

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 5, 11, 12, 13, and 52****[FAR Case 96-307]****RIN 9000-AH20****Federal Acquisition Regulation;
Application of Special Simplified
Procedures to Certain Commercial
Items**

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 4202 of the Federal Acquisition Reform Act of 1996 (Pub. L. 104-106). Section 4202 requires revisions to the FAR to incorporate special simplified procedures for the acquisition of certain commercial items with a value greater than the simplified acquisition threshold (\$100,000) but not greater than \$5 million. The purpose of this revision is to vest contracting officers with additional procedural discretion and flexibility, so that commercial item acquisitions in this dollar range may be solicited, offered, evaluated, and awarded in a simplified manner that maximizes efficiency and economy and minimizes burden and administrative costs for both the Government and industry. 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 November 5, 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 and F Streets NW., Room 4037, Washington, DC 20405.

Please cite FAR case 96-307 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAR case 96-307.

SUPPLEMENTARY INFORMATION:**A. Background**

This proposed rule amends the Federal Acquisition Regulation to implement section 4202 of the Federal Acquisition Reform Act of 1996 (Pub. L. 104-106). Section 4202 authorizes special simplified procedures for acquisitions of commercial items at amounts greater than the simplified acquisition threshold (\$100,000) but not greater than \$5 million when the contracting officer reasonably expects, based on the nature of the commercial items sought and on market research, that offers will include only commercial items. The authority to use the special simplified procedures under this section expires on January 1, 2000. Section 4202 also amends 10 U.S.C. 2305, 41 U.S.C. 253a, and 41 U.S.C. 416 to permit issuance of solicitations for commercial items in fewer than 15 days after the synopsis notice is published.

Pursuant to section 4202 of Pub. L. 104-106, acquisitions of commercial items using special simplified procedures are exempt from many of the Competition in Contracting Act (CICA) requirements that otherwise apply to acquisitions over the simplified acquisition threshold. Solicitations are not required to state the relative importance assigned to each evaluation factor and subfactor, nor are they required to include subfactors at all. Contracting officers have the flexibility to, among other things—

- (1) Forego formal evaluation plans, scoring of quotes or offers, or a competitive range determination;
- (2) Negotiate with one or more offerors, as appropriate, but not necessarily all offerors;
- (3) Conduct comparative evaluations of offers; and
- (4) Evaluate past performance based on such information as the contracting officer's knowledge and previous experience with the item or service being purchased, customer surveys, or other reasonable basis, without the existence of a formal database.

Synopsis requirements still apply, and all responsible sources must be permitted to submit a quote or offer which the contracting officer must consider. Sole-source acquisitions must be justified and approved consistent with existing CICA requirements. Otherwise, except for those procedures specifically limited to the simplified acquisition threshold or a lower threshold, this proposed rule authorizes use of procedures in FAR Part 13, Simplified Acquisition Procedures, for acquisitions of commercial items exceeding the simplified acquisition

threshold but not exceeding \$5,000,000 (including options) if the conditions apply that permit use of the special simplified procedures (see new subpart 13.6).

The special simplified procedures for commercial items also include guidance at 13.604 that expressly gives contracting officers the flexibility to indicate to an offeror a price the contracting officer anticipates offerors will have to meet or better to remain competitive; and/or a consideration other than price (e.g., a contract term, a commercially-available feature) the offeror will have to meet or better, as appropriate, to remain competitive. These techniques are used in the commercial marketplace to increase and sustain competitive pressures throughout the negotiation process and are expected to help improve the efficiency of negotiations and reduce bid and proposal preparation costs by reducing the guesswork currently required to remain competitive.

The Federal Acquisition Streamlining Act (FASA) of 1994 (Pub. L. 103-355) amended the publicizing and response time requirements for acquisitions of commercial items to allow less than a 30-day response time for receipt of offers after the date of issuance of a solicitation, provided the contracting officer establishes a response time that will afford potential offerors a reasonable opportunity to respond. Section 4202 further increases the contracting officer's latitude when acquiring commercial items by permitting a period of less than 15 days between publication of a synopsis notice and issuance of a solicitation. To bring these changes into compliance with the minimum time frames established in the North American Free Trade Agreement (NAFTA) and the Trade Agreements Act (TAA), this proposed rule adds new coverage at 5.203(h). For acquisitions subject to NAFTA or TAA, the period of time between synopsis and receipt of offers must be at least 40 days. However, the contracting officer can reduce this time period to as few as 10 days if the acquisition falls within a general category that is identified in an annual forecast, the availability of which is published in the *Commerce Business Daily*.

