

## Health and Human Services

315.201

*FAR 14.202-7*, to ensure uniform processing and control.

### Subpart 314.4—Opening of Bids and Award of Contract

#### 314.404 Rejection of bids.

##### 314.404-1 Cancellation of invitations after opening.

(c) The HCA or CCO (non-delegable) shall make the agency head determinations specified in *FAR 14.404-1*.

#### 314.407 Mistakes in bids.

##### 314.407-3 Other mistakes disclosed before award.

(e) The CCO (non-delegable) has the authority to make determinations under paragraphs (a), (b), (c), and (d) of *FAR 14.407-3*.

(f) OGC-GLD shall concur in each proposed determination.

(i) The CCO shall submit directly to OGC-GLD cases in which the evidence is not clear and convincing or is otherwise doubtful.

#### 314.407-4 Mistakes after award.

(c) The HCA or the CCO (non-delegable), in consultation with OGC-GLD, has the authority to make administrative determinations in connection with mistakes in bid alleged after award.

(d) OGC-GLD shall concur in each proposed determination.

## PART 315—CONTRACTING BY NEGOTIATION

### Subpart 315.2—Solicitation and Receipt of Proposals and Information

Sec.

315.201 Exchanges with industry before receipt of proposals.

315.204-5 Part IV—Representations and instructions.

315.208 Submission, modification, revision, and withdrawal of proposals.

315.209 Solicitation provisions and contract clauses.

#### Subpart 315.3—Source Selection.

315.303-70 Policy.

315.304 Evaluation factors and significant subfactors.

315.305 Proposal evaluation.

315.306 Exchanges with offerors after receipt of proposals.

315.307 Proposal revisions.

315.370 Finalization of details with the selected source.

315.371 Contract preparation and award.

315.372 Preparation of negotiation memorandum.

#### Subpart 315.4—Contract Pricing

315.404 Proposal analysis.

315.404-2 Information to support proposal analysis.

315.404-4 Profit.

#### Subpart 315.6—Unsolicited Proposals

315.605 Content of unsolicited proposals.

315.606 Agency procedures.

315.606-1 Receipt and initial review.

315.609 Limited use of data.

#### Subpart 315.70—Acquisition of Electronic Information Technology

315.7000 Section 508 accessibility standards.

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### Subpart 315.2—Solicitation and Receipt of Proposals and Information

#### 315.201 Exchanges with industry before receipt of proposals.

(e)(1) An OPDIV may issue an advance notice, entitled “Request for Information,” in accordance with the requirements of *FAR 15.201(e)*, whenever it requires technical, scientific, and/or business information and input from the marketplace for project planning purposes regarding the availability of existing or potential solutions. An RFI may be used for any type of requirement, but is particularly appropriate for complex projects involving R & D, IT, construction, and other highly technical requirements. An RFI may also be issued to identify issues about the Government’s requirements and the planned acquisition strategy. Use of an RFI generally is appropriate under the following conditions:

(i) It is not clear whether the purpose and performance requirements of a potential or planned project are feasible, achievable, and complete.

(ii) It is not certain that a solution, technical approach, or product needed to accomplish a potential or planned

project exists or can be developed, particularly in the case of a new, highly specialized/unique Government program mandate.

(iii) It is necessary to test the marketplace to determine if there are questions or concerns regarding the use of a new or innovative acquisition strategy or instrument previously untried to accomplish a potential or planned project.

(iv) It is necessary to determine the general effort or time (estimate or rough order of magnitude) that may be required to accomplish a potential or planned project.

NOTE: This type of information may be requested, only if it is necessary, broad in scope, and required for planning purposes. Detailed estimates must not be requested.

(v) It is necessary to ensure that unduly restrictive technical or business/acquisition requirements are not made part of any resultant solicitation so that maximum competition is generated.

(2) When using an RFI, an OPDIV shall not request that potential sources provide more than the minimum information necessary—see *FAR 10.001(b)*, to obtain the input required. The notice and the information received shall not be used to determine how well respondents can perform a requirement, which can only be evaluated in response to a solicitation. Accordingly, the notice shall not be used to—

(i) Obtain capability statements that are evaluated and determined acceptable or unacceptable;

(ii) Require cost/price proposals or detailed technical solutions;

(iii) Identify a prospective sole source; or

(iv) Exclude small business concerns.

(3) While not the primary intent of an RFI, an OPDIV may additionally request that respondents provide information regarding their organizational size classification and capabilities when the OPDIV is uncertain whether any organization, acting individually or in partnership with others, can satisfy the requirement. For example, the notice may ask respondents to identify whether they are small businesses; HUBZone small businesses; service-disabled, veteran-owned small businesses; 8(a) small businesses; veteran-owned small businesses; woman-owned small

businesses; or a small disadvantaged businesses. However, an RFI shall not be used solely to determine the availability of qualified sources for a proposed project or to determine their size classification. In such instances, as applicable, an R & D Sources Sought notice, Sources Sought notice, or Small Business Sources Sought notice may be used—see *HHSAR 305.205*, *310.001*, and *319.202-2*.

(4) OPDIVs shall follow the standard HHS instructions for completing an RFI. The template for an RFI is available on the ASFR/OGAPA/DA Internet Web site. The Contracting Officer shall post the notice in FedBizOpps by selecting and completing a Special Notice, accessible on the FedBizOpps “Notices” page at: <http://www.fedbizopps.gov>. RFIs must be published, at a minimum, in FedBizOpps—see *FAR 10.002(b)(2)(iii)* and *15.201(d)*. Additional information may be included in an RFI in accordance with OPDIV procedures. The Contracting Officer shall document, in the form of a memorandum to the file, the results of the review by technical personnel of information submitted in response to the notice, including whether each respondent appears to be capable of performing the requirement. The Contracting Officer shall attach a copy of the analysis provided by the technical personnel to the memorandum.

#### **315.204-5 Part IV—Representations and instructions.**

(c) *Section M, Evaluation factors for award.*

(1) *General.*

(i) The Project Officer shall develop technical evaluation factors and submit them to the Contracting Officer as part of the acquisition plan or other acquisition request documentation for inclusion in a solicitation. The Project Officer shall indicate the relative importance or weight of the evaluation factors based on the requirements of an individual acquisition. Since the evaluation factors will serve as the standard for proposal evaluation, they require careful selection.

(ii) Only a formal amendment to a solicitation can change the evaluation factors. Evaluation of proposals shall

include only those factors set forth in a solicitation.

(2) *Review of evaluation factors.*

(i) The Contracting Officer shall review evaluation factors to ensure they are consistent with the SOW/PWS. This review is not intended to dictate technical requirements to the program office or Project Officer, but rather to ensure that the evaluation factors are clear, concise, and fair, so that all potential offerors are fully aware of the bases for proposal evaluation and are given an equal opportunity to compete.

(ii) The Project Officer and the Contracting Officer shall review the evaluation factors to ascertain the following:

(A) The factors address the key programmatic concerns which the offerors must be aware of in preparing proposals.

(B) The factors are specifically applicable to the current acquisition and are not restatements of factors from previous acquisitions which are not relevant.

(C) The factors represent only the significant areas of importance, rather than a multitude of factors. (*Note:* All factors tend to lose importance, if too many are included; and using too many factors may prove as detrimental as using too few.)

(3) Examples of topics that form a basis for evaluation factors. Typical examples of topics that form a basis for the development of evaluation factors are listed in the following paragraphs. These examples may assist in the development of actual evaluation factors for a specific acquisition, as appropriate.

(i) Understanding of the SOW/PWS.

(ii) Method of accomplishing the objectives and intent of the SOW/PWS.

