choose the most beneficial BAFO. *Id.*

205. *See id.* § 1.603-2 (selection criteria for contracting officer suggest contracting officer should be government employee).

faith and undivided loyalty to his principal, as well as a duty to follow the principal's instructions.<sup>207</sup> In the procurement context, the government agency, as principal, commands the contracting officer to select the bidder whose BAFO provides the greatest benefit.<sup>208</sup>

In a sealed bid procurement, the contracting officer is also the winning bidder's agent during the period following the contract award until the contract document is signed, similar to an auctioneer becoming the purchaser's agent after his hammer falls.<sup>209</sup> In an auction, the auctioneer is the agent of the property owner.<sup>210</sup> When the auctioneer accepts a bid, he also becomes the agent of the purchaser for the purpose of signing the memorandum of sale to remove the sale from the application of the Statute of Frauds.<sup>211</sup> Similarly, when a contracting officer in a sealed bid competition chooses the winner, he becomes the winning bidder's agent for the purpose of finalizing the written contract, and removing the sale from the effects of the Statute of Frauds.<sup>212</sup>

206. See RESTATEMENT (SECOND) OF AGENCY § 25 (1957). Agency concepts apply to the master/servant relationship. *Id.*; see also 48 C.F.R. § 1.602-3(b)(2) (1988)(allowing government ratification of contracting officer's unauthorized acts).

207. See L. LAKIN & M. SCHIFF, THE LAW OF AGENCY 104-06 (1984)(describing duties owed by agent to principal). The agent owes a duty to his principal to follow all of the principal's instructions. *Id.* at 104. The agent also owes a duty of good faith and undivided loyalty to his principal. *Id.* at 105.

208. See 48 C.F.R. § 15.611(d) (contracting officer's duty to select most advantageous BAFO).

209. See *id.* §§ 14.404-1 to .406-3 (describing contracting officer's responsibilities after bids received but before award made). The contracting officer is required to reject bids that do not meet the RFP's requirements after the bids are received and before awarding the contract. *Id.* §§ 14.404-1 to -5. During this same period the contracting officer is allowed to disregard minor inconsistencies in a bidder's proposal and allow the bidders to correct mistakes in their proposals. *Id.* §§ 14.405 to .406-3.

210. See 2 F. MECHEM, A TREATISE ON THE LAW OF AGENCY § 2320, at 1906 (2d ed. 1914)(auctioneer is agent for owner of property).

211. See *Rosin v. First Bank*, 466 N.E.2d 1245, 1250-51 (Ill. App. Ct. 1984)(describing dual agency of auctioneer). The auctioneer is the agent of the seller but also becomes the agent of the purchaser as soon as the hammer falls. *Id.* The auctioneer's agency relationship with the purchaser begins when his offer is accepted and ends when the auctioneer completes the memorandum of sale that is sufficient to remove the sale from the Statute of Frauds. *Id.* at 1251; see also *Love v. Harris*, 72 S.E. 150, 151 (N.C. 1911)(source of agency power for auctioneer). The purchaser, by bidding, sanctions the auctioneer's authority to sign the memorandum of sale on the purchaser's behalf. *Love* at 151; 2 F. MECHEM, A TREATISE ON THE LAW OF AGENCY § 2320, at 1907 (2d ed. 1914)(auctioneer is agent of purchaser to extent necessary to complete sale).

212. *Cf. Chevalier v. Town of Sanford*, 475 A.2d 1148, 1148 (Me. 1984)(rules for sealed bidding analogous to rules for auctions); RESTATEMENT (SECOND) OF CONTRACTS § 28 comment c (1981). Awarding contracts to the lowest responsible bidder is analogous to an auction to the extent that the bids are treated as offers which can be refused. *Id.*; CORBIN ON CONTRACTS § 24A (Supp. I 1989)(bidding on government contracts similar to auction).

In negotiated procurements, the contracting officer is the agent for each bidder in the competitive range.<sup>213</sup> The agency relationship arises from the contracting officer's duty to complete the competitive process after establishing the competitive range.<sup>214</sup> This conditional acceptance of some bids and rejection of others is analogous to the auctioneer's acceptance of a bid or the contracting officer choosing a winner in a sealed bid procurement.<sup>215</sup> As a result, an agency relationship arises between the contracting officer and the bidders in the competitive range in the same manner that an agency is created when an auctioneer accepts the highest bid.<sup>216</sup> The contracting officer is the bidders' agent for the purpose of completing the sale,<sup>217</sup> and that agency relationship continues to the end of the competitive process.<sup>218</sup> The agency relationship is not terminated by the selection of the competitive range.<sup>219</sup> The FAR imposes a duty through this agency relationship on the contracting officer to assist in improving their proposals through meaningful discussions.<sup>220</sup> The FAR also imposes a duty on the contracting officer to avoid technical leveling, technical transfusion, and auctioning techniques

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213. *Cf. Rosin*, 466 N.E.2d at 1250 (auctioneer becomes agent of buyer when hammer falls).

