

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 3, 14, 15, 28, 35, and 52

[FAR Case 2000-403]

RIN 9000-A184

Federal Acquisition Regulation; Definitions for Sealed Bid and Negotiated Procurements

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 (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to provide consistent definitions for sealed bids and negotiated procurements. This case is one of a series of cases in response to the White House memorandum, Plain Language in Government Writing, dated June 1, 1999. The Councils' proposed amendments are intended only to reorganize, simplify, and clarify the FAR. The Councils do not intend to make any substantive change to the FAR by these amendments. Comments should address any potential unintended substantive changes to the FAR resulting from the proposed amendments.

DATES: Interested parties should submit comments in writing on or before September 11, 2000, to be considered in the formulation of a final rule.

ADDRESSES: Submit written comments to:

General Services Administration
FAR Secretariat (MVR)
1800 F Street, NW, Room 4035
ATTN: Laurie Duarte
Washington, DC 20405
Submit electronic comments via the Internet to: farcase.2000-403@gsa.gov
Please submit comments only and cite FAR case 2000-403 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, at (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 FAR case 2000-403.

SUPPLEMENTARY INFORMATION:

A. Background

The rule amends the FAR to clarify definitions that are used for sealed bid and negotiated procurements. The rule—

- Moves the definitions of "bid sample" and "descriptive literature" from FAR Part 14 to FAR 2.101 because the definitions apply to more than one FAR, (e.g. Parts 14 and 15).
• Amends those definitions and the definition of "offer" in accordance with plain language guidelines;
• Revises applicable provisions in FAR Part 52 to conform with the new definitions;
• Adds a new definition for "solicitation" at FAR 2.101;
• Provides definitions for "bid" and "bidder" in FAR Part 28 because, as used in that part, the terms address sealed bid and negotiated acquisitions; and
• Revises 3.302 by deleting "invitation for bids" and substituting "solicitation."

We also reviewed every instance where the terms "offeror," "prospective offeror," and "potential offeror" are used in the FAR. The rule corrects policy in FAR 15.201(f), 15.609(e), and 35.007(g) because the term "prospective offeror" is not used properly. Where we mean an entity that is actively seeking a contract, we use the term "prospective offeror." However, those cites describe processes that are set up to ensure fair and open competition. Therefore, any interested party is able to participate, including parties that the Government has not yet identified. Therefore, the proposed rule uses the more general term "potential offeror."

This rule 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

The Councils do not expect this proposed 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, et seq., because, while we have made changes in accordance with plain language guidelines, we have not substantively changed procedures for award and administration of contracts. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. We invite comments from small businesses and other interested parties. The Councils will consider comments from small entities concerning the affected FAR Parts 2, 3,

14, 15, 28, 35, and 52 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. (FAR case 2000-403), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed 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.

List of Subjects in 48 CFR parts 2, 3, 14, 15, 28, 35, and 52

Government procurement.

Dated: July 5, 2000.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, DoD, GSA, and NASA propose that 48 CFR parts 2, 3, 14, 15, 28, 35, and 52 be amended as set forth below:

1. The authority citation for 48 CFR parts 2, 3, 14, 15, 28, 35, 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).

PART 2—DEFINITIONS OF WORDS AND TERMS

2. Amend section 2.101 by adding, in alphabetical order, the definitions "Bid sample;," "Descriptive literature," and "Solicitation;" and revise the definition "Offer" to read as follows:

2.101 Definitions.

* * * * *

Bid sample means a product sample required to be submitted by an offeror to show characteristics of the offered products that cannot adequately be described by specifications, purchase descriptions, or the solicitation (e.g., balance, ease of use, or pattern).

* * * * *

Descriptive literature means information provided by an offeror, such as cuts, illustrations, drawings, and brochures, that shows a product's characteristics or construction or explains its operation. The term includes only that information needed to evaluate the acceptability of the product and excludes other information for operating or maintaining the product.

* * * * *

Offer means a response to a solicitation that, if accepted, would bind the offeror to perform the resultant contract. Responses to invitations for

bids (sealed bidding) are offers called "bids" or "sealed bids;" responses to requests for proposals in negotiated acquisitions are offers called "proposals;" responses to requests for quotations in simplified acquisitions are called "quotations" not offers. For unsolicited proposals, see subpart 15.6.

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Solicitation means any request to submit offers or quotations to the Government. Solicitations under sealed bid procedures are called "invitations for bids." Solicitations under negotiated procedures are called "requests for proposals." Solicitations under simplified acquisition procedures may require submission of either a quotation or an offer.

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PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

3. In section 3.302, revise the definition "Line item" to read as follows:

3.302 Definitions.

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Line item means an item of supply or service, specified in a solicitation, that the offeror must separately price.

