

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 5, 13, 14, 15, 19, 25, 33,
and 36****[FAR Case 96-304]****RIN 9000-AH13****Federal Acquisition Regulation;
Preaward Debriefings****AGENCIES:** Department of Defense (DOD),
General Services Administration (GSA),
and National Aeronautics and Space
Administration (NASA).**ACTION:** Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council are proposing to amend the Federal Acquisition Regulation (FAR) to implement Section 4104 of the Federal Acquisition Reform Act of 1996. The proposed rule requires that, prior to contract award, contracting officers provide a debriefing to any interested offeror on the reasons for that offeror's exclusion from the competitive range in a competitive negotiation. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This is not a major rule under 5 U.S.C. 804.

DATES: Comments should be submitted on or before August 23, 1996 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General

Services Administration, FAR Secretariat (MVRS), 18th and F Streets, NW., Room 4037, Washington, DC 20405.

Please cite FAR case 96-304 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: Mr. Ralph DeStefano at (202) 501-1758 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 FAR case 96-304.

SUPPLEMENTARY INFORMATION:**A. Background**

Section 4104 of the Federal Acquisition Reform Act of 1996 (Public Law 104-106) requires that, prior to contract award, contracting officers provide a debriefing to any interested offeror on the reasons for that offeror's exclusion from the competitive range in a competitive negotiation. The contracting officer may refuse a preaward debriefing request if it is not in the best interests of the government to conduct a debriefing at that time. Section 4104 also requires that the debriefings include the following information: the agency's evaluation of the significant elements in the offeror's proposal; a summary of the rationale for the offeror's exclusion; and reasonable responses to relevant questions posed by the debriefed offeror as to whether the source selection procedures in the solicitation and applicable regulations were followed by the agency.

B. Regulatory Flexibility Act

This proposed rule is not expected 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 the rule provides for earlier

debriefings to unsuccessful offerors but does not significantly alter the amount of information provided to unsuccessful offerors. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. Comments from small entities concerning the affected FAR subpart will be considered in accordance with 5 U.S.C. 610 of the Act. Such comments must be submitted separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 96-304), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed 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.*

List of Subjects in 48 CFR Parts 5, 13, 14, 15, 19, 25, 33, and 36

Government procurement.

Dated: June 18, 1996.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, it is proposed that 48 CFR Parts 5, 13, 14, 15, 19, 25, 33 and 36 be amended as set forth below:

1. The authority citation for 48 CFR Parts 5, 13, 14, 15, 19, 25, 33 and 36 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).

CHAPTER 1—[AMENDED]

2. In the list below, for each section listed in the left column, remove the citation listed in the middle column, and insert the citation in the last column:

Section	Remove	Insert
5.303(b)(2)	15.1002(c)	15.1003(b)
13.106-1(c)(2)	15.1001(c)(3)	15.1003(b)(2)
15.412(d)	15.1002(c)(1)	15.1003(b)(1)
15.609(c)	15.1002(b)	15.1003
19.302(d)(1)	15.1002(b)(2)	15.1003(a)(2)
19.501(h)(1)	15.1002(b)(2)	15.1003(a)(2)
19.501(h)(2)	15.1002(b)(2)	15.1003(a)(2)
25.405(e)	15.1002	15.1003
33.104(c)(1)	15.1004	15.1006
33.105(d)(1) (intro text)	15.1004	15.1006

PART 14—SEALED BIDDING

3. Section 14.503-1(g) is revised in the second sentence to read as follows:

14.503-1 Step one.

* * * * *

(g) * * * Upon written request, the contracting Officer shall debrief unsuccessful offerors (see 15.1005 and 15.1006.

* * * * *

**PART 15—CONTRACTING BY
NEGOTIATION**

4. Section 15.612(f) is revised to read as follows:

15.612 Formal source selection.

* * * * *

(f) *Notices and debriefings.* See 15.1003, 15.1004, 15.1005, and 15.1006.

5. Subpart 15.10 is revised to read as follows:

Subpart 15.10—Preaward, Award, and Postaward Notifications, Protests, and Mistakes

Sec.

15.1001 Definition.

15.1002 Applicability.

15.1003 Notifications to unsuccessful offerors.

15.1004 Notification to successful offeror.

15.1005 Preaward debriefing of offerors.

15.1006 Postaward debriefing of offerors.

15.1007 Protests against award.

15.1008 Discovery of mistakes.

Subpart 15.10—Preaward, Award, and Postaward Notifications, Protests, and Mistakes**15.1001 Definition.**

"Day," as used in this subpart, means calendar day, except that the period will run until a day which is not a Saturday, Sunday, or legal holiday.

15.1002 Applicability.

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).

15.1003 Notifications to unsuccessful offerors.

(a) *Preaward notices.* (1) *Preaward notices of exclusion from competitive range.* The contracting officer shall promptly notify offerors when their proposals are excluded from the competitive range. The notice shall state the basis for the determination and that a proposal revision will not be considered.

