



DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 15

[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

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

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend 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: Interested parties should submit written comments to the Regulatory Secretariat at one of the addresses shown below on or before **[insert 60 days after publication in the FEDERAL REGISTER]** to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2017-006 by any of the following methods:

Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "FAR Case 2017-006" under the heading "Enter Keyword or ID" and selecting "Search". Select the link "Submit a Comment" that corresponds with "FAR Case 2017-006". Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "FAR Case 2017-006" on your attached document.

Mail: General Services Administration, Regulatory Secretariat (MVCB), ATTN: Lois Mandell, 1800 F Street NW., 2nd Floor, Washington, DC 20405-0001.

Instructions: Please submit comments only and cite "FAR Case 2017-006" in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

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 at 202-501-4755. Please cite FAR Case 2017-006.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are proposing to provide a separate standard for "adequate price competition" in the FAR, applicable only to DoD, NASA, and the Coast Guard, consistent with the requirements of section 822 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114-328). Setting forth the separate standard for DoD, NASA, and the Coast Guard in the FAR provides a top-level framework to facilitate consistent implementation of section 822 at the agency level by DoD, NASA, and the Coast Guard. Section 822 modifies 10 U.S.C. 2306a, the Truth in Negotiations Act, which is applicable only to DoD, NASA, and the Coast Guard. Section 822 limits the exception for price based on adequate price competition to circumstances in which there is adequate competition that results in at least two or more responsive and viable competing bids.

II. Discussion and Analysis

This proposed rule modifies the standard for adequate price competition at FAR 15.403-1(c)(1), to provide a separate standard for DoD, NASA, and the Coast Guard. There are also conforming changes to the cross references at FAR 15.305(a)(1) and 15.404-1(b)(2)(i).

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 provision or 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 proposed rule is not expected to be an E.O. 13771 regulatory action, because this proposed rule is not significant under E.O. 12866.

VI. 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:

This rule proposes to provide a separate standard for "adequate price competition" in the FAR for DoD, NASA, and the Coast Guard, consistent with the requirements of 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 clarify that there is a different standard applicable to DoD, NASA, and the Coast Guard, and to provide a top-level framework to facilitate consistent implementation of section 822 at the agency level by DoD, NASA, and the Coast Guard. The statutory basis is 10 U.S.C. 2306a, as amended by section 822 of the NDAA for FY 2017.

This rule only provides a statement of internal guidance to DoD, NASA, and the Coast Guard, i.e., "For DoD, NASA, and the Coast Guard, a price is based on adequate price competition only if two or more offerors, competing independently, submit responsive and viable offers." 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. The rule does not duplicate, overlap, or conflict with any other Federal rules.

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.

The Regulatory Secretariat Division 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 Division. 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 the 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 2017-006), in correspondence.

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.

Dated: June 6, 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 proposes to amend 48 CFR part 15 as set forth below:

PART 15—CONTRACTING BY NEGOTIATION

1. The authority citation for 48 CFR 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.

15.305 [Amended]

2. Amend section 15.305 by removing from paragraph (a) (1) in the fourth sentence "(see 15.403-1(c) (1) (i) (B))" and adding "(see 15.403-1(c) (1) (i) (A) (2))" in its place.

3. Amend section 15.403-1 by—

- a. Revising the heading of paragraph (c); and
- b. 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) Standards for exceptions from certified cost or pricing data requirements.

(1) Adequate price competition. (i) For agencies other than DoD, NASA, and the Coast Guard, a price is based on adequate price competition if—

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

(1) 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

(2) 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;

(B) 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

(C) 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.

(ii) For DoD, NASA, and the Coast Guard, a price is based on adequate price competition only if two or more responsible offerors, competing independently, submit responsive and viable offers. (10 U.S.C.

2306a(b) (1) (A) (i)).

* * * * *

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) (i) and (ii))" in its place.

[Billing Code: 6820-EP]

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