

(2) Base operations support on Guam.

(b) Lawfully admitted citizens of the freely associated states of the Republic of the Marshall Islands, the Federated States of Micronesia, or the Republic of Palau are not subject to the prohibition in paragraph (a) of this section.

222.7302 Exception.

The prohibition in 222.7301(a)(1) does not apply to a military construction project if—

(a) There is no acceptable offer in response to a solicitation for the project;

(b) The Secretary concerned makes a determination that the prohibition is a significant deterrent to obtaining offers on the project; and

(c) Another solicitation is issued for the project.

222.7303 Contract clause.

Use the clause at 252.222-7005, Prohibition on Use of Nonimmigrant Aliens-Guam, in solicitations and contracts subject to this subpart, except those issued in accordance with 222.7302.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. Section 252.222-7005 is revised to read as follows:

252.222-7005 Prohibition on Use of Nonimmigrant Aliens—Guam.

As prescribed in 222.7303, use the following clause:

PROHIBITION ON USE OF NONIMMIGRANT ALIENS—GUAM (SEP 1999)

The work required by this contract shall not be performed by any alien who is issued a visa or otherwise provided nonimmigrant status under Section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(ii)). This prohibition does not apply to the performance of work by lawfully admitted citizens of the freely associated states of the Republic of the Marshall Islands, the Federated States of Micronesia, or the Republic of Palau.

(End of clause)

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DEPARTMENT OF AGRICULTURE

Office of Procurement and Property Management

48 CFR Parts 401, 415, 437, and 452

[AGAR Case 96-04]

RIN 0599-AA07

Agriculture Acquisition Regulation; Part 415 Reorganization; Contracting by Negotiation

AGENCY: Office of Procurement and Property Management, USDA.

ACTION: Direct final rule.

SUMMARY: The Department of Agriculture (USDA) is amending the Agriculture Acquisition Regulation (AGAR) to revise and reorganize part 415, Contracting by Negotiation. USDA is revising and reorganizing part 415 to reflect changes in the content and structure of Federal Acquisition Regulation (FAR) part 15, Contracting by Negotiation. This amendment makes it easier for users to consult AGAR part 415 in tandem with FAR part 15.

DATES: This rule is effective November 29, 1999 without further action, unless we receive written adverse comments or written notice of intent to submit adverse comments on or before November 1, 1999. If we receive adverse comments, the Office of Procurement and Property Management will publish a timely withdrawal of the rule in the **Federal Register**.

ADDRESSES: Please submit any adverse comments, or a notice of intent to submit adverse comments, in writing to U.S. Department of Agriculture, Office of Procurement and Property Management, Procurement Policy Division, Stop 9303, 1400 Independence Avenue SW., Washington, DC 20250-9303.

FOR FURTHER INFORMATION CONTACT: Joseph J. Daragan, (202) 720-5729, or through the General Services Administration Relay Service, (800) 877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

II. Dates

III. Procedural Requirements

A. Executive Order Nos. 12866 and 12988

B. Regulatory Flexibility Act

C. Paperwork Reduction Act

D. Small Business Regulatory Enforcement Fairness Act

IV. Electronic Access Addresses

I. Background

The AGAR implements the FAR (48 CFR chapter 1) where further implementation is needed, and supplements the FAR when coverage is

needed for subject matter not covered by the FAR. In September 1997, FAR Part 15, Contracting by Negotiation, was rewritten to simplify the source selection process and to facilitate best value acquisition (62 FR 51224, September 30, 1997). FAR Part 15 also was restructured to facilitate use of the regulation. USDA is amending the AGAR to reflect changes made to FAR part 15. USDA also is reorganizing AGAR part 415, Contracting by Negotiation, to reflect the new structure of FAR Part 15. In this rulemaking document, USDA is amending the AGAR as a direct final rule, since the changes are non-controversial and unlikely to generate adverse comment. The changes are administrative in nature, and do not affect the public.

