

PART 17—SPECIAL CONTRACTING METHODS**17.104 [Amended]**

10. Amend section 17.104 in the second sentence of paragraph (b) by removing the words “contracting action” and adding “contract” in their place.

11. Amend section 17.503 by revising the introductory text of paragraph (b) to read as follows:

17.503 Determinations and findings requirements.

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(b) If the Economy Act order requires contract action by the servicing agency, the D&F must also include a statement that at least one of the following circumstances applies:

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PART 19—SMALL BUSINESS PROGRAMS**19.302 [Amended]**

12. Amend section 19.302 in the first sentence of paragraph (h)(4) by removing the words “contracting action” and adding “contract action” in their place.

13. Amend section 19.505 by revising paragraph (c) to read as follows:

19.505 Rejecting Small Business Administration recommendations.

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(c) If the head of the contracting activity agrees that the contracting officer's rejection was appropriate—

(1) Within 1 working day, the SBA procurement center representative may request the contracting officer to suspend action on the acquisition until the SBA Administrator appeals to the agency head (see paragraph (f) of this section); and

(2) The SBA must be allowed 15 working days after making such a written request, within which the Administrator of SBA—

(i) May appeal to the Secretary of the Department concerned; and

(ii) Must notify the contracting officer whether the further appeal has, in fact, been taken. If notification is not received by the contracting officer within the 15-day period, it is deemed that the SBA request to suspend the contract action has been withdrawn and that an appeal to the Secretary was not taken.

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PART 32—CONTRACT FINANCING

14. Revise the introductory paragraph of section 32.000 to read as follows:

32.000 Scope of part.

This part prescribes policies and procedures for contract financing and other payment matters. This part addresses—

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15. Amend section 32.001 by revising the definition “Contract action” to read as follows:

32.001 Definitions.

* * * * *

Contract action means an action resulting in a contract, as defined in subpart 2.1, including actions for additional supplies or services outside the existing contract scope, but not including actions that are within the scope and under the terms of the existing contract, such as contract modifications issued pursuant to the Changes clause, or funding and other administrative changes.

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32.703–2 [Amended]

16. Amend section 32.703–2 in the first sentence of the introductory text of paragraph (a) by removing the words “contracting action” and adding “contract action” in their place; by removing the semicolon after the word “available” and adding a comma in its place; and by removing the comma after the word “provided”.

17. Amend section 32.705–1 by revising paragraph (a) to read as follows:

32.705–1 Clauses for contracting in advance of funds.

(a) Insert the clause at 52.232–18, Availability of Funds, in solicitations and contracts if the contract will be chargeable to funds of the new fiscal year and the contract action will be initiated before the funds are available.

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PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

18. Amend section 52.232–18 by revising the introductory text to read as follows:

52.232–18 Availability of Funds.

As prescribed in 32.705–1(a), insert the following clause:

* * * * *

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DEPARTMENT OF DEFENSE**GENERAL SERVICES ADMINISTRATION****NATIONAL AERONAUTICS AND SPACE ADMINISTRATION****48 CFR Parts 2, 3, 14, 15, 28, 35, and 52**

[FAC 2001–06; FAR Case 2000–403; Item III]

RIN 9000–A184

Federal Acquisition Regulation; Definitions for Sealed Bid and Negotiated Procurements

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed to amend the Federal Acquisition Regulation (FAR) to provide consistent definitions for sealed bids and negotiated procurements.

DATES: *Effective Date:* April 4, 2002.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Ralph De Stefano, Procurement Analyst, at (202) 501–1758. Please cite FAC 2001–06, FAR case 2000–403.

SUPPLEMENTARY INFORMATION:**A. Background**

The rule clarifies definitions that are used in the FAR for sealed bid and negotiated procurements. The rule—

- Moves the definitions of “bid sample” and “descriptive literature” from FAR part 14 to FAR 2.101 because the definitions apply to more than one FAR part;

- Amends those definitions and the definition of “offer” in accordance with plain language guidelines;

- Revises applicable provisions in FAR part 52 to conform with the new definitions;

- Adds a new definition for “solicitation” at FAR 2.101; and
- Provides definitions for “bid” and “bidder” in FAR part 28 because, as used in that part, the terms address sealed bid and negotiated acquisitions.