This proposed rule also includes additional changes that are intended to help further promote the Government's effective use of proven commercial buying practices. These changes include:

- (1) Clarifying that an agency may identify its requirements in terms of

desired features or targets that do not have to be expressed as ranges;

(2) Changing the application of the Standard Form (SF) 1449, Solicitation/Contract/Order for Commercial Items (a form intended to emphasize the "cultural shift" to the use of commercial items and practices and which is currently mandatory for all paper solicitations or contracts for commercial items), so that, for acquisitions under the simplified acquisition threshold, use of the form is encouraged but is not mandatory; and

(3) Replacing references to "minimum needs" with "needs." (The term "minimum" has historically been misinterpreted, and its removal is consistent with 10 U.S.C. 2305(a)(1)(B), which states, "Each solicitation * * * shall include specifications which include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the agency or as authorized by law." "Minimum needs" has inaccurately been considered to require that the Government describe its needs in terms of the lowest level of technical capabilities or features that will address the requirement. However, the Government actually has substantial latitude to describe its needs in the manner that reflects an optimum acquisition strategy, e.g., considering which item(s) represent the best value in terms of quality, expected life of item, vendor past performance; making use of capabilities in the marketplace, such as those for ensuring reliability and distributing products; requiring offerors to have a "track record" of previous production for a length of time appropriate to the item being acquired, when such a requirement can be shown to reasonably relate to helping ensure that the agency will acquire an item that meets its need.)

It is clear that the drafters of this legislation intended for commercial items to be purchased in as simplified a manner as possible. A report by the House Committee on Government Reform and Oversight (No. 104-222) on H.R. 1670 noted that, "The purchase of a commercial item logically lends itself to simplified procedures because there exists a yardstick in the commercial marketplace against which to measure price and product quality and to serve as a surrogate for Government-unique procedures." The intent of this proposed rule is to ensure the benefits of this new authority can be fully realized by giving contracting officers a clear understanding of the procedural discretion and flexibility they have, so that acquisitions of commercial items conducted under these regulations may be solicited, offered, evaluated, and

awarded in a simplified manner that maximizes efficiency and economy and minimizes burden and administrative costs for both the Government and its suppliers.

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 implements the requirements of section 4202 of the Federal Acquisition Reform Act of 1996 and applies to all businesses, large or small, offering to sell commercial items to the Federal Government for amounts greater than the simplified acquisition threshold but not greater than \$5,000,000. Statistics indicate that a majority of commercial sales to the Government come from small businesses. The rule imposes no new reporting or recordkeeping requirements, and it does not duplicate, overlap, or conflict with any other Federal rules. These new simplified procedures would enable small and large entities to conduct business with the Government in a simpler manner, similar to the business they conduct with their commercial counterparts. The rule is expected to have a beneficial impact on industry and, therefore, applies equally to both large and small entities. However, existing preferences for small businesses, in accordance with FAR Part 19, remain unchanged by this rule.

An Initial Regulatory Flexibility Analysis (IRFA) has been prepared and will be provided to the Chief Counsel for Advocacy for the Small Business Administration. A copy of the IRFA may be obtained from the FAR Secretariat. Comments are invited. Comments from small entities concerning the affected FAR subpart will be considered in accordance with 5 U.S.C. 610. Such comments must be submitted separately and should cite 5 U.S.C. 601, *et seq.* (FAR Case 96-307), 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, 11, 12, 13, and 52

Government procurement.

Dated: August 30, 1996.

Jeremy Olson,

Acting Director, Office of Federal Acquisition Policy.

Therefore, it is proposed that 48 CFR Parts 5, 11, 12, 13, and 52 be amended as set forth below:

1. The authority citation for 48 CFR Parts 5, 11, 12, 13, and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. 2301 to 2331; and 42 U.S.C. 2473(c).

PART 5—PUBLICIZING CONTRACT ACTIONS

2. Section 5.203 is amended by revising paragraph (a) and adding paragraph (h) to read as follows:

5.203 Publicizing and response time.

(a) A notice of contract action shall be published in the *Commerce Business Daily* at least 15 days before issuance of a solicitation except that for acquisitions of commercial items, the contracting officer may—

(1) Establish a shorter period for issuance of the solicitation; or

(2) Use the combined CBD synopsis/solicitation procedure (see 12.603).

* * * * *

(h) For acquisitions subject to NAFTA or the Trade Agreements Act (see Subpart 25.4), the period of time between publication of the synopsis notice and receipt of offers shall be no less than 40 days. However, if the acquisition falls within a general category identified in an annual forecast, the availability of which is published in the CBD, the contracting officer may reduce this time period to as few as 10 days.

