

mandated by law (e.g., industry standards such as ISO 9000).

3. Revise section 11.107 to read as follows:

§ 11.107 Solicitation provision.

(a) Insert the provision at 52.211-6, Brand Name or Equal, when brand name or equal purchase descriptions are included in a solicitation.

(b) Insert the provision at 52.211-7, Alternatives to Government-Unique Standards, in solicitations that use Government-unique standards when the agency uses the transaction-based reporting method to report its use of voluntary consensus standards to the National Institute of Standards and Technology (see OMB Circular A-119, "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities"). Use of the provision is optional for agencies that report their use of voluntary consensus standards to the National Institute of Standards and Technology using the categorical reporting method. Agencies that manage their specifications on a contract-by-contract basis use the transaction-based method of reporting. Agencies that manage their specifications centrally use the categorical method of reporting. Agency regulations regarding specification management describe which method is used.

4. Revise paragraph (e) in section 11.201 to read as follows:

§ 11.201 Identification and availability of specifications.

* * * * *

(e) Agencies may purchase some nongovernment standards, including voluntary consensus standards, from the National Technical Information Service's Fedworld Information Network. Agencies may also obtain nongovernment standards from the standards developing organization responsible for the preparation, publication, or maintenance of the standard, or from an authorized document reseller. The National Institute of Standards and Technology can assist agencies in identifying sources for, and content of, nongovernment standards. DoD activities may obtain from the DoDSSP those nongovernment standards, including voluntary consensus standards, adopted for use by defense activities.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

5. Add section 52.211-7 to read as follows:

§ 52.211-7 Alternatives to Government-unique standards.

As prescribed in 11.107(b), insert the following provision:

Alternatives to Government-Unique Standards (Nov 1999)

(a) This solicitation includes Government-unique standards. The offeror may propose voluntary consensus standards that meet the Government's requirements as alternatives to the Government-unique standards. The Government will accept use of the voluntary consensus standard instead of the Government-unique standard if it meets the Government's requirements unless inconsistent with law or otherwise impractical.

(b) If an alternative standard is proposed, the offeror must furnish data and/or information regarding the alternative in sufficient detail for the Government to determine if it meets the Government's requirements. Acceptance of the alternative standard is a unilateral decision made solely at the discretion of the Government.

(c) Offers that do not comply with the Government-unique standards specified in this solicitation may be determined to be nonresponsive or unacceptable. The offeror may submit an offer that complies with the Government-unique standards specified in this solicitation, in addition to any proposed alternative standard(s).

(End of provision)

[FR Doc. 99-24414 Filed 9-23-99; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 12, 13, and 15

[FAC 97-14; FAR Case 98-300; Item VI]

RIN 9000-AI45

Federal Acquisition Regulation; Determination of Price Reasonableness and Commerciality

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement Sections 803 and 808 of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 (Pub. L. 105-261).

EFFECTIVE DATE: September 24, 1999.

Comment Date: Interested parties should submit comments to the FAR Secretariat at the address shown below on or before November 23, 1999 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (MVR), 1800 F Street, NW, Room 4035, Attn: Ms. Laurie Duarte, Washington, DC 20405.

Address e-mail comments submitted via the Internet to:

farcase.98-300@gsa.gov

Please submit comments only and cite FAC 97-14, FAR case 98-300 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405 (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Jeremy Olson at (202) 501-0692. Please cite FAC 97-14, FAR case 98-300.

SUPPLEMENTARY INFORMATION:

A. Background

The Councils initiated this case to implement Sections 803 and 808 of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 (Pub. L. 105-261) as follows:

(a) *Section 803 of Public Law 105-261.* (1) Paragraphs (a)(2)(A) through (a)(2)(C) of Section 803 of Public Law 105-261 require that the FAR provide specific guidance concerning—

(i) The appropriate application and precedence of various price analysis tools;

(ii) The circumstances under which contracting officers should require offerors of exempt commercial items to provide information other than cost or pricing data; and

(iii) The role and responsibility of support organizations in determining price reasonableness.

(2) Paragraph (a)(2)(D) of Section 803 is not implemented under this case.

(b) *Section 808 of Public Law 105-261.* Section 808 of Public Law 105-261 requires amending the FAR to—

(1) Clarify procedures associated with obtaining information other than cost or pricing data;

(2) Establish that offerors who fail to comply with requirements to provide the information shall be ineligible for award; and

(3) Establish exceptions, as appropriate.

