



DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 16

[FAR Case 2020-005; Docket No. FAR-2020-0005; Sequence No. 1]

RIN 9000-A008

Federal Acquisition Regulation: Explanations to Unsuccessful Offerors on Certain Orders under Task and Delivery Order Contracts

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 for Fiscal Year 2020 that requires explanations to unsuccessful awardees on certain orders under task order and delivery order contracts.

DATES: Interested parties should submit written comments to the Regulatory Secretariat Division at 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 the final rule.

ADDRESSES: Submit comments in response to FAR Case 2020-005 to the Federal eRulemaking portal at <https://www.regulations.gov> by searching for "FAR Case 2020-005". Select the link "Comment Now" that corresponds with "FAR Case 2020-005". Follow the instructions provided on the "Comment Now" screen. Please include your name, company name (if any), and "FAR Case 2020-005" on your attached document. If your comment cannot be submitted using <https://www.regulations.gov>, call or email the points of contact in the FOR FURTHER INFORMATION CONTACT section of this document for alternate instructions.

Instructions: Please submit comments only and cite "FAR Case 2020-005" 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. Public comments may be submitted as an individual, as an organization, or anonymously (see frequently asked questions at <https://www.regulations.gov/faq>). 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. Michael O. Jackson, Procurement Analyst, at 202-208-4949 or by email at

michaelo.jackson@gsa.gov, for clarification of content. For information pertaining to status, publication schedules, or alternate instructions for submitting comments if <https://www.regulations.gov> cannot be used, contact the Regulatory Secretariat Division at 202-501-4755 or *GSARegSec@gsa.gov*. Please cite FAR Case 2020-005.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are proposing to revise the FAR to implement section 874 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020 (Pub. L. 116-92) which, for task orders or delivery orders exceeding the simplified acquisition threshold (SAT) but not greater than \$6 million, requires contracting officers to provide, upon written request from an unsuccessful offeror, a brief explanation as to why the offeror was unsuccessful, including the rationale for award and an evaluation of the significant weak or deficient factors in the offeror's offer.

Section 874 of the NDAA uses the term "unsuccessful offeror." FAR 16.505 uses the term "unsuccessful awardee". Both terms are synonymous; referring to an entity who has been awarded a basic contract but has been unsuccessful for the award of an order competed under the basic contract. Since the term "unsuccessful awardee" is already used and understood by

the acquisition community, the term will be used to implement the requirement.

FAR 16.505(b)(6) requires contracting officers to notify unsuccessful awardees when the total price of a task order or delivery order exceeds \$6 million. If the \$6 million threshold is met, contracting officers are directed to the procedures at FAR 15.503(b)(1) and FAR 15.506 when providing a postaward notification or postaward debriefing, respectively.

The FAR threshold at 16.505 is currently \$6 million as a result of two inflation adjustments in accordance with FAR 1.109. FAR Case 2014-022 published on July 2, 2015, at 80 FR 38293 and 2019-013 published on October 2, 2020, at 85 FR 62485 each raised the threshold by \$500,000 from the \$5 million reflected at 41 U.S.C. 4106(d).

II. Discussion and Analysis

The proposed rule implements the requirement for contracting officers to, upon written request from an unsuccessful awardee, provide a brief explanation as to why the awardee was unsuccessful for a task order or delivery order exceeding the SAT but not exceeding \$6 million. While the statutory threshold is \$5.5 million, this rule is imposing these debriefing requirements at the higher \$6 million threshold to align with the current threshold at FAR 16.505(b)(6). This avoids a gap between \$5.5 million and \$6 million. This new debriefing requirement for orders above the

SAT and below \$6 million does not provide a debriefing at the level of detail currently afforded to unsuccessful awardees over \$6 million, however, this information is expected to benefit entities by improving future offers. While not expressly required by the statute, the proposed rule adds a postaward notification requirement for the applicable task orders and delivery orders to ensure unsuccessful awardees are provided an opportunity to obtain the debriefing information in a timely manner.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT), for Commercial Products (Including Commercially Available Off-the-Shelf (COTS) Items), and for Commercial Services

This rule does not create any new provisions or clauses, nor does it change the applicability of any existing provisions or clauses included in solicitations and contracts valued at or below the SAT, for commercial products, including COTS items, or for commercial services.

