



DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 13, 15, and 16

[FAR Case 2017-010; Docket No. 2017-0009; Sequence No. 1]

RIN 9000-AN54

Federal Acquisition Regulation: Evaluation Factors for Multiple-Award Contracts

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement a section of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017.

DATES: Interested parties should submit comments to the Regulatory Secretariat Division at one of the addresses shown below on or before **[INSERT DATE 60 DAYS AFTER**

PUBLICATION IN THE FEDERAL REGISTER] to be considered in the formulation of a final rule.

ADDRESSES: Submit comments in response to FAR Case 2017-010 by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by entering "FAR Case 2017-010" under the heading "Enter Keyword or ID" and selecting "Search". Select the link "Comment Now" that corresponds with "FAR Case 2017-010". Follow the instructions provided on the screen. Please include your name, company name (if any), and "FAR Case 2017-010" on your attached document.

- Mail: General Services Administration, Regulatory Secretariat Division, ATTN: Lois Mandell, 1800 F Street, NW, 2nd floor, Washington, DC 20405.

Instructions: Please submit comments only and cite "FAR case 2017-010" in all correspondence related to this case. Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Michael O. Jackson, Procurement Analyst, at 202-208-4949. For information pertaining to status or publication schedules, contact the Regulatory

Secretariat Division at 202-501-4755. Please cite "FAR Case 2017-010."

SUPPLEMENTARY INFORMATION:

I. Background

Section 825 of the NDAA for FY 2017 (Pub. L. 114-328) amends 10 U.S.C. 2305(a)(3) to modify the requirement to consider cost or price as an evaluation factor for the award for certain multiple-award task order contracts issued by DoD, NASA, or the Coast Guard. Section 825 provides that, at the Government's discretion, solicitations for multiple-award contracts for the same or similar services that state the Government intends to award a contract to each qualifying offeror do not require price or cost as an evaluation factor for contract award. This exception does not apply to solicitations for multiple-award contracts that provide for sole source orders pursuant to section 8(a) of the Small Business Act (15 U.S.C. 637(a)). When cost or price is not evaluated during contract award, the contracting officer shall consider price or cost as a factor for the award of each order under the contract. Section 825 of the NDAA for FY 2017 also amends 10 U.S.C. 2304c(b) to add exemptions for the use of competitive procedures when placing an order under a multiple-award contract.

II. Discussion and Analysis

This rule proposes to amend the FAR, as follows:

- FAR parts 13 and 15 are revised to add, for use by DoD, NASA, or the Coast Guard, the exception to requiring price or cost as an evaluation factor in solicitations valued above the simplified acquisition threshold for multiple-award contracts for the same or similar services when the Government intends to award a contract to each and all qualifying offerors; explain what a qualifying offeror is in terms of the rule; and clarify that the exception shall not apply to solicitations for multiple-award contracts that provide for sole source orders pursuant to section 8(a) of the Small Business Act (15 U.S.C. 637(a)).
- FAR part 16 is revised to add, for use by DoD, NASA, or the Coast Guard, the exceptions for use of other than full and open competition, listed in FAR 6.302, to the list of exceptions to fair opportunity at FAR 16.505(b) (2).

III. Expected Impact of the Proposed Rule and Proposed Cost Savings

Currently, offerors on solicitations for multiple-award contracts for services are required to submit cost or price information with their proposals in order to be

eligible for award. The time and effort that offerors expend to produce this cost or price information varies according to numerous factors, such as the proposed contract type, the source selection approach, or the offeror's internal processes and resources.

Upon implementation of a final rule, contracting officers from DoD, NASA, and the Coast Guard may choose not to include cost or price as an evaluation factor in solicitations for multiple-award contracts for services, as long as an award will be made to each and all qualified offerors. As a result, offerors responding to these solicitations will not incur costs to develop and prepare the cost or price information typically required to be eligible for contract award. Subsequently, the FAR also requires cost and price information to be evaluated before the award of an order placed under a multiple-award contract. This rule does not impact that process.

As this rule, when utilized, will remove a burden from offerors and does not implement any new requirements on offerors, DoD, GSA, and NASA consider this rule to be deregulatory.

In an attempt to monetize an offeror's cost savings as a result of this rule, DoD, GSA, and NASA seek input from service contractors that could be impacted by this rule. In

particular, DoD, GSA, and NASA welcome feedback on (i) the type of personnel (e.g., accountants or program managers) used to develop and prepare cost or price information for proposals on multiple-award service contracts; (ii) the number of hours (in a range) that would be spent by each type of personnel to develop and prepare the cost or price information for such a proposal; and (iii) the average hourly rate for each type of personnel used to develop and prepare the cost or price information for such a proposal, or the total average amount spent for each type of personnel to develop and prepare the cost or price information for such a proposal. Please identify the types of services you typically submit proposals for and whether or not your efforts/costs to provide cost or price information vary depending on different factors related to the solicitation (e.g., contract type or service type). If you do experience a variation in your efforts/costs to provide cost or price information, please describe these variations in your efforts/cost, to the extent possible, in your response.

IV. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

No contract clauses or solicitation provisions are

being created or revised by this rule.

V. Executive Order 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

VI. Executive Order 13771

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866. However, as explained in Section III of this preamble, DoD, GSA, and NASA believe the rule is deregulatory and seek public input on this preliminary determination, as well as information that can help monetize any savings.

