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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 6, 16 and 52

[FAR Case 94-711]

Federal Acquisition Regulation; Task and Delivery Order Contracts

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

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council are proposing to amend Federal Acquisition Regulations (FAR) to implement the statutory requirements of the Federal Acquisition Streamlining Act with regard to task and delivery order contracts. This regulatory action is subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

DATES: *Comment Due Date:* Comments should be submitted on or before May 15, 1995 to be considered in the formulation of a final rule.

Public Meeting: A public meeting will be held on April 13, 1995, at 1:00 p.m.

Oral/Written Statements: Views to be presented at the public meeting should be sent, in writing, to the FAR Secretariat, at the address given below, not later than April 10, 1995.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th & F Streets, NW, Room 4037, Washington, DC 20405, Telephone: (202) 501-4755.

The public meeting will be held at: General Services Administration Auditorium, 18th & F Streets, NW, First Floor, Washington, DC 20405.

Please cite FAR case 94-711 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: Mr. Ed McAndrew, Special Contracting Team Leader, at (202) 501-1474 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GSA Building,

Washington, DC 20405 (202) 501-4755. Please cite FAR case 94-711.

SUPPLEMENTARY INFORMATION:

A. Background

The Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355) (the Act) provides authorities that streamline the acquisition process and minimize burdensome government-unique requirements. Major changes can be expected in the acquisition process as a result of the Act's implementation.

FAR Case 94-711

This notice announces FAR revisions developed under FAR case 94-711 which implement the requirements of sections 1004 and 1054, of the Act. Both of these sections contain statutory requirements for the award of task and delivery order contracts, the issuance of orders under such contracts and the award of such contracts for advisory and assistance services.

Public Meeting. The FAR Council is interested in an exchange of ideas and opinions on this rule. For that reason, the FAR Council is conducting a series of public meetings. A public meeting will be held on April 13, 1995, to enable the public to present its views on this rule. This rule will only be discussed at the public meeting session. Any subsequent public meetings will be devoted to other revisions to the FAR. The public is encouraged to furnish its views; the Council anticipates that public comments will be very helpful in formulating final rules.

Persons or organizations wishing to make presentations will be allowed 10 minutes each, provided they notify the FAR Secretariat at (202) 501-4755 and submit written statements of the presentation by April 10, 1995. Persons or organizations with similar positions are encouraged to select a common spokesman for presentation of their views. This meeting, in conjunction with this **Federal Register** notice soliciting public comments on the rule, will be the only opportunity for the public to present its views.

B. Regulatory Flexibility Act

The proposed changes 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.*, because the rule may result in more opportunities for small businesses to compete for awards as a result of the multiple award preference. There is a potential negative impact resulting from consolidation of contract requirements under a task or delivery order contract; however, it is expected that this

negative impact could be mitigated by an increase in the opportunities for small businesses to receive subcontracts. Small businesses could also form joint ventures to bid on larger contract requirements. An Initial Regulatory Flexibility Analysis (IRFA) has been prepared and will be provided to the Chief Counsel for Advocacy for the Small Business Administration. Comments from small entities concerning the affected FAR subpart will be considered in accordance with 5 U.S.C. 610. Such comments must be submitted separately and should cite 5 U.S.C. 601, *et seq.* (FAR Case 94-711), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose recordkeeping or information collection requirements, or collections of information from offerors, contractors, or members of the public which require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 6, 16 and 52

Government procurement.

Dated: March 9, 1995.

Barry Cohen,

Project Manager for the Implementation of the Federal Acquisition Streamlining Act of 1994.

Therefore, it is proposed that 48 CFR Parts 6, 16 and 52 be amended as set forth below:

PART 6—COMPETITION REQUIREMENTS

1. The authority citation for 48 CFR Parts 6, 16 and 52 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).

2. Section 6.001 is amended by adding paragraph (f) to read as follows:

6.001 Applicability.

* * * * *

(f) Orders placed against task order and delivery order contracts entered into pursuant to 48 CFR (FAR) part 16, subpart 16.5.

PART 16—TYPES OF CONTRACTS

3. Section 16.500 is added to read as follows:

16.500 Scope of subpart.

This subpart prescribes policies and procedures for making awards of indefinite delivery contracts and establishes a preference scheme for

making multiple awards of delivery order contracts and task order contracts. This subpart does not limit the use of other than full and open competitive procedures authorized by 48 CFR (FAR) part 6. The preference scheme established by this subpart and the limitations on the use of contracts for advisory and assistance services do not apply to contracts subject to the procedures of 48 CFR (FAR) parts 36, 38, 39 and 41.

16.501 [Redesignated and amended]

4. Section 16.501 is redesignated as 16.501-1 and is amended by removing paragraph (c).

5. Section 16.501-2 is added to read as follows:

16.501-2 Definitions.