3. Section 5.207 is amended by revising paragraph (e)(3) to read as follows:

5.207 Preparation and transmittal of synopses.

* * * * *

(e) * * *

(3) Except for contract actions equal to or less than the simplified acquisition threshold or acquisitions of commercial items, the synopsis shall refer to Numbered Note 22 for noncompetitive contract actions. If it is anticipated that award will be made via a delivery order to an existing basic ordering agreement, the synopsis shall so state.

* * * * *

PART 11—DESCRIBING AGENCY NEEDS

4. Section 11.002 is amended by revising paragraph (a)(1)(ii) and adding paragraph (e) to read as follows:

11.002 Policy.

(a) * * *

(1) * * *

(ii) Only include restrictive provisions or conditions to the extent necessary to satisfy the needs of the agency or as authorized by law.

* * * * *

(e) Some or all of the performance levels or performance specifications in a solicitation may be identified as targets rather than as fixed or minimum requirements.

5. Section 11.104 is amended by revising paragraph (a) to read as follows:

11.104 Items peculiar to one manufacturer.

* * * * *

(a) The particular brand-name, product, or feature is essential to the Government's requirements and market research indicates other companies' similar products, or products lacking the particular feature, do not meet, or cannot be modified to meet, the agency's minimum needs; and

* * * * *

PART 12—ACQUISITION OF COMMERCIAL ITEMS

6. Section 12.202 is amended by revising paragraph (b) to read as follows:

12.202 Market research and description of agency need.

* * * * *

(b) The description of agency need must contain sufficient detail for potential offerors of commercial items to know which commercial products or services may be suitable. Generally, for acquisitions in excess of the simplified acquisition threshold, an agency's statement of need for a commercial item will describe the type of product or service to be acquired and explain how the agency intends to use the product or service in terms of function to be performed, performance requirement or essential physical characteristics. Describing the agency's needs in these terms allows offerors to propose methods that will best meet the needs of the Government.

* * * * *

7. Section 12.203 is amended by adding a sentence to the end of the paragraph to read as follows:

12.203 Procedures for solicitation, evaluation, and award.

* * * The contracting officer may use the simplified acquisition procedures in Part 13 for acquisitions of commercial items up to \$5,000,000, including options, other than those procedures specifically limited to the simplified acquisition threshold or a lower threshold (see Subpart 13.6).

8. Section 12.204 is revised to read as follows:

12.204 Solicitation/contract form.

(a) The contracting officer shall use the Standard Form 1449, Solicitation/Contract/Order for Commercial Items, if: (1) the acquisition is expected to exceed the simplified acquisition threshold; (2) a paper solicitation or contract is being issued; and (3) procedures at 12.603 are not being used. Use of the SF 1449 is nonmandatory but encouraged for commercial acquisitions not exceeding the simplified acquisition threshold.

(b) Consistent with the requirements at 5.203 (a) and (h), the contracting officer may allow fewer than 15 days before issuance of the solicitation.

9. Section 12.205 is amended by revising paragraph (c) to read as follows:

12.205 Offers.

* * * * *

(c) Consistent with the requirements at 5.203 (b) and (h), the contracting officer may allow fewer than 30 days response time for receipt of offers for commercial items.

10. Section 12.213 is revised to read as follows:

12.213 Other commercial practices.

It is a common practice in the commercial marketplace for both the buyer and seller to propose terms and conditions written from their particular perspectives. The terms and conditions prescribed in this Part 12 seek to balance the interests of both the buyer and seller. These terms and conditions are generally appropriate for use in a wide range of acquisitions. However, market research may indicate other commercial practices that are appropriate for the acquisition of the particular item. These practices should be considered for incorporation into the solicitation and contract if the contracting officer determines them appropriate in concluding a business arrangement satisfactory to both parties and not otherwise precluded by law or Executive order.

11. Section 12.302(a) is revised to read as follows:

12.302 Tailoring of provisions and clauses for the acquisition of commercial items.

(a) *General.* The provisions and clauses established in this subpart are intended to address, to the maximum extent practicable, commercial market practices for a wide range of potential Government acquisitions of commercial items.

However, because of the broad range of commercial items acquired by the Government, variations in commercial practices, and the relative volume of the

Government's acquisitions in the specific market, contracting officers may, within the limitations of this subpart, and after conducting appropriate market research, tailor the provision at 52.212–1, Instructions to Offerors—Commercial Items, and the clause at 52.212–4, Contract Terms and Conditions—Commercial Items, to adapt to the market conditions for each acquisition.

