



6820-EP

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 5 and 7

[FAR Case 2019-003; Docket No. FAR-2019-0029, Sequence No. 1]

RIN 9000-AN86

Federal Acquisition Regulation: Consolidation and Substantial Bundling

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) 2016, which requires providing public notices of determinations for substantial bundling and consolidation of contract requirements.

DATES: Interested parties should submit written comments to the Regulatory Secretariat Division at one of the addresses shown below on or before **[insert 60 days after**

date of publication in the FEDERAL REGISTER] to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2019-003 by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "FAR Case 2019-003". Select the link "Comment Now" that corresponds with FAR Case 2019-003. Follow the instructions provided on the screen. Please include your name, company name (if any), and "FAR Case 2019-003" on your attached document.

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

Instructions: Please submit comments only and cite FAR Case 2019-003 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. 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: Mr. Kevin Funk,
Procurement Analyst, at 202-357-5805 or via email at
kevin.funk@gsa.gov for clarification of content. For
information pertaining to status or publication schedules,
contact the Regulatory Secretariat Division at 202-501-
4755. Please cite "FAR Case 2019-003".

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are proposing to amend the FAR to
implement section 863 of the NDAA for FY 2016 (Pub. L. 114-
92, codified at 15 U.S.C. 644(e)(3) and 15 U.S.C.
657q(c)(2)) and SBA's implementing regulations. Section
863 requires public notification of an agency's
determination to substantially bundle or consolidate
contract requirements.

Specifically, publication of a notice is required when
the head of a contracting agency determines that an
acquisition plan for a procurement involves substantial
bundling of contract requirements. The head of the
contracting agency must publish a notice on a public
website that such determination has been made not later
than 7 days after making the determination. Any
solicitation for a procurement related to the acquisition

plan may not be published earlier than 7 days after such notice is published. A justification for the determination must be published with the solicitation. The justification must address the specific benefits anticipated, any alternative approaches, impediments to participation by small business concerns as prime contractors, and actions designed to maximize participation of small business concerns as subcontractors. See 15 U.S.C. 644(e) (3) (A) through (C) for a list of the requirements.

Section 863 also requires publication of a notice when the senior procurement executive (SPE) or chief acquisition officer (CAO) makes a determination that an acquisition strategy involving consolidation of contract requirements is necessary and justified under 15 U.S.C. 657q(c) (2) (A). The SPE or CAO must publish a notice on a public website that such determination has been made not later than 7 days after making the determination. Any solicitation for a procurement related to the acquisition strategy may not be published earlier than 7 days after such notice is published. A justification for the determination must be published with the solicitation. The justification must include the information in 15 U.S.C. 657q(c) (1) (A) through (E).

SBA published a rule to implement section 863 on November 29, 2019, at 84 FR 65647. SBA's implementation is very similar to the statutory language.

II. Discussion and Analysis

The proposed changes to the FAR are summarized in the following paragraphs.

A. Notification of Substantial Bundling.

At FAR 7.107-5, Notifications, a requirement is added for publication of a notification of substantial bundling on the Governmentwide point of entry (GPE). Any solicitation for a procurement may not be published earlier than 7 days after a notice is published concerning a determination that the procurement involves substantial bundling of contract requirements. The head of the agency must also publish in the GPE the rationale for substantial bundling with the publication of the solicitation. The rationale must address the information required at 7.107-4(b), such as the specific benefits anticipated, any alternative approaches, impediments to participation by small business concerns as prime contractors, and actions designed to maximize participation of small business concerns as subcontractors. A reference to the notification requirement at FAR 7.107-5 is added to FAR 5.205, Special situations.

B. *Notification of Consolidation.*

At 7.107-5, Notifications, a requirement is added for the SPE or CAO to publish a notice on the GPE that a determination has been made that a consolidation of contract requirements is necessary and justified. The SPE or CAO must also publish the determination that consolidation is necessary and justified with the publication of the solicitation. A reference to the notification requirement at FAR 7.107-5 is added to FAR 5.205, Special situations.

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

This rule proposes to implement a statutory requirement for Federal agencies to provide notifications to the public on consolidation and substantial bundling of contract requirements. No solicitation provisions or contract clauses are being created or revised in this proposed rule.

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 subject to E.O. 13771, Reducing Regulation and controlling Regulatory Costs, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

The change may 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. The 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 863 of the National Defense Authorization Act for 2016 (Public Law 114-92, codified at 15 U.S.C. 644(e)(3) and 15 U.S.C. 657q(c)(2)) and the Small Business Administration (SBA) implementing regulations. Section 863 requires that, if the head of a contracting agency determines that an

acquisition plan involves a substantial bundling of contract requirements, the head of the agency shall publish a notice of such determination on a public website within 7 days of making such determination. Additionally, section 863 requires, upon determining that a consolidation of contract requirements is necessary and justified, the senior procurement executive (SPE) or chief acquisition officer (CAO) shall publish a notice on a public website that such determination has been made and that an agency may not issue the solicitation any earlier than 7 days after publication of such notice. The SPE or CAO must also publish the justification along with the solicitation.