As used in this subpart—

Advisory and assistance services has the same meaning as set forth in 48 CFR (FAR) 37.201.

Delivery order contract means a contract for supplies that does not procure or specify a firm quantity of supplies (other than a minimum or maximum quantity) and that provides for the issuance of orders for the delivery of supplies during the period of the contract.

Task order contract means a contract for services that does not procure or specify a firm quantity of services (other than a minimum or maximum quantity) and that provides for the issuance of orders for the performance of tasks during the period of the contract.

6. Section 16.503 is amended in the introductory text of paragraph (a) by removing the word "specific", and by revising paragraphs (a)(2) and (b) and adding (a)(3) and (d) to read as follows:

16.503 Requirements contracts.

(a) * * *

(2) In addition to other required provisions and clauses, a solicitation for a requirements contract shall—

(i) Specify the period of the contract including the number of options and the period for which the contract may be extended under each option, if any;

(ii) Specify the maximum quantity or dollar value of services or supplies to be acquired under the contract;

(iii) Include a statement of work, specifications or other description that reasonably describes the general scope, nature, complexity, and purpose of the supplies or services to be acquired under the contract in a manner that will enable a prospective offeror to decide whether to submit an offer; and

(iv) State the procedures that will be used in issuing orders.

(3) The contract may specify maximum or minimum quantities that

the Government may order under each individual order and the maximum that it may order during a specified period of time.

(b) *Application.* A requirements contract may be appropriate for acquiring any supplies or services when the Government anticipates recurring requirements but cannot predetermine the precise quantities of supplies or services that designated Government activities will need during a definite period. Funds are obligated by each delivery order, not by the contract itself.

* * * * *

(d) *Limitations on use of requirements contracts for advisory and assistance services in excess of three years and \$10,000,000.* (1) Except as provided in 16.503(d)(2), no solicitation may be issued for a requirements contract for advisory and assistance services in excess of three years and \$10,000,000 (including all options) which does not provide for multiple awards, unless the head of the agency or designee determines in writing that the services required are so unique or highly specialized that it is not practicable to award more than one contract.

(2) The limitation at 16.503(d)(1) is not applicable to the acquisition of supplies or services that includes the acquisition of advisory and assistance services if the head of an agency or designee determines that the advisory and assistance services are necessarily incident to, and not a significant component of, the contract.

7. Section 16.504 is amended in the introductory text of paragraph (a) by removing the word "specific", and by adding paragraphs (a)(4) and (c) to read as follows:

16.504 Indefinite-quantity contracts.

(a) * * *

(4) In addition to other required provisions and clauses, a solicitation for an indefinite-quantity contract shall—

(i) Specify the period of the contract including the number of options and the period for which the contract may be extended under each option, if any;

(ii) Specify the total minimum and maximum quantity or dollar value of services or supplies to be acquired under the contract;

(iii) Include a statement of work, specifications, or other description, that reasonably describes the general scope, nature, complexity, and purpose of the supplies or services to be acquired under the contract in a manner that will enable a prospective offeror to decide whether to submit an offer;

(iv) State the procedures that will be used in issuing orders;

(v) If multiple awards may be made, include the provision at 48 CFR (FAR) 52.216-27, Election to Award Single or Multiple Task Order Contracts or Delivery Order Contracts, to notify offerors that more than one contract may be awarded; and

(vi) If an award of a task order contract for advisory and assistance services in excess of three years and \$10,000,000 (including all options) is anticipated, include the provision at 48 CFR (FAR) 52.216-28, Notice of Intent to Make Multiple Awards Under a Task Order Contract for Advisory and Assistance Services That Exceeds Three Years and \$10,000,000, unless a determination to make a single award is made under 16.504(c)(2)(i)(A).

* * * * *

(c) *Multiple award preference—(1) General preference.* Except for indefinite quantity contracts for advisory and assistance services as provided in 16.504(c)(2), the contracting officer shall, to the maximum extent practicable, give preference to making multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies or services to two or more sources. In making a determination as to whether multiple awards are appropriate, the contracting officer shall exercise sound business judgment as part of acquisition planning. Multiple awards should not be made when—

(i) Only one contractor is capable of providing performance at the level of quality required because the supplies or services are unique or highly specialized;

(ii) Based on the contracting officer's knowledge of the market and consideration of the cost to the Government of administration of multiple contracts, more favorable terms and conditions, including pricing, will be provided if a single award is made;

(iii) The nature of the work to be performed under each order is integrally related;

(iv) Making multiple awards would be inconsistent with other provisions of law;

(v) The total estimated value of the contract is less than the simplified acquisition threshold; or

(vi) The contracting officer determines that multiple awards would not be in the best interests of the Government.