* * * * *

12. Section 12.602 is amended by revising paragraph (a) to read as follows:

12.602 Streamlined evaluation of offers.

(a) When evaluation factors are used, the contracting officer may insert a provision substantially the same as the provision at 52.212–2, Evaluation—Commercial Items, in solicitations for commercial items or comply with the procedures in 13.106–2 if the acquisition is being made using the simplified acquisition procedures. When the provision at 52.212–2 is used, paragraph (a) of the provision shall be tailored to the specific acquisition to describe the evaluation factors and relative importance of those factors. However, contracting officers are not required to describe the relative importance of evaluation factors when using the simplified acquisition procedures in Part 13.

* * * * *

13. Section 12.603 is amended by revising paragraph (c)(3)(ii) to read as follows:

12.603 Streamlined solicitation for commercial items.

(c) * * *

(3) * * *

(ii) When using the combined CBD synopsis/solicitation, contracting officers shall establish a response time in accordance with 5.203(b).

* * * * *

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

14. Section 13.000 is revised to read as follows:

13.000 Scope of part.

This part prescribes policies and procedures for the acquisition of supplies and services, including construction, research and development, and commercial items, the aggregate amount of which does not exceed the simplified acquisition threshold (see 2.101). (However, when the conditions in 13.602 are met, the contracting officer is authorized to use the procedures in this part, other than those specifically limited to the

simplified acquisition threshold or a lower threshold, for acquisitions of commercial items exceeding the simplified acquisition threshold but not greater than \$5,000,000, including options.) See Part 12, Acquisition of Commercial Items, for policies applicable to the acquisition of commercial items exceeding the micro-purchase threshold. See 36.602-5 for simplified procedures to be used when acquiring architect-engineering services.

15. Section 13.103 is amended by revising paragraphs (b), (c) and (j) to read as follows:

13.103 Policy.

* * * * *

(b) The contracting office shall not use simplified acquisition procedures for contract actions exceeding \$50,000 after December 31, 1999, unless the office's cognizant agency has certified full FACNET capability in accordance with 4.505-2. This limitation does not apply to acquisitions of commercial items conducted using Subpart 13.6.

(c) Simplified acquisition procedures shall not be used in the acquisition of supplies and services initially estimated to exceed the simplified acquisition threshold (or \$5,000,000, including options, for acquisitions of commercial items using Subpart 13.6), even though resulting awards do not exceed that threshold. Requirements aggregating more than the simplified acquisition threshold (or \$5,000,000, including options, if using Subpart 13.6) or the micro-purchase threshold shall not be broken down into several purchases that are less than the applicable threshold merely to permit use of simplified acquisition procedures, or to avoid any requirements that apply to purchases exceeding the micro-purchase threshold.

* * * * *

(j) Contracting officers are encouraged to use innovative approaches in awarding contracts using the simplified acquisition procedures under the authority of this part. For commercial items, contracting officers have the flexibility to use any combination of the procedures in Subpart 12.6 or Parts 13, 14, 15, 35, or 36, as applicable. For other than commercial items, the procedures in other FAR parts may be appropriate. Other FAR parts that may be used include, but are not limited to Parts 14, 15, 35, or 36, including the use of Standard Form (SF) 1442, Solicitation, Offer, and Award (Construction, Alteration, or Repair), for construction contracts (see 36.701(b)).

16. Section 13.104 is amended by revising paragraph (b) to read as follows:

13.104 Procedures.

* * * * *

(b) Related items (such as small hardware items or spare parts for vehicles) may be included in one solicitation and the award made on an "all-or none" or "multiple award" basis if suppliers are so advised when quotations or offers are requested.

* * * * *

17. Section 13.106-2 is amended by revising paragraphs (a)(1) through (a)(3) and the introductory text of paragraph (a)(4), (a) (5) and (6), (b)(1), (b)(3), (c) (1) and (2), (d)(3), and (d)(4)(ii) to read as follows:

13.106-2 Purchases exceeding the micro-purchase threshold.

(a) *Soliciting competition.* (1) Contracting officers shall promote competition to the maximum extent practicable to obtain supplies and services from the source whose offer is the most advantageous to the Government, based, as appropriate, on either price alone or price and other factors (e.g., past performance, quality) including the administrative cost of the purchase. Contracting officers are encouraged to use best value. Solicitations shall notify suppliers of the basis upon which award is to be made.