Rules that an agency believes are noncontroversial and unlikely to result in adverse comment may be published in the **Federal Register** as direct final rules. The Office of Procurement and Property Management published a policy statement in the **Federal Register** (63 FR 9158, February 24, 1998) to notify the public of its intent to use direct final rulemaking in appropriate circumstances.

This rule makes the following changes to the AGAR:

(a) We are amending section 401.106 to reflect the restructuring of AGAR part 415. We are changing a reference to AGAR segment 415.4 to read AGAR segment 415.2.

(b) We are removing sections 415.103, 415.408, 415.411, 415.607, 415.608 and 415.612. These sections supplemented FAR regulatory guidance which has been removed from the FAR. AGAR coverage is no longer required.

(c) We are removing paragraph (b) of subsection 415.413-2. This paragraph merely restates guidance included in the FAR.

(d) We are moving the following segments of AGAR part 415 to match the numbering structure of FAR part 15 following its revision:

(1) Subsection 415.406-1, Uniform contract format, is now section 415.204, Contract format;

(2) Section 415.407, Solicitation provisions, is now section 415.209, Solicitation provisions and contract clauses;

(3) Paragraphs (c) through (e) of subsection 415.413-2, Disclosure and use of information before award—Alternate II, are now paragraphs (a) through (c) of section 415.207, Handling proposals and information.

(4) Subpart 415.5, Unsolicited Proposals, is now subpart 415.6, Unsolicited Proposals;

(5) Subpart 415.9, Profit, is now subpart 415.4, Contract Pricing;

(6) Subpart 415.10, Preaward, Award, and Postaward Notifications, Protests and Mistakes, is now subpart 415.5, Preaward, Award, and Postaward Notifications, Protests and Mistakes.

(e) We are adding section 415.303, Responsibilities, to specify that the head of the contracting activity is authorized to appoint an individual other than the contracting officer as the source selection authority.

(f) We are adding section 415.305, Proposal evaluation, to authorize USDA contracting activities to establish procedures for release of cost information to technical evaluation teams.

(g) We are adding section 437.204, Guidelines for determining availability of personnel. This section authorizes heads of contracting activities to approve the use of non-Government evaluators in proposal evaluation. AGAR subsection 415.413-2 included a substantially similar authorization, which we adapted in drafting section 437.204.

(h) We are amending AGAR clause 452.215-71 to update a FAR reference in that clause and to delete clause Alternates I and II. These alternates provided for the use of standard forms which have been canceled and not replaced. Furthermore, guidance provided by the alternate clauses is provided by FAR clause 52.215-20.

(i) We are correcting prescriptions in sections 452.215-71, 452.215-72 and 452.215.73 to reflect updated AGAR section numbers based on reorganization of AGAR part 415.

II. Procedural Requirements

A. Executive Order Nos. 12866 and 12988

USDA prepared a work plan for this regulation and submitted it to the Office of Management and Budget (OMB) pursuant to Executive Order No. 12866. OMB determined that the rule was not significant for the purposes of Executive Order No. 12866. Therefore, the rule has not been reviewed by OMB. USDA has reviewed this rule in accordance with Executive Order No. 12988, Civil Justice Reform. The proposed rule meets the applicable standards in section 3 of Executive Order No. 12988.

B. Regulatory Flexibility Act

USDA reviewed this rule under the Regulatory Flexibility Act, 5 U.S.C. 601-611, which requires preparation of a regulatory flexibility analysis for any rule which is likely to have significant economic impact on a substantial

number of small entities. The reorganization and revision of AGAR part 415 does not affect the way in which USDA conducts its acquisitions or otherwise interacts with the public. USDA certifies that this rule will not have a significant economic effect on a substantial number of small entities, and, therefore, no regulatory flexibility analysis has been prepared.

C. Paperwork Reduction Act

No new information collection or recordkeeping requirements are imposed on the public by this rule. Accordingly no OMB clearance is required by section 350(h) of the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*, or OMB's implementing regulation at 5 CFR Part 1320.

