

(1) That are cost-reimbursement, incentive, time-and-materials, labor-hour, or price-redeterminable type or any combination of these;

(2) For which cost or pricing data are required; or

(3) That require the subcontractor to furnish reports as discussed in paragraph (e) of this clause.

The clause may be altered only as necessary to identify properly the contracting parties and the Contracting Officer under the Government prime contract.

(End of clause)

Alternate I (OCT 1995). As prescribed in 15.106-1(c), in facilities contracts, add the following sentence at the end of paragraph (b) of the basic clause:

The obligations and rights specified in this paragraph shall extend to the use of, and charges for the use of, the facilities under this contract.

Alternate II (OCT 1995). As prescribed in 15.106-1(c), in cost-reimbursement contracts with educational and other non-profit institutions, add the following paragraph (h) to the basic clause:

(h) The provisions of OMB Circular No. A-133, "Audits of Institutions of Higher Learning and Other Nonprofit Institutions," apply to this contract.

Alternate III (OCT 1995). As prescribed in 15.106-1(c), delete paragraph (d) of the basic clause and redesignate the remaining paragraphs accordingly.

[FR Doc. 95-19858 Filed 8-15-95; 8:45 am]

BILLING CODE 6820-EP-M

48 CFR Parts 2, 4, 5, 6, 14, 15, 17, 19, 25, 36, 51 and 52

[FAC 90-31; FAR Case 94-701; Item II]

RIN 9000-AG39

Federal Acquisition Regulation; Contract Award Implementation

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

ACTION: Final rule.

SUMMARY: This final rule is issued pursuant to the Federal Acquisition Streamlining Act of 1994 to (1) identify new Federal Procurement Data System reporting requirements, (2) expand the reasons for establishing or maintaining alternative sources of supplies or services, (3) allow acquisition of expert services to support litigation by other than full and open competition and provide an exception to synopsis requirements, (4) clarify procedures for award to a source identified in a statute, (5) clarify approval authority for use of other than full and open competition, (6) revise procedures for use of source selection evaluation factors in solicitations, for conducting written or

oral discussions, and for providing postaward notices and debriefing to offerors, (7) require a determination that an option is likely to be exercised before providing for evaluation of sealed bid options, (8) allow nonprofit agencies for the blind or severely disabled to use Government supply sources in performing certain Javits-Wagner-O'Day contracts, and (9) make procedures for award without discussion the same for Department of Defense and civilian agencies. This regulatory action was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

EFFECTIVE DATE: October 1, 1995.

FOR FURTHER INFORMATION CONTACT:

Ms. Melissa Rider, Contract Award Team Leader, at (703) 614-1634 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAC 90-31, FAR case 94-701.

SUPPLEMENTARY INFORMATION:

A. Background

The Federal Acquisition Streamlining Act of 1994, Pub. L. 103-355 (the Act), provides authorities that streamline the acquisition process and minimize burdensome Government-unique requirements. Major changes that can be expected in the acquisition process as a result of the Act's implementation include changes in the areas of Commercial Item Acquisition, the Truth in Negotiations Act, and introduction of the Federal Acquisition Computer Network.

This notice announces FAR revisions developed under FAR Case 94-701, Contract Award Implementation, which implements the following sections of the Act:

- Sections 1002 and 1052 amend 10 U.S.C. 2304(b) and 41 U.S.C. 253(b) to—(1) Ensure the continuous availability of a reliable source of supply; (2) satisfy projected needs based on a history of high demand; and (3) satisfy a critical need for medical, safety, or emergency supplies, as reasons for establishing or maintaining alternative sources. (Implementation at FAR 6.202.)
- Sections 1003 and 1053 amend 10 U.S.C. 2304(f)(1)(B)(i) and 41 U.S.C. 253(f)(1)(B)(i) to clarify the approval authority for use of other than full and open competition. (Implementation at FAR 6.304.)
- Sections 1005 and 1055 amend 10 U.S.C. 2304(c)(3) and 41 U.S.C. 253(c) to add the acquisition of expert services for use in any litigation or

dispute involving the Federal Government as an exception to use of full and open competition.