The objective of this rule is to implement section 863 of the NDAA for FY 2016 and SBA's implementing regulations. The legal basis for the rule is section 863 of the NDAA for FY 2016.

This rule may have a positive economic impact on any small entity that is interested in participating in Federal procurement. By posting justifications and notices of upcoming procurements which are planned to be substantially bundled or consolidated, small business concerns are made aware of potential subcontracting opportunities and possibilities for participating in joint ventures or small business teaming arrangements, which will help small businesses increase their competitiveness. The System for Award Management (SAM) shows 315,655 entities which are small business concerns under at least one North American Industry Classification System code.

This proposed rule does not include any new reporting, recordkeeping, or other compliance requirements for small entities.

This proposed rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternative approaches that would accomplish the stated objectives of the applicable statute.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the SBA. 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 this rule in accordance with 5 U.S.C. 610. Interested parties must submit comments separately and should cite 5 U.S.C. 610 (FAR case 2019-003) in correspondence.

VII. Paperwork Reduction Act

This 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 5 and 7

Government procurement.

William F. Clark,
Director,
Office of Governmentwide
Acquisition Policy,
Office of Acquisition Policy,
Office of Governmentwide Policy.

Therefore, DoD, GSA, and NASA are proposing to amend 48 CFR part(s) 5 and 7, as set forth below:

1. The authority citation for 48 CFR part(s) 5 and 7 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 5-PUBLICIZING CONTRACT ACTIONS

2. Amend section 5.205 by revising paragraph (g) to read as follows:

5.205 Special Situations.

* * * * *

(g) *Notifications to the public regarding consolidation, bundling, or substantial bundling.* (1) For the requirement to publish a notification of consolidation or substantial bundling of contract requirements, see 7.107-5(c) and (d).

(2) The agency is encouraged to provide notification of the rationale for any bundled requirement to the GPE before issuing the solicitation of any bundled requirement (see 7.107-5(b)).

PART 7-ACQUISITION PLANNING

7.105 [Amended]

3. Amend section 7.105 by removing from paragraph

(b) (16) "GPE" and adding "Governmentwide point of entry (GPE)" in its place.

7.107-1 [Amended]

4. Amend section 7.107-1 by removing from paragraph (a) "7.107-3 and 7.107-4" and adding "7.107-3, 7.107-4, and 7.107-5" in its place.

7.107-2 [Amended]

5. Amend section 7.107-2 by:

a. In paragraph (a) introductory text removing the words "procurement executive" and "acquisition officer" and adding in their place "procurement executive (SPE)" and "acquisition officer (CAO)", respectively;

b. In from paragraph (b) removing the words "senior procurement executive or chief acquisition officer" and "subsection" and adding in their place "SPE or CAO" and "section", respectively;

c. In from paragraph (d) (3) removing the words "senior procurement executive or chief acquisition officer" and adding in their place "SPE or CAO";

d. In paragraph (e) (1) introductory text removing the word "subsection" wherever it appears and adding in its place "section";

e. In paragraph (e) (1) (i) removing the word "subsection" and adding in its place the word "section"; and

f. In paragraph (e) (2) (i) removing the words "senior procurement executive" and adding in their place "SPE".

6. Amend section 7.107-5 by:

a. Revising paragraph (b);

b. Redesignating paragraphs (c) and (d) as paragraphs (e) and (g), and adding new paragraphs (c), (d), and (f); and

c. In newly redesignated paragraph (g) removing the words "*Public notification*" and adding in their place "*Notification to public*".

The revision and additions read as follows:

7.107-5 Notifications.

* * * * *

(b) *Notification to public of rationale for bundled requirement.* The agency is encouraged to provide notification of the rationale for any bundled requirement to the GPE, before issuance of the solicitation (see 5.201).

(c) *Notification to public of consolidation of contract requirements.* The SPE or CAO shall publish in the GPE—

(1) A notice that the agency has determined a consolidation of contract requirements is necessary and justified (see 7.107-2) no later than 7 days after making

the determination; the solicitation may not be publicized prior to 7 days after publication of the notice of the determination; and

(2) The determination that consolidation is necessary and justified with the publication of the solicitation. See 7.107-2 for the required content of the determination.

(d) *Notification to public of substantial bundling of contract requirements.* The head of the agency shall publish in the GPE—

(1) A notice that the agency has determined that a procurement involves substantial bundling (see 7.107-4) no later than 7 days after such determination has been made; the solicitation may not be publicized prior to 7 days after publication of the notice of the determination; and

(2) The rationale for substantial bundling with the publication of the solicitation. The rationale is the information required for inclusion in the acquisition strategy at 7.107-4(b).

* * * * *

(f) *Annual notification to public of rationale for bundled requirements.* The agency shall publish on its website a list and rationale for any bundled requirement for which the

agency solicited offers or issued an award. The notification shall be made annually within 30 days of the agency's data certification regarding the validity and verification of data entered in the Federal Procurement Data System to the Office of Federal Procurement Policy (see 4.604).

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