

DEPARTMENT OF DEFENSE

GENERAL SERVICES
ADMINISTRATIONNATIONAL AERONAUTICS AND
SPACE ADMINISTRATION

48 CFR Parts 11 and 52

[FAR Case 96-018]

RIN 9000-AH85

Federal Acquisition Regulation; Use of
Brand Name Item Descriptions

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 provide for the use of brand name purchase descriptions, including "brand name or equal," "brand name—no substitute," and "brand name as target"; and to add two new related solicitation provisions. **DATES:** Comments should be submitted on or before January 15, 1999 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (MVRs), Attn: Laurie Duarte, 1800 F Street, NW, Room 4035, Washington, DC 20405.

E-mail comments submitted over Internet should be addressed to: farcase.96-018@gsa.gov. Please cite FAR case 96-018 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405 (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Victoria Moss, Procurement Analyst, at (202) 501-4764. Please cite FAR case 96-018.

SUPPLEMENTARY INFORMATION:

A. Background

While indicating that performance specifications are the preferred method for describing the Government's needs, the proposed rule provides three types of brand name purchase descriptions, "brand name or equal," "brand name no substitute," and "brand name as target," for use based on the degree of flexibility of the Government's requirement. The rule also proposes two solicitation

provisions providing guidance to offerors responding to "brand name or equal" and "brand name as target" purchase descriptions.

The proposed guidance at FAR 11.104-3 permits contracting officers to describe their needs by identifying brand names as targets rather than as "brand name or equal." The rule would permit solicitations to include salient physical, functional, or performance characteristics of the brand name. However, since needs would be described as targets, offerors could propose alternatives for consideration by the Government that are not identical to the brand name. In addition to looking at alternatives exceeding the target's characteristics, agencies could consider alternatives that were not fully compliant with the salient characteristics of the brand name target (*i.e.*, that were "less than equal" to the brand name but represented a better overall value for the intended use). This will allow contracting officers a simple way to describe needs and enhance their flexibility to make tradeoffs between price and quality to achieve a best value decision. Public comment is sought regarding whether the rule should speak in terms of "desired" characteristics rather than "salient" characteristics, since the latter term is generally associated with the brand name or equal approach, where requirements are fixed and agencies are denied the opportunity to consider offers that fall below the "or equal" level.

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.

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 affects how purchase descriptions may be written for competitive procurements. An Initial Regulatory Flexibility Analysis (IRFA) has been prepared and will be provided to the Chief Counsel for Advocacy for the Small Business Administration. The IRFA is summarized as follows:

The objective of the proposed rule is to provide more comprehensive, uniform FAR guidance on the appropriate use of brand name purchase descriptions, as there are currently many differing interpretations of this issue. Application of the proposed guidance should result in more consistent use of such purchase descriptions in Federal acquisitions. The rule will apply to all large and small entities that offer supplies to the

Government that are brand name items or are comparable to such items. It is anticipated that the selected approach will be the most advantageous to small entities, while achieving the objective of the rule, because this approach best enables the Government to express its requirements clearly and describe the degree of flexibility with which offered supplies or services will be evaluated as "equals."

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 96-018), 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 11 and 52

Government procurement.

Dated: November 9, 1998.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

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

1. The authority citation for 48 CFR Parts 11 and 52 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 11—DESCRIBING AGENCY
NEEDS

2. Section 11.104 is revised and sections 11.104-1, 11.104-2, and 11.104-3 are added to read as follows:

11.104 Use of brand name purchase
descriptions.

While the use of performance specifications is preferred to encourage offerors to propose innovative solutions, the use of a brand name purchase description may be advantageous under certain circumstances.

11.104-1 Brand name or equal.

Brand name or equal purchase descriptions shall include, in addition to the brand name, a general description of those salient physical, functional, or performance characteristics of the brand name item that an "equal" item must meet to be acceptable for award. Use

brand name or equal descriptions when the salient characteristics are firm requirements.

11.104-2 Brand name—no substitute.

Brand name—no substitute purchase descriptions may be used when—

(a) A particular brand name product has a feature or features essential to the Government's requirements, and market research indicates that other companies' similar products do not meet or cannot be modified to meet the agency's legitimate needs; and

(b)(1) The authority to contract without providing for full and open competition is supported by the required justifications and approvals (see 6.302-1); or

(2) The basis for not providing for maximum practicable competition is documented in the file when the acquisition is awarded using simplified acquisition procedures and the amount does not exceed the simplified acquisition threshold.

11.104-3 Brand name as target.

To the extent authorized by agency regulations, for other than sealed bidding acquisitions, contracting officers may identify one or more brand name products as targets for addressing agency needs. The solicitation shall identify the items intended use and may, but need not, include salient physical, functional, or performance characteristics. Use brand name as target purchase descriptions when there are desirable, but not firm, requirements.

3. Section 11.106 is added to read as follows:

11.106 Solicitation provisions.

(a) The contracting officer shall insert the provision at 52.211-X1, Brand Name or Equal, when brand name or equal

purchase descriptions are included in a solicitation.

(b) The contracting officer shall insert the provision at 52.211-X2, Brand Name as Target, when brand name as target purchase descriptions are included in a solicitation.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

5. Sections 52.211-X1 and 52.211-X2 are added to read as follows:

52.211-X1 Brand name or equal.

As prescribed in 11.106(a), insert the following provision:

Brand Name or Equal (Date)

(a) If items in this solicitation are identified as "brand name or equal," the purchase description reflects the characteristics and level of quality that will satisfy the Government's needs. The salient physical, functional, or performance characteristics that "equal" products must meet are specified in the solicitation.

(b) To be considered for award, offers of "equal" products, including "equal" products of the brand name manufacturer, must—

(1) Meet the salient physical, functional, or performance characteristic specified in this solicitation;

(2) Clearly identify the item by—

(i) Brand name, if any; and

(ii) Make or model number;

(3) Include descriptive literature such as cuts, illustrations, drawings, or a clear reference to previously furnished descriptive data or information available to the Contracting Officer; and

(4) Clearly describe any modifications the offeror plans to make in a product to make it conform to the solicitation requirements. Mark any descriptive material to clearly show the modifications.

(c) The Contracting Officer will evaluate "equal" products on the basis of information furnished by the offeror or identified in the offer and reasonably available to the

Contracting Officer. The Contracting Officer is not responsible for locating or obtaining any information not identified in the offer.

(d) Unless the offeror clearly indicates in its offer that the product being offered is an "equal" product, the offeror shall provide the brand name product referenced in the solicitation.

(End of provision)

52.211-X2 Brand Name as Target.

As prescribed in 11.106(b), insert the following provision:

Brand Name as Target (Date)

(a) If items in this solicitation are identified as "brand name as target", the specified brand name item(s) reflects the characteristics and level of quality that will satisfy the Government's needs. Offerors are encouraged to offer these or similar items that will provide comparable performance and quality at a reasonable price.

(b) To be considered for award, offers of substitute products, including other products of the brand name manufacturer, must—

(1) Identify the salient physical, functional, or performance characteristics of the offered item; and

(2) Include descriptive literature, or a clear reference to previously furnished descriptive data or information available to the Contracting Officer.

(c) The Contracting Officer will evaluate offered substitute products on the basis of information furnished by the offeror or identified in the offer and reasonably available to the Contracting Officer. The Contracting Officer is not responsible for locating or obtaining any information not identified in the offer.

(d) Unless the offeror clearly indicates in its offer that a substitute product is being offered, the offeror shall provide the target brand name product referenced in the solicitation.

(End of provision)

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