(2) *Preaward notices for small business set-asides.* 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 offeror in writing of the name and location of the apparent successful offeror. The notice shall also state that

(i) The Government will not consider subsequent revisions of the offeror's proposal, and

(ii) No response is required unless a basis exists to challenge the small business size status of the apparently successful offeror. The notice is not required when the contracting officer determines in writing that the urgency of the requirement necessitates award without delay.

(b) *Postaward notices.* Within three days after the date of contract award, the contracting officer shall provide written notification to each offeror whose proposal was in the competitive range but not selected for award (Public Law 103-355).

(1) The notice shall include—

(i) The number of offerors solicited;

(ii) The number of proposals received;

(iii) The name and address of each offeror receiving an award;

(iv) The items, quantities, and unit prices of each award (if the number of items or other factors makes listing unit prices impracticable, only the total contract price need be furnished); and

(v) In general terms, the reasons the offeror's proposal was not accepted, unless the price information in paragraph (b)(1)(iv) of this section readily reveals the reason. In no event shall an offeror's cost breakdown, profit, overhead rates, trade secrets, manufacturing processes and techniques, or other confidential business information be disclosed to any other offeror.

(2) Upon request, the contracting officer shall furnish the information described in paragraphs (b)(1) (i) through (v) of this section to unsuccessful offerors in solicitations using simplified acquisition procedures in part 13.

(3) Upon request, after contract award, the contracting officer shall provide the information in paragraphs (b)(1) (i) through (v) of this section to unsuccessful offerors who received a preaward notice of exclusion from the competitive range.

15.1004 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 notice of the award to that offeror (but see 15.608(b)). When an award is made to an offeror for less than all of the items that may be awarded to that offeror and additional items are being withheld for subsequent award, each notice shall state that the Government may make subsequent awards on those additional items within the offer acceptance period.

15.1005 Preaward debriefing of offerors.

Offerors excluded from the competitive range may request a debriefing before award (10 U.S.C. 2305(b)(6)(A) and 41 U.S.C. 253b(f)-(h)). The process for preaward debriefings follows:

(a) The offeror may request a preaward debriefing by submitting a written request for debriefing to the contracting officer within three days after the receipt of notice of exclusion from the competitive range. If the offeror does not submit a timely request, the offeror need not be given either a preaward or a postaward debriefing. Offerors are entitled to no more than one debriefing for each proposal.

(b) The contracting officer should provide a debriefing to the offeror as soon as practical. If providing a preaward debriefing is not in the best interest of the Government at the time it is requested, the contracting officer may delay the debriefing, but shall provide the debriefing no later than the time postaward debriefings are provided under 15.1006. In that event, the contracting officer shall include the information at 15.1006(d) in the debriefing.

(c) Debriefings may be done orally, in writing, or by any other method acceptable to the contracting officer.

(d) The contracting officer should normally chair any debriefing session held. Individuals who conducted 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, if approved by an individual at a level above the contracting officer.

(e) At a minimum, preaward debriefings shall include—

(1) The agency's evaluation of significant elements in the offeror's proposal;

(2) A summary of the rationale for excluding the offeror from the competitive range; and

(3) Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed in the process of excluding the offeror from the competitive range.

(f) Preaward debriefings shall not disclose—

(1) The number of offerors;

(2) The identity of other offerors;

(3) The content of other offeror's proposals;

(4) The ranking of other offerors;

(5) The evaluation of other offerors; or

(6) Any of the information prohibited in 15.1006(e).

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

15.1006 Postaward debriefing of offerors.

(a) 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. An offeror who failed to submit a timely request under 15.1005(a) is not entitled to a debriefing. When practicable, debriefing requests received more than three days after the offeror receives notice of contract award may be accommodated. However, accommodating untimely debriefing requests does not extend the time within which suspension of performance can be required because 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.

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

(c) The contracting officer should normally chair any debriefing session held. Individuals who conducted the evaluation 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, the 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.

15.1007 Protests against award.

(a) Protests against award in negotiated acquisitions shall be treated substantially the same as in sealed bidding (see subpart 33.1). Use of

agency protest procedures which incorporate the alternative dispute resolution provisions of Executive Order 12979 is encouraged for both preaward and postaward protests.

(b) 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 prospective offerors or original offerors still within the competitive range, respectively—

(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.

15.1008 Discovery of mistakes.

For treatment of mistakes in an offeror's proposal that are discovered before award, see 15.607. Mistakes in a contractor's proposal that are disclosed after award shall be processed in accordance with 14.407-4.

PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

6. Section 36.607(b) is revised 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 and 15.1006 (b) through (g). Note that 15.1006(d) (2) through (d)(5) does not apply to architect-engineer contracts.

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