(iii) Soundness of the scientific or technical approach for executing the requirements of the SOW/PWS, including, when applicable, preliminary layouts, sketches, diagrams, other graphic representations, calculations, curves, and other data necessary for presentation, substantiation, justification, or understanding of the approach.

(iv) Special technical factors, such as experience or pertinent novel ideas in the specific branch of science or technology involved.

(v) Feasibility or practicality of successfully accomplishing the requirements (including a statement and discussion of anticipated major difficulties and problem areas, and recommended approaches for their resolution).

(vi) Availability of required special research, test, and other equipment or facilities.

(vii) Managerial capability (ability to achieve delivery or performance requirements as demonstrated by the proposed use of management and other personnel resources, and to successfully manage the project, including subcontractor and/or consultant efforts, if applicable, as evidenced by the management plan and demonstrated by previous experience).

(viii) Availability, qualifications, experience, education, and competence of professional, technical, and other personnel, including proposed subcontractors and consultants (as evidenced by resumes, endorsements, and explanations of previous efforts).

(ix) Soundness of the proposed staff time or labor hours, propriety of personnel classifications (professional, technical, others), necessity for type and quantity of material and facilities proposed, validity of proposed subcontracting, and necessity of proposed travel.

(x) Quality of offeror's past performance on recent projects of similar size and scope.

(xi) Extent of proposed participation of small disadvantaged business concerns in performance of the contract.

**315.208 Submission, modification, revision, and withdrawal of proposals.**

(b) In addition to the provision in *FAR 52.215-1*, Instructions to Offerors—Competitive Acquisition, if an HCA determines that certain classes of biomedical or behavioral R & D acquisitions are subject to conditions other than those specified in *FAR 52.215-1(c)(3)*, the HCA may authorize for use in competitive solicitations for R & D, valued at more than the simplified acquisition threshold, the use of the provision in *352.215-70*, Late Proposals and Revisions. This is an authorized FAR deviation.

## 315.209

(2) When the provision at 352.215-70 is included in the solicitation and a proposal is received after the exact time specified for receipt, the Contracting Officer, with the assistance of cost and technical personnel, shall make a written determination as to whether the proposal meets the requirements of the provision at 352.215-70 and, therefore, can be considered.

### **315.209 Solicitation provisions and contract clauses.**

(a) The Contracting Officer shall insert paragraph (e) in 352.215-1 in place of paragraph (e) in the provision in FAR 52.215-1, Instructions to Offerors—Competitive Acquisition, in solicitations for competitive, negotiated acquisitions valued at more than the simplified acquisition threshold. This is an authorized FAR deviation.

## **Subpart 315.3—Source Selection**

### **315.303-70 Policy.**

(a) If an OPDIV is required by statute to use peer review for technical review of specified contracts, the requirements of those statutes, any implementing regulatory requirements, the Federal Advisory Committee Act, and as applicable, any approved HHSAR deviation(s) from this subpart take precedence over the otherwise applicable requirements of this subpart.

(1) The statutes that require such review and implementing regulations are as follows: NIH—42 U.S.C. 289a and 42 CFR Part 52h; SAMHSA—42 U.S.C. 290aa-3, and AHRQ—42 U.S.C. 299c-1.

### **315.304 Evaluation factors and significant subfactors.**

(a) A solicitation for EIT products and services, including EIT deliverables such as electronic documents and reports, shall include a separate technical evaluation factor (which may be in the form of a technical evaluation criterion or a mandatory qualification criterion, as appropriate) developed by the Contracting Officer, Project Officer, and the OPDIV Section 508 Coordinator to determine vendor compliance with applicable Section 508 accessibility standards. The technical evaluation panel's assessment of Section 508 accessibility standards con-

## 48 CFR Ch. 3 (10-1-11 Edition)

formance shall be based on the Section 508 Product Assessment Template—see Section 508 policy on Office of Disability Web site for the template, and on any other pertinent information that offerors provide in response to a solicitation. The HHS Office on Disability is responsible for providing technical assistance in Section 508 evaluation factor development.

(b) Before conducting negotiations or making an award, the Contracting Officer shall provide a summary of the technical evaluation panel's assessment of vendor responses to the solicitation's Section 508 evaluation factor for review by the Section 508 Official or designee. The Section 508 Official or designee shall indicate approval/disapproval of the evaluation panel's assessment. The Contracting Officer shall coordinate the resolution of any issues raised by the Section 508 Official or designee with the chair of the technical evaluation panel or Project Officer, as appropriate. The acquisition process shall not proceed unless and until the Section 508 Official or designee has approved the technical evaluation panel's assessment. The Contracting Officer shall include the assessment in the official contract file. See 339.203 regarding processing exception determination requests.

### **315.305 Proposal evaluation.**

(a)(1) *Cost or price evaluation.*

(i) The Contracting Officer shall evaluate proposals in accordance with the FAR 15.404. The extent of cost or price analysis in each case depends on the availability of competition, contract type, the proposed amount, and technical complexity.

(A) For competitive firm-fixed-price and fixed price with economic price adjustment contracts, price analysis should be sufficient to determine price fairness and reasonableness.

(B) When competition is not adequate for the above contract types, and for cost-reimbursement and time and materials contracts, cost analysis may be required. In such cases, the Contracting Officer shall request the Project Officer's assistance in analyzing the following cost elements, if

## Health and Human Services

315.305

applicable, to determine if the proposed amounts are necessary and reasonable for efficient contract performance:

(1) The number and mix of proposed labor hours relative to the technical requirements.

(2) Types, numbers and hours/days of proposed consultants.

(3) The kinds and quantities of material, equipment, supplies, and services.

(4) Kinds and quantities of IT.

(5) Logic of proposed subcontracting.

(6) Travel proposed, including number of trips, locations, purpose, and travelers.

(7) Other direct costs not specified above.

(ii) The Project Officer shall provide written comments, including the rationale for any exceptions to the cost elements. The Contracting Officer shall consider the Project Officer's comments for negotiations or to support award without discussions. The Contracting Officer shall also request assistance of a cost/price analyst, when necessary.

(2) *Past performance evaluation.* When evaluating past performance, the Contracting Officer shall check references to obtain information concerning the performance history of offerors in compliance with *FAR 42.1502*. The Contracting Officer may require the assistance of the Project Officer as well as other Government technical personnel in performing this function.

(3) *Technical evaluation.*

(i) *Technical evaluation plan.*

(A) The Contracting Officer shall require a technical evaluation plan if the proposed acquisition either requires preparation of an AP—see *307.71* or is otherwise sufficiently complex.

(B) The technical evaluation plan shall include, at a minimum, the following elements:

(1) A list of recommended technical evaluation panel members, their organizations, a list of their major consulting clients (if applicable), their qualifications, and curricula vitae (if applicable).

(2) A statement that the technical evaluation panel will include non-Federal technical proposal evaluators, if applicable, and a determination that sufficient Federal technical proposal

evaluators are unavailable—see *FAR 37.204*. A determination to use non-Federal proposal evaluators shall be signed at a level no lower than the HCA. A determination is not required, however, if non-Federal evaluators will be used in accordance with *315.303–70(a)*.

(3) A statement that there is no apparent or actual conflict of interest regarding any recommended panel member.

(4) A copy of each rating sheet, approved by the Contracting Officer, to ensure consistency with the evaluation criteria.

(5) A brief description of the general evaluation approach.

(6) A description of the methodology for evaluating key elements in the technical evaluation plan, including any solicitation evaluation factor involving the acquisition of EIT products and services subject to Section 508.

(C) Except as provided in OPDIV procedures, a program office official at least one level above the Project Officer shall approve the technical evaluation plan.

