

d. in the first sentence of paragraphs (f)(1) and (f)(2) by inserting the word "agency" after the word "pending";

e. by adding paragraph (f)(4); and

f. by revising paragraphs (g) and (h) to read as follows:

33.103 Protests to the agency.

* * * * *

(d) * * *

(2) Protests shall include the following information:

(i) Name, address, and fax and telephone numbers of the protester.

* * * * *

(4) In accordance with agency procedures, interested parties may request an independent review of their protest at a level above the contracting officer; solicitations should advise potential bidders and offerors that this review is available. Agency procedures and/or solicitations shall notify potential bidders and offerors whether this independent review is available as an alternative to consideration by the contracting officer of a protest or is available as an appeal of a contracting officer decision on a protest. Agencies shall designate the official(s) who are to conduct this independent review, but the official(s) need not be within the contracting officer's supervisory chain. When practicable, officials designated to conduct the independent review should not have had previous personal involvement in the procurement. If there is an agency appellate review of the contracting officer's decision on the protest, it will not extend GAO's timeliness requirements. Therefore, any subsequent protest to the GAO must be filed within 10 days of knowledge of initial adverse agency action (4 CFR 21.2(a)(3)).

* * * * *

(f) * * *

(4) Pursuing an agency protest does not extend the time for obtaining a stay at GAO. Agencies may include, as part of the agency protest process, a voluntary suspension period when agencies protests are denied and the protester subsequently files at GAO.

(g) Agencies shall make their best efforts to resolve agency protests within 35 days after the protest is filed. To the extent permitted by law and regulation, the parties may exchange relevant information.

(h) Agency protest decisions shall be well-reasoned, and explain the agency position. The protest decision shall be provided to the protester using a method that provides evidence of receipt.

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[BILLING CODE 6820-EP-P]

48 CFR Parts 1, 5, 14, and 36

[FAC 90-45; FAR Case 96-305; Item XIII]

RIN 9000-AH17

Federal Acquisition Regulation; Two-Phase Design Build Selection Procedures

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 have agreed on a final rule to amend the Federal Acquisition Regulation (FAR) to implement Section 4105 of the Clinger-Cohen Act of 1996 (Public Law 104-106), which authorizes the use of two-phase design-build procedures for construction contracting. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993, and is not a major rule under 5 U.S.C. 804.

EFFECTIVE DATE: January 1, 1997.

FOR FURTHER INFORMATION CONTACT: Mr. Jack O'Neill at (202) 501-3856 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4035, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAC 90-5, FAR case 96-305.

SUPPLEMENTARY INFORMATION:

A. Background

A proposed rule with request for public comment was published in the Federal Register at 61 FR 41212, August 7, 1996. Comments were received from 77 respondents. After analysis of the public comments and further consideration of the proposed language, the rule was revised at FAR 36.104, 36.301(b)(2), and 36.303-1 to more closely conform to the provisions of Section 4105 of Public Law 104-106. In addition, examples of phase-two evaluation factors have been added at FAR 36.303-(a).

B. Regulatory Flexibility Act

This final rule 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 reduces the cost of proposal preparation for those offerors not selected for Phase Two, when two-phase design-build procedures are used. A Final Regulatory Flexibility Analysis (FRFA) has been prepared and is summarized as follows:

We estimate that approximately 1,465 small businesses responding to two-phase design-build solicitations annually may save proposal costs on an average of eight separate solicitations each. This final rule imposes no new reporting or recordkeeping requirements.

A copy of the FRFA will be provided to the Chief Counsel for Advocacy for the Small Business Administration. A copy of the FRFA may be obtained from the FAR Secretariat. Comments are invited. 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 cite 5 U.S.C. 601, *et seq.* (FAR Case 96-305), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the 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 1, 5, 14, and 36

Government procurement.

Dated: December 24, 1996.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Parts 1, 5, 14, and 36 is amended as set forth below:

1. The authority citation for 48 CFR Parts 1, 5, 14, and 36 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 1—FEDERAL ACQUISITION REGULATION SYSTEM

1.106 [Amended]

2. Section 1.106 is amended in the list following the introductory paragraph by removing the FAR segment "36.302" and inserting "36.213-2".

PART 5—PUBLICIZING CONTRACT ACTIONS

3. Section 5.204 is amended by revising the first sentence to read as follows:

5.204 Presolicitation notices.

Contracting officers shall publicize presolicitation notices in the CBD (see 15.404 and 36.213-2). * * *

PART 14—SEALED BIDDING

4. Section 14.202-1 is amended in paragraph (a) by revising the first parenthetical to read as follows:

14.202-1 Bidding time.