- (Implementation at FAR 6.302-3.)
- Section 1055 also amended 41 U.S.C. 416(c) and 15 U.S.C. 637(c) to provide an exception to the publication of notices in the Commerce Business Daily for acquisition of expert services. (Implementation at FAR 5.201, 5.202, 5.301, and 6.302-3.)
- Sections 1011 and 1061 amend 10 U.S.C. 2305(a) and 41 U.S.C. 253a and 253b to (1) Make procedures for award of contracts without discussion comparable in Department of Defense and civilian agencies, (2) require solicitations for competitive proposals to include all significant factors and subfactors and whether they are more important, of equal importance or less important than cost or price, (3) permit agencies to disclose numerical weights assigned to evaluation factors at their discretion, and (4) allow award without discussion to other than the lowest overall cost offeror. (Implementation at FAR 15.406-5, 15.407, 15.605, 15.610, and 52.215-16.)
- Sections 1012 and 1062 amend 10 U.S.C. 2305(a) and 41 U.S.C. 253a to require a determination that it is likely that an option will be exercised before providing for evaluation of prices of options in solicitations for contracts awarded using sealed bid procedures. (Implementation at FAR 17.202 and 17.208.)
- Sections 1013 and 1063 amend 10 U.S.C. 2305(b) and 41 U.S.C. 253b to require, within three days of contract award, notification to unsuccessful offerors that a contract has been awarded and to allow electronic transmission of the notice. (Implementation at FAR 2.101, 14.408-1, 14.409-1, 15.1002, 15.1003, 25.405, and 36.304.)
- Sections 1014 and 1064 amend 10 U.S.C. 2305(b) and 41 U.S.C. 253b to (1) Allow offerors to request a debriefing within three days of receipt of notice of award and require agencies, to the maximum extent practicable, to conduct the debriefings within five days, and (2) specify minimum requirements for content of the debriefings. (Implementation at FAR 15.1001, 15.1004, 36.607, and 52.215-16.)
- Section 1555 amends 40 U.S.C. 481 to allow nonprofit agencies for the blind or severely disabled providing supplies or services under a Javits-Wagner-O'Day Act contract to use Government supply sources in performing the contract. (Implementation at FAR 51.101 and

51.102.) Other parts of Section 1555 are being implemented separately by GSA (see proposed rule of April 7, 1995, 60 FR 17764).

- Section 7203 amends 10 U.S.C. 2304 and 41 U.S.C. 253 to state Congressional policy regarding legislative requirements for award of a new contract to a specific non-Federal Government entity. (Implementation at FAR 6.302-5.)
- Section 10004 requires the Federal Procurement Data System to collect from contracts in excess of \$25,000 data on awards to small and disadvantaged businesses using either set asides or full and open competition, awards to businesses owned and controlled by women, the number of offers received in response to a solicitation, task or delivery order contracts and contracts for the acquisition of commercial items. (Implementation at FAR 4.601.)

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the regulatory changes contained in the rule relate primarily to the content of solicitations, briefings and notifications to offerors, internal Government procedures, and procedures which apply only to the acquisition of expert services for litigation or to decisions to maintain alternative sources of supply. The rule will increase the amount of pre-award and post-award information provided to the public, but will not have a significant economic impact.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose recordkeeping or information collection requirements, or collections of information from offerors, contractors, or members of the public which require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

D. Public Comments

Eighteen public comments were received in response to the proposed rule published in the **Federal Register** on January 9, 1995 (60 FR 2472). These comments were considered in formulation of this final rule.

List of Subjects in 48 CFR Parts 2, 4, 5, 6, 14, 15, 17, 19, 25, 36, 51 and 52

Government procurement.

Dated: August 7, 1995.

Edward C. Loeb,

Deputy Project Manager for the Implementation of the Federal Acquisition Streamlining Act of 1994.

Therefore, 48 CFR Chapter 1 is amended as set forth below:

1. The authority citation for 48 CFR Parts 2, 4, 5, 6, 14, 15, 17, 19, 25, 36, 51 and 52 continue to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

2. Section 2.101 is amended by adding, in alphabetical order, the definition *Day* to read as follows:

2.101 Definitions.

* * * * *

Day means, unless otherwise specified, a calendar day.