(2) For acquisitions not exceeding the simplified acquisition threshold where FACNET is not available, or an exemption set forth in 4.506 applies, quotations may be solicited through other appropriate means (e.g., orally, or in writing). The contracting officer shall comply with the requirements of 5.101 when not soliciting via FACNET. Sufficient information to permit vendors to develop quotations may be incorporated into the combined synopsis/solicitation. In such cases, the contracting officer is not required to issue a separate solicitation. For commercial item acquisitions, see 12.603.

(3) For acquisitions not exceeding \$25,000, requests for quotations should be solicited orally to the maximum extent practicable when FACNET is not available or a written determination has been made that it is not practicable or cost-effective to purchase via FACNET. Sufficient information to permit suppliers to develop quotations may be incorporated into a combined synopsis/solicitation. In such cases, the contracting officer is not required to issue a separate solicitation. Paper solicitations for contract actions not expected to exceed \$25,000 should only be issued when obtaining electronic or oral quotations is not considered economical or practicable. Written

solicitations shall be issued for construction contracts over \$2,000.

(4) If synopsising is not required (e.g., the acquisition does not exceed \$25,000 or an exemption to the synopsis requirement applies) and FACNET is not being used, solicitation of at least three sources generally may be considered to promote competition to the maximum practicable extent. In such circumstances, maximum practicable competition ordinarily can be obtained without soliciting quotations or offers from sources outside the local trade area. If practicable, two sources not included in the previous solicitation should be requested to furnish quotations or offers. The following factors influence the number of quotations or offers required in connection with any particular purchase:

* * * * *

(5) For purchases not exceeding the simplified acquisition threshold, contracting officers may solicit from one source if the contracting officer determines that the circumstances of the contract action deem only one source reasonably available. For acquisitions of commercial items in excess of the simplified acquisition threshold conducted pursuant to Subpart 13.6, the requirements at 13.603(a) apply.

(6) Contracting officers shall not limit competition to suppliers of well-known and widely distributed makes or brands (see 11.104), or solicit quotations on a personal preference basis.

* * * * *

(b) *Evaluation of quotations or offers.*

(1) When evaluating quotations or offers, the evaluation must be performed based on any criteria established in the solicitation. All quotations or offers must be considered. However, the contracting officer has broad discretion in fashioning suitable evaluation procedures. The procedures prescribed in Parts 14 and 15 are not mandatory. At the contracting officer's discretion, one or more but not necessarily all of the evaluation procedures in Parts 14 or 15 may be used.

* * * * *

(3) Contracting officers shall evaluate quotations or offers inclusive of transportation charges from the shipping point of the supplier to the delivery destination.

* * * * *

(c) *Award.* (1) Occasionally an item can be obtained only from a supplier who quotes a minimum order price or quantity that either unreasonably exceeds stated quantity requirements or results in an unreasonable price for the quantities required. In these instances,

the contracting officer should inform the requiring activity of all facts regarding the quotation or offer and ask it to confirm or alter its requirement. The file shall be documented to support the final action taken.

(2) For acquisitions not exceeding the simplified acquisition threshold (other than those conducted through FACNET), Except for awards conducted through FACNET, notification to unsuccessful suppliers shall be given only if requested.

* * * * *

(d) * * *

(3) If only one source is solicited and the acquisition does not exceed the simplified acquisition threshold, an additional notation shall be made to explain the absence of competition, except for acquisition of utility services available only from one source.

(4) * * *

(ii) *Written solicitations (see 2.101).* For acquisitions not exceeding the simplified acquisition threshold, written records of solicitations/offers may be limited to notes or abstracts to show prices, delivery, references to printed price lists used, the supplier or suppliers contacted, and other pertinent data.

* * * * *

18. Section 13.107 is amended by revising paragraph (a) to read as follows:

13.107 Solicitation forms.

(a) For use of the SF 1449, Solicitation/Contract/Order for Commercial Items, see 12.204

* * * * *

19. Section 13.202 is amended by revising paragraph (b)(2) to read as follows:

13.202 Establishment of blanket purchase agreements (BPAs).

* * * * *

(b) * * *

(2) Consider suppliers whose past performance has shown them to be dependable, and who offer good quality supplies or services at consistently lower prices

* * * * *

20. Section 13.204 is amended by revising paragraphs (a) and (b) to read as follows:

13.204 Purchases under blanket purchase agreements.

(a) The use of a BPA does not authorize purchases that are not otherwise authorized by law or regulation. For example, the BPA, being a method of simplifying the making of individual purchases, shall not be used to avoid the simplified acquisition threshold (or the \$5,000,000 threshold,

including options, on acquisitions using Subpart 13.6).

