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GENERAL SERVICES ADMINISTRATION

48 CFR Parts 8 and 38

**[GSAR Case 2020-G502; Docket No. GSA-GSAR-2020-0014;
Sequence No. 1]**

RIN 3090-AK15

**General Services Administration Acquisition Regulation
(GSAR); Increasing Order Level Competition for Federal
Supply Schedules**

AGENCY: Office of Acquisition Policy, General Services Administration (GSA).

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The General Services Administration (GSA) is issuing this advance notice of proposed rulemaking (ANPR) to seek public comments that can be used to assist in the implementation of Section 876 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 for the Federal Supply Schedule (FSS) program. Section 876 amended the United States Code by providing an exception to the requirement to consider price as an evaluation factor for the award of certain indefinite-delivery, indefinite-quantity contracts and Federal Supply Schedule contracts.

DATES: Interested parties should submit written comments at the address shown below on or before **[Insert date 30**

days after date of publication in the *FEDERAL REGISTER*] to be considered in the formulation of a proposed rule.

ADDRESSES: Submit comments in response to GSAR Case 2020-G502 to <https://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by searching for "GSAR Case 2020-G502". Select the link "Comment Now" that corresponds with GSAR Case 2020-G502. Follow the instructions provided at the "Comment Now" screen. Please include your name, company name (if any), and "GSAR Case 2020-G502" on your attached document.

Instructions: Please submit comments only and cite GSAR Case 2020-G502 in all correspondence related to this case. Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check <https://www.regulations.gov> approximately two to three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas O'Linn, Procurement Analyst, at 202-445-0390 or thomas.olinn@gsa.gov for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755 or GSARegSec@gsa.gov. Please cite GSAR Case 2020-G502.

SUPPLEMENTARY INFORMATION:

I. Background

The Federal Supply Schedule (FSS) program provides the Government with a simplified process of acquiring commercial supplies and services in varying quantities while obtaining volume discounts. Federal Acquisition Regulation (FAR) subpart 8.4 and part 38, along with various parts of the GSA Acquisition Regulation (GSAR) provide direction to customers, offerors, contractors, and GSA contracting officers as it relates to the FSS program. GSA is seeking public comment for purposes of assisting GSA in effectively implementing Section 876 of the NDAA for FY 2019 (Pub. L. 115-232) as it relates to the FSS program.

Section 876 amended 41 U.S.C. 3306(c) to modify the requirement to consider cost or price as an evaluation factor for the award of certain indefinite-delivery, indefinite-quantity multiple-award contracts and certain FSS contracts to qualifying offerors. Currently, offerors responding to solicitations for award of FSS contracts are required to submit commercial sales practice data, or other cost or price information with their proposals. Section 876 gives GSA the discretion to not include price as an evaluation factor in certain FSS contracts and other Indefinite Delivery Indefinite Quantity (IDIQ) contracts

provided that 1) the agency intends to make a contract award to each qualifying offeror, 2) task or delivery orders will be based on hourly rates, and 3) competition takes place at the order level. To be eligible for award a "qualifying offeror" must be a responsible source; submit a proposal that conforms to the requirements of the solicitation; meet all technical requirements; and be otherwise eligible for award.

The Federal Acquisition Regulatory Council has opened FAR case 2018-014, Increasing Task-order Level for purposes of implementing 41 U.S.C. 3306(c), which provides an exception to the requirement to consider price as an evaluation factor for the award of certain indefinite-delivery, indefinite-quantity contracts and FSS contracts. Since the FAR case is still in development, GSA is issuing this ANPR to aid in thinking through a series of questions related to applying this authority to the FSS program.

GSA will consider comments received in response to this ANPR in future rulemaking: (i) to proceed with rulemaking through the publication of a proposed rule to amend the GSAR, (ii) to inform the Federal Acquisition Regulatory Council on its implementation of this authority within the FAR (i.e., FAR case 2018-014), and (iii) to

revise other GSA policies, procedures, and guidance that support the FSS program.

II. Expected Impact

Because of the length of the contracts, reach of the program, and unique statutory environment, GSA anticipates that implementing this authority will be more complex for the FSS program than for other IDIQs. GSA expects that complete implementation will require substantial retraining and communication efforts and may require a number of changes to both the FAR and the GSAR. GSA expects that successful implementation will decrease the costs of entry into the FSS program thus increasing competition, increasing opportunity for small business, and possibly reducing price. A successful implementation will also increase the ability for ordering agencies to purchase a total solution under the FSS program.