(2) *Contracts for advisory and assistance services.* (i) Except as provided in 16.504(c)(2)(ii), if an indefinite quantity contract for advisory and assistance services will not exceed three years and \$10,000,000, including all options, a contracting officer need

not give preference to making multiple awards. If an indefinite quantity contract for advisory and assistance services is to exceed three years and \$10,000,000, including all options, multiple awards shall be made unless—

(A) The head of the agency or designee determines in writing, prior to the issuance of the solicitation, that the services required under the task order contract are so unique or highly specialized that it is not practicable to award more than one contract;

(B) The head of the agency or designee determines in writing, after the evaluation of offers, that only one offeror is capable of providing the services required at the level of quality required; or

(C) Only one offer is received.

(ii) The requirements of 16.504(c)(2)(i) are not applicable to the acquisition of supplies or services that includes the acquisition of advisory and assistance services if the head of an agency or designee determines that the advisory and assistance services are necessarily incident to, and not a significant component of, the contract.

8. Sections 16.505 and 16.506 are redesignated as 16.506 and 16.505, respectively, and the newly-redesignated 16.505 is revised and the newly-redesignated 16.506 is amended by revising the heading and adding paragraphs (f) and (g) to read as follows:

16.505 Ordering.

(a) *General.* (1) When placing orders under this subpart, a separate notice under 48 CFR (FAR) 5.201 is not required.

(2) The ordering officer shall ensure that individual orders clearly describe all services to be performed or supplies to be delivered. The ordering officer shall also ensure that orders are within the scope, period, or maximum value of the contract.

(3) The contracting officer shall include in the contract Schedule the names of the activity or activities authorized to issue orders.

(4) If appropriate, authorization for placing oral orders may be included in the contract Schedule; provided, that procedures have been established for obligating funds and that oral orders are confirmed in writing.

(5) Orders may be placed by written telecommunication or other electronic means, if provided for in the contract.

(6) Orders placed under indefinite-delivery contracts shall contain the following information:

(i) Date of order.

(ii) Contract number and order number.

(iii) Item number and description, quantity, and unit price.

(iv) Delivery or performance date.

(v) Place of delivery or performance (including consignee).

(vi) Packaging, packing, and shipping instructions, if any.

(vii) Accounting and appropriation data.

(viii) Any other pertinent information.

(7) No protest under 48 CFR (FAR) part 33 is authorized in connection with the issuance or proposed issuance of an order under a task order contract or delivery order contract except for a protest on the grounds that the order increases the scope, period or maximum value of the contract.

(b) *Orders under multiple award task or delivery order contracts.* (1) Except as provided for in 16.505(b)(2), for orders issued under multiple delivery order contracts or multiple task order contracts, each awardee shall be provided a fair opportunity to be considered for each order in excess of \$2,500. In determining the procedures for providing awardees a fair opportunity to be considered for each order, contracting officers shall exercise broad discretion and may consider factors such as past performance, quality of deliverables, cost control, price, cost, or other factors that the contracting officer, in the exercise of sound business judgment, believes are relevant to the placement of orders. Such procedures need not comply with the competition requirements of 48 CFR (FAR) part 6. The contracting officer need not request written proposals or conduct discussions with multiple contractors before issuing orders unless the contracting officer determines such actions to be necessary.

(2) Awardees need not be given a fair opportunity to be considered for a particular order in excess of \$2,500 if the contracting officer determines that—

(i) The agency need for such services or supplies is of such urgency that providing such opportunity would result in unacceptable delays;

(ii) Only one such contractor is capable of providing such services or supplies required at the level of quality required because the services or supplies ordered are unique or highly specialized;

(iii) The order should be issued on a sole-source basis in the interest of economy and efficiency as a logical follow-on to an order already issued under the contract; or

(iv) It is necessary to place an order to satisfy a minimum guarantee.

(3) Soliciting offers from one or more awardees under a multiple award task order contract or delivery order contract shall satisfy the “competing

independently” requirements of 48 CFR (FAR) 15.804–3(b)(3).

(4) The head of the agency shall designate a task order contract and delivery order contract ombudsman who shall be responsible for reviewing complaints from contractors on task order contracts and delivery order contracts. The ombudsman shall review complaints from the contractors and ensure that all contractors are afforded a fair opportunity to be considered, consistent with the procedures in the contract. The ombudsman shall be a senior agency official who is independent of the contracting officer and may be the agency’s competition advocate.

(c) *Limitation on ordering period for task order contracts for advisory and assistance services.* (1) Except as provided for in 16.505(c)(2), the ordering period of a task order contract for advisory and assistance services, including all options or modifications, may not exceed five years unless a longer period is specifically authorized in a law that is applicable to such a contract. Notwithstanding the five year limitation or the requirements of 48 CFR (FAR) part 6, a task order contract for advisory and assistance services may be extended on a sole-source basis only once for a period not to exceed six months if—

(i) The head of the agency or designee determines that the award of a follow-on contract is delayed by circumstances that were not reasonably foreseeable at the time the initial contract was entered into; and

(ii) The extension is necessary to ensure continuity of services pending the award of the follow-on contract.

