

- (a) Revising the date of the provision; and
- (b) Removing from paragraph (h)(4) introductory text “\$3,500” and adding “the threshold at 9.104–5(a)(2)” in its place.

The revision reads as follows:

52.212–3 Offeror Representations and Certifications—Commercial Items.

* * * * *

Offeror Representations and Certifications—Commercial Items (Aug 2020)

* * * * *

[FR Doc. 2020–12763 Filed 7–1–20; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 4, 13, 15, and 16

[FAC 2020–07; FAR Case 2017–010; Item III; Docket No. FAR–2017–0010; Sequence No. 1]

RIN 9000–AN54

Federal Acquisition Regulation: Evaluation Factors for Multiple-Award Contracts

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement a section of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017.

DATES: *Effective:* August 3, 2020.

FOR FURTHER INFORMATION CONTACT: Mr. Michael O. Jackson, Procurement Analyst, at 202–208–4949 or michaelo.jackson@gsa.gov for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite FAC 2020–07, FAR Case 2017–010.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule at 83 FR 48271 on September 24, 2018, to implement section 825 of the NDAA for FY 2017 (Pub. L. 114–328). Section 825 of the

NDAA for FY 2017 amends 10 U.S.C. 2305(a)(3) to modify the requirement to consider price or cost as an evaluation factor for the award of certain multiple-award task-order contracts issued by DoD, NASA, and the Coast Guard. Section 825 provides that, at the Government’s discretion, solicitations for multiple-award contracts that will be awarded for the same or similar services and state the Government intends to award a contract to each qualifying offeror do not require price or cost as an evaluation factor for contract award. This exception does not apply to solicitations for multiple-award contracts that provide for sole-source orders pursuant to 8(a) of the Small Business Act (15 U.S.C. 637(a)). When price or cost is not evaluated during contract award, the contracting officer shall consider price or cost as a factor for the award of each order under the contract. In accordance with statute, the rule specifies that, when using the authority of section 825, the solicitation must be for the “same or similar services.” This language aligns with the guidance at FAR 16.504(c)(1)(i), which requires contracting officers, to the maximum extent practicable, to 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. By ensuring that a solicitation using the authority of section 825 is for the “same or similar services,” the contracting officer will avoid situations in which awardees specialize exclusively in one or a few areas within the statement of work, thus creating the likelihood that orders in those areas will be awarded on a sole-source basis (FAR 16.504(c)(1)(ii)(A)) and, in turn, negating the purpose of the statute to obtain price competition at the task order level—where service requirements are apt to be more definite and offers more meaningfully comparable.

Section 825 also amends 10 U.S.C. 2304c(b) to add the exceptions for the use of other than full and open competition found in FAR 6.302 to the list of exceptions to the fair opportunity process at FAR 16.505(b)(2) when placing an order under a multiple-award contract. Contracting officers shall still follow all of the applicable justification documentation, approval, and posting requirements of part 16.5 when providing an exception to the fair opportunity process and using one of the exceptions of FAR 6.302.

Five respondents submitted comments on the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. No significant changes were made to the rule as a result of public comments. Changes were made to the final rule to clarify the intent of section 825 and the rule text, as a result of public comments. A change is made in the final rule to make the guidance in FAR subpart 4.10 consistent with section 825. A change is made to a sentence in FAR 16.504 to make the text consistent with the policy in FAR part 13. Changes were made to the format of the rule text to enhance readability. The definition of “qualifying offeror” is moved from FAR 13.106–1 and FAR 15.304 to FAR part 2. Discussion of the edits and comments are provided as follows:

A. Summary of Changes

FAR subpart 4.10, Uniform Use of Line Items, is amended to align guidance on the information required for a contract line item with usage of the rule. Currently, FAR 4.1005 requires price or cost to be included for each contract line item or subline item. In order to conform the subpart with section 825, the rule amends FAR 4.1005–2 to permit the omission of cost or price at the contract line item or subline item level when awarding multiple-award IDIQ contracts in accordance with the authority of section 825, provided that a total contract minimum and maximum is stated, in accordance with FAR subpart 16.5. This addition does not change the intent of the rule; instead, it conforms internal Government procedures to facilitate use of the rule.