(a) * * * (For construction contracts, see 36.213-3(a)). * * *

* * * * *

5. Section 14.211 is amended by revising the first sentence of paragraph (a) to read as follows:

14.211 Release of acquisition information.

(a) *Before solicitation.* Information concerning proposed acquisitions shall not be released outside the Government before solicitation except for presolicitation notices in accordance with 14.205-4(c) or 36.213-2, or long-range acquisition estimates in accordance with 5.404, or synopses in accordance with 5.201. * * *

* * * * *

PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

6. Section 36.102 is amended by adding, in alphabetical order, the definitions "Design", "Design-bid-build", "Design-build", and "Two-phase design-build selection procedures" to read as follows:

36.102 Definitions.

* * * * *

Design, as used in this part, means defining the construction requirement (including the functional relationships and technical systems to be used, such as architectural, environmental, structural, electrical, mechanical, and fire protection), producing the technical specifications and drawings, and preparing the construction cost estimate.

Design-bid-build, as used in this part, means the traditional delivery method where design and construction are sequential and contracted for separately with two contracts and two contractors.

Design-build, as used in this part, means combining design and construction in a single contract with one contractor.

* * * * *

Two-phase design-build selection procedures, as used in this part, is a selection method in which a limited number of offerors (normally five or fewer) is selected during Phase One to submit detailed proposals for Phase Two (see subpart 36.3).

7. Section 36.104 is added to read as follows:

36.104 Policy.

Unless the traditional acquisition approach of design-bid-build established under the Brooks Architect-Engineers Act (41 U.S.C. 541, *et seq.*) or another acquisition procedure authorized by law is used, the contracting officer shall use the two-phase selection procedures authorized by 10 U.S.C. 2305a or 41 U.S.C. 253m when entering into a contract for the design and construction of a public building, facility, or work, if the contracting officer makes a determination that the procedures are appropriate for use (see subpart 36.3). Other acquisition procedures authorized by law include the procedures established in this part and other parts of this chapter and, for DoD, the design-build process described in 10 U.S.C. 2862.

Subpart 36.3 [Redesignated as 36.213 and Amended]**36.301-36.304 [Redesignated as 36.213-1-36.213-4]**

8. Subpart 36.3 is redesignated as section 36.213 and the heading is revised to read "Special procedures for sealed bidding in construction contracting."; and sections 36.301 through 36.304 are redesignated as 36.213-1 through 36.213-4, respectively.

Subpart 36.4 [Removed]**36.401 [Removed]****36.402 [Redesignated as 36.214]****36.403 [Redesignated as 36.215]**

9. Subpart heading 36.4 and section 36.401 are removed; and sections 36.402 and 36.403 are redesignated as 36.214 and 36.215, respectively, and the section headings revised to read as follows:

36.214 Special procedures for price negotiation in construction contracting.**36.215 Special procedure for cost-reimbursement contracts for construction.**

10. Subpart 36.3, consisting of sections 36.300 through 36.303-2, is added to read as follows:

Subpart 36.3—Two-Phase Design-Build Selection Procedures**Sec.**

36.300 Scope of subpart.

36.301 Use of two-phase design-build selection procedures.

36.302 Scope of work.

36.303 Procedures.

36.303-1 Phase One.

36.303-2 Phase Two.

Subpart 36.3—Two-Phase Design-Build Selection Procedures**36.300 Scope of subpart.**

This subpart prescribes policies and procedures for the use of the two-phase design-build selection procedures authorized by 10 U.S.C. 2305a and 41 U.S.C. 253m.

36.301 Use of two-phase design-build selection procedures.

(a) During formal or informal acquisition planning (see part 7), if considering the use of two-phase design-build selection procedures, the contracting officer shall conduct the evaluation in paragraph (b) of this section.

(b) The two-phase design-build selection procedures shall be used when the contracting officer determines that this method is appropriate, based on the following:

(1) Three or more offers are anticipated.

(2) Design work must be performed by offerors before developing price or cost proposals, and offerors will incur a substantial amount of expense in preparing offers.

(3) The following criteria have been considered:

(i) The extent to which the project requirements have been adequately defined.

(ii) The time constraints for delivery of the project.

(iii) The capability and experience of potential contractors.

(iv) The suitability of the project for use of the two-phase selection method.

(v) The capability of the agency to manage the two-phase selection process.

(vi) Other criteria established by the head of the contracting activity.

36.302 Scope of work.

The agency shall develop, either in-house or by contract, a scope of work that defines the project and states the Government's requirements. The scope of work may include criteria and preliminary design, budget parameters, and schedule or delivery requirements. If the agency contracts for development of the scope of work, the procedures in subpart 36.6 shall be used.

