

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Part 15**

[FAC 2005–67; FAR Case 2012–018; Item VI; Docket 2012–0018, Sequence 1]

RIN 9000–AM27

**Federal Acquisition Regulation; Price
Analysis Techniques**

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to clarify and give a precise reference in the use of a price analysis technique in order to establish a fair and reasonable price.

DATES: *Effective Date:* July 22, 2013.

FOR FURTHER INFORMATION CONTACT: Mr. Edward N. Chambers, Procurement Analyst, at 202–501–3221, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755. Please cite FAC 2005–67, FAR Case 2012–018.

SUPPLEMENTARY INFORMATION:**I. Background**

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 77 FR 40552 on July 10, 2012, to clarify and pinpoint a reference used in FAR 15.404–1(b)(2)(i). FAR 15.404–1(b)(2) addresses various price analysis techniques and procedures that the Government may use to ensure a fair and reasonable price. One of those techniques at FAR 15.404–1(b)(2)(i) describes the comparison of proposed prices received in response to a solicitation as an example of such techniques and procedures. In its discussion, FAR 15.404–1(b)(2)(i) references 15.403–1(c)(1), which sets forth the various standards of adequate price competition (for exceptions from certified cost or pricing data requirements). However, only FAR 15.403–1(c)(1)(i) (rather than all of 15.403–1(c)(1)) actually addresses the situation when two or more responsible offerors, competing independently, submit priced offers that satisfy the Government's expressed requirement. Since FAR 15.404–1(b)(2)(i) deals only

with the price analysis technique of comparing proposed prices received in response to a solicitation, the reference in this section is more appropriately identified as 15.403–1(c)(1)(i), which is more precise (and addresses adequate price competition when proposed prices are received from multiple offerors), in lieu of the existing reference, 15.403–1(c)(1), which is more generalized (and addresses various standards for adequate price competition, including the receipt of proposed prices from multiple offerors).

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Summary of Significant Changes

FAR 15.404–1(b)(2)(i) is amended to change the reference in this FAR section from 15.403–1(c)(1) to 15.403–1(c)(1)(i). This change ensures that the revised reference is more precise and directly related to the topic covered in 15.404–1(b)(2)(i).

Based on a review of the public comments, discussed below, the Councils have concluded that no change to the proposed rule is necessary.

B. Analysis of Public Comments

The Regulatory Secretariat received responses from two respondents to the proposed rule, which are discussed below:

1. Determination That a Price Is Fair and Reasonable

Comment: One respondent believed that removing the reference to FAR 15.403–1(c)(1) and replacing it with 15.403–1(c)(1)(i) would mean that only one of the three prongs of the definition of adequate price competition could be used to establish that a price is fair and reasonable.

Response: FAR 15.404–1(b)(2) delineates the various price analysis techniques to ensure a fair and reasonable price; 15.404–1(b)(2)(i) describes one of those price analysis techniques, the comparison of proposed prices received in response to a solicitation, and refers to 15.403–1(c)(1) therein. The current reference (to FAR 15.403–1(c)(1)) in this section (15.404–1(b)(2)(i)) was too broad; therefore, this rule changes this reference to 15.403–1(c)(1)(i), which precisely aligns the price analysis technique of

comparing multiple proposed prices received in response to a solicitation described in 15.404–1(b)(2)(i) with the adequate price competition standard (for exceptions from certified cost or pricing data requirements) of comparing proposed prices submitted by multiple independent offerors. The other two alternative standards for establishing adequate price competition within the generalized reference FAR 15.403–1(c)(1) (for exceptions from certified cost or pricing data requirements) at 15.403–1(c)(1)(ii) and (iii) do not involve any comparison of proposed prices submitted by multiple offerors. Furthermore, it was illogical to rely on the other two alternative standards of adequate price competition (for exceptions from certified cost or pricing data requirements at FAR 15.403–1(c)(1)(ii) and (iii)) to determine a fair and reasonable price using price analysis techniques and procedures (per the prescription at 15.404–1(b)(2)(i)). This is because the determination that the price is fair and reasonable itself is required for these two alternative standards at FAR 15.403–1(c)(1)(ii) and (iii) in order to determine that adequate price competition exists. These two alternative standards of adequate price competition can be used to meet the exceptions from certified cost or pricing data requirements, but only after some form of cost or price analysis has been applied to determine that the price is fair and reasonable; *i.e.*, these two alternative standards of adequate price competition are insufficient by themselves to be used to establish fair and reasonable prices in accordance with price analysis techniques and procedures (per FAR 15.404–1(b)(2)).

2. Justification for Changing FAR Price Analysis Techniques

Comment: One respondent stated that no justification has been provided to support this proposed change to the FAR price analysis techniques. The respondent stated they did not know what supposed problem the proposed rule is intended to address.