(D) The Project Officer shall provide the technical evaluation plan to the Contracting Officer for review and approval before the solicitation is issued. The Contracting Officer shall ensure that the evaluation criteria reflect the significant factors and subfactors relating to the evaluation when conducting the review of the plan.

(ii) *Technical evaluation panel.*

(A) *General.*

(1) A technical evaluation panel is required for all acquisitions subject to this subpart that require preparation of an AP. The Contracting Officer may require a technical evaluation panel for acquisitions that do not require preparation of an AP, based on the complexity of the acquisition and the role that the technical evaluation will have in the award decision.

(2) The technical evaluation process requires careful consideration regarding the size, composition, expertise, and function of the technical evaluation panel. The panel's efforts will influence the success or failure of the acquisition.

(3) At least 50 percent of the HHS personnel on a technical evaluation

panel shall have successfully completed HHS University's "Basic Contracting Officer's Technical Representative" course or an equivalent course within 4 years before assuming their designated role. This training requirement applies to evaluators performing the initial technical evaluation and any subsequent technical evaluations, but does not apply to peer review panel members. The Contracting Officer may waive this training requirement in exigent circumstances if documented in writing and approved by the Head of Contracting Activity. This training requirement applies to evaluators performing the initial technical evaluation and any subsequent technical evaluations. However, this training requirement does not apply to peer review panel members.

(B) *Role of the Project Officer.*

(1) The Project Officer provides guidance, information, and assistance to the Contracting Officer on all technical aspects of a proposed acquisition—see 302.101. The Project Officer may be a voting member of the technical evaluation panel and may serve as the chairperson of the panel unless prohibited by law or contracting activity procedures.

(2) The Project Officer shall recommend panel members who have sufficient expertise in the technical aspects of the acquisition to be able to evaluate strengths and weaknesses in proposals.

(3) The Project Officer shall ensure that persons possessing expertise and experience in addressing issues relative to sex, race, national origin, and disability are included as panel members for acquisitions to which such issues apply.

(4) The Project Officer shall submit a list of recommended panel members to a program office official at least one level higher than him/herself. This official shall review the list and select the chairperson.

(5) The Project Officer shall arrange for adequate and secure working space for the panel.

(C) *Role of the Contracting Officer.*

(1) The term "Contracting Officer," as used in this subpart, may be the Contracting Officer or a Contract Spe-

cialist possessing an appropriate FAC-C certification.

(2) The Contracting Officer shall not serve as a member of the technical evaluation panel, but shall—

(i) Address the initial meeting of the technical evaluation panel;

(ii) Provide assistance to the evaluators as required; and

(iii) Ensure that the scores adequately reflect the written technical report comments.

(D) *Conflict of interest.*

(1) If a panel member has an actual or apparent conflict of interest related to a proposal under evaluation, the individual cannot serve on the panel. If a suitable replacement is not available, the panel shall perform the review without a replacement.

(2) For the purposes of this subpart, conflicts of interest are defined in the *Standards of Ethical Conduct for Employees of the Executive Branch* (5 CFR part 2635), *Supplemental Standards of Ethical Conduct for Employees of the Department of Health and Human Services* (5 CFR part 5501), and the *Procurement Integrity Act*. For outside evaluators serving on the technical evaluation panel, see paragraph (a)(3)(ii)(F) of this section.

(E) *Continuity of evaluation process.*

(1) The technical evaluation panel shall evaluate all original proposals; make recommendations to the chairperson regarding strengths and weaknesses of proposals; if required by the Contracting Officer, assist the Contracting Officer during communications and discussions; and review supplemental, revised or final proposal revisions. To the extent possible, the same evaluators shall be available throughout the entire evaluation and selection process to ensure continuity and consistency in the treatment of proposals. The following are examples of circumstances when it would not be necessary for the technical evaluation panel to evaluate revised proposals submitted during the acquisition:

(i) The answers to questions do not have a substantial impact on the proposal.

(ii) Final proposal revisions are not materially different from the original proposals.

(iii) Revisions to the proposals are relatively minor and do not affect the rankings of the offerors.

(2) The Contracting Officer, with the written concurrence of the technical evaluation panel chairperson, may decide not to have the panel evaluate the revised proposals. The Contracting Officer shall fully document such a decision in the contract file.

(3) When the Contracting Officer considers technical evaluation panel meetings necessary, the attendance of evaluators is mandatory. When the chairperson determines that an evaluator's failure to attend the meetings is prejudicial to the evaluation, the chairperson shall remove or replace the individual after discussing the situation with the Contracting Officer and obtaining the Contracting Officer's concurrence and the approval of the official responsible for appointing the panel members.

(4) When continuity of the evaluation process is not possible, and new evaluators are selected or the size of the evaluation panel is reduced, each panel member shall review all proposals at the current stage of the acquisition—*i.e.*, initial proposal, final proposal revisions, *etc.* Also, the Contracting Officer shall provide guidance concerning what steps to take if an unusually large number of proposals is received, including how to determine what constitutes an unusually large number of proposals.

(F) *Use of outside evaluators.*

(1) Except when peer review is required by statute as provided in 315.303-70(a), decisions to disclose proposals to evaluators outside of the Government shall be made by the official responsible for appointing panel members in accordance with OPDIV procedures. The avoidance of organization conflict of interest and competitive relationships must be taken into consideration when making the decision to use outside evaluators.

(2) When a solicited proposal will be disclosed outside the Government for evaluation purposes, the following or similar conditions shall be part of the written agreement with the evaluator(s) prior to disclosure:

#### CONDITIONS FOR EVALUATING PROPOSALS

The evaluator agrees to use the data (trade secrets, business data, and technical data) contained in the proposal for evaluation purposes only. The foregoing requirement does not apply to data obtained from another source without restriction. Any notice or legend placed on the proposal by either HHS or the submitter of the proposal shall be applied to any reproduction or abstract provided to the evaluator or made by the evaluator. Upon completion of the evaluation, the evaluator shall return to the Government the furnished copy of the proposal or abstract, and all copies thereof, to the HHS office which initially furnished the proposal for evaluation. Unless authorized by the HHS initiating office, the evaluator shall not contact the submitter of the proposal concerning any aspects of its contents. The evaluator's employees and subcontractors shall abide by these conditions.

(iii) *Receipt of proposals.*

(A) After the closing date for the receipt of proposals set in the solicitation, the Contracting Officer shall forward the technical proposals, by memorandum, to the Project Officer or chairperson for evaluation. The Contracting Officer shall retain the business proposals for evaluation.

(B) The transmittal memorandum shall include at least the following elements:

(1) A list of the names of the organizations submitting proposals.

(2) A reference to the need to preserve the integrity of the source selection process.

(3) A statement that only the Contracting Officer is authorized to conduct discussions.

(4) A requirement for a technical evaluation report in accordance with paragraph (a)(3)(vi) of this section.

(5) The establishment of a date for receipt of the technical evaluation report.

(iv) *Convening the technical evaluation panel.*

(A) Normally, the technical evaluation panel convenes to evaluate proposals. However, there may be situations when the panel chairperson determines that it is not feasible for the panel to convene. Whenever the panel does not convene, the panel chairperson shall closely monitor the technical review to produce acceptable results.

(B) When a panel convenes, the chairperson shall control the technical proposals provided by the Contracting Officer for use during the evaluation process. The chairperson normally distributes the technical proposals prior to the initial panel meeting and establishes procedures for securing the proposals whenever they are not being evaluated to ensure their confidentiality. After an evaluation is completed, the chairperson shall return all proposals to the Contracting Officer.