(b) Unless otherwise specified in agency regulations, individual purchases under BPAs, except those under BPAs established in accordance with 13.202(c)(3), shall not exceed \$100,000, or \$5,000,000, including options, for acquisitions using Subpart 13.6).

* * * * *

21. Subpart 13.6, consisting of sections 13.601 through 13.604-4, is added to read as follows:

Subpart 13.6—Use of Simplified Acquisition Procedures for the Purchase of Commercial Items in Amounts Greater Than the Simplified Acquisition Threshold But Not Exceeding \$5 Million

13.601 General.

This subpart authorizes, as a test program, use of the simplified acquisition procedures in Part 13 for the acquisition of commercial items in amounts greater than the simplified acquisition threshold but not exceeding \$5,000,000, including options, if the condition in 13.602 is met. The purpose of this test program is to vest contracting officers with additional procedural discretion and flexibility, so that commercial item acquisitions in this dollar range may be solicited, offered, evaluated, and awarded in a simplified manner that maximizes efficiency and economy and minimizes burden and administrative costs for both the Government and industry (see section 4202 of Public Law 104-106). For the period of this test, contracting activities shall employ the simplified procedures authorized by the test to the maximum practicable extent. The authority to issue solicitations under this subpart shall expire on January 1, 2000. Contracts may be awarded after the expiration of this authority for solicitations issued before the expiration of the authority.

13.602 Condition for use.

(a) At the contracting officer's option, any procedure in Part 13, other than those whose use is specifically limited to the simplified acquisition threshold or a lower threshold, may be used for a commercial item acquisition in an amount greater than the simplified acquisition threshold but not exceeding \$5,000,000, including options, if the contracting officer reasonably expects, based on the nature of the commercial items sought and on market research, that offers will include only commercial items.

(b) Circumstances under which the contracting officer may reasonably expect that offers will include only commercial items include, but are not limited to, the following:

(1) No sources of items other than commercial items are known to exist;

(2) Sources of items other than commercial items are known to exist but are not expected to submit offers; or

(3) The agency has specified that only offers of commercial items will be considered. (This is likely to occur when the agency has determined that utilizing the capabilities of the commercial market is the optimum means of meeting its needs.)

(c) If the contracting officer reasonably expected that offers would only include commercial items but receives one or more offers of other than commercial items, the contracting officer may proceed with the acquisition under the procedures in Part 13.

(d) Contracts for commercial items awarded using the procedures of Part 13 remain subject to the requirements of Part 12 and other parts of the FAR pursuant to the order of precedence provided at 12.102(c). This includes use of the provisions and clauses at Subpart 12.3.

13.603 Additional requirements.

(a) *Sole source acquisitions.* The acquisition may not be conducted on a sole source basis, unless the need to do so is justified in writing and approved at the levels as specified in subparagraphs (a)(1) and (a)(2) of this section. Full and open competition is not required; therefore, Part 6 does not apply; however, contracting officers shall prepare sole source justifications. When the types of conditions described at 6.302-2 occur (i.e., urgency), the justification may be made and approved within a reasonable time after contract award when preparation and approval prior to award would unreasonably delay the acquisition.

(1) For a proposed contract exceeding \$100,000 but not exceeding \$500,000, the contracting officer's certification that the justification is accurate and complete to the best of the contracting officer's knowledge and belief will serve as approval, unless a higher approval level is established in agency procedures.

(2) For a proposed contract exceeding \$500,000, the waiver must be approved by the competition advocate for the procuring activity designated pursuant to 6.501; or an official described in 6.304(a)(3) or (a)(4). This authority is not delegable; and

(b) *Documentation.* The contract file shall include—

(1) A brief written description of the procedures used in awarding the contract;

(2) The number of offers received; and

(3) An explanation, tailored to the size and complexity of the acquisition, of the basis for the contract award decision.

13.604 Alternative negotiation techniques.

13.604-1 General.

In addition to other procedures authorized by this subpart, notwithstanding 15.610, the contracting officer may use the negotiation techniques described in this section.

13.604-2 Awards based on price and price-related factors only.

(a) The contracting officer may provide prospective offerors with a description of the Government's requirements and invite the submission of offers on a specified date, during a specified time period. During the specified time period, the amount of the lowest offer shall be posted electronically or otherwise on an auction board for viewing by interested parties. The identity of offerors shall not be disclosed during the period specified for receipt of offers. During the specified time period, offerors may revise offers at anytime. At the end of the specified period, the contracting officer awards the contract to the responsible offeror submitting the lowest priced acceptable offer.

