



DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 15

[FAC 2019-03; FAR Case 2017-006; Docket No. 2017-0006;

Sequence No. 1]

RIN 9000-AN53

Federal Acquisition Regulation: Exception from Certified Cost or Pricing Data Requirements—Adequate Price Competition

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to provide guidance to DoD, NASA, and the Coast Guard, consistent with a section of the National Defense Authorization Act for Fiscal Year 2017 that addresses the exception from certified cost or pricing data requirements when price is based on adequate price competition

DATES: Effective [Insert date 30 days after date of publication in the FEDERAL REGISTER].

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

publication schedules, contact the Regulatory Secretariat Division at 202-501-4755. Please cite FAC 2019-03, FAR Case 2017-006.

SUPPLEMENTARY INFORMATION:

I. Background.

DoD, GSA, and NASA published a proposed rule at 83 FR 27303 on June 12, 2018, to revise the standard for "adequate price competition" applicable to DoD, NASA, and the Coast Guard, as required by section 822 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114-328). Section 822 excludes from the standard for adequate price competition the situation in which there was an expectation of competition, but only one offer is received. The standard of adequate price competition that is based on a reasonable expectation of competition is now applicable only to agencies other than DoD, NASA, and the Coast Guard. Ten respondents submitted comments on the proposed rule.

II. Discussion and Analysis.

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. A discussion of the comments and the changes

made to the rule as a result of those comments are provided as follows:

A. Summary of significant changes.

Instead of providing a separate standard for DoD, NASA, and the Coast Guard, the final rule states first what is common to all agencies, and then makes the standard relating to expectation of competition applicable only to agencies other than DoD, NASA, and the Coast Guard. This clarification is not intended to reflect a substantive change from the proposed rule; rather, it is intended as a drafting improvement.

For simplicity, the final rule does not use the terms "responsive" and "viable," but expresses the new requirements using the existing FAR terminology.

B. Analysis of public comments

1. Statutory requirement for the rule.

Comment: One respondent found it unclear what problem this rule is trying to resolve. The respondent urged reconsideration of this regulation until the actual problem can be identified and targeted with an expected outcome that provides an acceptable solution. The respondent further recommended that contracting officers should be allowed wide latitude to exercise business judgment, and that any regulatory changes should be focused on training

and appointment of contracting officers Governmentwide. Another respondent stated that the ability to utilize "the expectation of competition" is a valuable tool that should not be removed for DoD, NASA, and the Coast Guard.

Response: This rule is required to partially implement section 822 of the NDAA for FY 2017, which excludes from the standard for adequate price competition the situation in which there was an expectation of competition, but only one offer is received.

2. Applicability.

a. All Federal agencies.

Comment: One respondent recommended that the rule should also apply to all Federal agencies.

Response: Section 822 of the NDAA for FY 2017 only applies to DoD, NASA, and the Coast Guard (see 10 U.S.C. 2306a).

b. Below simplified acquisition threshold and commercial items.

Comment: One respondent recommended that the rule should apply to all noncompetitive contracts and subcontracts at or below the simplified acquisition threshold (SAT) and to the acquisition of commercial products and services.

Response: Section 822 of the NDAA for FY 2017 only addressed when contractors need to provide cost or pricing data for DoD, NASA, and the Coast Guard. Certified cost or pricing data is not required below the SAT or for the acquisition of commercial products or services. See 10 U.S.C. 2306a and 41 U.S.C. 3502 and 3503. These sections set the threshold at \$2 million (section 811 of Pub. L. 115-91) and exempt commercial items.

3. Terminology.

a. Responsive and viable offer.

Comment: Several respondents requested a definition of "responsive offer." Another respondent stated that the term, "responsive" is not appropriate to define "adequate price competition" under FAR part 15. This respondent cited a Government Accountability Office ruling that responsiveness is applicable to FAR part 14 sealed bidding acquisitions and not FAR part 15 contracting by negotiation. Two respondents recommended including a definition of "viable offer."