GSA may choose to exempt some or all of the hourly rate services within the FSS program from the requirement to submit commercial sales practice or other cost or pricing data. By removing the requirement to establish priced hourly labor rates, GSA acquisition officials involved in the award of FSS contracts will be able to focus their energy on establishing and evaluating the non-price factors that will result in more meaningful

distinctions among offerors for purposes of making an award, becoming better experts in the services they acquire, and will enable a stronger focus on contract administration.

However, there may be additional complexity that needs to be considered for purposes of implementing this authority. For example, the statute only applies to services procured based on hourly rates. Not all offerors propose strictly services priced on hourly rates FSS solicitations. This ANPR poses a number of questions to help GSA think through the authority.

III. Anticipated Savings

Not having to demonstrate price reasonableness for hourly rates at the Schedule contract level should reduce costs for offerors to enter into the FSS program. Not having to track sales under the price reduction clause should reduce the administrative cost of contract compliance. Not having to justify price changes under the economic price adjustments clause should reduce costs of administrative compliance.

Therefore, GSA anticipates that the net result of this authority will be to reduce total administrative cost.

However, within that overall reduction, offerors may see greater burdens in some areas such as more detailed

proposals at the task or delivery order level, and the need to submit data under the transactional data reporting. The time and effort expended to develop and prepare cost or price information for purposes of responding to a solicitation or other requests varies according to numerous factors, such as the source selection approach, the contract type, the offeror's proposal (e.g., services only, or a mix of supplies and services), or the offeror's internal processes and resources. GSA is interested in understanding the potential for cost savings both pre-award and post-award and is seeking to attempt to monetize any such costs or savings that offerors and resultant awardees may see as a result of the implementation of this authority for the FSS program.

IV. Public Comment

In order to develop the best implementation strategy, GSA welcomes feedback on all the known or anticipated benefits and concerns associated with such a fundamental change to the FSS pricing model. GSA is especially interested in seeking comment in seven major topic areas:

- Implementing the Authority
- Contract Type
- Mixed-Use Contracts
- FAR Changes Necessary

- GSAR Changes Necessary
- Updated GSA Guidance
- Regulatory Impacts- Costs/Savings

These topics are further detailed below. When commenting, please include citations, as appropriate, to relevant sources of information that may be used to substantiate the basis for the response provided.

1. Implementing the Authority

Inclusive of options, FSS contracts last up to 20 years and are continuously open. In addition, GSA is in the midst of migrating to a single Schedule platform. With these facts in mind, should GSA look at beginning with the entire FSS program or just a portion (e.g., one or more category, subcategory, or SIN)? If the latter, which portion? Should GSA strip hourly rate pricing out of current Schedule contracts or permit a two tier approach in which older Schedule contracts have established hourly rates and newer Schedule contracts do not?

2. Contract Type

The following are two specific elements of the Section 876 authority that GSA is particularly interested in seeking comments:

(a) Section 876 states, "...a solicitation for one or more contracts for services to be acquired on an hourly rate basis..."

(i) Does this language restrict use of the exception to labor-hour or time-and-material type contracts?

(ii) Does this language support the use of fixed price contracts wherein the services being offered can be converted into hourly rate calculations through a labor mix provided by the offeror?

(b) Section 876 states, "...feature individually competed task or delivery orders based on hourly rates..."

(i) Does this language restrict the use of the exception to full and open competition set-forth in FAR subpart 6.3?

(ii) Does this language support the authority provided in FAR 8.405-6 Limiting Sources?

(iii) Does this language limit the types of services that can be ordered to only those that are performed on an hourly-rate basis?

3. Mixed-Use Contracts

Many FSS contracts include both products and services,

and not all pricing for services are based on hourly rates. Should GSA establish separate FSS contracts for priced and unpriced items? Or should GSA combine them into one contract in which some items are priced and other items are not priced?

4. FAR Changes Necessary

Although GSA is looking at implementing the IDIQ price evaluation exception authority through the GSAR, GSA welcomes the public's insight into the potential impact to the FAR as well, which portions of the FAR should be amended and why.

(a) FAR 8.404(d) states, "Services offered on the schedule are priced either at hourly rates, or at a fixed price for performance of a specific task (e.g., installation, maintenance, and repair)."