* * * * *

PART 4—ADMINISTRATIVE MATTERS

3. Section 4.601 is amended by redesignating existing paragraph (d) as (e); and adding a new paragraph (d) to read as follows:

4.601 Record requirements.

* * * * *

(d) In addition to the information described in paragraphs (b) and (c) of this section, for procurements in excess of \$25,000, agencies shall be able to access information on the following from the computer file:

- (1) Awards to small disadvantaged businesses using either set-asides or full and open competition.
- (2) Awards to business concerns owned and controlled by women.
- (3) The number of offers received in response to a solicitation.
- (4) Task or delivery order contracts.
- (5) Contracts for the acquisition of commercial items.

* * * * *

PART 5—PUBLICIZING CONTRACT—ACTIONS

4. Section 5.201 is amended by revising paragraph (a) to read as follows:

5.201 General.

(a) As required by the Small Business Act (15 U.S.C. 637(e)) and the Office of Federal Procurement Policy Act (41 U.S.C. 416), agencies shall furnish for publication in the Commerce Business Daily (CBD) notices of proposed

contract actions as specified in paragraph (b) of this section.

* * * * *

5. Section 5.202 is amended at the end of paragraph (a)(13) by removing the word “or”; at the end of paragraph (a)(14) by removing the period and inserting “; or” in its place; and by adding paragraph (a)(15) to read as follows:

5.202 Exceptions.

* * * * *

(a) * * *

(15) The contract action is made under conditions described in 6.302-3 with respect to the services of an expert to support the Federal Government in any current or anticipated litigation or dispute.

* * * * *

6. Section 5.301 is amended at the end of paragraph (b)(6) by removing “or”; at the end of paragraph (b)(7) by removing the period and inserting “; or”; and by adding paragraph (b)(8) to read as follows:

5.301 General.

* * * * *

(b) * * *

(8) The award is for the services of an expert to support the Federal Government in any current or anticipated litigation or dispute pursuant to the exception to full and open competition authorized at 6.302-3.

* * * * *

5.303 [Amended]

7. Section 5.303 is amended in paragraph (b)(2) by removing the citation “15.1001(c)” and inserting “15.1002(c)” in its place.

PART 6—COMPETITION REQUIREMENTS

8. Section 6.202 is amended by revising paragraph (a)(1); at the end of paragraph (a)(2) by removing “or”; at the end of paragraph (a)(3) by removing the period and inserting a semicolon; and adding paragraphs (a)(4) through (a)(6) to read as follows:

6.202 Establishing or maintaining alternative sources.

(a) * * *

(1) Increase or maintain competition and likely result in reduced overall costs for the acquisition, or for any anticipated acquisition;

* * * * *

(4) Ensure the continuous availability of a reliable source of supplies or services;

(5) Satisfy projected needs based on a history of high demand; or

(6) Satisfy a critical need for medical, safety, or emergency supplies.

* * * * *

9. Section 6.302-3 is amended by revising the heading and paragraph (a)(2); and by adding paragraph (b)(3) to read as follows:

6.302-3 Industrial mobilization; engineering, developmental, or research capability; or expert services.

(a) * * *

(2) Full and open competition need not be provided for when it is necessary to award the contract to a particular source or sources in order:

(i) to maintain a facility, producer, manufacturer, or other supplier available for furnishing supplies or services in case of a national emergency or to achieve industrial mobilization,

(ii) to establish or maintain an essential engineering, research, or other nonprofit institution or a federally funded research and development center, or

(iii) to acquire the services of an expert for any current or anticipated litigation or dispute.