Response: The terms "responsive" and "viable" have been removed from the final rule. The concept is conveyed through current FAR language at FAR 15.403-1(c)(1), i.e., "responsible offerors, competing independently, submit

priced offers that satisfy the Government's expressed requirement."

b. Competing independently.

Comment: One respondent sought elaboration on the use of the phrase "competing independently," specifically if it were to be used in the context of a contractor's affiliate or long-term agreement holder entering a price competition.

Response: The first standard for adequate price competition in FAR 15.403-1(c)(1)(i) already includes the requirement that two or more responsible offerors, competing independently, submit price offers that satisfy the Government's expressed requirements, where award will be made in a best-value competition and there is no finding that the price of the otherwise successful offeror is unreasonable. Whether two offerors are competing independently is specific to the particular circumstances.

4. Impact on burden and procurement action lead time.

Comment: Several respondents commented on the increased burdens that will result from this rule and potential impact on procurement action lead time (PALT). One respondent stated that this change will increase the burden on the contracting officer in obtaining certified cost or pricing data and conducting additional proposal analysis. Another respondent was concerned that the new

statutory framework will likely generate costly and time-consuming rework of proposals by requiring a bidder to provide a second, TINA-compliant proposal when it is learned that they are the only responsive bidder.

Response: This rule provides to DoD, NASA, and the Coast Guard the revised standard on how to determine adequate price competition. The principle will not have an impact on offerors/contractors or contracting officers until implemented at the agency level by DoD, NASA, and the Coast Guard. There are no projected reporting, recordkeeping, or other compliance requirements of this rule. However, the corollary of this FAR change is that DoD, NASA, and the Coast Guard will be required, by statute, to obtain certified cost or pricing data from an offeror when only one offer is received and no other exception applies, which will likely increase burden and PALT (e.g., see DoD proposed rule published under DFARS Case 2017-D009 at 83 FR 30656 on June 29, 2018).

5. Subcontracts.

Comment: Several respondents raised issues relating to subcontracts.

One respondent asked whether this rule intends for subcontracts under DoD, NASA, and Coast Guard contracts to

be competed at the same standard as is being applied to prime contracts.

Another respondent was concerned that the FAR rule did not implement 10 U.S.C. 2306a(b)(6), which requires a prime contractor required to submit cost or pricing data to determine whether a subcontract under such contract qualifies for an exception under paragraph (b)(1)(A) (adequate price competition) from such requirement.

One respondent expressed concern about restarts of subcontract competitions when a prime contractor receives only one offer for a subcontract. This respondent also speculated that prime contractors may take on more evaluation risks to avoid finding suppliers unacceptable, so as not to end up with only one responsive and viable offer.

Response: This FAR rule lays out the general principle of what constitutes adequate price competition for DoD, NASA, and the Coast Guard. The details of applicability to subcontracts and responsibilities of the prime contractor will be addressed at the agency level (e.g., see DoD proposed rule published under DFARS Case 2017-D009 at 83 FR 30656 on June 29, 2018). The concern about potential impact on subcontract awards cannot be resolved, because this change is required by statute.

6. Edits.

Comment: One respondent requested insertion of the word "or" between 15.403-1(c)(1)(i)(A)(2) and section (c)(1)(i)(B) to clarify that the two options are separate and distinct and are not both required to meet the standard for adequate price competition.

Response: The language in the proposed rule text between FAR 15.403-1(c)(1)(i)(A) and (B) is structured consistent with the FAR drafting convention for vertical lists of items separated by semi-colons: namely, in a vertical list of more than two items, the conjunction "and" or "or" only appears between the last two items in the list. However, as noted in section II.A. of this preamble, FAR 15.403-1(c)(1) is revised in this final rule to provide a drafting improvement and clarification, which obviates the request to modify the proposed rule language.

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

This rule does not contain any solicitation provision or contract clause that applies to contracts or subcontracts at or below the simplified acquisition threshold or contracts or subcontracts for the acquisition

of commercial items, including commercially available off-the-shelf items.