Response: The Councils note that this rule does not change the availability of the various price analysis techniques available to the contracting officer. The current FAR reference (to 15.403–1(c)(1)) is a FAR section that discusses various standards for adequate price competition (for exceptions from certified cost or pricing data requirements), including the price analysis technique of comparing two or more proposed prices. The rule simply pinpoints the reference associated with the price analysis technique of comparing proposed prices (described at

15.404–1(b)(2)(i) for determining a fair and reasonable price) with the FAR section (15.403–1(c)(1)(i)) that discusses the comparison of proposed prices submitted by two or more responsible offerors (for determining adequate price competition, one of the standards for exception from certified cost or pricing data requirements). Additionally, it eliminates a possible inconsistency. The current reference (to FAR 15.403–1(c)(1)) in the discussion on price analysis techniques to ensure a fair and reasonable price (at 15.404–1(b)(2)(i)) could be interpreted to mean that the other two alternative standards for adequate price competition (for exceptions from certified cost or pricing data requirements described at 15.403–1(c)(1)(ii) and (iii)) could be used to determine a fair and reasonable price, when, in fact, they cannot. See response to Comment 1, Determination that a price is fair and reasonable.

3. The Promotion of Competition

Comment: One respondent believed that the proposed rule would discourage contracting officers from promoting competition.

Response: This rule does not discourage contracting officers from promoting competition. 10 U.S.C. 2304 and 41 U.S.C. 3301 require, with certain limited exceptions, that contracting officers shall promote and provide for full and open competition in soliciting offers and awarding Government contracts (see FAR 6.101). This rule has no effect on those statutory requirements. Furthermore, there is great emphasis within the Government on obtaining competition, because competition generally results in cost savings to the Government.

4. Expansion of Cost or Pricing Data Requests

Comment: Although one respondent acknowledged that this rule does not alter the current FAR requirements regarding the requesting of certified cost or pricing data, the respondent believed that this FAR change will inevitably lead to contracting officers requesting data other than certified cost or pricing data for a greater number of procurements. According to the respondent, this will impose substantial costs on prospective offerors who will be forced to compile comprehensive cost or pricing data to meet the Government's expansive definition of that term. Compiling these data will also be time consuming which will delay procurements. The respondent also stated that there is no reasonable basis to revert to the broad requirements for submission of cost or pricing data that

existed prior to the statutory reforms of the 1990s, including the Federal Acquisition Streamlining Act of 1994.

Response: This rule should not impact the requesting of data other than certified cost or pricing data. FAR 15.403–1(c)(1)(ii) and (iii) already requires determination that the price is reasonable in order for adequate price competition to exist. According to the pricing policy at 15.402, which remains unchanged, contracting officers are directed to obtain only the minimum amount of data necessary to establish a fair and reasonable price, and are directed at FAR 15.403–3(b) to obtain any necessary additional data from sources other than the offeror to the maximum extent practicable.

5. Significant Regulatory Action

Comment: One respondent stated that this proposed rule is a significant regulatory action and should have been subject to review by the Office of Information and Regulatory Affairs (OIRA). The respondent stated that the proposed rule will have an annual effect on the economy of \$100 million or will adversely affect a sector of the economy in a material way. The respondent believed that by indicating that the proposed rule merely “clarifies” FAR 15.404–1(b)(2)(i), the Councils are subverting the OFPP Act requirements to solicit and provide an opportunity for public comment. The Councils should issue another **Federal Register** notice that explains the nature and effect of the proposed changes that reasonably solicits public comments on those changes.

Response: The Councils met the requirements of the OFPP Act by publishing the proposed rule and its supporting rationale in the **Federal Register** for public comment. Furthermore, DoD, GSA, and NASA submit all FAR rules to OIRA for clearance to publish. OIRA determined that the rule was not a significant rule and cleared it for publication without subjecting it to the formal coordination and review under section 6(b) of E.O. 12866. OIRA also concurred that this is not a major rule under 5 U.S.C. 804.

6. Distinction Between Adequate Competition and Adequate Price Competition

Comment: One respondent commented that a reasonableness determination and comparison of prices based upon two or more offers are two different things that require a distinction. The respondent further stated that a price found reasonable is not suitable in all cases to be used for comparison and that this was an

opportunity for the FAR to make explicit such a distinction. The respondent recommended that adequate competition be distinguished from adequate price competition.

Response: The Councils take no position on this comment because it is outside the scope of this case, which was limited to clarifying a FAR reference relative to a particular price analysis technique.