(b) * * *

(3) Use of the authority in paragraph (a)(2)(iii) of this section may be appropriate when it is necessary to acquire the services of either—

(i) An expert to use, in any litigation or dispute (including any reasonably foreseeable litigation or dispute) involving the Government in any trial, hearing, or proceeding before any court, administrative tribunal, or agency, whether or not the expert is expected to testify. Examples of such services include, but are not limited to:

(A) Assisting the Government in the analysis, presentation, or defense of any claim or request for adjustment to contract terms and conditions, whether asserted by a contractor or the Government, which is in litigation or dispute, or is anticipated to result in dispute or litigation before any court, administrative tribunal, or agency, or

(B) Participating in any part of an alternative dispute resolution process, including but not limited to evaluators, fact finders, or witnesses, regardless of whether the expert is expected to testify; or

(ii) A neutral person, e.g., mediators or arbitrators, to facilitate the resolution of issues in an alternative dispute resolution process.

* * * * *

10. Section 6.302-5 is amended by revising paragraph (c)(1) and adding paragraph (c)(3) to read as follows:

6.302-5 Authorized or required by statute.

* * * * *

(c) *Limitations.* (1) This authority shall not be used when a provision of law requires an agency to award a new contract to a specified non-Federal Government entity unless the provision of law specifically—

(i) Identifies the entity involved;

(ii) Refers to 10 U.S.C. 2304(j) for armed services acquisitions or section 303(h) of the Federal Property and Administrative Services Act of 1949 for civilian agency acquisitions; and

(iii) States that award to that entity shall be made in contravention of the merit-based selection procedures in 10 U.S.C. 2304(j) or section 303(h) of the Federal Property and Administrative Services Act, as appropriate. However, this limitation does not apply—

(A) When the work provided for in the contract is a continuation of the work performed by the specified entity under a preceding contract; or

(B) To any contract requiring the National Academy of Sciences to investigate, examine, or experiment upon any subject of science or art of significance to an executive agency and to report on those matters to the Congress or any agency of the Federal Government.

* * * * *

(3) The authority in (a)(2)(ii) of this subsection may be used only for purchases of brand-name commercial items for resale through commissaries or other similar facilities. Ordinarily, these purchases will involve articles desired or preferred by customers of the selling activities (but see 6.301(d)).

11. Section 6.304 is amended by revising paragraph (a)(2) to read as follows:

6.304 Approval of the justification.

(a) * * *

(2) For a proposed contract over \$100,000 but not exceeding \$1,000,000, by the competition advocate for the procuring activity designated pursuant to 6.501 or an official described in paragraph (a)(3) or (a)(4) of this section. This authority is not delegable.

* * * * *

PART 14—SEALED BIDDING

12. Section 14.408-1 is amended by revising paragraphs (a)(1) and (d)(2) to read as follows:

14.408-1 General.

(a) * * *

(1) by written or electronic notice,* * *

* * * * *

(d) * * *

(2) Use of the Award portion of SF 33, SF 26, or SF 1447, does not preclude the

additional use of informal documents, including telegrams or electronic transmissions, as notices of awards.

13. Section 14.409-1 is revised to read as follows:

14.409-1 Award of unclassified contracts.

(a)(1) The contracting officer shall as a minimum (subject to any restrictions in Subpart 9.4)—

(i) Notify each unsuccessful bidder in writing or electronically within three days after contract award, that its bid was not accepted. "Day," for purposes of the notification process, means calendar day, except that the period will run until a day which is not a Saturday, Sunday, or legal holiday;

(ii) Extend appreciation for the interest the unsuccessful bidder has shown in submitting a bid; and

(iii) When award is made to other than a low bidder, state the reason for rejection in the notice to each of the unsuccessful low bidders.

(2) For acquisitions subject to the Trade Agreements Act or the North American Free Trade Agreement (NAFTA) Implementation Act (see 25.405(e)), agencies shall include in notices given unsuccessful bidders from designated or NAFTA countries—

(i) The dollar amount of the successful bid; and

(ii) The name and address of the successful bidder.

(b) Information included in paragraph (a)(2) of this subsection shall be provided to any unsuccessful bidder upon request except when multiple awards have been made and furnishing information on the successful bids would require so much work as to interfere with normal operations of the contracting office. In such circumstances, only information concerning location of the abstract of offers need be given.