IV. Executive Orders 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.

V. Executive Order 13771

This final rule is not an E.O. 13771 regulatory action, because this rule is not significant under E.O. 12866.

VI. Regulatory Flexibility Act.

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is

summarized as follows:

The reason for this action is to implement section 822 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114-328). The objective of this rule is to provide a separate standard for "adequate price competition" as the basis for an exception to the requirement to provide certified cost or pricing data. The statutory basis is 10 U.S.C. 2306a, as amended by section 822 of the NDAA for FY 2017.

Section 822 modifies 10 U.S.C. 2306a, the Truth in Negotiations Act, which is applicable only to DoD, NASA, and the Coast Guard.

No significant issues were raised by the public with regard to the initial regulatory flexibility analysis.

This rule only provides a statement of internal guidance to DoD, NASA, and the Coast Guard. This principle will not have impact on small entities until implemented at the agency level by DoD, NASA, and the Coast Guard.

There are no projected reporting, recordkeeping, or other compliance requirements of the rule. The rule amends the standards for adequate price competition for DoD, NASA, and the Coast Guard. However, the corollary of this FAR change is that DoD, NASA, and the Coast Guard will be required to obtain certified cost or pricing data from an offeror when only one offer is received, and no other exception applies.

Since this rule does not impose a burden on small entities, DoD, GSA, and NASA were unable to identify any alternatives that would reduce burden on small business and still meet the requirements of the statute.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VII. Paperwork Reduction Act.

The 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 Part 15

Government procurement.

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 amending 48 CFR part 15 as set forth below:

PART 15—CONTRACTING BY NEGOTIATION

1. The authority citation for part 15 continues to read as follows:

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

2. Amend section 15.305 by revising the third sentence of paragraph (a) (1) to read as follows:

15.305 Proposal evaluation.

(a) * * *

(1) * * * In limited situations, a cost analysis may be appropriate to establish reasonableness of the otherwise successful offeror's price (see 15.403-

1(c) (1) (i) (C)). * * *

* * * * *

3. Amend section 15.403-1 by revising paragraph (c)(1) to read as follows:

15.403-1 Prohibition on obtaining certified cost or pricing data (10 U.S.C. 2306a and 41 U.S.C. chapter 35) .

* * * * *

(c) * * *

(1) Adequate price competition. (i) A price is based on adequate price competition when—

(A) Two or more responsible offerors, competing independently, submit priced offers that satisfy the Government's expressed requirement;

(B) Award will be made to the offeror whose proposal represents the best value (see 2.101) where price is a substantial factor in source selection; and

(C) There is no finding that the price of the otherwise successful offeror is unreasonable. Any finding that the price is unreasonable must be supported by a statement of the facts and approved at a level above the contracting officer.

(ii) For agencies other than DoD, NASA, and the Coast Guard, a price is also based on adequate price competition when—

(A) There was a reasonable expectation, based on market research or other assessment, that two or more

responsible offerors, competing independently, would submit priced offers in response to the solicitation's expressed requirement, even though only one offer is received from a responsible offeror and if-

(1) Based on the offer received, the contracting officer can reasonably conclude that the offer was submitted with the expectation of competition, e.g., circumstances indicate that-

(i) The offeror believed that at least one other offeror was capable of submitting a meaningful offer; and

(ii) The offeror had no reason to believe that other potential offerors did not intend to submit an offer; and

(2) The determination that the proposed price is based on adequate price competition and is reasonable has been approved at a level above the contracting officer; or

(B) Price analysis clearly demonstrates that the proposed price is reasonable in comparison with current or recent prices for the same or similar items, adjusted to reflect changes in market conditions, economic conditions, quantities, or terms and conditions under contracts that resulted from adequate price competition.

* * * * *

15.404-1 [Amended]

4. Amend section 15.404-1 by removing from paragraph (b) (2) (i) "(see 15.403-1(c) (1) (i))" and adding "(see 15.403-1(c) (1))" in its place.

Billing Code: 6820-EP

[FR Doc. 2019-12263 Filed: 6/11/2019 8:45 am; Publication Date: 6/12/2019]