(C) The Contracting Officer shall address the initial meeting of the panel and state the basic rules for conducting the evaluation. The Contracting Officer shall provide written guidance to the panel, if the Contracting Officer cannot attend the initial panel meeting. The guidance shall include the following elements:

(1) An explanation of the evaluation process and the role of evaluators throughout the process.

(2) The need for evaluators to read and understand the solicitation, especially the SOW/PWS and evaluation criteria, prior to reading the proposals.

(3) The need for evaluators to restrict the review to only the SOW/PWS, the evaluation criteria, and the contents of the technical proposals.

(4) The need for each evaluator to review all of the proposals.

(5) The need for evaluators to identify ambiguities, inconsistencies, errors, and deficiencies.

(6) The need for the evaluators to provide complete written documentation of the individual strengths and weaknesses for each proposal.

(7) An instruction specifying that, until an award is made, they may not disclose information concerning the acquisition to any person not directly involved in the evaluation process.

(8) An explanation of conflicts of interest.

(v) *Rating and ranking of proposals.* The evaluators shall individually read each proposal, describe tentative strengths and weaknesses, and independently assign preliminary scores in relation to each evaluation factor set forth in the solicitation. The evaluators may then discuss in detail the individual strengths and weaknesses described by each evaluator and, if pos-

sible, arrive at a common understanding of the major strengths and weaknesses and the potential for correcting each offeror's weakness(es). Each evaluator shall assign a final score to each proposal, and the technical evaluation panel shall collectively rank the proposals. Normally, ranking is the result of adding the numerical scores assigned to the evaluation factors and determining the average for each offeror. The evaluators shall then identify whether each proposal is acceptable or unacceptable. The technical evaluation panel shall not employ predetermined cutoff scores.

(vi) *Technical evaluation report.* The chairperson shall prepare a technical evaluation report and provide it to the Contracting Officer, who shall maintain it as a permanent record in the contract file. The report shall reflect the ranking of the proposals and identify each proposal as acceptable or unacceptable. The report shall also include a narrative evaluation specifying the strengths and weaknesses of each proposal, and any reservations, qualifications, or areas to be addressed that might bear upon the selection of sources for negotiation and award. The report shall include concrete technical reasons supporting any determination of unacceptability of a proposal and, for acceptable proposals, include specific points and questions for discussions or negotiations. The technical evaluation report shall also include a copy of each signed rating sheet, unless the Contracting Officer determines, in accordance with FAR 15.305(a)(3)(ii), and 315.305(a)(3)(vi), that the technical evaluation report includes appropriate and sufficiently detailed supporting narrative (with specific references to particular portions of offerors' proposals) to (1) fully and reasonably explain the basis for the technical evaluation panel's assessments of each proposal, including an evaluation rating of "acceptable" or "unacceptable; and (2) support any recommendation to include or not include a proposal in the competitive range. However, when peer review of proposals is required as provided in 315.303–70(a), OPDIVs shall follow applicable peer review guidelines

## Health and Human Services

315.371

and practices regarding the submission, maintenance, and disposal of reviewer rating sheets.

[74 FR 62398, Nov. 27, 2009, as amended at 75 FR 21510, Apr. 26, 2010]

### **315.306 Exchanges with offerors after receipt of proposals.**

(d) *Exchanges with offerors after establishment of the competitive range.* The Project Officer or technical evaluation panel shall develop technical questions as part of the technical evaluation report. The questions shall disclose the ambiguities, weaknesses, and deficiencies of offeror(s)' proposals. The Contracting Officer, with the assistance of the Project Officer or panel as required, shall prepare the management, past performance, and cost or price questions. The method of requesting offerors in the competitive range to submit additional information may vary depending on the complexity of the questions, the extent of additional information necessary, the time needed to analyze the responses, and the time frame for making the award. However, to the extent practicable, all questions and answers shall be in writing. The Contracting Officer shall give each offeror in the competitive range an equitable period of time for preparation of responses to questions to the extent practicable.

### **315.307 Proposal revisions.**

(b) Final proposal revisions are subject to—

(1) A final evaluation of price or cost and other salient factors by the Contracting Officer and Project Officer, with assistance from a cost/price analyst, as appropriate; and

(2) An evaluation of technical factors by the technical evaluation panel, as necessary.

The technical evaluation panel may rescore and re-rank technical proposals in the competitive range and prepare a technical evaluation report. To the extent practicable, the same evaluators who reviewed the original proposals shall perform the evaluation. The Contracting Officer and Project Officer shall conduct a final evaluation of past performance. The technical evaluation panel may be involved in the final evaluation of past performance, if the panel

is comprised solely of Government personnel.

### **315.370 Finalization of details with the selected source.**

(a) After selection of the successful proposal, the Contracting Officer may finalize details with the selected offeror, if necessary. However, the Contracting Officer shall not introduce any factor that could have an effect on the selection process after the common cutoff date for receipt of final proposal revisions, nor shall the finalization process in any way prejudice the competitive interest or rights of the unsuccessful offerors. The Contracting Officer shall restrict finalization of details with the selected offeror to definitizing the final agreement on terms and conditions, assuming none of these factors were involved in the selection process.

(b) Whenever a change occurs in the requirements, the Contracting Officer shall reopen the competition, and provide all offerors submitting final proposal revisions an opportunity to resubmit proposals based on the revised requirements. If there is a question as to whether a change is material and would require the initiation of a new competition, the Contracting Officer shall obtain the advice of technical personnel and OGC-GLD before proceeding. Significant changes in the offeror's cost proposal may also necessitate a reopening of a competition, if the changes alter the factors involved in the original selection process.

(c) Upon finalization of details, the Contracting Officer shall obtain a confirmation letter from the successful offeror which includes any revisions to its technical proposal, the agreed upon price or cost, and, as applicable, a certificate of current cost or pricing data.

### **315.371 Contract preparation and award.**

(a) After completing any activities that may be necessary to finalize details with the selected offeror, the Contracting Officer shall—

(1) Prepare the negotiation memorandum in accordance with 315.372;

(2) Prepare the contract containing all agreed to terms and conditions and clauses required by law or regulation;

### 315.372

(3) Include in the contract file the pertinent documents referenced in *FAR 4.803*; and

(4) Obtain the appropriate approval of the proposed contract award(s) in accordance with subpart *304.71* and contracting activity procedures.

(b) After receiving the required approvals, the Contracting Officer shall—

(1) Transmit the contract to the prospective contractor for signature; and

(2) Inform the prospective contractor that the contract is not effective until the Contracting Officer transmits the fully executed contract to the contractor.

(c) The Contracting Officer shall not sign or issue the contract until the finance office certifies that the funds are available for obligation.

#### **315.372 Preparation of negotiation memorandum.**

The Contracting Officer shall prepare a negotiation memorandum, or summary of negotiations, to document all actions leading to award of a contract and support the source selection decision discussed in *FAR 15.308*. The memorandum also satisfies the requirement for preparation of a “cost/price negotiation memorandum” required by *FAR 15.406-3*. The memorandum shall be in sufficient detail to explain and support the rationale, judgments, and authorities upon which all actions were predicated. The memorandum shall document the negotiation process and reflect the negotiator’s actions and judgments in concluding a satisfactory agreement for the Government. The memorandum shall address each item listed below. If an item is not applicable, the memorandum shall so state. The Contracting Officer may reference information already contained in the contract file rather than reiterate it.

(a) *Description of articles and services and period of performance.* Provide a description of the articles or services, quantity, unit price, total contract amount, and period of contract performance.

(b) *Acquisition planning.* Summarize or reference any acquisition planning activities that have taken place.

(c) *Synopsis of acquisition.* Provide a statement as to whether the acquisition

### 48 CFR Ch. 3 (10-1-11 Edition)

has or has not been publicized in accordance with *FAR Subpart 5.2*. Include a brief statement referencing the specific basis for exemption under the FAR, if applicable.

