



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:** Final rule.

**SUMMARY:** DoD is issuing a final rule to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2018 that provides an exemption from design-build selection procedures for contracts that exceed \$4 million.

**DATES:** Effective **[Insert date of publication in the FEDERAL REGISTER]**.

**FOR FURTHER INFORMATION CONTACT:** Ms. Heather Kitchens, telephone 571-372-6104.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD published a proposed rule in the *Federal Register* at 83 FR 42850 on August 24, 2018, to implement section 823 of the

National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018. Section 823 modifies 10 U.S.C. 2305a to provide an exemption from the phase two design-build maximum number of offerors that may be selected to submit competitive proposals for contracts exceeding \$4 million. The exemption provides that if the contract value exceeds \$4 million and the solicitation is issued pursuant to an indefinite-delivery indefinite-quantity (IDIQ) contract for design-build construction, the maximum number of offerors to be selected may exceed five.

In addition, for other than IDIQ contracts, the rule provides authority to exceed the five offeror maximum when the contracting officer's decision is approved by the head of the contracting activity, delegable to a level no lower than the senior contracting official within the contracting activity, when the solicitation is for a contract that exceeds \$4 million. When a solicitation is for a contract that does not exceed \$4 million, the rule provides that the number of offerors is at the contracting officer's discretion.

Three respondents submitted public comments in response to the proposed rule.

## **II. Discussion and Analysis**

DoD reviewed the public comments in the development of the final rule. A discussion of the comments received and any changes made to the rule are provided as follows:

## *A. Summary of Significant Changes*

There were no changes from the proposed rule made in the final rule as a result of the comments received. The comments did not recommend changes to the proposed rule; rather, the respondents expressed concerns over the underlying intent of the statute.

## *B. Analysis of Public Comments*

### *1. Administrative and cost burden*

*Comment:* Several respondents stated that the statutory requirement will create a significant administrative and cost burden on the Government and/or industry. One respondent suggested that the exemption will require DoD officials to review an unnecessarily high number of full proposals undermining the purpose of both IDIQ contracts and design-build.

*Response:* The rule does not require contracting officers to consider more than five offerors; instead, the rule provides contracting officers the option to allow for more than five offerors to submit competitive proposals in solicitations for contracts for design-build construction that exceed \$4 million.

### *2. Impact on competition*

*Comment:* Several respondents stated that the statutory requirement will drive away highly qualified design-build firms and/or possibly favor lower qualified firms. One respondent stated that increasing the number of offerors will reduce participation from highly qualified firms who incur much of the

cost in these competitions. The same respondent noted that increasing the number of offerors may favor lower qualified offerors based on artificially low bids.

*Response:* DoD does not agree that the statutory requirement, and the resulting implementing rule, will drive away highly qualified design-build firms and/or possibly favor lower qualified firms. The competitive selection criteria will not change based on this rule. Conversely, the rule could be viewed as providing expanded opportunity for qualified firms to compete.

### 3. *Learning curve*

*Comment:* One respondent stated that the statutory requirement will create a learning curve for new firms, which will result in longer project times.

*Response:* DoD does not agree that expanding the competitive pool will necessarily result in longer project times. While a learning curve might be expected for any new firm or new requirement, this does not drive the decision of whether or not to restrict competition.

### 4. *Industry best practices/innovation*

*Comment:* Two respondents stated that the statutory requirement moves away from industry best practices. One respondent stated that the statutory requirement diminishes the opportunities for innovation that design-build offers.

*Response:* While the rule may be viewed by the respondents as moving away from industry best practices, this rule is necessary to meet the requirements of the statute. Opening up the competitive pool may result in opportunities for increased innovation.

#### 5. *Accountability*

*Comment:* One respondent stated that the statutory requirement will create a larger competitive pool which will diminish accountability.

*Response:* Opening up the competitive pool should not have any effect upon or diminish accountability.

#### C. *Other Changes*

One minor editorial change is made to the rule numbering to correctly designate the added DFARS rule text as "236.303-1(a)(4)" in lieu of "236.303-1(4)".

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

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

A final regulatory flexibility analysis has been prepared and is summarized as follows:

This rule amends the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 823 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018, which modifies 10 U.S.C. 2305a(d) regarding the maximum number of offerors that may be selected to submit competitive proposals under solicitations for two-phase design-build. Specifically, the selection procedures are modified by providing an exemption from the maximum number of five offerors when the contract value

in a solicitation exceeds \$4 million and the solicitation is issued pursuant to an indefinite-delivery indefinite-quantity (IDIQ) contract for design-build construction. The rule provides the authority to exceed the five offeror maximum when the contracting officer's decision is approved by the head of the contracting activity, delegable to a level no lower than the senior contracting official within the contracting activity, when the solicitation is for a contract that exceeds \$4 million. The rule also provides 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.

There were no significant issues raised by the public comments in response to the initial regulatory flexibility analysis.

Based on FY 2017 data from the Federal Procurement Data System, DoD issued approximately 499 new awards for construction exceeding \$4 million to 396 unique businesses, to include IDIQ contracts, purchase orders, and orders under basic ordering agreements. Of the 499 new awards for construction, approximately 305 awards (approximately 61 percent) were made to 252 unique small entities (approximately 64 percent). This estimate is based on the assumption that contracts for design-build are coded as "construction" in FPDS, in which case a smaller number of small entities are actually impacted by the opportunity to exceed to the five offeror maximum for contracts

valued in excess of \$4 million. For contracts valued at or below \$4 million, the FAR already provides an opportunity for contracting officers to determine that a greater number of offerors is in the Government's interest and is consistent with the purposes and objectives of the two-phase design-build selection procedures. No significant impact is expected to result from authorizing contracting officers to exceed the maximum number at their own discretion.

This final rule does not include any new reporting or recordkeeping requirements for small entities.

There are no known significant alternative approaches to the final rule that would meet the requirements of the applicable statute.

## **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 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, consisting of 236.303-1, to read as follows:

**SUBPART 236.3—TWO-PHASE DESIGN-BUILD SELECTION PROCEDURES**

**236.303-1 Phase One.**

(a)(4) In lieu of the limitations on the maximum number of offerors that may be selected to submit phase-two proposals at FAR 36.303-1(a)(4), for DoD—

(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.

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