(i) Is the FAR language still sufficient in light of the statutory language using "an hourly rate basis"? If not please provide suggested language.

(ii) Would it be reasonable to read Section 876 as allowing for pricing for services offered on a Schedule not to be established at the FSS contract-level, but at the order-level? If so, what, if any, mechanisms could be established at the FSS contract-level concerning pricing?

(iii) If pricing is not established at the FSS contract-level, is the FAR language still accurate or even necessary?

(iv) Are separate ordering procedures necessary for services not priced on an hourly basis, such as fixed unit rates?

(b) FAR 8.405(d) provides that GSA has already determined the prices of supplies and fixed-price services, and rates for services offered at hourly rates, under schedule contracts to be fair and reasonable. Ordering activities do not have to make a separate determination of fair and reasonable pricing, except for a price evaluation as required by 8.405-2(d).

(i) If pricing for services is no longer evaluated as part of the contract award, can a fair and reasonable determination still be made for other items? If not, then how would the lack of determination of price reasonableness at the FSS contract-level still support FAR 12.209?

(ii) Would it be possible for FSS contractors submitting offers involving services to submit price or cost information in response to solicitation for award of a task or delivery

order in order to support a fair and reasonable determination being made by the ordering activity? What if there ends up being no other competition on the agency order?

(c) FAR 8.401 states, "Multiple Award Schedule (MAS) means contracts awarded by GSA... for similar or comparable supplies, or services, established with more than one supplier, at varying prices..."

(i) If pricing is no longer established at the FSS contract-level since it is no longer being evaluated, then would the language "at varying prices" still be accurate or even necessary?

(ii) Since similar language concerning 'pricing' can be found throughout FAR subpart 8.4 (e.g., FAR 8.402), are other changes to the FAR necessary?

(d) FAR 12.207(c)(1) provides that indefinite-delivery contracts (see subpart 16.5) may be used when—(1) The prices are established based on a firm-fixed-price or fixed-price with economic price adjustment; or (2) are established for commercial services acquired on a time-and-materials or labor-hour basis.

(i) Is the language in either paragraph still sufficient in light of the statutory language

using "an hourly rate basis"? If not, please provide suggested language.

5. GSAR Changes Necessary

GSA welcomes the public's insight into the potential impact to the GSAR in relation to the FSS program as a result of implementation of this authority. The following are areas of particular interest in terms of impact: (a) price reductions, (b) transactional data reporting, (c) evaluation and use of options, (d) economic price adjustment, (e) price list, and (f) others.

6. Updated GSA Guidance

GSA would appreciate any thoughts about the potential impact to FSS solicitation and ordering requirements and what changes should be made in FSS solicitations, instructions, ordering guidance, and training. What, if any type, of pricing information for services should be requested as part of an offeror's response to a FSS solicitation? Even though pricing would not be evaluated at the contract-level for hourly rate services, should GSA still ask for pricing as part of the solicitation?

7. Regulatory Cost Impacts

GSA would appreciate any thoughts about how GSA should think about the regulatory cost increase or decrease associated with moving to unpriced hourly rate Schedule contracts. GSA is particularly interested in the following:

(a) Confirmation of GSA's belief that this change will result in a net burden reduction;

(b) The type of (e.g., accountants or program managers) and number of employees used to develop and prepare cost or price information in response to a solicitation seeking to award a FSS contract, a solicitation seeking to award a task/delivery order under a FSS contract, and requests where cost or pricing information is required/requested under the FSS program;

(c) The number of hours (in a range) that would be spent by each type of employee to develop and prepare the cost or price information;

(d) The average hourly rate for each type of employee used to develop and prepare the cost or price information, or the total average amount spent for each type of employee to develop and prepare the cost or price information for such a proposal;

(e) The types of services organizations typically submit responses for and whether or not efforts/costs to provide cost or price information vary depending on different factors such as the solicitation (e.g., contract type, type of service), the mix and type of supplies and services being offered, or request/requirement (e.g., complying with GSAR clause, 552.238-81 Price Reductions);

(f) To the extent possible, a description of any variations in efforts and costs; and

(g) Other possible areas of savings that an offeror or FSS awardee may see as a result of implementation of this authority for the FSS program.

Jeffrey A. Koses,
Senior Procurement Executive,
Office of Acquisition Policy,
Office of Governmentwide Policy,
General Services Administration.

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