(b) As an alternative to the approach outlined in paragraph (a) of this subsection, the contracting officer may indicate to offerors during negotiations a price that the offeror will have to meet or better in order to be considered further. The same price must be communicated to all offerors. The price established by the contracting officer may be based on offers received or information from other sources as they may relate to the total acquisition or to any contract line item(s). A reasonable response time shall be established for the submission of revised offers. The contracting officer may repeat the process as necessary to conduct negotiations that will result in the submission of lower priced acceptable offers that will satisfy the Government's requirements. Revising an offer to meet or better a price established by the contracting officer does not guarantee any offeror an award. Offerors eliminated from the competition shall be promptly notified that their offer is no longer being considered.

(c) Use of the technique described in paragraphs (a) and (b) of this subsection, may be appropriate when the contracting officer—

(1) Can provide prospective offerors with a purchase description that clearly defines the Government's requirements;

(2) Reasonably expects to receive more than one offer, and

(3) Does not expect discussions with offerors regarding non-price aspects of the offer will be necessary.

13.604-3 Awards based on price and other factors.

(a) When conducting negotiations, the contracting officer may indicate to all offerors a price, contract term or condition, commercially-available feature, and/or requirement (beyond any requirement or target specified in the solicitation) that an offeror will have to improve upon or meet, as appropriate, in order to remain competitive.

(b) The price or other requirement identified to an offeror by the contracting officer as an area needing improvement or as a condition for further consideration for award—

(1) May be based on an evaluation of offers received or information from other sources;

(2) May relate to the total acquisition or to any contract line item(s);

(3) Shall be based on an evaluation of individual offers and need not be the same for all offerors; and

(4) Shall not disclose proprietary information.

(c) The contracting officer may consider alternative offers. A reasonable response time shall be established for the submission of revised offers. The contracting officer may repeat the process as necessary to conduct negotiations that will result in increasing the value of acceptable offers that will satisfy the Government's requirements.

(d) Revising an offer to meet or better a price or other consideration established by the contracting officer does not guarantee any offeror an award.

(e) Offerors eliminated from the competition shall be promptly notified that their offer is no longer being considered.

(f) When an offeror's price is used as the basis for negotiating with other offerors, the identity of that offeror shall not be disclosed during negotiations.

13.604-4 Solicitation provisions.

(a) The contracting officer shall insert the provision at 52.213-4, Alternative Evaluation—Commercial Items, in lieu of the provision at 52.212-2, Evaluation—Commercial Items, when the procedures described in 13.604-2(a) will be used.

(b) The contracting officer shall insert a provision in solicitations, substantially the same as the provision

at 52.213-5, Alternative Negotiation Techniques, when either the technique described in 13.604-2(b) or in 13.604-3 may be used.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

22. Sections 52.213-4 and 52.213-5 are added to read as follows:

52.213-4 Alternative Evaluation—Commercial Items.

As prescribed in 13.604-4(a), insert the following provision:

Alternative Evaluation—Commercial Items (Date)

(a) The Government will award a contract resulting from this solicitation to the responsible offeror submitting the lowest priced offer that conforms to the solicitation. Offers shall be submitted on [Contracting Officer inserts the date] beginning at [Contracting Officer inserts the time] and ending at [Contracting Officer inserts the time or date and time]. During the specified time frame, the amount of the lowest offer will be posted and may be viewed by [Contracting Officer describes how the information may be viewed electronically or otherwise]. Offerors may revise offers anytime during the specified period. At the end of the specified time period, the responsible Offeror submitting the lowest priced offer will be in line for award.

(b) *Options.* The Government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. The Government may determine that an offer is unacceptable if the option prices are significantly unbalanced. Evaluation of options shall not obligate the Government to exercise the options(s).

(c) A written notice of award or acceptance of an offer, mailed or otherwise furnished to the successful offeror within the time for acceptance specified in the offer, shall result in a binding contract without further action by either party. Before the offer's specified expiration time, the Government may accept an offer (or part of an offer) unless a written notice of withdrawal is received before award.

(End of provision)

52.213-5 Alternative Negotiation Techniques.

As prescribed in 13.604-4(b), insert the following provision:

Alternative Negotiation Techniques (Date)

The Contracting Officer may elect to use the alternative negotiation techniques described in section 13.604-2(b) or 13.604-3 of the Federal Acquisition Regulation in conducting this procurement. If used, offerors may respond by maintaining offers as originally submitted, revising offers, or by submitting an alternative offer. The Government may consider initial offers unless revised or withdrawn, revised offers, and alternative offers in making the award. Revising an offer does not guarantee an offeror an award.