(d) *Contract type.* Provide sufficient detail to support the type of contractual instrument recommended for the acquisition. If the contract is a cost-sharing type, explain the essential cost-sharing features.

(e) *Extent of competition.* Discuss the extent to which full and open competition was solicited and obtained. Include the date of solicitation, sources solicited, and solicitation results. If a late proposal was received, discuss whether or not the late proposal was evaluated and the rationale for the decision.

(f) *Technical evaluation.* Summarize or reference the results presented in the technical evaluation report.

(g) *Business evaluation.* Summarize or reference results presented in the business report.

(h) *Past performance.* Summarize or reference results of both the past performance evaluation and reference checks.

(i) *Competitive range (if applicable).* Describe how the competitive range was determined, and indicate the offerors that were included in and excluded from the competitive range.

(j) *Cost breakdown and analysis.* Include a complete cost breakdown together with the Contracting Officer’s analysis of the estimated cost by individual cost elements. The analysis shall discuss the items specified in *FAR 15.406-3* and other cost factors, such as—

(1) A comparison of cost factors proposed for the current requirement with actual factors used in earlier contracts, using the same cost centers of the same supplier or cost centers of other sources having recent contracts for the same or similar item;

(2) Any pertinent Government-conducted audit of the proposed contractor’s record or any pertinent cost advisory report;

(3) Any pertinent technical evaluation inputs as to necessity, allocability and reasonableness of labor, material and other direct expenses;

## Health and Human Services

## 315.404-2

(4) Any other pertinent information to fully support the basis for the cost analysis;

(5) If the contract is an incentive type, a discussion of all elements of profit and fee structure; and

(6) A justification of the reasonableness of the contractor's proposed profit or fixed fee considering the requirements of *FAR 15.404-4* and *315.404-4*.

(k) *Cost realism*. Describe the cost realism analysis performed on proposals.

(1) *Government-furnished property and facilities*. With respect to Government-furnished facilities, equipment, tooling, or other property, include the following:

(1) If the Government will not provide property, a statement to that effect.

(2) If the Government will provide property, a full description of it, its estimated dollar value, the basis of price comparison with competitors, and the basis of rental charge, if rental is involved.

(3) If a decision to furnish property has not been made, a detailed explanation.

(m) *Negotiations*. Include a statement as to the date and place of negotiations, and identify members of both the Government and contractor negotiating teams by area of responsibility. Include negotiation details relative to the SOW/PWS, terms and conditions, and special provisions. The results of cost or price negotiations shall include the information required by *FAR 31.109* and *15.406-3*. In addition, if the potential contractor provided cost or pricing data, specify the extent to which the Contracting Officer relied upon the factual cost or pricing data submitted and used it in negotiating the cost or price.

(n) *Other considerations*. Include coverage of areas such as the following:

(1) Financial data with respect to a contractor's capacity and stability.

(2) Determination of contractor responsibility.

(3) Details as to why the method of payment, such as progress payments, advance payments, *etc.*, is necessary and cite any required D & F's.

(4) Information with respect to obtaining a certificate of current cost or pricing data.

(5) Other required special approvals.

(6) If the contract represents an extension of previous work, the status of funds and performance under the prior contract(s). Also, the Project Officer shall provide sufficient information for the Contracting Officer to determine that the Government has obtained enough actual or potential value from the work previously performed to warrant continuation with the same contractor.

(7) A statement that the Contracting Officer has explained the equal opportunity provisions of the proposed contract to the contractor, and the contractor is aware of its responsibilities. Also, state whether or not an Equal Employment Opportunity (EEO) clearance is required.

(8) If the contract is for services, a statement, in accordance with *FAR 37.103*, that the services are nonpersonal in nature.

(o) *Terms and conditions*. Identify the general and special clauses and conditions that are contained in the contract, such as option arrangements, multi-year contracting, anticipatory costs, deviations from standard clauses, *etc.* The Contracting Officer shall state the rationale for inclusion of any special terms and conditions and, where applicable, identify the document which granted approval for their use.

(p) *Recommendation*. Briefly state the basis (or bases) for recommending award.

(q) *Signature*. The Contracting Officer and the individual who prepared the negotiation memorandum must sign the document.

### Subpart 315.4—Contract Pricing

#### 315.404 Proposal analysis.

##### 315.404-2 Information to support proposal analysis.

(a)(2) When some or all information sufficient to determine the reasonableness of the proposed cost or price is already available or can be obtained by phone from the cognizant audit agency, the Contracting Officer may request less-than-complete field pricing support (specifying in the request the information needed) or may waive in writing the requirement for audit and

field pricing support by documenting the file to indicate what information will be used instead of the audit report and the field pricing report.

(3) When initiating audit and field pricing support, the Contracting Officer shall do so by sending a request to the cognizant Administrative Contracting Officer, with an information copy to the cognizant audit office. When field pricing support is not available, the Contracting Officer shall initiate an audit by sending, in accordance with agency procedures, two (2) copies of the request to the OIG Office of Audit Services, Regional Inspector General. In both cases, the Contracting Officer shall, in the request—

(i) Prescribe the extent of the support needed;

(ii) State the specific areas for which input is required;

(iii) Include the information necessary to perform the review, such as the offeror's proposal and the applicable portions of the solicitation, particularly those describing requirements and delivery schedules;

(iv) Provide the complete address of the location of the offeror's financial records that support the proposal;

(v) Identify the office having audit responsibility, if other than the HHS Regional Audit Office; and

(vi) Specify a due date for receipt of a verbal report and the written audit report. If the time available is not adequate to permit satisfactory coverage of the proposal, the auditor shall so advise the Contracting Officer and indicate the additional time needed. The Contracting Officer shall submit one copy of the audit request letter provided to the Office of Audit Services, Regional Inspector General and a complete copy of the contract price proposal to OIG Office of Audit Services. Whenever the Office of Audit Services has conducted an audit review, the Contracting Officer shall forward two (2) copies of the memorandum of negotiation to OIG Office of Audit Services.

#### 315.404-4 Profit.

(b) *Policy.* (1) The structured approach for determining profit provides a technique for establishing a profit objective for negotiation. A profit objective is that part of the estimated con-

tract price objective or value which, in the judgment of the Contracting Officer, constitutes an appropriate amount of profit for the acquisition being considered. This technique allows for consideration of the profit factors described in paragraph (d) of this section. The Contracting Officer's analysis of these factors shall be based on available information, such as proposals, audit data, assessment reports, and pre-award surveys. The structured approach provides a basis for documenting the profit objective. The Contracting Officer shall explain any significant departure from this objective. The amount of documentation depends on the dollar value and complexity of the proposed acquisition. The profit objective is a part of the overall negotiation objective and is directly related to the cost objective and any proposed sharing arrangement. The profit objective shall exclude factors considered inapplicable to the acquisition.

(ii) The Contracting Officer shall negotiate the profit objective at the same time as the other cost items and as a whole rather than as individual profit factors. The profit factor breakdown shall be part of the documentation. The Contracting Officer shall use the profit analysis factors in *FAR 15.404-4(d)* in lieu of the structured approach in the following circumstances:

(A) Contracts not expected to exceed \$100,000.

(B) A & E contracts.

(C) Management contracts for operations or maintenance of Government facilities.

(D) Construction contracts.

(E) Contracts primarily requiring delivery of material supplies by subcontractors

(F) Termination settlements.

(G) Cost-plus-award-fee contracts.

However, the Contracting Officer may perform a structured profit analysis as an aid in arriving at an appropriate fee arrangement. The Contracting Officer may make other exceptions in the negotiation of contracts having unusual pricing situations, but shall justify in writing those situations where the structured approach is determined to be unsuitable.