VII. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. However, an Initial Regulatory Flexibility Analysis (IRFA) has been performed and is summarized as follows:

DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement section 825 of the National Defense Authorization Act (NDAA) for FY 2017 (Pub. L. 114-328; 10 U.S.C. 2305(a)(3) and 10 U.S.C. 2304c(b)(5)).

The objective of this proposed rule is to implement section 825 of the NDAA for FY 2017.

This rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. There were 3,963 new multiple-award contracts for services awarded in Fiscal Year 2016, and 2,810 (71 percent) of these actions were awarded to small business. The proposed rule applies to all entities who do business with the Federal Government, but it is not expected to have a significant impact.

This rule does not impose any new reporting, recordkeeping or other compliance requirements. The rule does not duplicate, overlap, or conflict with any other Federal rules. There are no known significant alternative approaches to the proposed rule that would meet the requirements of the applicable statute.

The Regulatory Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by this rule consistent with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2017-010) in correspondence.

VIII. Paperwork Reduction Act

This proposed rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 13, 15, and 16

Government procurement.

Dated: September 18, 2018.

William F. Clark,
Director,
Office of Government-wide
Acquisition Policy,
Office of Acquisition Policy,
Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA are proposing to amend 48 CFR parts 13, 15, and 16 as set forth below:

1. The authority citation for 48 CFR parts 13, 15, and 16 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 13-SIMPLIFIED ACQUISITION PROCEDURES

2. Amend 13.106-1 by revising paragraph (a) (2) to read as follows:

13.106-1 Soliciting competition.

(a) * * *

(2)(i) When soliciting quotations or offers, the contracting officer shall notify potential quoters or offerors of the basis on which award will be made (price alone or price and other factors, e.g., past performance and quality).

(ii) Contracting officers are encouraged to use best value.

(iii) Solicitations are not required to state the relative importance assigned to each evaluation factor and subfactor, nor are they required to include subfactors.

(iv) For DoD, NASA, and the Coast Guard—

(A) When issuing a solicitation valued above the simplified acquisition threshold for a multiple-award

contract for the same or similar services and the solicitation states that the Government intends to make an award to each and all qualifying offerors, the contracting officer may choose not to include price or cost as an evaluation factor for the contract award (10 U.S.C. 2305(a)(3));

(B) Whether or not cost or price is evaluated at contract award, the contracting officer shall consider price or cost as one of the factors in the selection decision for each order (see 16.505);

(C) A qualifying offeror is an offeror that is determined to be a responsible source, submits a technically acceptable proposal that conforms to the requirements of the solicitation, and the contracting officer has no reason to believe would be likely to offer other than fair and reasonable pricing (10 U.S.C. 2305(a)(3)); and

(D) The exception at 13.106-1(a)(2)(iv)(A) shall not apply to solicitations for multiple-award contracts that provide for sole source orders pursuant to section 8(a) of the Small Business Act (15 U.S.C. 637(a)).

PART 15-CONTRACTING BY NEGOTIATION

3. Amend 15.304 by revising paragraph (c)(1) and paragraph (e) introductory text to read as follows:

15.304 Evaluation factors and significant subfactors.

* * * * *

(c) * * *

(1)(i) Price or cost to the Government shall be evaluated in every source selection (10 U.S.C. 2305(a)(3)(A)(ii) and 41 U.S.C. 3306(c)(1)(B)) (also see part 36 for architect-engineer contracts), subject to the exception listed in paragraph (c)(1)(ii) of this section for use by DoD, NASA, and the Coast Guard.

(ii) For DoD, NASA, and the Coast Guard—

(A) When issuing a solicitation valued above the simplified acquisition threshold for a multiple-award contract for the same or similar services and the solicitation states that the Government intends to make an award to each and all qualifying offerors, the contracting officer may choose not to include price or cost as an evaluation factor for the contract award (10 U.S.C.

2305(a)(3));

(B) Whether or not cost or price is evaluated at contract award, the contracting officer shall consider price or cost as one of the factors in the selection decision for each order (see 16.505);

(C) A qualifying offeror is an offeror that is determined to be a responsible source, submits a

technically acceptable proposal that conforms to the requirements of the solicitation, and the contracting officer has no reason to believe would be likely to offer other than fair and reasonable pricing (10 U.S.C. 2305(a)(3)); and

(D) The exception in paragraph (c)(1)(ii)(A) of this section shall not apply to solicitations for multiple-award contracts that provide for sole source orders pursuant to section 8(a) of the Small Business Act (15 U.S.C. 637(a));

* * * * *

(e) Unless the exception at 15.304(c)(1)(ii)(A) of this section applies, the solicitation shall also state, at a minimum, whether all evaluation factors other than cost or price, when combined, are—

* * * * *

PART 16—TYPES OF CONTRACTS

4. Amend 16.505 by adding paragraph (b)(2)(i)(G) to read as follows:

16.505 Ordering.

* * * * *

(b) * * *

(2) * * *

(i) * * *

(G) For DoD, NASA, and the Coast Guard, the order satisfies one of the exceptions permitting the use of other than full and open competition listed in 6.302 (10 U.S.C. 2304c(b)(5)). The public interest exception shall not be used unless Congress is notified in accordance with 10 U.S.C. 2304(c)(7).

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Billing Code: 6820-EP

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