

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 1, 5, 14 and 36**

[FAR Case 96-305]

RIN 9000 AH17

**Federal Acquisition Regulation; Two-
Phase Design Build Selection
Procedures**

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 4105 of the Fiscal Year 1996 Defense Authorization Act which authorizes the use of two-phase design-build construction procedures. 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 October 7, 1996, to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th & F Streets, NW, Room 4037, Washington, DC 20405.

Please cite FAR case 96-305 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: Mr. Jack O'Neill at (202) 501-3856 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 96-305.

SUPPLEMENTARY INFORMATION:**A. Background**

This proposed rule amends FAR Part 36 to implement Section 4105 of the Fiscal Year 1996 Defense Authorization Act. Section 4105 adds Section 2305a of Title 10 U.S.C. and Section 303M of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253m). Comments were received in response to a Notice of Proposed Rulemaking that was published on February 21, 1996 (61

FR 6760). The proposed rule details considerations that would be used by a contracting officer to determine whether to use the two-phase design-build method and describes the selection procedures. As required by the statute, the proposed rule limits the number of proposals to be considered in the second phase to no more than five, unless the agency determines that a greater number is in the Government's interest and is consistent with the purposes and objectives of two-phase design-build contracting.

B. Regulatory Flexibility Act

The proposed changes may 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 reduces the cost of proposal preparation for those offerors not selected for Phase Two. An Initial Regulatory Flexibility Analysis (IRFA) has, therefore, been prepared. A copy of the IRFA will be provided to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the FAR Secretariat. Comments from small entities concerning the affected subpart will be considered in accordance with Section 610 of the Act. Such comments must be submitted separately and cite 5 U.S.C. 601, *et seq.*, (FAR Case 96-305) 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 1, 5, 14 and 36

Government procurement.

Dated: July 31, 1996.

Edward C. Loeb,

Director, Federal Acquisition Division.

Therefore, it is proposed that 48 CFR Parts 1, 5, 14 and 36 be amended as set forth below:

1. The authority citation for 48 CFR Parts 1, 5, 14 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).

**PART 1—FEDERAL ACQUISITION
REGULATIONS SYSTEM****1.106 [Amended]**

2. Section 1.106 is amended by revising the entry for "36.302" in the OMB approval table to read "36.213-2".

**PART 5—PUBLICIZING CONTRACT
ACTIONS**

3. Section 5.204 is amended by revising the first sentence to read as follows:

5.204 Presolicitation notices.

Contracting officers shall publicize presolicitation notices in the CBD (see 15.404 and 36.213-2). * * *

PART 14—SEALED BIDDING**14.202-1 [Amended]**

4. Section 14.202-1 is amended by revising the parenthetical following the first sentence in paragraph (a) to read "(For construction contracts, see 36.213-3(a).)"

5. Section 14.211 is amended by revising the first sentence of paragraph (a) to read as follows:

14.211 Release of acquisition information.

(a) *Before solicitation.* Information concerning proposed acquisitions shall not be released outside the Government before solicitation except for presolicitation notices in accordance with 14.205-4(c) or 36.213-2, or longrange acquisition estimates in accordance with 5.404, or synopses in accordance with 5.201. * * *

* * * * *

**PART 36—CONSTRUCTION AND
ARCHITECT-ENGINEER CONTRACTS**

6. Section 36.102 is amended by adding, in alphabetical order, the definitions "Design," "Design-bid-build," "Design-build" and "Two-phase Design-build" to read as follows:

36.102 Definitions.

* * * * *

Design, as used in this part, means defining the construction requirement (including the functional relationships and technical systems to be used, such as architectural, environmental, structural, electrical, mechanical, and fire protection), producing the technical specifications and drawings, and preparing the construction cost estimate.

Design-bid-build, as used in this part, means the traditional method of construction contracting, where design and construction are sequential and contracted for separately with two contracts and two contractors.

Design-build, as used in this part, means combining design and construction in a single contract with one contractor.

* * * * *

Two-phase design-build, as used in this part, is one type of *design-build* construction contracting in which a limited number of offerors (normally five or fewer) is selected during Phase One to submit detailed proposals for Phase Two (See subpart 36.3).

7. Section 36.104 is added to read as follows:

36.104 Policy.

(a) Contracting officers are authorized to use any of the following methods, as appropriate, when contracting for construction:

(1) Design-bid-build;

(2) Design-build, including—

(i) Two-phase design-build, as authorized by 10 U.S.C. 2305a and 41 U.S.C. 253m (see subpart 36.3);

(ii) For DOD, the design-build process described in 10 U.S.C. 2862;

(3) Any other acquisition process authorized by law.