III. Executive Orders 12866 and 13563

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

IV. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this final rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* because this rule merely clarifies and pinpoints the reference at FAR 15.404–1(b)(2)(i), a discussion on the price analysis technique of comparing two or more proposed prices received in response to the solicitation in order to establish a fair and reasonable price. The original, more generalized reference (to FAR 15.403–1(c)(1)), which describes various standards for adequate price competition (for exceptions from certified cost or pricing data requirements, including comparing proposals from multiple offerors), is changed to the more precise reference, 15.403–1(c)(1)(i), which describes the receipt of multiple offers in response to the solicitation as a standard for adequate price competition. Nevertheless DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

FAR 15.404–1(b)(2) addresses various price analysis techniques and procedures the Government may use to ensure a fair and

reasonable price. FAR 15.404–1(b)(2)(i) discusses the comparison of proposed prices received in response to a solicitation as an example of such techniques and procedures. In this discussion of price analysis techniques, FAR 15.404–1(b)(2)(i) references 15.403–1(c)(1), which sets forth the various standards of adequate price competition (for exceptions from certified cost or pricing data requirements). However, only FAR 15.403–1(c)(1)(i) addresses the situation when two or more responsible offerors, competing independently, submit priced offers that satisfy the Government's expressed requirement, a situation which is consistent with the price analysis technique of comparing proposed prices from multiple offerors. Therefore, the reference in FAR 15.404–1(b)(2)(i) is more appropriately identified as 15.403–1(c)(1)(i), which describes the standard comparing proposed prices received from multiple offerors, rather than the generalized 15.403–1(c)(1), which is broader in scope with various additional standards of adequate price competition.

One comment from an interested party was submitted in response to the Regulatory Flexibility Act request under the proposed rule. The respondent believed that this rule was a significant regulatory action under E.O. 12866 based upon the respondent's interpretation that the rule would constitute a significant change to the pricing regulations in FAR subpart 15.4. However, FAR 15.404–1(b)(2) delineates the various price analysis techniques; 15.404–1(b)(2)(i) describes the comparison of proposed prices received in response to a solicitation. The current reference in this section (to FAR 15.403–1(c)(1)) was too broad; therefore, this rule changes this generalized reference to 15.403–1(c)(1)(i), which precisely aligns the price analysis technique of comparing proposed prices from multiple offerors in 15.404–1(b)(2)(i) (for determining a fair and reasonable price) with the adequate price competition standard of comparing two or more offerors' proposed prices (for exceptions from certified cost or pricing data requirements). The designation of a rule as significant regulatory action under E.O. 12866 is made by the Office of Information and Regulatory Affairs within the Office of Management and Budget, which declined to designate this rule as requiring official review. No comments were filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the rule and no changes were made to the rule.

It is not expected that this rule will 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.*; this rule merely clarifies that in order to establish a fair and reasonable price, the reference at FAR 15.404–1(b)(2)(i) (which describes the pricing technique of comparing proposed prices from multiple offerors) shall be the more precise FAR 15.403–1(c)(1)(i) (which describes the standard for adequate price competition when proposed prices are submitted by multiple offerors), rather than the more generalized 15.403–1(c)(1) (which describes various standards for adequate price competition, including comparing proposed prices from multiple offerors).

There are no projected reporting, recordkeeping, or other compliance requirements projected for this rule.

The approach described in the final rule is the most practical and beneficial for both Government and industry.

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

V. Paperwork Reduction Act

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

List of Subject in 48 CFR Part 15

Government procurement.

Dated: June 13, 2013.

William Clark,

Acting Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR part 15 as set forth below:

PART 15—CONTRACTING BY NEGOTIATION

- 1. The authority citation for 48 CFR part 15 is revised to read as follows:

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

15.404–1 [Amended]

- 2. Amend section 15.404–1 by removing from paragraph (b)(2)(i) “15.403–1(c)(1)” and adding “15.403–1(c)(1)(i)” in its place.

[FR Doc. 2013–14615 Filed 6–20–13; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 19

[FAC 2005–67; FAR Case 2013–010; Item VII; Docket 2013–0010, Sequence 1]

RIN 9000–AM59

Federal Acquisition Regulation; Contracting With Women-Owned Small Business Concerns

AGENCY: Department of Defense (DoD), General Services Administration (GSA),

and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule.

SUMMARY: DoD, GSA, and NASA are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to remove the dollar limitation for set-asides to economically disadvantaged women-owned small business concerns and to women-owned small business concerns eligible under the Women-owned Small Business Program.

DATES: *Effective Date:* June 21, 2013.

Comment Date: Interested parties should submit written comments to the Regulatory Secretariat on or before August 20, 2013 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–67, FAR Case 2013–010, by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by searching for “FAR Case 2013–010”. Select the link “Submit a Comment” that corresponds with “FAR Case 2013–010.” Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company name (if any), and “FAR Case 2013–010” on your attached document.

- *Fax:* 202–501–4067.

- *Mail:* U.S. General Services Administration, Regulatory Secretariat Division (MVCB), ATTN: Hada Flowers, 1800 F Street NW., 2nd Floor, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005–67, FAR Case 2013–010, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Karlos Morgan, Procurement Analyst, at 202–501–2364, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755. Please cite FAC 2005–67, FAR Case 2013–010.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are issuing an interim rule amending the FAR, to implement section 1697 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013, Public Law 112–239, which amended section 8(m) of the Small Business Act, (15 U.S.C. 637(m)). Section 8(m) of the Small Business Act sets forth the Procurement Program for