In FAR subpart 16.5, section 16.504, Indefinite-Delivery Contracts, is amended to make the policy for the use of the multiple-award approach consistent with the policy in FAR part 13. Currently, FAR 16.504(c)(1)(ii)(B)(5) states that contracting officers must not use the multiple-award approach if the estimated value of the contract is “less than” the simplified acquisition threshold (SAT). This statement was included in FAR 16.504 to comply with the policy in FAR 13.003, which requires the use of simplified acquisition procedures (SAP), to the maximum extent practicable, for purchases not exceeding the SAT. This rule changes the text of FAR 16.504 from “less than” the SAT to “at or below” the SAT, to be consistent with the policy of FAR part 13. Paragraph (G) at FAR 16.505(b)(2)(i) of the proposed

rule added the exceptions permitting other than full and open competition to the list of exceptions to the fair opportunity process.

At FAR 13.106–1(a)(2)(iv), paragraph (A) of the proposed rule is restructured stating the action contracting officers may take when using the authority of section 825, and adding subparagraphs (1)–(3), identifying the requirements a solicitation must meet before a contracting officer can take the action in paragraph (A); at paragraph (C), the definition of “qualifying offeror” is deleted and moved to part 2, with the addition of text clarifying the parts to which the definition is applicable; and the text of renumbered subparagraph (B) was modified to use the statutory language that “if” price or cost was not an evaluation factor for award, as opposed to “whether or not” price or cost was evaluated. Similar changes are made at FAR 15.304(c)(1)(ii). These revisions simply clarify the intent, readability, and applicability of the rule and section 825.

B. Analysis of Public Comments

Comment: A respondent expressed concern that the rule is not compliant with the implementing statute, because the rule does not include the term “qualifying offeror,” as used in section 825.

Response: The definition of “qualifying offeror” is taken directly from the statute and included in the final rule at FAR 2.101, 13.106–1(a)(2)(iv)(A)(3), and 15.304(c)(1)(ii)(A)(3). This requirement helps to ensure there will be sufficient contract holders submitting offers for task orders.

Comment: A respondent advised that use of the term “head of the agency” in section 825 makes the statute impractical for use by the contracting community, because the “head of the agency” does not typically issue solicitations. The respondent recommended amending the statutory language to implement section 825 effectively.

Response: Section 825 is implemented in the FAR effectively without a change to the statutory language. Unless otherwise stated in statute, the head of the agency may delegate procurement responsibilities to another officer or official in the same agency (see FAR 1.108(b)). FAR 1.102–4(b) further requires decision-making authority to be delegated to the lowest level within the FAR System, consistent with law. As section 825 does not prohibit delegation by the head of the agency, this rule delegates this authority

to the contracting officer in accordance with FAR 1.108(b) and 1.102–4(b).

Comment: A respondent advised that the definition of a “qualifying offer” in the rule does not align with the statute. The rule requires that the proposal be “technically acceptable,” which is not required by the statute.

Response: The section 825 definition of a “qualifying offeror” includes language that the offeror “submits a proposal that conforms to the requirements of the solicitation.” The rule refers to a “qualifying offeror” as an offeror that “submits a technically acceptable proposal that conforms to the solicitation.” The terms “technically acceptable” and “conforms” have different meanings to Government contracting personnel. A proposal can conform to the requirements for the solicitation (e.g., meeting a required page limit or proposal format), but not demonstrate that the offeror can meet the stated technical requirements (e.g., having necessary certifications or offering the requisite services) of the Government. This clarification ensures contracting officers, when using the authorities in section 825, also evaluate whether a proposal meets the minimum technical requirements stated in the solicitation.

Comment: A respondent expressed concern that the rule is requiring the evaluation of price or cost in every source selection at FAR 15.304(c)(1)(i).

Response: FAR 15.304(c)(1) currently states that price or cost shall be evaluated in every source selection conducted under the negotiated acquisition procedures of FAR part 15. The cited language was already in the FAR. The rule relocates the text at FAR 15.304(c)(1) to a new subparagraph (i) with a reference to the new subparagraph (ii)(A), which includes the exception to considering price or cost when DoD, NASA, or the Coast Guard are using the authority of section 825.