36.303 Procedures.

One solicitation may be issued covering both phases, or two solicitations may be issued in sequence. Proposals will be evaluated in Phase One to determine which offerors will submit proposals for Phase Two. One contract will be awarded using competitive negotiation.

36.303-1 Phase One.

(a) Phase One of the solicitation(s) shall include—

- (1) The scope of work;
- (2) The phase-one evaluation factors, including—
 - (i) Technical approach (but not detailed design or technical information);
 - (ii) Technical qualifications, such as—
 - (A) Specialized experience and technical competence;
 - (B) Capability to perform;
 - (C) Past performance of the offeror's team (including the architect-engineer and construction members); and
 - (iii) Other appropriate factors (excluding cost or price related factors, which are not permitted in Phase One);
- (3) Phase-two evaluation factors (see 36.303-2); and
- (4) A statement of the maximum number of offerors that will be selected to submit phase-two proposals. The maximum number specified shall not exceed five unless the contracting officer determines, for that particular solicitation, that a number greater than five is in the Government's interest and is consistent with the purposes and objectives of two-phase design-build contracting).

(b) After evaluating phase-one proposals, the contracting officer shall select the most highly qualified offerors (not to exceed the maximum number specified in the solicitation in accordance with 36.303-1(a)(4)) and request that only those offerors submit phase-two proposals.

36.303-2 Phase Two.

(a) Phase Two of the solicitation(s) shall be prepared in accordance with part 15, and include phase-two evaluation factors, developed in accordance with 15.605. Examples of potential phase-two technical evaluation factors include design concepts, management approach, key personnel, and proposed technical solutions.

(b) Phase Two of the solicitation(s) shall require submission of technical and price proposals, which shall be evaluated separately, in accordance with part 15.

11. Subpart 36.4 is added and reserved to read as follows:

Subpart 36.4—Commercial Practices [Reserved]

[FR Doc. 96-33217 Filed 12-31-96; 8:45 am]

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48 CFR Parts 39 and 52

[FAC 90-45; FAR Case 96-607; Item XIV]

RIN 9000-AH51

Federal Acquisition Regulation; Year 2000 Compliance

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 are amending the FAR on an interim basis to increase awareness of Year 2000 procurement issues and to ensure that solicitations and contracts address Year 2000 issues. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993, and is not a major rule under 5 U.S.C. 804.

DATES: *Effective Date:* January 1, 1997. *Comment Date:* Comments should be submitted to the FAR Secretariat at the address shown below on or before March 3, 1997 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (MVR), 18th & F Streets, NW, Room 4035, Attn: Ms. Beverly Fayson, Washington, DC 20405. Please cite FAC 90-45, FAR case 96-607 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: Mr. Jack O'Neill, at (202) 501-3856 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501-4755. Please cite FAC 90-45, FAR case 96-607.

SUPPLEMENTARY INFORMATION:**A. Background**

Many information technology systems will have operational difficulties due to the use of two-digit years in date representations. While commonly thought to be a problem of old legacy systems, it can also be a problem in information technology services and products that are for sale today.

At the recommendation of the Chief Information Officers Council and the interagency working group on the year 2000, the Federal Government intends to only acquire products that will work in the year 2000. This interim rule is intended to assist in the implementation of that intent. It provides a uniform

approach and definition for addressing the year 2000 problem in the many, unique information technology acquisitions that will occur between now and the year 2000.

The rule defines the term "year 2000 compliant." It also requires that agencies assure that when acquiring information technology which will be required to perform date/time processing involving dates subsequent to December 31, 1999, the solicitations and contracts either require year 2000 compliant technology, or require that non-compliant information technology be upgraded to be compliant in a timely manner. The rule also recommends that agency solicitations describe existing information technology that will be used with the information technology to be acquired and identify whether the existing information technology is Year 2000 compliant.

Additional information about the year 2000 problem and the activities of the interagency working group on the year 2000 can be found on the group's home page located at URL <http://www.itpolicy.gsa.gov>.

B. Regulatory Flexibility Act

The interim rule is not expected 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, et seq., because the rule primarily pertains to internal Government acquisition planning guidance regarding the acquisition of major systems of information technology. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. Comments are invited from small businesses and other interested parties. Comments from small entities concerning the affected FAR part also will be considered in accordance with 5 U.S.C. 610. Such comments must be submitted separately and should cite FAR case 96-607 in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because this interim rule does 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.

D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense, the Administrator of General Services (GSA), and the Administrator