214. *See* 48 C.F.R. § 15.610(b) (1988)(contracting officer required to hold discussions with bidders in competitive range). *But see id.* § 15.610(a)(3) (situations when discussions not needed). The contracting officer is not required to hold discussions if he can demonstrate that the procurement has been fully and openly competitive and that awarding the contract to the bidder proposing the most beneficial initial proposal would produce the lowest cost to the government. *Id.*

215. *See id.* § 15.609(a)-(b) (describing rejection of bids that do not fall in competitive range). Proposals that are acceptable to the government or could be made acceptable through discussions are considered to be within the competitive range. *Id.* § 15.609(d). Proposals that are not within the competitive range are not considered further. *See id.* § 15.609(b).

216. *Cf. Love v. Harris*, 72 S.E. 150, 151 (N.C. 1911)(buyer's participation in auction is source of agency power for auctioneer). The buyer, by bidding, gives the auctioneer the authority to sign the memorandum of sale on his behalf. *Id.*

217. *Cf. Rosin v. First Bank*, 466 N.E.2d 1245, 1251 (Ill. App. Ct. 1984)(describing extension of auctioneer's agency to sale with reserve). A sale with reserve occurs when the auctioneer invites bids but makes it clear that a contract for sale has not been formed until the seller makes some indication of assent to the high bid. *Id.* at 1249. The auctioneer's authority as agent for the high bidder extends beyond the point where the high bid was made to the point that the transaction is completed either by the seller accepting or rejecting the bid. *Id.* at 1251.

218. *See id.* at 1251 (agency created to accomplish particular purpose and not terminated until purpose is accomplished); *see also Hartford v. McGillicuddy*, 68 A. 860, 862 (Me. 1907)(agency to sell land continues until land sold).

219. *See Rosin*, 466 N.E.2d at 1251 (agent's authority to perform series of tasks is not terminated by performance of one task); *see also Wolcott v. Hayes*, 88 N.E. 111, 113 (Ind. Ct. App. 1909)(agency created to purchase land extends to resolution of ambiguity about number of acres).

220. *See* 48 C.F.R. § 15.610(c)(1)-(5) (1988)(purpose of discussions to allow bidder to correct ambiguities, mistakes, and deficiencies in his proposal).



during the discussions.<sup>221</sup> The contracting officer's contradictory duties imposed by the FAR guarantee that he will violate his fiduciary duty to one of his two principals.<sup>222</sup> The FAR imposes a duty on the contracting officer on behalf of the government agency to pursue the most beneficial contract through meaningful discussions.<sup>223</sup> The contracting officer also owes a duty to the bidders under the FAR to avoid technical leveling, technical transfusion, and auctioning.<sup>224</sup> These duties conflict because frequently the most beneficial contract to the government is best achieved through the prohibited means of technical leveling, technical transfusion, or auctioning.<sup>225</sup>

Because of this conflict, either meaningful discussions or the prohibition against technical transfusion, technical leveling, and auctioning must be eliminated.<sup>226</sup> If meaningful discussions were unavailable, the conflict would disappear because the contracting officer could choose the winning proposal without incurring an obligation to help the bidders improve their proposals.<sup>227</sup> Alternatively, the conflict disappears if the prohibitions were eliminated because the contracting officer could obtain the most beneficial contract using innovative elements from each bidder's proposal received, without undertaking an obligation to the bidders to avoid technical leveling, technical transfusion, or auctioning.<sup>228</sup>

## VII. CONCLUSION

Meaningful discussions in federal negotiated procurements provide government agencies with the opportunity to procure goods or services that can-

221. *See id.* § 15.610(d)(1)-(3) (technical leveling, technical transfusion and auctioning prohibited).

222. *See Hampton Roads Carriers, Inc. v. Boston Ins. Co.*, 150 F. Supp. 338, 343 n.9 (D. Md. 1957)(dual agency possible when parties act in good faith, authority granted by both principals, and no conflict of interest present); *see also American Eagle Fire Ins. Co. v. Burdine*, 200 F.2d 26, 30 (10th Cir. 1952)(dual agency may exist as long as neither conflict of interest between principals nor inconsistent duties to principals are present).

223. *See* 48 C.F.R. § 15.611(d) (after receipt of BAFOs, contracting officer should select proposal most advantageous to government).

