

DEPARTMENT OF DEFENSE

**GENERAL SERVICES
ADMINISTRATION**

**NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION**

48 CFR Parts 6, 12, 15, and 52

[FAR Case 96-303]

RIN 9000-AH15

**Federal Acquisition Regulation;
Competitive Range Determinations**

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 the Federal Acquisition Regulation (FAR) to implement Sections 4101 and 4103 of the Federal Acquisition Reform Act of 1996. The rule provides the contracting officer with the authority to limit the size of the competitive range, in accordance with criteria specified in the solicitation, to the greatest number that will permit an efficient competition. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This is not a major rule under 5 U.S.C. 804.

DATES: Comments should be submitted on or before September 30, 1996 to be considered in the formulation of a final rule.

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

Please cite FAR case 96-303 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: Mr. Ralph DeStefano at (202) 501-1758 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAR case 96-303.

SUPPLEMENTARY INFORMATION:

A. Background

Subsections 4101 (a) and (b) of the Federal Acquisition Reform Act of 1996 (Pub. L. 104-106) (the Act) require FAR implementation of the requirement to obtain full and open competition in a manner that is consistent with the need

to efficiently fulfill the Government's requirements. Section 4103 of the Act provides that the contracting officer may limit the number of proposals in the competitive range, in accordance with criteria specified in the solicitation, to the greatest number that will permit an efficient competition. The proposed rule revises FAR 6.101(b), 12.301(e), 15.407(d)(4), 15.609, 52.212-1(g) and 52.215-16 to implement sections 4101 and 4103. The integrity, fairness, and openness principles in FAR subpart 1.102 are not changed.

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 revises the procedures for determining the competitive range in negotiated acquisitions. The size of the competitive range will be reduced in some negotiated acquisitions and some offerors may be eliminated from a competition earlier than they would be eliminated under existing procedures. However, bid and proposal costs are expected to decrease, as an offeror who is not likely to receive an award will be less likely to remain in a competition. An Initial Regulatory Flexibility Analysis has been performed and will be provided to the Chief Council for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the FAR Secretariat. Comments are invited from small businesses and other interested parties. Comments from small entities concerning the affected FAR subpart will be considered in accordance with section 610 of the Act. Such comments must be submitted separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 96-303), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose any substantial change in 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, 12, 15 and 52

Government procurement.

Dated: July 25, 1996.
Edward C. Loeb,
Director, Federal Acquisition Policy Division.

Therefore, it is proposed that 48 CFR Parts 6, 12, 15 and 52 be amended as set forth below:

1. The authority citation for 48 CFR Parts 6, 12, 15 and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. 2301 to 2331; and 42 U.S.C. 2473(c).

**PART 6—COMPETITION
REQUIREMENTS**

2. Section 6.101 is amended by revising paragraph (b) to read as follows:

6.101 Policy

* * * * *

(b) Contracting officers shall provide for full and open competition through use of the competitive procedure, or combination of competitive procedures, contained in this subpart that is best suited to the circumstances of the contract action and is consistent with the need to efficiently fulfill the Government's requirement. Contracting officers must use good judgment in selecting the procedure that best meets the needs of the Government.

**PART 12.3—ACQUISITION OF
COMMERCIAL ITEMS**

3. Section 12.301 is amended by adding new paragraph (e)(4) to read as follows:

12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(e) * * *

(4) The contracting officer may reserve the right to conduct discussions with offerors determined to be within the competitive range after evaluation of proposals and to limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals. 52.215-16, Contract Award, Alternate III, may be used in solicitations for this purpose.

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**PART 15—CONTRACTING BY
NEGOTIATION**

4. Section 15.407 is amended by revising paragraph (d)(4)(ii) and adding new paragraph (d)(4)(iii) to read as follows:

15.407 Solicitation provisions.

* * * * *

(d) * * *

(4) * * *

(ii) If awards are intended to be made without discussions with offerors within the competitive range, use the basic provision with its Alternate II.

(iii) If the Government wishes to reserve the right to limit the competitive range to no more than a specific number, use the basic provision with its Alternate III, or the basic provision with both Alternates II and III.

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5. Section 15.609 is revised to read as follows:

15.609 Competitive range.

(a) The contracting officer shall determine the competitive range for the purpose of conducting written or oral discussion (see 15.610(b)) based on cost or price and other factors in the solicitation. The competitive range consists of proposals having the greatest likelihood of award based on the factors and subfactors in the solicitation.

(b) In planning an acquisition, the contracting officer may determine that the number of proposals that would otherwise be included in the competitive range is expected to exceed the number at which an efficient competition can be conducted. In reaching such a conclusion, the contracting officer may consider such factors as the results of market research, historical data from previous acquisitions for similar supplies and services, and the resources available to conduct the source selection. Alternate III of 52.215-16, Contract Award, may be used to indicate the Government's estimate of the greatest number or proposals that will be included in the competitive range for purposes of conducting an efficient competition among the most highly rated proposals.

(c) After evaluating offers, the contracting officer may determine that the number of proposals that would otherwise be included in the competitive range exceeds the number at which an efficient competition can be conducted. Provided the solicitation notifies offerors that the competitive range can be limited for purposes of efficiency, the contracting officials may limit the number of proposals in the competitive range to the greatest

number that will permit an efficient competition among the most highly rated proposals. The basic solicitation provisions at 52.215-16, Contract Award, reserves the contracting officer's right to limit the competitive range for purposes of efficiency.

(d) If the contracting officer determines that an offeror's proposal is no longer in the competitive range the proposal shall no longer be considered for award. Written notice of this decision shall be provided to the unsuccessful offeror at the earliest practicable time (see 15.1002(b)).

(e) Offerors excluded from the competitive range may request a debriefing. When a debriefing is requested, see 15.1004.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

6. Section 52.212-1 is amended by revising the provision date and paragraph (g) to read as follows:

52.212-1 Instructions to Offerors—Commercial Items.

* * * * *

Instructions to Offerors—Commercial Items (Date)

* * * * *

(g) *Contract award (not applicable to Invitation for Bids).* The Government intends to evaluate proposals and award a contract without discussions with offerors (except communications conducted for the purpose of minor clarification). Therefore, each individual offer should contain the offeror's best terms from a cost or price and technical standpoint. However, the Government reserves the right to conduct discussions if the Contracting Officer later determines them to be necessary. If discussions are held and the Contracting Officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the Contracting Officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals. The Government may reject any or all offers if such action is in the public interest; accept other than the lowest offer; and waive informalities and minor irregularities in offers received.

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7. Section 52.215-16 is amended by revising the provision date and paragraph (c), revising Alternate II (c), and adding a new Alternate III to read as follows:

52.215-16 Contract Award.

* * * * *

Contract Award (Date)

* * * * *

(c) The Government intends to evaluate proposals and award a contract after conducting discussions with responsible offerors whose proposals have been determined to be within the competitive range. If the Contracting Officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the Contracting Officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals. Therefore, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint.

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Alternate II (Date) * * *

(c) The Government intends to evaluate proposals and award a contract without discussions with offerors (except communications conducted for the purpose of minor clarification). Therefore, each individual offer should contain the offeror's best terms from a cost or price and technical standpoint. However, the Government reserves the right to conduct discussions if the Contracting Officer later determines them to be necessary. If discussions are to be held and the Contracting Officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the Contracting Officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals.

Alternate III (Date). As prescribed in 15.407(d)(4)(iii), insert the following paragraph (i) in the basic provision:

(i) If the Contracting Officer exercises the Government's right to limit the number of proposals in the competitive range, the competitive range will be limited to no more than _____ (insert number).

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