(c) *Contracting Officer responsibilities.* The Contracting Officer shall develop

the profit objective, which shall realistically reflect the total overall effort of the contractor. The Contracting Officer shall not begin to develop the profit objective until he or she has completed a thorough review of the proposed contract work; conducted a review of all available knowledge regarding the contractor pursuant to FAR subpart 9.1, including audit data, pre-award survey reports and financial statements, as appropriate; and completed an analysis of the contractor's cost estimate and comparison with the Government's estimate or projection of cost.

(d) *Profit-analysis factors*—(1) *Common factors*. The Contracting Officer shall consider the following factors in all cases in which profit is negotiated and shall use the weight ranges listed after each factor in all instances where the structured approach is used.

Profit factors	Weight ranges (%)
<b>Contractor Effort:</b>	
Material acquisition .....	1 to 5.
Direct labor .....	4 to 15.
Overhead .....	4 to 9.
General & Administrative (G & A) .....	4 to 8.
Other costs .....	1 to 5.
<b>Other Factors:</b>	
Cost risk .....	0 to 7.
Investment .....	-2 to +2.
Performance .....	-1 to +1.
Socioeconomic programs .....	-5 to +5.
Special situations	

(i) The Contracting Officer shall measure "Contractor Effort" by assigning a profit percentage within the designated weight range to each element of contract cost. The categories listed are for reference purposes only, but are broad and basic enough to provide guidance for other elements of cost. The Contracting Officer shall not include facilities capital cost of money. "Contractor Effort" shall include a computed total dollar profit.

(ii) The Contracting Officer shall use the total dollar profit for the "Contractor Effort" to calculate specific profit dollars for "Other Factors"—cost risk, investment, performance, socioeconomic programs, and special situations. The Contracting Officer shall multiply the total dollar profit for the "Contractor Effort" by the weight assigned to each of the elements in the "Other Factors" category. Facilities

capital cost of money is not included. Form HHS 674, Structured Approach Profit/Fee Objective, shall be used.

(iii) In making a judgment of the value of each factor, the Contracting Officer shall consider the definition, description, and purpose of the factors together with considerations for evaluating them.

(iv) The structured approach was designed for arriving at profit objectives for other than nonprofit organizations. However, the Contracting Officer shall use the modified structured approach in paragraph (d)(1)(iv)(B) of this section to establish fee objectives for nonprofit organizations.

(A) For purposes of this section, nonprofit organizations are defined as those business entities organized and operated exclusively for charitable, scientific, or educational purposes, no part of the net earnings of which inure to the benefit of any private shareholder or individual, and which are exempt from Federal income taxation under Section 501(c)(3) of the Internal Revenue Code.

(B) For contracts with nonprofit organizations where fee is involved, the Contracting Officer shall subtract up to three percentage points from the total "profit" objective percentage. In determining the amount of this adjustment, the Contracting Officer shall consider the following factors:

- (1) Tax position benefits.
- (2) Granting of financing through advance payments.
- (3) Other pertinent factors which may work to either the advantage or disadvantage of the contractor in its position as a nonprofit organization.

(2) *Contractor effort*. Contractor effort is a measure of how much the contractor is expected to contribute to the overall effort necessary to meet the contract performance requirement in an efficient manner. This factor, which is apart from the contractor's responsibility for contract performance, takes into account what resources are necessary and what steps the contractor must take to accomplish a conversion of ideas and material into the final service or product called for in the contract. This is a recognition that within a given performance output, or within a given sales dollar figure, necessary

efforts on the part of individual contractors can vary widely in both value and quantity, and that the profit objective shall reflect the extent and nature of the contractor's contribution to total performance. A major consideration, particularly in connection with experimental or R & D work, is the difficulty or complexity of the work to be performed, and the unusual demands of the contract, such as whether the project involves a new approach unrelated to existing technology or equipment or only refinements to these items. The evaluation of this factor requires an analysis of the cost content of the proposed contract as follows:

(i) *Material acquisition* (subcontracted items, purchased parts, and other material). Analysis of these cost items shall include an evaluation of the managerial and technical effort necessary to obtain the required subcontracted items, purchased parts, material or services. The Contracting Officer shall determine whether the contractor will obtain the items or services by routine order from readily available sources or by detailed subcontracts for which the prime contractor must develop complex specifications. The Contracting Officer shall also consider the managerial and technical efforts necessary for the prime contractor to select subcontractors and to perform subcontract administration functions, which may be substantial. Normally, the lowest unadjusted weight for direct material is two percent. A weighting of less than two percent may be appropriate only in unusual circumstances when there is a minimal contribution by the contractor.

(ii) *Direct labor* (professional, service, manufacturing and other labor). Analysis of the various labor categories of the cost content of the contract shall include evaluation of the comparative quality and quantity of professional and semiprofessional talents, manufacturing and service skills, and experience to be employed. In evaluating professional and semiprofessional labor for the purpose of assigning profit dollars, the Contracting Officer shall consider the amount of notable scientific talent or unusual or scarce talent needed in contrast to nonprofessional effort, including the contribution this talent

will provide toward the achievement of contract objectives. Since nonprofessional labor is relatively plentiful and the contractor may easily obtain it, it is less critical to the successful performance of contract objectives. Therefore, the Contracting Officer cannot weight it nearly as high as professional or semiprofessional labor. The Contracting Officer shall evaluate service contract labor in a like manner by assigning higher weights to engineering or professional type skills required for contract performance and considering the variety of manufacturing and other categories of labor skills required and the contractor's personnel resources for meeting those requirements. For purposes of evaluation, the Contracting Officer may separately categorize, as appropriate, certain types of labor (e.g., quality control, receiving and inspection), that do not fall within the definition of professional, service or manufacturing labor; but shall apply the same evaluation considerations as outlined in this paragraph.

(iii) *Overhead and G & A expense*. (A) Analysis of these overhead items of cost shall include the evaluation of the makeup of these expenses and how much they contribute to contract performance. To the extent practicable, analysis shall include a determination of the amount of labor within these overhead pools and how this labor would be treated if it were considered direct labor under the contract. The Contracting Officer shall give the allocable labor elements the same profit considerations that they would receive if they were treated as direct labor. The other elements of these overhead pools require analysis to determine whether they are routine expenses, such as utilities and maintenance, and hence given lesser profit consideration, or whether they are significant contributing elements. The composite of the individual determinations in relation to the elements of the overhead pools shall be the profit consideration given the pools as a whole. The procedure for assigning relative values to these overhead expenses differs from the method used in assigning values of the direct labor. The upper and lower limits assignable to the direct labor are absolute. In the case of overhead

expenses, individual expenses may be assigned values outside the range as long as the composite ratio is within the range.

(B) It is not necessary that the contractor's accounting system break down overhead expenses within the classifications of research overhead, other overhead pools, and general administrative expenses, unless dictated otherwise by Cost Accounting Standards (CAS). The contractor whose accounting system reflects only one overhead rate on all direct labor need not change its system, if CAS exempt, to correspond with these classifications. The Contracting Officer, in an evaluation of such a contractor's overhead rate, may break out the applicable sections of the composite rate which could be classified as research overhead, other overhead pools, and general and administrative expenses, and follow the appropriate evaluation technique.

(C) The Contracting Officer shall consider management problems that may surface in varying degrees and the management expertise exercised to solve them as an element of profit. For example, a contract for a new R & D program or an item which is on the cutting edge may cause more problems and require more managerial time and abilities of a higher order than a follow-on contract. If new contracts create more problems and require a higher profit weight, the Contracting Officer shall adjust follow-ons downward because many of the problems should have been solved. In any event, the evaluation shall consider the underlying managerial effort involved on a case-by-case basis.