D. Small Business Regulatory Enforcement Fairness Act

This rule has been submitted to each House of Congress and the Comptroller General in accordance with the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 801 *et seq.*

IV. Electronic Access Addresses.

You may send electronic mail (E-mail) to JDARAGAN@USDA.GOV, or contact us via fax at (202) 720-8972, if you would like additional information about this rule, or if you wish to submit comments.

List of Subjects in 48 CFR Parts 415 and 452

Government contracts, Government procurement.

For the reasons set out in the preamble, the Office of Procurement and Property Management amends 48 CFR Parts 401, 415, 437, and 452 as set forth below:

1. The authority citation for Part 401 continues to read as follows:

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

2. In section 401.106, remove "415.4" and add, in its place, "415.2".

3. Revise Part 415 to read as follows:

PART 415—CONTRACTING BY NEGOTIATION

Subpart 415.2—Solicitation and Receipt of Proposals and Information:

Sec.

415.204 Contract format.

415.207 Handling proposals and information.

415.209 Solicitation provisions and contract clauses.

Subpart 415.3—Source Selection

Sec.

415.303 Responsibilities.

415.305 Proposal evaluation.

Subpart 415.4—Contract Pricing

Sec.

415.404-4 Profit.

Subpart 415.5—Preaward, Award, and Postaward Notifications, Protests and Mistakes

Sec.

415.570 Post-award conference.

Subpart 415.6—Unsolicited Proposals

Sec.

415.604 Agency points of contact.

415.606 Agency procedures.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

Subpart 415.2—Solicitation and Receipt of Proposals and Information:

415.204 Contract format.

The Senior Procurement Executive is authorized to exempt contracts from the uniform contract format.

415.207 Handling proposals and information.

(a) Throughout the source selection process, agency personnel and non-Government evaluators with access to proposal information shall disclose neither the number of offerors nor their identity except as authorized by FAR subpart 15.5. (See also FAR 5.403.)

(b) The contracting officer shall obtain the following written agreement from the non-Government evaluator prior to the release of any proposal to that evaluator.

AGREEMENT GOVERNING THE USE AND DISCLOSURE OF PROPOSALS

RFP _____

Offeror _____

21. To the best of my knowledge and belief, no conflict of interest exists that may diminish my capacity to perform an impartial and objective review of the offeror's proposal, or may otherwise result in a biased opinion or an unfair advantage. If a potential conflict of interest arises or if I identify such a conflict, I agree to notify the Government promptly concerning the potential conflict. In determining whether any potential conflict of interest exists, I agree to review whether my or my employer's relationships with other persons or entities, including, but not limited to, ownership of stocks, bonds, other outstanding financial interests or commitments, employment arrangements (past, present, or under consideration), and, to the extent known by me, all financial interests and employment arrangements of my spouse, minor children, and other members of my immediate household, may place me in a position of conflict, real or apparent, with the evaluation proceedings.

2. I agree to use proposal information only for evaluation purposes. I understand that any authorized restriction on disclosure placed upon the proposal by the prospective contractor or subcontractor or by the Government shall be applied to any reproduction or abstracted information of the proposal. I agree to use my best effort to safeguard such information physically, and not to disclose the contents of, or release any information relating to, the proposal(s) to anyone outside of the Source Evaluation Board or other panel assembled for this acquisition, the Contracting Officer, or other individuals designated by the Contracting Officer.

3. I agree to return to the Government all copies of proposals, as well as any abstracts, upon completion of the evaluation.

(Name and Organization)

(Date)

(End of provision)

(c) The release of a proposal to a non-Government evaluator for evaluation does not constitute the release of information for purposes of the Freedom of Information Act (5 U.S.C. 552).

(d) The contracting officer shall attach a cover page bearing the following notice: GOVERNMENT NOTICE FOR HANDLING PROPOSALS—This proposal shall be used and disclosed for evaluation purposes only. Attach a copy of this Government notice to every reproduction or abstract of the proposal. Any authorized restrictive notices which the submitter places on this proposal shall be strictly complied with. Disclosure of this proposal outside the Government for evaluation purposes shall be made only to the extent authorized by, and in accordance with, FAR 3.104–5, FAR 15.207, and AGAR 415.207.