PART 14—SEALED BIDDING

4. Amend section 14.201-6 as follows:

(a) Revise paragraph (a);
 (b) Remove paragraphs (b)(1) and (b)(2) and redesignate paragraphs (b)(3) and (b)(4) as (b)(1) and (b)(2), respectively;

(c) In paragraph (c)(2), remove "14.202-4(f)(1)" and add "14.202-4(e)(1)" in its place; and

(d) In paragraph (c)(3), remove "14.202-4(f)(2)" and add "14.202-4(e)(2)" in its place.

The revised text reads as follows:

14.201-6 Solicitation provisions.

(a) The provisions prescribed in this subsection apply to preparation and submission of bids in general. See other FAR parts for provisions and clauses related to specific acquisition requirements.

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14.202-4 [Amended]

5. Amend section 14.202-4 by removing paragraph (a); redesignating paragraphs (b) through (h) as (a) through (g), respectively; and in the newly redesignated paragraph (g) remove "of" from the paragraph heading.

6. In section 14.202-5, remove paragraph (a); redesignate paragraphs (b) through (f) as (a) through (e),

respectively; and revise the newly designated paragraphs (a) through (e) to read as follows:

14.202-5 Descriptive literature.

(a) *Policy*. Contracting officers must not require bidders to furnish descriptive literature unless it is needed before award to determine whether the products offered meet the specification and to establish exactly what the bidder proposes to furnish.

(b) *Justification*. The contracting officer must document in the contract file the reasons why product acceptability cannot be determined without the submission of descriptive literature, except when the contract specifications require submission.

(c) *Requirements of invitation for bids*. (1) The invitation must clearly state—

(i) What descriptive literature the bidder must furnish;

(ii) The purpose for requiring the literature;

(iii) The extent of its consideration in the evaluation of bids; and

(iv) The rules that will apply if a bidder fails to furnish the literature before bid opening or if the literature provided does not comply with the requirements of the invitation.

(2) If bidders must furnish descriptive literature, see 14.201-6(p).

(d) *Waiver of requirements for descriptive literature*. (1) The contracting officer may waive the requirement for descriptive literature if—

(i) The bidder states in the bid that the product being offered is the same as a product previously or currently being furnished to the contracting activity; and

(ii) The contracting officer determines that the product offered by the bidder complies with the specification requirements of the current invitation for bids. When the contracting officer waives the requirement, see 14.201-6(p)(2).

(2) When descriptive literature is not necessary and a waiver of literature requirements of a specification has been authorized, the contracting officer must include a statement in the invitation that, despite the requirements of the specifications, descriptive literature will not be required.

(3) If the solicitation provides for a waiver, a bidder may submit a bid on the basis of either the descriptive literature furnished with the bid or a previously furnished product. If the bid is submitted on one basis, the bidder may not have it considered on the other basis after bids are opened.

(e) *Unsolicited descriptive literature*. If descriptive literature is furnished

when it is not required by the invitation for bids, the procedures set forth in 14.202-4(g) must be followed.

PART 15—CONTRACTING BY NEGOTIATION

7. In section 15.201, revise paragraph (f) to read as follows:

15.201 Exchanges with industry before receipt of proposals.

* * * * *

(f) General information about agency mission needs and future requirements may be disclosed at any time. After release of the solicitation, the contracting officer must be the focal point of any exchange with potential offerors. When specific information about a proposed acquisition that would be necessary for the preparation of proposals is disclosed to one or more potential offerors, that information must be made available to the public as soon as practicable, but no later than the next general release of information, to avoid creating an unfair competitive advantage. Information provided to a potential offeror in response to its request must not be disclosed if it would reveal the potential offeror's confidential business strategy, and is protected under 3.104 or subpart 24.2. When conducting a presolicitation or preproposal conference, materials distributed at the conference should be made available to all potential offerors, upon request.

8. In section 15.609, revise paragraph (e) to read as follows:

15.609 Limited use of data.

* * * * *

(e) Use the notice in paragraph (d) of this section solely as a manner of handling unsolicited proposals that will be compatible with this subpart. However, do not use this notice to justify withholding of a record, or to improperly deny public access to a record, where an obligation is imposed by the Freedom of Information Act, 5 U.S.C. 552. An offeror should identify trade secrets, commercial or financial information, and privileged or confidential information to the Government (see paragraph (a) of this section).

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PART 28—BONDS AND INSURANCE

9. Revise section 28.000 to read as follows:

28.000 Scope of part.

This part prescribes requirements for obtaining financial protection against losses under contracts that result from

use of the sealed bid or negotiated methods. It covers bid guarantees, bonds, alternative payment protections, security for bonds, and insurance.