(c) When a request is received concerning an unclassified invitation from an inquirer who is neither a bidder nor a representative of a bidder, the contracting officer should make every effort to furnish the names of successful bidders and, if requested, the prices at which awards were made. However, when such requests require so much work as to interfere with the normal operations of the contracting office, the inquirer will be advised where a copy of the abstract of offers may be seen.

(d) Requests for records shall be governed by agency regulations implementing Subpart 24.2.

14.503-1 [Amended]

14. Section 14.503-1 is amended at the end of paragraph (g) by removing the phrase "(see 15.1003)" and inserting "(see 15.1004)" in its place.

PART 15—CONTRACTING BY NEGOTIATION

15.406-5 [Amended]

15. Section 15.406-5 is amended in paragraph (c) by inserting the word "significant" after the word "all"; and by removing the phrase "(see 15.605(e) and (f))" and inserting in its place "(see 15.605(d) and (e))".

16. Section 15.407 is amended by revising paragraph (d)(4) to read as follows:

15.407 Solicitation provisions.

* * * * *

(d) * * *

(4) Insert in RFP's the provision at 52.215-16, Contract Award.

(i) If the RFP is for construction, the contracting officer shall use the provision with its Alternate I. If awards are to be made without discussions, also use Alternate II.

(ii) If the contracting officer intends to evaluate offers and make award without discussions, use the basic provision with its Alternate II.

* * * * *

15.412 [Amended]

17. Section 15.412 is amended in the second sentence of paragraph (d) by removing the citation "15.1001(c)(1)" and inserting "15.1002(c)(1)" in its place.

18. Section 15.605 is amended by revising the heading, and paragraphs (a), (b)(1) introductory text, (b)(1)(iii), (b)(2), and (d) to read as follows:

15.605 Evaluation factors and subfactors.

(a) The factors and subfactors that will be considered in evaluating proposals shall be tailored to each acquisition and shall include only those factors that will have an impact on the source selection decision.

(b)(1) The evaluation factors and subfactors that apply to an acquisition and the relative importance of those factors and subfactors are within the broad discretion of agency acquisition officials except that—

* * * * *

(iii) Quality shall be addressed in every source selection through inclusion in one or more of the non-cost evaluation factors or subfactors, such as past performance, technical excellence, management capability, personnel qualifications, prior experience, and schedule compliance.

* * * * *

(2) Any other relevant factors or subfactors, such as cost realism, may also be included.

* * * * *

(d)(1) The solicitation should be structured to provide for the selection of the source whose proposal offers the greatest value to the Government in terms of performance, risk management, cost or price, and other factors. At a minimum, the solicitation shall clearly state the significant evaluation factors, such as cost or price, cost or price-related factors, past performance and other non-cost or non-price-related factors, and any significant subfactors, that will be considered in making the source selection, and their relative importance (see 15.406-5(c)). The solicitation shall inform offerors of minimum requirements that apply to particular evaluation factors and significant subfactors. Further, the solicitation shall state whether all evaluation factors other than cost or price, when combined, are—

(i) Significantly more important than cost or price;

(ii) Approximately equal to cost or price; or

(iii) Significantly less important than cost or price.

(2) The solicitation may elaborate on the relative importance of factors and subfactors at the discretion of the contracting officer. Agencies may elect to assign numerical weights to evaluation factors and employ those weights when evaluating proposals. Numerical weights need not be disclosed in solicitations; however, nothing precludes an agency from disclosing the weights on a case-by-case basis. The solicitation may state that award will be made to the offeror that meets the solicitation's minimum criteria for acceptable award at the lowest cost or price.

* * * * *

15.609 [Amended]

19. Section 15.609 is amended in paragraph (c) by removing "(see 15.1001(b))" and inserting "(see 15.1002(b))" in its place.

20. Section 15.610 is amended by revising paragraphs (a) and (b) to read as follows:

15.610 Written or oral discussion.

(a) The requirement in paragraph (b) of this section for written or oral discussion need not be applied in acquisitions—

(1) In which prices are fixed by law or regulation;

(2) Of the set-aside portion of a partial set-aside; or

(3) In which the solicitation notified all offerors that the Government intends to evaluate proposals and make award without discussion, unless the contracting officer determines that

discussions (other than communications conducted for the purpose of minor clarification) are considered necessary (see 15.407(d)(4)). Once the Government states its intent to award without discussion, the rationale for reversal of this decision shall be documented in the contract file.