(2) The limitation on ordering period contained in 16.505(c)(1) is not applicable to the acquisition of supplies or services that includes the acquisition of advisory and assistance services if the head of an agency or designee determines that the advisory and assistance services are necessarily incident to, and not a significant component of, the contract.

16.506 Solicitation provisions and contract clauses.

* * * * *

(f) The contracting officer shall insert the provision at 48 CFR (FAR) 52.216–27, Election to Award Single or Multiple Task Order Contracts or Delivery Order Contracts, in solicitations for task or delivery order contracts that may result in multiple contract awards. This provision shall not be used for advisory and assistance services contracts.

(g) In accordance with 16.504(a)(4)(vi), the contracting officer

shall insert the provision at 48 CFR (FAR) 52.216-28, Notice of Intent to Make Multiple Awards Under a Task Order Contract for Advisory and Assistance Services That Exceeds Three Years and \$10,000,000, in solicitations for task order contracts for advisory and assistance services that exceed three years and \$10,000,000 (including all options) provided that no determination is made under 16.504(c)(2)(i)(A).

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

9. Section 52.216-18 is amended in the introductory text by removing "16.505(a)" and inserting "16.506(a)" in its place, and revising the clause date and paragraphs (b) and (c) to read as follows:

52.216-18 Ordering.

* * * * *

ORDERING (XXX 1995)

* * * * *

(b) All delivery orders or task orders are subject to the terms and conditions of this contract. In the event of conflict between a delivery order or task order and this contract, the contract shall control.

(c) If mailed, a delivery order or task order is considered "issued" when the Government deposits the order in the mail. Orders may be issued orally, by written telecommunications, or by other electronic means only if authorized in the Schedule.
(End of clause)

10. Section 52.216-19 is amended by revising the section heading, introductory text and clause heading and date to read as follows:

52.216-19 Order Limitations.

As prescribed in 16.506(b), insert a clause substantially the same as follows in solicitations and contracts when a definite-quantity contract, a requirements contract, or an indefinite-quantity contract is contemplated:
ORDER LIMITATIONS (XXX 1995)

* * * * *

52.216-20 [Amended]

11. Section 52.216-20 is amended in the introductory text by removing "16.505(c)" and inserting "16.506(c)" in its place, revising the clause date to read "(XXX 1995)", and in the first sentence of paragraph (c) by removing the word "Delivery-".

52.216-21 [Amended]

12. Section 52.216-21 is amended in the introductory text by removing "16.505(d)" and inserting "16.506(d)" in its place; in the clause heading by removing the date "(APR 1984)" and inserting "(XXX 1995);" in the second sentence of paragraph (b) by removing the word "Delivery-"; and in the introductory texts of Alternates III and IV by removing the phrase "or labor surplus area" and revising the Alternate dates to read "(XXX 1995)".

52.216-22 [Amended]

13. Section 52.216-22 is amended in the introductory text by removing "16.505(e)" and inserting "16.506(e)" in its place; in the clause heading by removing the date "(APR 1984)" and inserting "(XXX 1995)" in its place; and in the first sentence of paragraph (c) by removing the word "Delivery-".

14. Section 52.216-27 is added to read as follows:

52.216-27 Election to Award Single or Multiple Task Order Contracts or Delivery Order Contracts.

As prescribed in 16.506(f), insert the following provision:

ELECTION TO AWARD SINGLE OR MULTIPLE TASK ORDER CONTRACTS OR DELIVERY ORDER CONTRACTS (XXX 1995)

The Government may elect to award a single delivery order contract or task order contract or to award multiple task order contracts or delivery order contracts for the same or similar services or supplies to two or more sources under this solicitation.
(End of provision)

15. Section 52.216-28 is added to read as follows:

52.216-28 Notice of Intent to Make Multiple Awards Under a Task Order Contract for Advisory and Assistance Services That Exceeds Three Years and \$10,000,000.

As prescribed in 16.506(g), insert the following provision:

NOTICE OF INTENT TO MAKE MULTIPLE AWARDS UNDER A TASK ORDER CONTRACT FOR ADVISORY AND ASSISTANCE SERVICES THAT EXCEEDS THREE YEARS AND \$10,000,000 (XXX 1995)

The Government intends to award multiple contracts for the same or similar advisory and assistance services to two or more sources under this solicitation unless the Government determines, after evaluation of offers, that only one offeror is capable of providing the services at the level of quality required.

(End of provision)

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