10. Amend section 28.001 as follows:

(a) Add an introductory paragraph;

(b) In the definitions "Attorney-in-fact," "Insurance," and "Power of attorney," remove "as used in this part,"; and

(c) Add the definitions, in alphabetical order, "Bid" and "Bidder" to read as follows:

28.001 Definitions.

As used in this part:

* * * * *

Bid means any response to a solicitation, including a proposal under a negotiated acquisition. See the definition of "offer" at 2.101.

* * * * *

Bidder means any entity that is responding or has responded to a solicitation, including an offeror under a negotiated acquisition.

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PART 35—RESEARCH AND DEVELOPMENT CONTRACTING

11. In section 35.007, revise paragraph (g) to read as follows:

35.007 Solicitations.

* * * * *

(g) The contracting officer should ensure that potential offerors fully understand the details of the work, especially the Government interpretation of the work statement. If the effort is complex, the contracting officer should provide potential offerors an opportunity to comment on the details of the requirements in the work statement, the contract Schedule, and any related specifications. This may be done at a preproposal conference (see 15.201).

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PART 52—SOLICITATION PROVISIONS AND REMOVED AND CONTRACT CLAUSES

52.214-1 [Reserved]

12. Section 52.214-1 is removed and reserved.

13. In section 52.214-20, revise the introductory text, the date of the provision, paragraphs (a), (b), and the introductory text of paragraph (c); and in Alternate I and Alternate II remove "14.202-4(f)(1)" and add "14.202-4(e)(1)", in their places, respectively. The revised text reads as follows:

52.214-20 Bid samples.

As prescribed in 14.201-6(o)(1), insert the following provision:

Bid Samples (Date)

(a) *Bid sample* means a product sample required to be submitted by a bidder to show characteristics of the offered products that cannot adequately be described by specifications, purchase descriptions, or the invitation for bid (e.g., balance, ease of use, or pattern).

(b) Bidders must furnish bid samples as part of the bid. The Government must receive the bid samples by the time specified in the invitation for bid. If the bidder fails to submit samples on time, the Government will reject the bid, except that the Contracting Officer will consider a late sample sent by mail under the Late Submissions, Modifications, and Withdrawals of Bids provision of this solicitation.

(c) The Government will test or evaluate bid samples to determine compliance with all the characteristics listed for examination in this solicitation. The Government will reject the bid when the bid fails to conform to the required characteristics. Products delivered under any resulting contract must conform to—

* * * * *

(End of Provision)

14. Revise section 52.214-21 to read as follows:

52.214-21 Descriptive Literature.

As prescribed in 14.201-6(p)(1), insert the following provision:

Descriptive Literature (Date)

(a) *Descriptive literature* means information furnished by a bidder, such as cuts, illustrations, drawings, and brochures that shows a product's characteristics or construction or explains its operation. The term includes only that information required to evaluate the acceptability of the product and excludes other information for operating or maintaining the product.

(b) Descriptive literature is required to establish, for the purpose of evaluation and

award, details of the product offered that are specified elsewhere in the solicitation and pertain to significant elements such as—

- (1) Design;
- (2) Materials;
- (3) Components;
- (4) Performance characteristics; and
- (5) Methods of manufacture, assembly, construction, or operation.

(c) Descriptive literature, required elsewhere in this solicitation, shall be—

- (1) Identified to show the item(s) of the offer to which it applies; and
- (2) Received by the time specified in this solicitation.

(d) If the bidder fails to submit descriptive literature on time, the Government will reject the bid, except that late descriptive literature sent by mail may be considered under the Late Submissions, Modifications, and Withdrawals of Bids provision of this solicitation.

(e) If the descriptive literature fails to show that the product offered conforms to the requirements of this solicitation, the Government will reject the bid.

(End of Provision)

Alternate I (Date). As prescribed in 14.201-6(p)(2), add the following paragraphs (f) and (g) to the basic provision.

(f) The Contracting Officer may waive the requirement for furnishing descriptive literature if the offeror has supplied a product that is the same as that required by this solicitation under a prior contract. A bidder requesting a waiver of this requirement shall provide the following information:

Prior contract number _____
Date of prior contract _____
Contract line item number of product supplied _____
Name and address of Government activity to which delivery was made _____
Date of final delivery of product supplied _____

(g) Bidders shall submit offers on the basis of required descriptive literature or on the basis of a previously supplied product under paragraph (f) of this provision. A bidder submitting a bid on one of these two bases may not elect to have its bid considered on the alternative basis after the time specified for receipt of bids. The Government will disregard a bidder's request for a waiver under paragraph (f), if that bidder has submitted the descriptive literature required under this solicitation.

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