(b) Except as provided in paragraph (a) of this section, the contracting officer shall conduct written or oral discussions with all responsible offerors who submit proposals within the competitive range. The content and extent of the discussions is a matter of the contracting officer's judgment, based on the particular facts of each acquisition (but see paragraphs (c) and (d) of this section).

* * * * *

21. Section 15.612 is amended by revising paragraph (f) to read as follows:

15.612 Formal source selection.

* * * * *

(f) *Postaward notices and debriefings.* See 15.1002(c) and 15.1004.

15.1001 through 15.1005 [Redesignated as 15.1002 through 15.1006]

22. Sections 15.1001 through 15.1005 are redesignated as 15.1002 through 15.1006, respectively; and a new 15.1001 is added to read as follows:

15.1001 General.

This subpart applies to the use of competitive proposals, as described in 6.102(b), and a combination of competitive procedures, as described in 6.102(c). To the extent practicable, however, the procedures and intent of this subpart, with reasonable modification, should be followed for acquisitions described in 6.102(d): broad agency announcements, small business innovation research contracts, and architect-engineer contracts. However, they do not apply to multiple award schedules, as described in 6.102(d)(3).

23. Newly designated section 15.1002 is amended by revising paragraph (a), and the introductory text of paragraph (b)(2); by removing paragraph (c)(2) and redesignating paragraph (c)(3) as (c)(2); and by amending the newly designated paragraph (c)(2) by removing "15.1001(c)(1)(i)" and inserting "15.1002(c)(1)(i)". The revised text reads as follows:

15.1002 Notifications to unsuccessful offerors.

(a) *General.* Within three days after the date of contract award, the contracting officer shall notify, in writing or electronically, each offeror whose proposal is determined to be

unacceptable or whose offer is not selected for award. "Day," for purposes of the notification process, means calendar day, except that the period will run until a day which is not a Saturday, Sunday, or legal holiday.

(b) * * *

(2) In a small business set-aside (see Subpart 19.5), upon completion of negotiations and determinations of responsibility, but prior to award, the contracting officer shall notify each unsuccessful offeror in writing or electronically of the name and location of the apparent successful offeror. The notice shall also state that:

* * * * *

24. Newly designated section 15.1003 is amended by revising the first sentence to read as follows:

15.1003 Notification to successful offeror.

The contracting officer shall award a contract with reasonable promptness to the successful offeror (selected in accordance with 15.611(d)) by transmitting written or electronic notice of the award to that offeror (but see 15.608(b)). * * *

25. Newly designated section 15.1004 is revised to read as follows:

15.1004 Debriefing of offerors.

(a) When a contract is awarded on the basis of competitive proposals, an offeror, upon its written request received by the agency within three days after the date on which that offeror has received notice of contract award, shall be debriefed and furnished the basis for the selection decision and contract award. When practicable, debriefing requests received more than three days after the offeror receives notice of contract award shall be accommodated. However, accommodating such untimely debriefing requests does not extend the time within which suspension of performance can be required, as this accommodation is not a "required debriefing" as described in FAR Part 33. To the maximum extent practicable, the debriefing should occur within five days after receipt of the written request. "Day," for purposes of the debriefing process, means calendar day, except that the period will run until a day which is not a Saturday, Sunday, or legal holiday.

(b) Debriefings of successful and unsuccessful offerors may be done orally, in writing, by electronic means, or any other method acceptable to the contracting officer.

(c) The contracting officer should normally chair any debriefing session held. Individuals actually responsible for the evaluations shall provide

support. If the contracting officer is unavailable, another agency representative may be designated by the contracting officer on a case-by-case basis, with the approval of an individual a level above the contracting officer.