We also reviewed every instance where the terms “offeror,” “prospective offeror,” and “potential offeror” are used in the FAR. The rule clarifies

terminology used in FAR 15.201(f), 15.609(e), and 35.007(g). Where we mean an entity that is actively seeking a contract, we use the term "prospective offeror." However, those cites describe processes that are set up to ensure competition. Therefore, any interested party is able to participate, including parties that the Government has not yet identified. Therefore, the rule uses the more general term "potential offeror."

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 65 FR 42852, July 11, 2000. Four respondents submitted comments on the proposed rule. The Councils considered all comments in the development of the final rule. A summary of the substantive comments is provided:

- *Comment:* Under 52.214-20, paragraph (c), change the second sentence to read "The Government will reject the bid when the sample fails" for clarity.

Response: Accepted.

- *Comment:* Under FAR 2.101, the definition of an "offer" does not include a "quotation." The definition of a "solicitation" includes a "quotation." Both definitions should be consistent.

Response: Not accepted. The definition of "offer" is not all-inclusive. It does not include "quotations." A quotation is not an offer and, consequently, cannot be accepted by the Government to form a binding contract. See FAR 13.004.

- *Comment:* The proposed language under FAR 14.202-5(e) should cite FAR 14.202-4(f) in lieu of (g).

Response: Accepted.

This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The 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, while we have made changes for clarity and consistency, we have not substantively changed procedures for award and administration of contracts.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require

Office of Management and Budget approval under 44 U.S.C. 3501, *et seq.*

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

Government procurement.

Dated: March 6, 2002.

Al Matera,

Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA amend 48 CFR Parts 2, 3, 14, 15, 28, 35, and 52 as set forth below:

1. The authority citation for 48 CFR Parts 2, 3, 14, 15, 28, 35, and 52 continues to read as follows:

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

PART 2—DEFINITIONS OF WORDS AND TERMS

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

2.101 Definitions.

* * * * *

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

* * * * *

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

* * * * *

Offer means a response to a solicitation that, if accepted, would bind the offeror to perform the resultant contract. Responses to invitations for bids (sealed bidding) are offers called "bids" or "sealed bids"; responses to requests for proposals (negotiation) are offers called "proposals"; however, responses to requests for quotations (simplified acquisition) are "quotations", not offers. For unsolicited proposals, see subpart 15.6.

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Solicitation means any request to submit offers or quotations to the Government. Solicitations under sealed bid procedures are called "invitations for bids." *Solicitations* under negotiated

procedures are called "requests for proposals." Solicitations under simplified acquisition procedures may require submission of either a quotation or an offer.

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PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

3. Amend section 3.302 by revising the definition "Line item" to read as follows:

3.302 Definitions.

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

PART 14—SEALED BIDDING

4. Amend section 14.201-6 by—
a. Revising paragraph (a);
b. Removing paragraphs (b)(1) and (b)(2) and redesignating paragraphs (b)(3) and (b)(4) as (b)(1) and (b)(2);
c. Revising the introductory text of paragraph (o)(2) and paragraph (o)(3); and
d. Removing from paragraph (p)(3) "14.202-5(e)(2)" and adding "14.202-5(d)(2)" in its place. The revised text reads as follows:

14.201-6 Solicitation provisions.

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

* * * * *

(o)(1) * * *

(2) If it appears that the conditions in 14.202-4(e)(1) will apply and the contracting officer anticipates granting waivers and—

* * * * *

(3) See 14.202-4(e)(2) regarding waiving the requirement for all bidders.

* * * * *

14.202-4 [Amended]

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

6. Revise section 14.202-5 to read as follows:

14.202-5 Descriptive literature.

(a) *Policy.* Contracting officers must not require bidders to furnish descriptive literature unless it is needed before award to determine whether the

products offered meet the specification and to establish exactly what the bidder proposes to furnish.

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

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

(i) What descriptive literature the bidders must furnish;

(ii) The purpose for requiring the literature;

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

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

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

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

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

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

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

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

(e) *Unsolicited descriptive literature.* If descriptive literature is furnished when it is not required by the invitation for bids, the procedures set forth in 14.202–4(f) must be followed.

14.404–4 [Amended]

7. Amend section 14.404–4 in the first sentence by removing “14.202–5(a)” and adding “2.101” in its place; and in

the last sentence by removing “14.202–5(f)” and adding “14.202–5(e)” in its place.