415.209 Solicitation provisions and contract clauses.

(a) The provision at 452.215–71, Instructions for the Preparation of Technical and Business Proposals, may be used when offerors will be required to submit technical and business proposals. Contracting officers should tailor the clause to reflect the degree of information required for the specific acquisition.

(b) The contracting officer shall insert the provision at 452.215–72, Amendments to Proposals, in solicitations which require the submittal of lengthy, complex technical proposals.

Subpart 415.3—Source Selection

415.303 Responsibilities.

The head of the contracting activity (HCA) is authorized to appoint an individual other than the contracting officer as the source selection authority.

415.305 Proposal evaluation.

HCAs are responsible for establishing procedures regarding the release of cost information to the members of the technical evaluation team.

Subpart 415.4—Contract Pricing

415.404–4 Profit.

(a)(1) USDA will use a structured approach to determine the profit or fee prenegotiation objective in acquisition actions when price negotiation is based on cost analysis.

(2) The following types of acquisitions are exempt from the requirements of the structured approach, but the contracting officer shall comply with FAR 15.404–4(d) when analyzing profit for these contracts or actions:

- (i) Architect-engineer contracts;
- (ii) Construction contracts;
- (iii) Contracts primarily requiring delivery of material supplied by subcontractors;
- (iv) Termination settlements; and
- (v) Cost-plus-award-fee contracts;

(b) Unless otherwise restricted by contracting activity procedures, the Contracting Officer may use another Federal agency's structured approach if that approach has been formalized and is maintained as part of that Agency's acquisition regulations (*i.e.*, included in that Agency's assigned chapter of Title 48 of the Code of Federal Regulations).

(c) The HCA is responsible for establishing procedures to ensure compliance with this subpart.

Subpart 415.5—Preaward, Award, and Postaward Notifications, Protests and Mistakes

415.570 Post-award conference.

If a postaward conference is necessary, the contracting officer shall insert clause 452.215–73, Post-Award Conference.

Subpart 415.6—Unsolicited Proposals

415.604 Agency points of contact.

HCAs are responsible for establishing procedures to ensure compliance with the requirements of FAR 15.604.

415.606 Agency procedures.

HCAs are responsible for establishing the procedures for control of unsolicited proposals required by FAR 15.606(a) and for identifying the contact points as required by FAR 15.606(b).

4. The authority citation for Part 437 continues to read as follows:

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

5. Add section 437.204 to read as follows:

437.204 Guidelines for determining availability of personnel.

The head of the contracting activity (HCA) is authorized to approve the use of non-Government evaluators in proposal evaluation. Each such decision shall be supported by a written determination in accordance with FAR 37.204.

6. The authority citation for Part 452 continues to read as follows:

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

7. Revise paragraphs (c) introductory text and (c)(1) and remove Alternates I and II of 452.215–71 to read as follows:

452.215–71 Instructions for the preparation of technical and business proposals.

As prescribed in 415.209(a), insert a provision substantially as follows:

INSTRUCTIONS FOR THE PREPARATION OF TECHNICAL AND BUSINESS PROPOSALS

(September 1999)

* * * * *

(c) *Business Proposal Instructions.*

(1) Cost Proposal.

In addition to any other requirements for cost/pricing information required in clause FAR 52.215–20, Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data (OCT 1997), the following is required:

(Contracting Officer shall identify additional information required if appropriate.)

* * * * *

8. In section 452.215–72, remove “415.407(b)” and add, in its place, “415.209(b)”.

9. In section 452.215–73, remove “415.1070” and add, in its place, “415.570”.

Done at Washington, DC, this 27th day of September, 1999.

W.R. Ashworth,

Director, Office of Procurement and Property Management.

[FR Doc. 99–25474 Filed 9–29–99; 8:45 am]

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