(End of provision)

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

**48 CFR Parts 1, 3, 4, 9, 12, 14, 15, 19,
33, 37, 43, 52, and 53**

[FAR Case 96-314]

RIN 9000-AH19

Federal Acquisition Regulation; Procurement Integrity

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 27 of the Office of Federal Procurement Policy (OFPP) Act, as amended by Section 4304 of the Fiscal Year 1996 National Defense Authorization Act, also known as the Federal Acquisition Reform Act. 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 November 5, 1996 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (MVR), 18th & F Streets, NW, Room 4040, Washington, DC 20405.

Please cite FAR case 96-314 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: Mr. Peter O'Such at (202) 501-1759 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4040, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAR case 96-314.

SUPPLEMENTARY INFORMATION:

A. Background

On September 6, 1990, an interim rule with request for public comments was

published in the Federal Register (55 FR 36782) under FAR case 89-023 to implement Section 27 of the OFPP Act. On November 30, 1990, as a result of amendments made by Section 815 of the FY 1991/1992 National Defense Authorization Act, Public Law 101-510, the interim rule was amended (55 FR 49852) and the time allowed for submission of public comments was extended. A total of 222 comments were received.

Section 4304 of the FY 1996 National Defense Authorization Act again amends Section 27 of the OFPP Act. As amended, Section 27 of the OFPP Act specifies restrictions in four areas: a prohibition on disclosing procurement information; a prohibition on obtaining procurement information; actions required of procurement officers when contacted by offerors regarding non-Federal employment; and a prohibition on former officials' acceptance of compensation from certain contractors.

The public comments received in response to the interim rule under FAR case 89-023 were considered in preparing this proposed rule, to the extent that the comments are relevant under the 1996 amendments to Section 27 of the OFPP Act.

B. Regulatory Flexibility Act

The proposed rule may have a significant beneficial 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 eliminates the procurement integrity certifications and supporting information previously required to be submitted by every bidder and apparently successful offeror for a contract of over \$100,000, and every contractor seeking a contract modification valued at over \$100,000. An Initial Regulatory Flexibility Analysis (IRFA) has been prepared and submitted to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the FAR Secretariat. Comments are invited. Comments from small entities concerning the affected FAR parts will be considered in accordance with Section 610 of the Act. Such comments must be submitted separately and cite FAR case 96-314 in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. 3501, *et seq.*) may apply because the proposed rule eliminates existing recordkeeping and information collection requirements approved by the Office of Management and Budget under OMB Control Number 9000-0103. A

paperwork burden of 43,333 hours would be eliminated.

List of Subjects in 48 CFR Parts 1, 3, 4, 9, 12, 14, 15, 19, 33, 37, 43, 52, and 53

Government procurement.

Dated: August 30, 1996.

Jeremy Olson,

Acting Director, Federal Acquisition Policy Division.

Therefore, it is proposed that 48 CFR Parts 1, 3, 4, 9, 12, 14, 15, 19, 33, 37, 43, 52, and 53 be amended as set forth below:

1. The authority citation for 48 CFR Parts 1, 3, 4, 9, 12, 14, 15, 19, 33, 37, 43, 52, and 53 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 in the table by removing entries 3.104-9, 3.104-12(a)(12), 52.203-8, 52.203-9, and their respective OMB Control Numbers.

PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

3. Sections 3.104 through 3.104-9 are revised to read as set forth below and sections 3.104-10 through 3.104-12 are removed.

Sec.

3.104 Procurement integrity.

3.104-1 General.

3.104-2 Applicability.

3.104-3 Statutory and related prohibitions, restrictions, and requirements.

3.104-4 Definitions.

3.104-5 Disclosure, protection, and marking of contractor bid or proposal information and source selection information.

3.104-6 Disqualification.

3.104-7 Ethics advisory opinions regarding prohibitions on former official's acceptance of compensation from contractors.

3.104-8 Contract clause.

3.104-9 Violations or possible violations.

3.104 Procurement integrity.

3.104-1 General.

(a) Section 3.104 implements section 27 of the Office of Federal Procurement Policy Act (41 U.S.C. 423), as amended by section 814 of the FY 90/91 National Defense Authorization Act, Pub. L. 101-189, section 815 of the FY 91 National Defense Authorization Act, Pub. L. 101-510, and section 4304 of the FY 96 National Defense Authorization Act, Pub. L. 104-106 (hereinafter, section 27 is referred to as "the Act" or "the law