(d) At a minimum, the debriefing information shall include—

(1) The Government's evaluation of the significant weaknesses or deficiencies in the offeror's proposal, if applicable;

(2) The overall evaluated cost or price and technical rating, if applicable, of the successful offeror and the debriefed offeror;

(3) The overall ranking of all offerors when any ranking was developed by the agency during the source selection;

(4) A summary of the rationale for award;

(5) For acquisitions of commercial end items, the make and model of the item to be delivered by the successful offeror; and

(6) Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed.

(e) The debriefing shall not include point-by-point comparisons of the debriefed offeror's proposal with those of other offerors. Moreover, debriefing shall not reveal any information exempt from release under the Freedom of Information Act including—

(1) Trade secrets;

(2) Privileged or confidential manufacturing processes and techniques;

(3) Commercial and financial information that is privileged or confidential, including cost breakdowns, profit, indirect cost rates, and similar information; and

(4) The names of individuals providing reference information about an offeror's past performance.

(f) The contracting officer shall include an official summary of the debriefing in the contract file.

(g) If, within one year of contract award, a protest causes the agency to issue either a new solicitation or a new request for best and final offers on the protested contract award, the agency shall make available to all prospective offerors—

(1) Information provided in any debriefings conducted on the original award about the successful offeror's proposal; and

(2) Other nonproprietary information that would have been provided to the original offerors.

PART 17—SPECIAL CONTRACTING METHODS

26. Section 17.202 is amended by revising paragraph (a); and at the end of paragraph (b)(1)(ii) by removing ";" or" and inserting a period in its place. The revised text reads as follows:

17.202 Use of options.

(a) Subject to the limitations of paragraphs (b) and (c) of this section, for both sealed bidding and contracting by negotiation, the contracting officer may include options in contracts when it is in the Government's interest. When using sealed bidding, the contracting officer shall make a written determination that there is a reasonable likelihood that the options will be exercised before including the provision at 52.217-5, Evaluation of Options, in the solicitation. (See 17.207(f) with regard to the exercise of options.)

* * * * *

27. Section 17.208 is amended by revising paragraphs (b) and (c)(4) to read as follows:

17.208 Solicitation provisions and contract clauses.

* * * * *

(b) The contracting officer shall insert a provision substantially the same as the provision at 52.217-4, Evaluation of Options Exercised at Time of Contract Award, in solicitations when the solicitation includes an option clause, the contracting officer has determined that there is a reasonable likelihood that the option will be exercised, and the option may be exercised at the time of contract award.

(c) * * *

(4) The contracting officer has determined that there is a reasonable likelihood that the option will be exercised. For sealed bids, the determination shall be in writing.

* * * * *

PART 19—SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS CONCERNS

19.302 [Amended]

28. Section 19.302 is amended in paragraph (d)(1) introductory text by removing the word "below" and inserting "of this section" in its place; and removing "(see 15.1001(b)(2))" and inserting "(see 15.1002(b)(2))" in its place.

19.501 [Amended]

29. Section 19.501 is amended in the second sentence of paragraphs (h)(1) and (h)(2) by removing the citation "15.1001(b)(2)" and inserting "15.1002(b)(2) in their place.

PART 25—FOREIGN ACQUISITION

30. Section 25.405 is amended by revising paragraph (e) to read as follows:

25.405 Procedures.

* * * * *

(e) Within three days after a contract award for an eligible product, agencies shall give unsuccessful offerors from designated or NAFTA countries notice in accordance with 14.409-1 and 15.1002. "Day," for purposes of the notification process, means calendar day, except that the period will run until a day which is not a Saturday, Sunday, or legal holiday.

PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

31. Section 36.304 is amended by revising the introductory text to read as follows:

36.304 Notice of award.

When a notice of award is issued, it shall be done in writing or electronically, shall contain information required by 14.408, and shall—

* * * * *

32. Section 36.607 is amended by designating the existing text as paragraph (a) and adding paragraph (b) to read as follows:

36.607 Release of information on firm selection.

* * * * *

(b) Debriefings of successful and unsuccessful firms will be held after final selection has taken place and will be conducted, to the extent practicable, in accordance with 15.1004 (b) through (g). Note that 15.1004 (d)(2) through (d)(5) does not apply to architect-engineer contracts.