(D) It may not be necessary for the Contracting Officer to make a separate profit evaluation of overhead expenses, in connection with each acquisition action for substantially the same project with the same contractor. Where the Contracting Officer has made an analysis of the profit weight to be assigned to the overhead pool, the weight assigned may apply to future acquisitions with the same contractor unless there is a change in the cost composition of the overhead pool or contract circumstances, or unless the factors discussed in paragraph (d)(2)(iii)(C) of this section are involved.

(iv) *Other costs.* Analysis of this factor shall include all other direct costs associated with contractor performance (e.g., travel and relocation, direct support, and consultants). Analysis of these items of cost shall include the significance of the cost of contract performance, nature of the cost, and how much they contribute to contract performance. Normally, travel costs require minimal administrative effort by the contractor and, therefore, usually receive a weight no greater than one percent. Also, the contractor may designate individuals as "consultants," but in reality the contractor may obtain these individuals to supplement its workforce in the performance of routine duties required by contract. These costs would normally receive a minimum weight. However, there may be instances when contract performance may require the contractor to obtain the services of consultants having expertise in fields such as medicine or human services. In these instances, the contractor may expend greater managerial and technical effort to obtain these services and, consequently, the costs shall receive a much greater weight.

(3) *Other factors:* (i) *Contract cost risk.* The contract type employed basically determines the degree of cost risk assumed by the contractor. For example, where a portion of the risk has been shifted to the Government through cost-reimbursement provisions, unusual contingency provisions, or other risk-reducing measures, the amount of profit shall be less than where the contractor assumes all the risk.

(A) In developing the prenegotiation profit objective, the Contracting Officer shall consider the type of contract anticipated and the contractor risk associated therewith, when selecting the position in the weight range for profit that is appropriate for the risk the contractor will bear. This factor is one of the most important in arriving at the prenegotiation profit objective. Evaluation of this risk requires a determination of: The degree of cost responsibility assumed by the contractor; the reliability of the cost estimates in relation to the tasks assumed by the contractor; and the complexity of the tasks assumed by the contractor. This

**315.404-4**

factor is specifically limited to the risk of contract costs. Risks associated with a contractor's reputation, a contractor's potential loss of a commercial market, or a contractor's loss of potential profits in other fields, are not within the scope of this factor.

(B) The first and basic determination of the degree of cost responsibility assumed by the contractor is related to the sharing of total risk of contract cost by the Government and the contractor through the selection of contract type. The extremes are a cost-plus-fixed-fee contract requiring the contractor to use its best efforts to perform a task and a firm fixed-price contract for a service or a complex item. A cost-plus-fixed-fee contract would reflect a minimum assumption of cost responsibility, whereas a firm-fixed-price contract would reflect a complete assumption of cost responsibility. The determination of risk by contract type usually falls into the following percentage ranges:

	Percent
Cost-reimbursement type contracts .....	0-3
Fixed-price type contracts .....	2-7

(C) The second determination is that of the reliability of the cost estimates. Sound price negotiation requires well-defined contract objectives and reliable cost estimates. Prior experience assists the contractor in preparing reliable cost estimates on new acquisitions for similar efforts. An excessive cost estimate reduces the likelihood that the cost of performance will exceed the contract price, thereby reducing the contractor's assumption of contract cost risk.

(D) The third determination is that of the difficulty of the contractor's task. The contractor's task can be difficult or easy, regardless of the type of contract.

(E) Contractors are likely to assume greater cost risk only if Contracting Officers objectively analyze the risk associated with proposed contracts and are willing to compensate contractors for it. Generally, a cost-plus-fixed fee contract will not justify a reward for risk in excess of 0.5 percent, nor will a firm fixed-price contract justify a reward of less than the minimum in the

**48 CFR Ch. 3 (10-1-11 Edition)**

structured approach. The reward for risk, by contract type, will usually fall into the following percentage ranges:

(1) Type of contract and percentage ranges for profit objectives based on structured approach for R & D and manufacturing contracts:

	Percent
Cost-plus-fixed-fee .....	0 to 0.5.
Cost-plus-incentive-fee: With cost incentive only.	1 to 2.
With multiple incentives .....	1.5 to 3.
Fixed-price-incentive: With cost incentive only.	2 to 4.
With multiple incentives .....	3 to 5.
Prospective price redetermination .....	3 to 5.
Firm-fixed-price .....	5 to 7.

(2) Type of contract and percentage ranges for profit objectives based on the structured approach for service contracts:

	Percent
Cost-plus-fixed-fee .....	0 to 0.5.
Cost-plus-incentive-fee .....	1 to 2.
Fixed-price incentive .....	2 to 3.
Firm-fixed-price .....	3 to 4.

(F) These ranges may not be appropriate for all acquisitions. For instance, a fixed-price incentive contract with a low ceiling price and high incentive share may be tantamount to a firm fixed-price contract. In this situation, the Contracting Officer may determine that a basis exists for high confidence in the reasonableness of the estimate and that little opportunity exists for cost reduction without extraordinary efforts. On the other hand, a contract with a high ceiling and low incentive formula can be considered to contain cost-plus-incentive-fee contract features. In this situation, the Contracting Officer may determine that the Government is retaining much of the contract cost responsibility and that the risk the contractor assumes is minimal. Similarly, if a cost-plus-incentive-fee contract includes an unlimited downward (negative) fee adjustment on cost control, it could be comparable to a fixed-price-incentive contract. In such a pricing environment, the Contracting Officer may determine that the Government has transferred a greater amount of cost responsibility to the contractor than is typical under a normal cost-plus-incentive-fee contract.

(G) The contractor's subcontracting program may have a significant impact on the contractor's acceptance of risk. It could cause risk to increase or decrease in terms of both cost and performance. This consideration shall be a part of the Contracting Officer's overall evaluation in selecting a factor to apply to cost risk. The Contracting Officer may determine, for instance, that the prime contractor has effectively transferred real cost risk to a subcontractor and the contract cost risk evaluation may, as a result, be below the range which would otherwise apply for the contract type being proposed. However, without any substantial transfer of cost risk from the prime contractor to a subcontractor, the Contracting Officer shall not lower the contract cost risk evaluation merely because a substantial portion of the contract costs represents subcontracts.

(H) In making a contract cost risk evaluation for an acquisition that involves definitization of a letter contract, unpriced change orders, and unpriced orders under basic ordering agreements, the Contracting Officer shall consider the effect on total contract cost risk of partial performance before definitization. Under some circumstances, the total amount of cost risk may have been effectively reduced. Under other circumstances it may be apparent that the contractor's cost risk remains substantially unchanged. To be equitable, the Contracting Officer shall make the determination of profit weight for all recognized costs, both incurred and yet to be expended, considering all attendant circumstances—not merely the portion of costs incurred or percentage of work completed prior to definitization.

(I) The Contracting Officer shall consider time-and-materials and labor-hour contracts to be cost-plus-fixed-fee contracts for the purpose of establishing profit weights in the evaluation of the contractor's assumption of contract cost risk, unless otherwise exempt from use of the structured approach under paragraph (b)(1)(ii) of this section.