Comment: A respondent suggested that the rule be expanded to include the authority granted under section 876 of the NDAA for FY 2019.

Response: Section 876 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 amends Title 41 of United States Code to provide executive agencies with the discretionary authority not to include price as an evaluation factor in certain solicitations for multiple-award and Federal Supply Schedule contracts, when specific conditions are met. Section 825 amends Title 10 of the U.S.C. to implement a similar, but not the same, authority for DoD, NASA, and the Coast Guard. The authority and applicability of these sections are

different; as such, FAR Case 2018–014, Increasing Task Order Level Competition, implements section 876.

Comment: A respondent requested clarification regarding the inclusion of language that limits the application of the rule to multiple-award task-order contracts with a value above the simplified acquisition threshold (SAT).

Response: Currently, FAR 16.504(c)(1)(ii)(B)(5) does not permit the use of a multiple-award approach if the total estimated value of the IDIQ contract is less than the SAT; therefore, the rule applies the authority of section 825 to solicitations valued above the SAT. Additionally, this rule changes the text of FAR 16.504 from “less than” the SAT to “at or below” the SAT, to be consistent with the policy of FAR part 13, which requires the use of SAP for acquisitions valued at or below the SAT.

Comment: A respondent expressed support for establishing fair and reasonable rates at the time of contract award. The respondent recommends modifying the rule to require an evaluation of fair and reasonable pricing when awarding an IDIQ contract. The respondent advises that establishing maximum thresholds for price or cost at the time of contract award would still allow for competition at the task-order level, while assuring that the Government will subsequently receive fair and reasonably priced offers for requirements at the task- and delivery-order level. Another respondent expressed concern about the increased time and labor to be expended by a contracting officer placing an order under a multi-agency contract (MAC) awarded using the authority of section 825, as certain pricing information will no longer be available to support market research activities and associated acquisition decisions.

Response: The rule implements the intent of the statute. Section 825 provides DoD, NASA, and Coast Guard contracting officers with the ability not to include price or cost as an evaluation factor in certain solicitations for multiple-award contracts, if specific conditions are met. When determining whether to use the authority of section 825 or place an order under a resulting contract, a contracting officer must consider all of the circumstances and available information relating to the acquisition to decide the most appropriate procurement approach. Contracting officers are not required to use the authority of section 825 and may, instead, use the current solicitation, evaluation, and award procedures, which require that price be determined fair and reasonable prior to contract award.

In regard to the applicability of the rule to MACs, a MAC is a task-order or delivery-order contract established by one agency for use by Government agencies to obtain supplies and services, consistent with the Economy Act. This rule applies to multiple award contracts, which are: Contracts issued under the Multiple Award Schedule (MAS) authority described in FAR part 38; multiple-award task-order or delivery-order contracts issued in accordance with FAR subpart 16.5; or other indefinite-delivery indefinite-quantity contracts entered into with two or more sources pursuant to the same solicitation. A multiple award contract may also be a MAC, but the two terms are not interchangeable in identifying the same set of contracts. To avoid any potential confusion when applying section 825, some paragraphs of the rule text are renumbered to reinforce their applicability to section 825 and make the text more readable.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

This rule does not contain any solicitation provisions or contract clauses that apply to contracts at or below the SAT, or contracts for the acquisition of commercial items, including commercially available off-the-shelf items.

IV. Expected Cost Savings

Currently, contracting officers must evaluate price or cost as a factor in the selection decision for both the award of the multiple-award contract and each order placed against the multiple-award contract. When applied to applicable multiple-award solicitations, this rule alleviates offerors' need to gather and analyze internal cost or pricing information or propose a price or cost for each line item in the solicitation. Subsequently, contracting officers do not need to review, analyze, and determine in writing that the proposed costs and prices are fair and reasonable for the award of the multiple-award contracts. When used, this rule impacts all offerors responding to a solicitation for a multiple-award contract for the same or similar services issued by the DoD, NASA, or the Coast Guard.