PART 51—USE OF GOVERNMENT SOURCES BY CONTRACTORS

33. Section 51.101 is amended at the end of paragraph (a)(1) by removing "or" and at the end of paragraph (a)(2) by removing the period and inserting "; or" and by adding paragraph (a)(3) to read as follows:

51.101 Policy.

(a) * * *

(3) A contract under the Javits-Wagner-O'Day Act (41 U.S.C. 46, *et seq.*) if:

(i) the nonprofit agency requesting use of the supplies and services is providing a commodity or service to the Federal Government, and

(ii) the supplies or services received are directly used in making or providing a commodity or service, approved by the Committee for Purchase From

People Who Are Blind or Severely Disabled, to the Federal Government (See Subpart 8.7).

* * * * *

34. Section 51.102 is amended by revising the second sentence of paragraph (a) introductory text to read as follows:

51.102 Authorization to use Government supply sources.

(a) * * * Except for findings under 51.101(a)(3), the determination shall be based on, but not limited to, considerations of the following factors:

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

35. Section 52.215-16 is amended by revising the date in the provision heading and by revising paragraph (c); by adding paragraph (h); by removing Alternate II and redesignating Alternate III as Alternate II; and revising Alternates I and II to read as follows:

52.215-16 Contract Award.

* * * * *

Contract Award (Oct 1995)

* * * * *

(c) The Government intends to evaluate proposals and award a contract after conducting written or oral discussions with all responsible offerors whose proposals have been determined to be within the competitive range. However, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint.

* * * * *

(h) The Government may disclose the following information in post-award debriefings to other offerors: (1) the overall evaluated cost or price and technical rating of the successful offeror; (2) the overall ranking of all offerors, when any ranking was developed by the agency during source selection; (3) a summary of the rationale for award; and (4) for acquisitions of commercial end items, the make and model of the item to be delivered by the successful offeror. (End of provision)

Alternate I (OCT 1995). As prescribed in 15.407(d)(4)(i), substitute the following paragraph (d) for paragraph (d) of the basic provision:

(d) The Government may accept any item or combination of items, unless doing so is precluded by a restrictive limitation in the solicitation or offer.

Alternate II (OCT 1995). As prescribed in 15.407(d)(4)(ii), substitute the following paragraph (c) for paragraph (c) of the basic provision:

(c) The Government intends to evaluate proposals and award a contract without discussions with offerors (except communications conducted for the purpose of minor clarification). Therefore, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint.

However, the Government reserves the right to conduct discussions if later determined by the Contracting Officer to be necessary.

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48 CFR Parts 31, 42, and 52

[FAC 90-31; FAR Case 94-751; Item III]

RIN 9000-AG20

Federal Acquisition Regulation; Penalties on Unallowable Indirect Costs

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

ACTION: Final rule.

SUMMARY: This final rule is issued pursuant to the Federal Acquisition Streamlining Act of 1994 to amend the Federal Acquisition Regulation (FAR) to implement the requirements for penalties for unallowable costs. This regulatory action was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

EFFECTIVE DATE: October 1, 1995.

FOR FURTHER INFORMATION CONTACT: Mr. Clarence Belton, Cost Principles Team Leader, at (703) 602-2357 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAC 90-31, FAR case 94-751.

SUPPLEMENTARY INFORMATION:

A. Background

The Federal Acquisition Streamlining Act of 1994, Pub. L. 103-355 (the Act), provides authorities that streamline the acquisition process and minimize burdensome Government-unique requirements. Major changes that can be expected in the acquisition process as a result of the Act's implementation include changes in the areas of Commercial Item Acquisition, the Truth in Negotiations Act, and introduction of the Federal Acquisition Computer Network (FACNET).

Sections 2101 and 2151 of the Federal Acquisition Streamlining Act of 1994 change the contract value threshold for assessment of penalties on unallowable costs from \$100,000 to \$500,000 and expand the coverage from the Department of Defense to all executive agencies. This final rule makes the required changes. With the exception of the threshold value, the penalty