224. *See id.* § 15.610(d)(1)-(3) (prohibition of technical leveling, technical transfusion, and auctioning).

225. *See* Act of July 2, 1926, PUB. L. NO. 69-446, 44 Stat. 780, 784 (amending National Defense Act, ch. 134, 39 Stat. 166 (1916))(allowing government to choose best ideas from bid competition). The government agency was allowed to select features from the designs of each of the bidders to produce a composite aircraft design. *Id.*

226. *See* 48 C.F.R. § 15.610(b) (1988)(requirement for discussions); *see also id.* § 15.610(d) (prohibition of technical leveling, technical transfusion, and auctioning).

227. *Cf. id.* § 14.101(d) (sealed bid procurements evaluated without discussions).

228. *See* Act of July 2, 1926, PUB. L. NO. 69-446, 44 Stat. 780, 784 (amending National Defense Act, ch. 134, 39 Stat. 166 (1916))(allowing government to choose best ideas). The government agency was authorized to produce a composite design using the best features of the designs proposed by each of the bidders. *Id.*

not be precisely defined. If these discussions were unlimited, the government could examine the approaches developed by a group of experts in response to an ambiguous specification and synthesize a composite approach incorporating the best ideas from each proposal. Bidders could then be urged to pursue some avenues of development and to abandon others. The end result would be a group of bidders knowledgeable about the government agency's procurement, and an increase in competition among those bidders, resulting in the most beneficial contract for the government agency.

The FAR, however, allows this stream of logic to flow to a certain point and then terminates it with the result that meaningful discussions become a hindrance to the government's pursuit of the most beneficial contract. The truncation takes place because the FAR limits the contents of discussions during the meaningful discussion period by prohibiting technical leveling, technical transfusion, and auctioning. The aggressive synthesis step that the government should be allowed to take during meaningful discussions is tempered by the realization that technical ideas from one proposal cannot be communicated to another bidder. It is not fair, the courts have held, for one bidder to benefit from the innovations of another.

The irony of the courts' reasoning is that the government pays for the ideas proposed by the bidders. Those bidders already working on government contracts are allowed to add a premium to their government bills for work done on contracts and use the premium to pay their bid and proposal expenses. The logical conclusion is that any innovations developed as part of a proposal are the property of the government agency. Instead, the courts and the OFPP have imposed ludicrous protections on these innovations during meaningful discussions when they have already been paid for by the government agency and may be the key to the most beneficial contract.

Coupled with this irony is the fact that meaningful discussions actually harm the procurement process. The government agency may not exert the necessary effort to produce a precise specification, when one is possible, because of the availability of meaningful discussions. The bidders may conceal their technical innovations and submit inflated bids in the early rounds of proposals because of their knowledge that an opportunity to reveal their innovations and lower bids in subsequent rounds and during meaningful discussions is present. These maneuverings by the bidders simply prolong the procurement process, increase the associated expense, and reduce the likelihood of achieving the government's most beneficial contract.

Meaningful discussions also place the contracting officer in the untenable position of being a dual agent with conflicting duties to his two principals. To the government agency, the contracting officer owes the duty of pursuing the most beneficial contract. To the bidders, he owes the duty of protecting their innovations during the procurement process. These duties conflict be-

cause the most beneficial contract to the government may come through technical leveling, technical transfusion, or auctioning.

These procurement problems are most easily solved by simply eliminating meaningful discussions from the procurement system. This solution, however, may be throwing the baby out with the bath water because the benefits to government agencies of increased competition and tolerance for ambiguous specifications may require that meaningful discussions continue.

To reach a compromise solution, the government should retain meaningful discussions but remove the prohibitions on the contents. This solution would move the negotiated procurement process closer to the ideal of the government agency combining the innovations from the proposals received into a single concept resulting in the most beneficial contract. This same result would be possible if the FAR's prohibition on technical transfusions were modified to prohibit only communication of innovations from one bidder to a single bidder but to allow such communications if all of the bidders receive the same information. The result of this modification would be to retain the current features of the FAR that prohibit favoritism while allowing the free flow of information necessary to produce the most beneficial contract.

The conflict identified with meaningful discussions arises partially from the government's practice of reimbursing bidders for their bid and proposal expenses. Terminating bidder reimbursement would eliminate the conflict. As a result, the bidders would absorb the cost of bidding on government contracts as a cost of doing business. The innovations produced through the bidder's unreimbursed proposal efforts would be their own and not the property of the government. Thus, eliminating bidder reimbursement for bid and proposal expenses would justify the prohibition of technical transfusions during meaningful discussions.