The Government has performed a regulatory cost analysis on this rule. The following is a summary of the estimated public cost savings in millions, which are calculated in 2016 dollars at a 7 percent discount rate:

Present Value Costs	– \$4,813,740
Annualized Costs	– 336,962
Annualized Value Costs as of 2016 if Year 1 is 2019	– 275,061

To access the full regulatory cost analysis for this rule, go to the Federal eRulemaking Portal at www.regulations.gov, search for “FAR case 2017–010,” click “Open Docket,” and view “Supporting Documents.”

V. Executive Orders 12866 and 13563

E.O.s 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

VI. Executive Order 13771

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866. However, this rule is considered to be a deregulatory action. Details on the estimated cost savings can be found in Section IV of this rule.

VII. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this 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.* However, a Final Regulatory Flexibility Analysis (FRFA) has been prepared and is summarized as follows:

The reason for this action is to implement section 825 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114–328). The objective of this rule is to permit contracting officers to omit price or cost as an evaluation factor for award in certain solicitations for multiple-award contracts, if certain conditions are met. When applied to applicable multiple-award solicitations, this rule alleviates offerors' need to gather and analyze internal cost or pricing information or propose a price or cost for each line item in the solicitation.

No public comments were received in response to the initial regulatory flexibility analysis.

DoD, GSA, and NASA do not have data on the total number of small business entities that respond to multiple-award solicitations for the same or similar services. However, the Federal Procurement Data System (FPDS)

provides information on the number of small business entities that received an award resulting from a multiple-award solicitation for services issued by DoD, NASA, and the Coast Guard. According to data from FPDS for FY 2015 through 2017, DoD, NASA, and the Coast Guard awarded an average of 1,905 multiple-award indefinite-delivery indefinite-quantity (IDIQ) contracts for services, and of those 1,905 contracts, an average of 1,292 contracts were awarded to 1,144 unique small business entities annually. The Government expects the number of small business entities impacted by the rule to be slightly larger than this estimate, as the data does not capture the small business entities that submit offers to applicable solicitations, but do not receive an award. This rule impacts all entities that submit offers in response to multiple-award solicitations for services that utilize the authority of section 825 issued by DoD, NASA, and the Coast Guard.

This rule does not include any new reporting, recordkeeping, or other compliance requirements. There are no known significant alternative approaches to the rule that would meet the requirements of the applicable statute.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The Regulatory Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VIII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 2, 4, 13, 15, and 16

Government procurement.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 4, 13, 15, and 16 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 4, 13, 15, and 16 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 2. In section 2.101, amend paragraph (b) by adding the defined term “Qualifying offeror” in alphabetical order to read as follows:

2.101 Definitions.

* * * * *

(b) * * *

Qualifying offeror, as used in 13.106–1 and 15.304, means an offeror that is determined to be a responsible source, submits a technically acceptable proposal that conforms to the requirements of the solicitation, and the contracting officer has no reason to believe would be likely to offer other than fair and reasonable pricing (10 U.S.C. 2305(a)(3)(D)).

* * * * *

PART 4—ADMINISTRATIVE AND INFORMATION MATTERS

■ 3. Amend section 4.1005–2 by revising paragraph (a)(2) to read as follows:

4.1005–2 Exceptions.

(a) * * *

(2) *Indefinite-delivery indefinite-quantity (IDIQ) and requirements contracts.* (i) IDIQ and requirements contracts may omit the quantity at the line item level for the base award provided that the total contract minimum and maximum, or the estimate, respectively, is stated.

(ii) Multiple-award IDIQ contracts awarded using the procedures at 13.106–1(a)(2)(iv)(A) or 15.304(c)(1)(ii)(A) may omit price or cost at the line item or subline item level for the contract award, provided that the total contract minimum and maximum is stated (see 16.504(a)(1)).

* * * * *

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

■ 4. Amend section 13.106–1 by revising paragraph (a)(2) to read as follows:

13.106–1 Soliciting competition.

(a) * * *

(2)(i) When soliciting quotations or offers, the contracting officer shall notify potential quoters or offerors of the basis on which award will be made (price alone or price and other factors, e.g., past performance and quality).

