



5001-06-P

**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Part 236**

**[Docket DARS-2018-0039]**

**RIN 0750-AJ75**

**Defense Federal Acquisition Regulation Supplement: Exemption from Design-Build Selection Procedures (DFARS Case 2018-D011)**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Proposed rule.

**SUMMARY:** DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement to implement a section of the National Defense Authorization Act for Fiscal Year 2018 that allows for more than five offerors on solicitations issued using two-phase design-build selection procedures for indefinite-delivery, indefinite-quantity contracts that exceed \$4 million.

**DATES:** Comments on the proposed rule should be submitted in writing to the address shown below on or before **[Insert date 60 days after date of publication in the FEDERAL REGISTER]**, to be considered in the formation of a final rule.

**ADDRESSES:** Submit comments identified by DFARS Case 2018-D011, using any of the following methods:

o Federal eRulemaking Portal: <http://www.regulations.gov>. Search for "DFARS Case 2018-D011". Select "Submit a Comment Now" and follow the instructions provided to submit a comment. Please include "DFARS Case 2018-D011" on any attached document.

o Email: [osd.dfars@mail.mil](mailto:osd.dfars@mail.mil). Include DFARS Case 2018-D011 in the subject line of the message.

o Fax: 571-372-6094.

o Mail: Defense Acquisition Regulations System, Attn: Ms. Heather Kitchens, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check [www.regulations.gov](http://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:** Ms. Heather Kitchens, telephone 571-372-6104.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

This rule proposes to revise the DFARS to implement section 823 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115-91). Section 823 amends 10 U.S.C. 2305a to

allow for more than the maximum number of five offerors when a solicitation is issued using two-phase design-build selection procedures for an indefinite-delivery, indefinite-quantity (IDIQ) contract that exceeds \$4 million.

Prior to the amendments made by section 823, 10 U.S.C. 2305a required the head of the contracting activity to approve the contracting officer's justification that it is in the best interest of the Government to exceed the maximum number of five offerors that may be selected to submit phase-two proposals, if certain conditions apply. Section 823 eliminates the requirement for such a justification when the solicitation is for an IDIQ contract that exceeds \$4 million.

## **II. Discussion and Analysis**

The two-phase design-build selection procedures authorized by 10 U.S.C. 2305a are implemented at Federal Acquisition Regulation (FAR) subpart 36.3. The statutory requirement for a contracting officer to justify exceeding the maximum number of five offerors is implemented at FAR 36.303-1(a)(4). This rule proposes to implement section 823 by adding a new DFARS section 236.303-1(a)(4), to be used in lieu of the procedures at FAR 36.303-1(a)(4). The new DFARS section implements 10 U.S.C. 2305a, as amended by section 823, by providing-

- The new authority to exceed the five offeror maximum when the solicitation is for an IDIQ contract that exceeds \$4 million;
- The authority to exceed the five offeror maximum when the contracting officer's decision is approved by the head of the contracting activity when the solicitation is for a contract that exceeds \$4 million; and
- A statement that the number of offerors is at the contracting officer's discretion when the solicitation is for a contract that does not exceed \$4 million.

### **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 propose to create any new provisions or clauses or impact any existing provisions or clauses.

### **IV. Executive Orders 12866 and 13563**

Executive Order (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 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, Reducing Regulation and Controlling Regulatory Costs, regulatory action, because this proposed rule is not significant under E.O. 12866.

#### **VI. Regulatory Flexibility Act**

DoD does not expect this proposed 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., because the scope of the rule only changes internal Government operating procedures for the design-build selection procedures. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

This rule proposes to amend the Defense Federal Acquisition Regulation (DFARS) to implement section 823 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. 115-91). Section 823 amends 10 U.S.C. 2305a to allow

contracting officers to exceed the maximum number of five offerors for solicitations issued using two-phase design-build selection procedures for indefinite-delivery, indefinite-quantity (IDIQ) contracts that exceed \$4 million.

The objective of this rule is to implement the statutory changes to the two-phase design-build selection procedures by adding a new DFARS section 236.303-1(a)(4), to be used in lieu of Federal Acquisition Regulation 23.303-1(a)(4). The new DFARS section provides—

- The new authority to exceed the five offeror maximum when the solicitation is for an IDIQ contract that exceeds \$4 million;
- The authority to exceed the five offeror maximum when the contracting officer's decision is approved by the head of the contracting activity when the solicitation is for a contract that exceeds \$4 million; and
- A statement that the number of offerors is at the contracting officer's discretion when the solicitation is for a contract that does not exceed \$4 million.

The legal basis for this rule is section 823 of the NDAA for FY 2018.

Based on FY 2017 data from the Federal Procurement Data System, DoD issued approximately 499 new awards for construction

exceeding \$4 million, to include IDIQ contracts, purchase orders, and orders under basic ordering agreements. Of the 499 new awards for construction, approximately 305 awards were made to 252 unique small businesses entities.

This proposed rule does not include any new reporting, recordkeeping, or other compliance requirements for small entities. However, this rule may create additional opportunities for small entities, because the rule allows the maximum number of offerors selected to submit phase-two proposals to exceed five, when the solicitation is for an IDIQ contract valued at greater than \$4 million, without requiring additional justification or approval.

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.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit

such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2018-D011), in correspondence.

## **VI. 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 236**

Government procurement.

**Jennifer Lee Hawes,**

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR 236 is proposed to be amended as follows:

### **PART 236—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS**

1. The authority citation for part 236 continues to read as follows:

**Authority:** 41 U.S.C. 1303 and 48 CFR chapter 1.

2. Add subpart 236.3 to read as follows:

### **Subpart 236.3—Two-Phase Design-Build Selection Procedures**

Sec.

236.303-1 **Phase One**

### **Subpart 236.3—Two-Phase Design-Build Selection Procedures**

**236.303-1 Phase One.**

(4) In lieu of the requirements at FAR 36.303-1(a)(4)–

(i) If the contract value exceeds \$4 million, the maximum number of offerors specified in the solicitation that are to be selected to submit phase-two proposals shall not exceed five, unless–

(A) The solicitation is issued for an indefinite-delivery indefinite-quantity contract for design-build construction; or

(B) The head of the contracting activity, delegable to a level no lower than the senior contracting official within the contracting activity, approves the contracting officer's decision with respect to an individual solicitation, that a maximum number greater than five is in the best interest of the Government and is consistent with the purposes and objectives of the two-phase selection procedures. The decision shall be documented in the contract file (10 U.S.C 2305a(d)).

(ii) If the contract value is at or below \$4 million, the maximum number of offerors specified in the solicitation that are to be selected to submit phase-two proposals is at the discretion of the contracting officer.

[FR Doc. 2018-18243 Filed: 8/23/2018 8:45 am; Publication Date: 8/24/2018]