(b) When awarding contracts using the methods in paragraph (a) of this section, contracting officers may use the procedures established in this and other parts, including parts 14 and 15.

36.213 Special procedures for sealed bidding in construction contracting.

8. A new section heading for 36.213 is added to read as set forth above.

36.213-1 through 36.213-4 [Redesignated from 36.301 through 36.304]

9. 36.301 through 36.304 are redesignated as 36.213-1 through 36.213-4 respectively.

36.214 Special procedures for price negotiation in construction contracting.

10. 36.402 is redesignated as 36.214 and the heading is revised to read as set forth above.

36.215 Special procedures for cost-reimbursement contracts for construction.

11. 36.403 is redesignated 36.215 and the heading is revised to read as set forth above.

Subpart 36.3—Two-phase Design-build Contracting for Construction [Revised]

12. Subpart 36.3 is revised to read as follows:

Subpart 36.3—Two-Phase Design-Build Contracting for Construction.

Sec.

36.300 Scope of subpart.

36.301 Use of two-phase design-build method.

36.302 Scope of work.

36.303 Procedures.

36.303-1 Phase one.

36.303-2 Phase two.

36.300 Scope of subpart.

This subpart prescribes policies and procedures for the use of the two-phase design-build method for construction contracting authorized by 10 U.S.C. 2305a and 41 U.S.C. 253m.

36.301 Use of two-phase design-build method.

(a) During formal or informal acquisition planning (see part 7), if considering the use of two-phase design-build, the contracting officer shall conduct the evaluation in paragraph (b) of this section.

(b) The two-phase design-build method shall be used when the contracting officer determines that this method is appropriate, based on the following—

(1) Three or more offers are anticipated;

(2) A substantial amount of design work will be performed by offerors before developing price or cost proposals, that may result in offerors incurring substantial expenses in preparing offers; and

(3) The following criteria have been considered:

(i) The extent to which the project requirements have been adequately defined;

(ii) The time constraints for delivery of the project;

(iii) The capability and experience of potential contractors;

(iv) The suitability of the project for use of the two-phase selection procedures;

(v) The capability of the agency to manage the two-phase selection process; and

(vi) Other criteria established by the head of the contracting activity.

36.302 Scope of work.

The agency shall develop, either in-house or by contract, a scope of work that defines the project and states the Government's requirements. The scope of work may include criteria and preliminary design, budget parameters, and schedule or delivery requirements. If the agency contracts for development of the scope of work, the procedures in subpart 36.6 shall be used.

36.303 Procedures.

One solicitation may be issued covering both phases, or two solicitations may be issued in sequence. Proposals will be evaluated in Phase

One to determine which offerors will submit proposals for Phase Two. One contract will be awarded using competitive negotiation.

36.303-1 Phase one.

(a) Phase One of the solicitation(s) shall include—

(1) The scope of work;

(2) The phase-one evaluation factors including—

(i) Technical approach (but not detailed design or technical information);

(ii) Specialized experience and technical competence;

(iii) Capability to perform;

(iv) Past performance of the offeror's team (including the architect-engineer and construction members); and

(v) Other appropriate factors (excluding cost or price related factors, which are not permitted in Phase One);

(3) Phase-two evaluation factors; and

(4) A statement of the maximum number of offerors that will be determined to be in the competitive range and invited to submit phase-two proposals. The maximum number specified shall not exceed five unless the contracting officer determines, for the particular solicitation, that a number greater than five is in the Government's interest and is consistent with the purposes and objectives of two-phase design-build contracting.

(b) After evaluating phase-one proposals, the contracting officer shall determine the competitive range of most highly qualified offerors (not to exceed the maximum number specified in the solicitation in accordance with 36.303-1(a)(4) and request that only those offerors in the competitive range submit phase-two proposals. The requirement in 15.609 that cost or price be considered in the determination of the competitive range does not apply.

36.303-2 Phase two.

Phase Two of the solicitation(s) shall:

(a) Be prepared in accordance with part 15, including phase-two evaluation factors, developed in accordance with 15.605, and

(b) Require the submission of separate technical and price proposals, that shall be evaluated separately, in accordance with part 15.

Subject 36.4—[Removed and Reserved]

13. Subpart 36.4 is removed and reserved.

[FR Doc. 96-20012 Filed 8-6-96; 8:45 am]

BILLING CODE 6820-EP-P