(ii) Contracting officers are encouraged to use best value.

(iii) Solicitations are not required to state the relative importance assigned to each evaluation factor and subfactor, nor are they required to include subfactors.

(iv) In accordance with 10 U.S.C. 2305(a)(3), for DoD, NASA, and the Coast Guard—

(A) The contracting officer may choose not to include price or cost as an evaluation factor for award when a solicitation—

(1) Has an estimated value above the simplified acquisition threshold;

(2) Will result in multiple-award contracts (see subpart 16.5) that are for the same or similar services; and

(3) States that the Government intends to make an award to each and all qualifying offerors (see 2.101).

(B) If the contracting officer chooses not to include price or cost as an evaluation factor for the contract award, in accordance with paragraph (a)(2)(iv)(A) of this section, the contracting officer shall consider price or cost as one of the factors in the selection decision for each order placed under the contract.

(C) The exception in paragraph (a)(2)(iv)(A) of this section shall not apply to solicitations for multiple-award contracts that provide for sole source orders pursuant to section 8(a) of the Small Business Act (15 U.S.C. 637(a)).

PART 15—CONTRACTING BY NEGOTIATION

■ 5. Amend section 15.304 by revising paragraph (c)(1) and paragraph (e) introductory text to read as follows:

15.304 Evaluation factors and significant subfactors.

* * * * *

(c) * * *

(1)(i) Price or cost to the Government shall be evaluated in every source selection (10 U.S.C. 2305(a)(3)(A)(ii) and 41 U.S.C. 3306(c)(1)(B)) (also see part 36 for architect-engineer contracts), subject to the exception listed in paragraph (c)(1)(ii)(A) of this section for use by DoD, NASA, and the Coast Guard.

(ii) In accordance with 10 U.S.C. 2305(a)(3), for DoD, NASA, and the Coast Guard—

(A) The contracting officer may choose not to include price or cost as an evaluation factor for award when a solicitation—

(1) Has an estimated value above the simplified acquisition threshold;

(2) Will result in multiple-award contracts (see subpart 16.5) that are for the same or similar services; and

(3) States that the Government intends to make an award to each and all qualifying offerors (see 2.101).

(B) If the contracting officer chooses not to include price or cost as an evaluation factor for the contract award, in accordance with paragraph (c)(1)(ii)(A) of this section, the contracting officer shall consider price or cost as one of the factors in the selection decision for each order placed under the contract.

(C) The exception in paragraph (c)(1)(ii)(A) of this section shall not

apply to solicitations for multiple-award contracts that provide for sole source orders pursuant to section 8(a) of the Small Business Act (15 U.S.C. 637(a)).

* * * * *

(e) Unless the exception at paragraph (c)(1)(ii)(A) of this section applies, the solicitation shall also state, at a minimum, whether all evaluation factors other than cost or price, when combined, are—

* * * * *

PART 16—TYPES OF CONTRACTS

16.504 [Amended]

■ 6. Amend section 16.504 by removing from paragraph (c)(1)(ii)(B)(5) “is less than the simplified” and adding “is at or below the simplified” in its place.

■ 7. Amend section 16.505 by adding paragraph (b)(2)(i)(G); and removing from paragraph (b)(2)(ii)(B)(10) “(b)(2)(i)(A) through (E) of” and adding “(b)(2)(i)(A) through (E) and (G) of” in its place.

The addition reads as follows:

16.505 Ordering.

* * * * *

(b) * * *

(2) * * *

(i) * * *

(G) For DoD, NASA, and the Coast Guard, the order satisfies one of the exceptions permitting the use of other than full and open competition listed in 6.302 (10 U.S.C. 2304c(b)(5)). The public interest exception shall not be used unless Congress is notified in accordance with 10 U.S.C. 2304(c)(7).

* * * * *

[FR Doc. 2020–12764 Filed 7–1–20; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 14, 15, 30, and 52

[FAC 2020–07; FAR Case 2018–005; Item IV; Docket No. FAR–2018–0006, Sequence No. 1]

RIN 9000–AN69

Federal Acquisition Regulation: Modifications to Cost or Pricing Data Requirements

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