IV. Expected Impact of the Rule

This proposed rule is expected to increase the availability of debriefing information to significantly more small and large entities participating in fair opportunity competitions than is currently required by the FAR. When requested by an unsuccessful awardee, the information provided is expected to enable these entities to improve future offers.

V. 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 anticipated to be a major rule under 5 U.S.C. 804.

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. 601-612, because the rule provides postaward information to unsuccessful awardees, if requested. However, an 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 874 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020 (Pub. L. 116-92). For task orders or delivery orders exceeding the simplified acquisition

threshold (SAT) but not greater than \$5.5 million, section 874 requires contracting officers to provide, upon written request from an unsuccessful offeror, a brief explanation as to why the offeror's offer was unsuccessful, including the rationale for award and an evaluation of the significant weak or deficient factors in the unsuccessful offeror's offer. While the statutory threshold is \$5.5 million, this rule is implementing this requirement at the higher \$6 million threshold for debriefings currently in the FAR to avoid a gap between \$5.5 million and \$6 million.

The objective of this proposed rule is to increase the availability of debriefing information to significantly more small and large entities participating in fair opportunity competitions than is currently required by the FAR. When requested by an unsuccessful awardee, the information provided is expected to enable these entities to improve future offers. The legal basis for the rule is section 874 of the NDAA for FY 2020. Promulgation of FAR regulations is authorized by 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

This proposed rule will apply to all entities participating in fair opportunity competitions that exceed the SAT but do not exceed \$6 million. Based upon FY 2018 through FY 2020 data obtained from the Federal Procurement Data System, the Government awarded an average of 53,068 task orders and delivery orders against multiple-award contracts exceeding the SAT but not exceeding \$6 million annually. Of those orders, an estimated 22,863 were awarded to approximately 5,984 unique small entities each year. While DoD, GSA, and NASA are unable to estimate how many unique small entities are unsuccessful awardees and would request information afforded by this rule, it is assumed that at least one small entity may make such a request per opportunity, 22,863 annually.

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

The proposed 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 proposed objectives.

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 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2020-005), 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. 3501-3521).

List of Subjects in 48 CFR Part 16

Government procurement.

William F. Clark,

Director,

Office of Government-wide

Acquisition Policy,

Office of Acquisition Policy,

Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA propose amending 48 CFR part 16 as set forth below:

PART 16—TYPES OF CONTRACTS

1. The authority citation for 48 CFR part 16 continues to read as follows:

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

2. Amend section 16.505 by revising paragraph (b) (6) to read as follows:

16.505 Ordering.

* * * * *

(b) * * *

(6) *Postaward notices and debriefings (41 U.S.C. 4106 and 41 U.S.C. 4106 note).*

(i) For task orders or delivery orders exceeding the simplified acquisition threshold but not exceeding \$6 million, the contracting officer shall—

(A) Provide timely notification to unsuccessful awardees. At a minimum, the notification shall provide the name of the awardee of the order and the total price of the order;

(B) Upon written request, received by the agency within 3 days after the date that the unsuccessful awardee has

received notification of award, provide a brief explanation as to why the awardee was unsuccessful that includes-

(1) A summary of the rationale for the award;

and

(2) An evaluation of the significant weak or deficient factors in the unsuccessful awardee's offer.

(C) Include the brief explanation in the task order or delivery order file.

(ii) For task orders or delivery orders exceeding \$6 million, the contracting officer shall-

(A) Provide postaward notification to unsuccessful awardees in accordance with the procedures at 15.503(b) (1);

(B) Follow the procedures at 15.506 when providing postaward debriefings to unsuccessful awardees; and

(C) Include a summary of the debriefing in the task order or delivery order file.

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[FR Doc. 2023-16395 Filed: 8/8/2023 8:45 am; Publication Date: 8/9/2023]