This is not a significant regulatory action and, therefore, was not subject to Office of Management and Budget

review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

This interim rule may have a significant cost or administrative impact on contractors or offerors within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because offerors may be ineligible for award if they fail to provide the required information other than cost or pricing data. We have prepared an Initial Regulatory Flexibility Analysis (IRFA) that is summarized as follows:

The rule will apply to all offerors, large or small, that respond to solicitations for commercial items which require submission of information other than cost or pricing data. We expect few, if any, offerors to fail to comply with the requirements to provide information other than cost or pricing data.

The FAR Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. Interested parties may obtain a copy from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR subpart in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAC 97-14, FAR case 98-300), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because this rule implements Section 808 of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 (Pub. L. 105-261), which required implementation in the FAR by April 15, 1999. However, pursuant to Public Law 98-577 and FAR 1.501, the Councils will consider public comments received

in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 12, 13, and 15

Government procurement.

Dated: September 14, 1999.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, DoD, GSA, and NASA amend 48 CFR Parts 12, 13, and 15 as set forth below:

1. The authority citation for 48 CFR Parts 12, 13, and 15 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 12—ACQUISITION OF COMMERCIAL ITEMS

2. Revise section 12.209 read as follows:

12.209 Determination of price reasonableness.

When contracting for commercial items, the contracting officer must establish price reasonableness in accordance with 13.106-3, 14.408-2, or Subpart 15.4, as applicable.

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

3. Amend section 13.106-3 in the introductory text of paragraph (a) by removing "shall" and adding "must" in its place, and by revising paragraph (a)(2) to read as follows:

13.106-3 Award and documentation.

(a) * * *

(2) If only one response is received, include a statement of price reasonableness in the contract file. The contracting officer may base the statement on—

(i) Market research;

(ii) Comparison of the proposed price with prices found reasonable on previous purchases;

(iii) Current price lists, catalogs, or advertisements. However, inclusion of a price in a price list, catalog, or advertisement does not, in and of itself, establish fairness and reasonableness of the price;

(iv) A comparison with similar items in a related industry;

(v) The contracting officer's personal knowledge of the item being purchased;

(vi) Comparison to an independent Government estimate; or

(vii) Any other reasonable basis.

* * * * *

PART 15—CONTRACTING BY NEGOTIATION

4. Amend section 15.403-1 to add a sentence to the end of paragraph (c)(3) to read as follows:

15.403-1 Prohibition on obtaining cost or pricing data (10 U.S.C. 2306a and 41 U.S.C. 254b).

* * * * *

(c) * * *

(3) * * * If the contracting officer determines that an item claimed to be commercial is, in fact, not commercial and that no other exception or waiver applies, the contracting officer must require submission of cost or pricing data.

* * * * *

5. Amend section 15.403-3 to revise paragraphs (a) and (c) to read as follows:

15.403-3 Requiring information other than cost or pricing data.

(a) *General.* (1) The contracting officer is responsible for obtaining information that is adequate for evaluating the reasonableness of the price or determining cost realism, but the contracting officer should not obtain more information than is necessary (see 15.402(a)). If the contracting officer cannot obtain adequate information from sources other than the offeror, the contracting officer must require submission of information other than cost or pricing data from the offeror that is adequate to determine a fair and reasonable price (10 U.S.C. 2306a(d)(1) and 41 U.S.C. 254b(d)(1)). Unless an exception under 15.403-1(b) (1) or (2) applies, the contracting officer must require that the information submitted by the offeror include, at a minimum, appropriate information on the prices at which the same item or similar items have previously been sold, adequate for determining the reasonableness of the price. To determine the information an offeror should be required to submit, the contracting officer should consider the guidance in Section 3.3, Chapter 3, Volume I, of the Contract Pricing Reference Guide cited at 15.404-1(a)(7).

(2) The contractor's format for submitting the information should be used (see 15.403-5(b)(2)).

(3) The contracting officer must ensure that information used to support price negotiations is sufficiently current to permit negotiation of a fair and reasonable price. Requests for updated offeror information should be limited to information that affects the adequacy of the proposal for negotiations, such as changes in price lists.

(4) As specified in Section 808 of Public Law 105-261, an offeror who

does not comply with a requirement to submit information for a contract or subcontract in accordance with paragraph (a)(1) of this subsection is ineligible for award unless the HCA determines that it is in the best interest of the Government to make the award to that offeror, based on consideration of the following:

- (i) The effort made to obtain the data.
- (ii) The need for the item or service.
- (iii) Increased cost or significant harm to the Government if award is not made.