PART 15—CONTRACTING BY NEGOTIATION

8. Amend section 15.201 by removing the undesignated paragraph at the end of the section and revising paragraph (f) to read as follows:

15.201 Exchanges with industry before receipt of proposals.

* * * * *

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

9. Amend section 15.609 by revising paragraph (e) to read as follows:

15.609 Limited use of data.

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

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PART 28—BONDS AND INSURANCE

10. Revise section 28.000 to read as follows:

28.000 Scope of part.

This part prescribes requirements for obtaining financial protection against losses under contracts that result from the use of the sealed bid or negotiated methods. It covers bid guarantees, bonds, alternative payment protections, security for bonds, and insurance.

11. Amend section 28.001 by adding, in alphabetical order, the definitions “Bid” and “Bidder” to read as follows:

28.001 Definitions.

* * * * *

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

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

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PART 35—RESEARCH AND DEVELOPMENT CONTRACTING

12. Amend section 35.007 by revising paragraph (g) to read as follows:

35.007 Solicitations.

* * * * *

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

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PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.214–1 [Reserved]

13. Remove and reserve section 52.214–1.

52.214–3 [Amended]

14. Amend section 52.214–3 in the prescription by removing “14.201–6(b)(3)” and adding “14.201–6(b)(1)” in its place.

52.214–4 [Amended]

15. Amend section 52.214–4 in the prescription by removing “14.201–6(b)(4)” and adding “14.201–6(b)(2)” in its place.

16. Amend section 52.214–20 by revising the introductory paragraph, date of the provision, and paragraphs

(a), (b), and the introductory text of paragraph (c); and by removing from Alternates I and II "14.202-4(f)(1)" and adding "14.202-4(e)(1)" in its place. The revised text reads as follows:

52.214-20 Bid Samples.

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

Bid Samples (Apr 2002)

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

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

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

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(End of provision)

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

52.214-21 Descriptive Literature.

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

Descriptive Literature (Apr 2002)

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

(b) Descriptive literature is required to establish, for the purpose of evaluation and award, details of the product offered that are specified elsewhere in the solicitation and pertain to significant elements such as—

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

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

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

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

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

(End of provision)

Alternate I (Apr 2002). As prescribed in 14.201-6(p)(2), add the following paragraphs (f) and (g) to the basic provision:

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

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

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

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 3, 4, 9, 15, and 52

[FAC 2001-06; FAR Case 1998-024; Item IV]

RIN 9000-AI61

Federal Acquisition Regulation; Procurement Integrity Rewrite

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council

(Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to rewrite procurement integrity coverage in plain language.

DATES: *Effective Date:* April 4, 2002.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Ralph De Stefano, Procurement Analyst, at (202) 501-1758. Please cite FAC 2001-06, FAR case 1998-024.

SUPPLEMENTARY INFORMATION:

A. Background

Section 27 of the Office of Federal Procurement Policy Act (41 U.S.C. 423) is more commonly referred to as the Procurement Integrity Act (hereinafter referred to as the Act). FAR 3.104 implements prohibitions, restrictions, and other requirements of the Act that are placed on certain agency officials that participate in Federal agency procurements.

Other statutes and regulations also govern the conduct of Government employees. In particular, the Office of Government Ethics regulations provide interpretive guidance on the prohibitions in 18 U.S.C. 207 and 208 that also apply to Government employees that participate in procurement activities during the conduct of a Federal agency procurement. While FAR 3.104 does not implement these other statutes and regulations, it is very important for agency employees to be aware, not only of the prohibitions and restrictions in the Act, but also those contained in other statutes and regulations that deal with the same or related prohibited conduct. Criminal and administrative penalties can result if an employee violates the restrictions or otherwise engages in prohibited conduct.

It became apparent that we could improve FAR 3.104 by reorganizing and simplifying the text. Moreover, we clarify 3.104 to alert agency officials that even if their participation does not meet the definition in FAR 3.104 of participating personally and substantially, they are precluded from participating in a Federal agency procurement if they engage in certain conduct otherwise prohibited by other statutes and regulations. We added this guidance in FAR 3.104-2(b), 3.104-3(c), and 3.104-5(a) to alert these agency officials that they should seek advice from agency ethics officials before engaging in certain activities that could have serious consequences, including