(ii) *Investment.* HHS encourages its contractors to perform their contracts with the minimum of financial, facilities, or other assistance from the Gov-

ernment. As such, it is the purpose of this factor to encourage the contractor to acquire and use its own resources to the maximum extent possible. The evaluation of this factor shall include an analysis of the following:

(A) *Facilities* (including equipment). Evaluating how this factor contributes to the profit objective requires knowledge of the level of facilities utilization needed for contract performance, the source and financing of the required facilities, and the overall cost-effectiveness of the facilities offered. The Contracting Officer shall provide contractors with additional profit, if they furnish their own facilities and such contractor-furnished facilities contribute significantly to lower total contract costs. On the other hand, contractors that rely on the Government to provide or finance needed facilities shall receive a corresponding reduction in profit. Between these extremes, the Contracting Officer shall evaluate cases on their merits and make positive or negative adjustments in profit, as appropriate. When applicable, the contractor's computation of facilities capital cost of money under CAS 414 can help the Contracting Officer identify the level of facilities investment the contractor will employ in contract performance.

(B) *Payments.* In analyzing this factor, the Contracting Officer shall consider the frequency of payments by the Government to the contractor. The key to this weighting is to give proper consideration to the impact the contract will have on the contractor's cash flow. Generally, negative consideration applies to advance payments and payments more frequent than monthly, with the Contracting Officer making a maximum reduction as the contractor's working capital approaches zero. The Contracting Officer shall generally give positive consideration for payments less frequent than monthly and for a capital turn-over rate on the contract less than the contractor's or the industry's normal capital turn-over rate.

(iii) *Performance* (cost control and other past accomplishments). The Contracting Officer shall evaluate the contractor's past performance in areas such as: quality of services or products,

meeting performance schedules, efficiency in cost control (including need for and reasonableness of costs incurred), accuracy and reliability of previous cost estimates, degree of cooperation (both business and technical), compliance with previous contract requirements, and management of subcontract programs. Where a contractor has consistently achieved excellent results in these areas in comparison with other contractors in similar circumstances, this performance merits a proportionately greater opportunity for profit. Conversely, a poor record in this regard warrants less profit.

(iv) *Federal socioeconomic programs.* This factor, which may apply to special circumstances or particular acquisitions, relates to the extent of a contractor's successful participation in Government sponsored programs involving: Small businesses; HUBZone small businesses; service-disabled, veteran-owned small businesses; 8(a) small businesses; women-owned small businesses; small disadvantaged businesses; sheltered workshops for the disabled; mentor-protégé; energy conservation, *etc.* The Contracting Officer shall give positive consideration for the contractor's policies and practices that support Federal socioeconomic programs and contribute to successful results. Conversely, the Contracting Officer shall view failure or unwillingness on the part of the contractor to support Federal socioeconomic programs as evidence of poor performance for the purpose of establishing a profit objective.

(v) *Special situations—(A) Inventive and developmental contributions.* The Contracting Officer shall consider the extent and nature of contractor-initiated and contractor-financed independent development in formulating the profit objective, provided that the Contracting Officer has made a determination that the effort will benefit the contract. Examples of profit weighting factors include contribution of the independent development to health and human service-related missions; the initiative demonstrated by the contractor in pursuing the independent development; the extent of the contractor's cost risk; and whether the

independent development cost was recovered directly or indirectly from Government sources.

(B) *Unusual pricing agreements.* Occasionally, unusual contract pricing arrangements are made with the contractor wherein it agrees to cost ceilings (e.g., a ceiling on overhead rates for conditions other than those discussed at *FAR 42.707*). In these circumstances, the Contracting Officer shall give the contractor favorable consideration in developing a profit objective.

(C) *Negative factors.* Special situations need not be limited to those which only increase profit levels. A negative consideration may be appropriate when the contractor is expected to obtain spin-off-benefits as a direct result of the contract (e.g., products or services with commercial application).

(4) *Facilities capital cost of money.* When facilities capital cost of money (cost of capital committed to facilities) is included as an item of cost in the contractor's proposal, the Contracting Officer shall reduce the profit objective in an amount equal to the amount of facilities capital cost of money allowed in accordance with the Facilities Capital Cost-of-Money cost principle. If the contractor does not propose this cost, the Contracting Officer shall insert a provision in the contract that makes facilities capital cost of money an unallowable cost.

### Subpart 315.6—Unsolicited Proposals

#### 315.605 Content of unsolicited proposals.

(d) *Certification by offeror.* To ensure against contacts between HHS personnel and prospective offerors that would exceed the limits of advance guidance set forth in *FAR 15.604* and potentially result in an unfair advantage to an offeror, the Contracting Officer shall: Furnish the following certification template to any prospective offeror of an unsolicited proposal; and require that the executed certification be included in any resultant unsolicited proposal:

## Health and Human Services

Pt. 316

### UNSOLICITED PROPOSAL

#### CERTIFICATION BY OFFEROR

This is to certify, to the best of my knowledge and belief, that—

- (a) This proposal has not been prepared under Government supervision;
- (b) The methods and approaches stated in the proposal were developed by this offeror;
- (c) Any contact with Department of Health and Human Services (HHS) personnel has been within the limits of appropriate advance guidance set forth in *FAR 15.604*; and
- (d) No prior commitments were received from HHS personnel regarding acceptance of this proposal.

Date: \_\_\_\_\_  
Organization \_\_\_\_\_  
Name \_\_\_\_\_  
Title \_\_\_\_\_

(This certification shall be signed by a responsible management official of the proposing organization or by a person authorized to contractually obligate the organization.)

#### **315.606 Agency procedures.**

- (a) The HCA is responsible for establishing procedures to comply with *FAR 15.606(a)*.
- (b) The HCA or designee shall be the point of contact for coordinating the receipt and processing of unsolicited proposals.

#### **315.606-1 Receipt and initial review.**

(d) OPDIVs shall not refuse consideration of an unsolicited proposal because an organization initially submitted it as a grant application. However, OPDIVs shall not award contracts based on unsolicited proposals that have been rejected for grant awards due to lack of scientific merit.

#### **315.609 Limited use of data.**

An offeror shall use the legend, Use and Disclosure of Data, prescribed in *FAR 15.609(a)*, to restrict the use of data for evaluation purposes only. However, data contained within the unsolicited proposal may need to be disclosed as a result of a request submitted pursuant to the Freedom of Information Act. Because of this possibility, the Contracting Officer shall provide the following notice to all prospective offerors of unsolicited proposals:

“The Government will attempt to comply with the “Use and Disclosure of Data” legend. However, the Government may not be able to withhold a record (data, document, etc.) or deny access to a record requested by an individual (the public) when an obligation is imposed on the Government under the Freedom of Information Act, 5 U.S.C. 552, as amended. The Government determination to withhold or disclose a record will be based upon the particular circumstances surrounding the record and on whether the record is exempt from disclosure under the Freedom of Information Act. Per *FAR 15.609(e)*, the offeror should identify any records that it considers to be trade secrets, commercial or financial information, and privileged or confidential information.”

### **Subpart 315.70—Acquisition of Electronic Information Technology**

#### **315.7000 Section 508 accessibility standards.**

EIT products and services, including EIT deliverables such as electronic documents and reports, acquired using negotiated procedures shall comply with Section 508 of the Rehabilitation Act of 1973, as amended. Consistent with paragraph 4.3.1 of the HHS Section 508 policy—see Section 508 policy on HHS Office on Disability Web site, if products and services, including commercially available items, meet some but not all of the applicable Section 508 accessibility standards, and no commercially available products or services meet all of the applicable Section 508 accessibility standards, an OPDIV/STAFFDIV shall acquire the products and services that best meet the applicable Section 508 accessibility standards. Commercial nonavailability exception determinations for EIT products and services that do not meet some or all of the applicable Section 508 accessibility standards shall be processed in accordance with 339.203.

## **PART 316—TYPES OF CONTRACTS**

### **Subpart 316.3—Cost-reimbursement Contracts**

Sec.  
316.307 Contract clauses.

### **Subpart 316.5—Indefinite-Delivery Contracts**

316.505 Ordering.