* * * * *

(c) *Commercial items.* (1) At a minimum, the contracting officer must use price analysis to determine whether the price is fair and reasonable whenever the contracting officer acquires a commercial item (see 15.404-1(b)). The fact that a price is included in a catalog does not, in and of itself, make it fair and reasonable. If the contracting officer cannot determine whether an offered price is fair and reasonable, even after obtaining additional information from sources other than the offeror, then the contracting officer must require the offeror to submit information other than cost or pricing data to support further analysis (see 15.403-3(a)(1)).

(2) *Limitations relating to commercial items (10 U.S.C. 2306a(d)(2) and 41 U.S.C. 254b(d)).* (i) The contracting officer must limit requests for sales data relating to commercial items to data for the same or similar items during a relevant time period.

(ii) The contracting officer must, to the maximum extent practicable, limit the scope of the request for information relating to commercial items to include only information that is in the form regularly maintained by the offeror as part of its commercial operations.

(iii) The Government must not disclose outside the Government information obtained relating to commercial items that is exempt from disclosure under 24.202(a) or the Freedom of Information Act (5 U.S.C. 552(b)).

6. Amend section 15.404-1 to revise paragraph (b)(2) introductory text, (b)(2)(i) and (b)(2)(ii); and to add (b)(2)(vii), (b)(3) and (b)(4) to read as follows:

15.404-1 Proposal analysis techniques.

* * * * *

(b) * * *

(2) The Government may use various price analysis techniques and procedures to ensure a fair and reasonable price. Examples of such techniques include, but are not limited to, the following:

(i) Comparison of proposed prices received in response to the solicitation. Normally, adequate price competition establishes price reasonableness (see 15.403-1(c)(1)).

(ii) Comparison of previously proposed prices and previous Government and commercial contract prices with current proposed prices for the same or similar items, if both the validity of the comparison and the reasonableness of the previous price(s) can be established.

* * * * *

(vii) Analysis of pricing information provided by the offeror.

(3) The first two techniques at 15.404-1(b)(2) are the preferred techniques. However, if the contracting officer determines that information on competitive proposed prices or previous contract prices is not available or is insufficient to determine that the price is fair and reasonable, the contracting officer may use any of the remaining techniques as appropriate to the circumstances applicable to the acquisition.

(4) Value analysis can give insight into the relative worth of a product and the Government may use it in conjunction with the price analysis techniques listed in paragraph (b)(2) of this section.

* * * * *

7. Amend section 15.404-2 to revise paragraphs (a)(1) and (a)(2) to read as follows:

15.404-2 Information to support proposal analysis.

(a) *Field pricing assistance.* (1) The contracting officer should request field pricing assistance when the information available at the buying activity is inadequate to determine a fair and reasonable price. The contracting officer must tailor requests to reflect the minimum essential supplementary information needed to conduct a technical or cost or pricing analysis.

(2) The contracting officer must tailor the type of information and level of detail requested in accordance with the specialized resources available at the buying activity and the magnitude and complexity of the required analysis. Field pricing assistance is generally available to provide—

(i) Technical, audit, and special reports associated with the cost elements of a proposal, including subcontracts;

(ii) Information on related pricing practices and history;

(iii) Information to help contracting officers determine commerciality and price reasonableness, including—

(A) Verifying sales history to source documents;

(B) Identifying special terms and conditions;

(C) Identifying customarily granted or offered discounts for the item;

(D) Verifying the item to an existing catalog or price list;

(E) Verifying historical data for an item previously not determined commercial that the offeror is now trying to qualify as a commercial item; and

(F) Identifying general market conditions affecting determinations of commerciality and price reasonableness.

(iv) Information relative to the business, technical, production, or other capabilities and practices of an offeror.

* * * * *

[FR Doc. 99-24415 Filed 9-23-99; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 14, 15, 22, and 52

[FAC 97-14; FAR Case 97-030; Item VII]

RIN 9000-AI25

Federal Acquisition Regulation; Conforming Late Offer Treatment

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to provide uniform guidance regarding receipt of late offers for commercial, sealed bid, and negotiated acquisitions.

EFFECTIVE DATE: November 23, 1999.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Ralph De Stefano, Procurement Analyst, at (202) 501-1758. Please cite FAC 97-14, FAR case 97-030.

SUPPLEMENTARY INFORMATION:

A. Background

The Councils published a proposed rule in the **Federal Register** on January