



May 11, 2022

Ms. Jacqueline Stevens  
601 University Place, Political Science, 2nd Floor  
Evanston IL, 60208

Dear Ms. Stevens:

This letter is in response to your U.S. General Services Administration (GSA) Freedom of Information Act (FOIA) request number (GSA-2021-001513), submitted on August 16, 2021, in which you requested the following:

“I am seeking all public comments and respective agency responses to FAR 15.404-4 Profits (<https://www.acquisition.gov/far/15.404-4>) and the following relevant Federal Acquisition Regulation (FAR) amendments.

The public comments and agency responses I am seeking are for the following:

1. 61 FR 48380 (<https://www.govinfo.gov/content/pkg/FR-1996-09-12/pdf/96-23392.pdf>) from September 12, 1996.
2. 61 FR 52998 (<https://www.govinfo.gov/content/pkg/FR-1996-10-09/pdf/96-25941.pdf>) from October 9, 1996.
3. 61 FR 57622 (<https://www.govinfo.gov/content/pkg/FR-1996-11-07/pdf/96-28635.pdf>) from November 7, 1996.
4. 62 FR 26640 (<https://www.govinfo.gov/content/pkg/FR-1997-05-14/pdf/97-12337.pdf>) from May 15, 1997.
5. 62 FR 51224 (<https://www.govinfo.gov/content/pkg/FR-1997-09-30/pdf/97-25666.pdf>) from September 30, 1997.
6. 69 FR 25274 (<https://www.govinfo.gov/content/pkg/FR-2004-05-05/pdf/04-9752.pdf>) from May 5, 2004.
7. 74 FR 39262 (<https://www.govinfo.gov/content/pkg/FR-2009-08-06/pdf/E9-18799.pdf>) from August 6, 2009.
8. 77 FR 57949 (<https://www.govinfo.gov/content/pkg/FR-2012-09-18/pdf/2012-21874.pdf>) from September 18, 2012.
9. 77 FR 60343 (<https://www.govinfo.gov/content/pkg/FR-2012-10-03/pdf/C1-2012-21874.pdf>) from October 3, 2012.

Please note that I submitted a separate and distinct request for similar documents. These requests should be processed independently.”

Enclosed please find the documents responsive to your request. Provided below is a table identifying what responsive document(s) applies to each item of your request.

Also, please note, after a thorough search, no comment documents could be found for 69 FR 25274.

<b>Request Item #</b>	<b>Request Item</b>	<b>File Name</b>
1	61 FR 48380 from September 12, 1996.	FAR Case 95-029
2	61 FR 52998 from October 9, 1996.	FAR Case 95-029 FAR Case 96-303
3	61 FR 57622 from November 7, 1996.	FAR Case 95-029
4	62 FR 26640 from May 15, 1997.	FAR Case 95-029
5	62 FR 51224 from September 30, 1997.	FAR Case 95-029
6	69 FR 25274 from May 5, 2004.	No comment documents found
7	74 FR 39262 from August 6, 2009.	FAR Case 2008-011
8	77 FR 57949 from September 18, 2012.	FAR Case 2011-018
9	77 FR 60343 from October 3, 2012.	FAR Case 2011-018

In processing your request, GSA has withheld the cell phone numbers, email addresses and signatures of private individuals and sensitive email addresses pursuant to the FOIA, 5 U.S.C. § 552(b)(6). This was done because public disclosure of this information would constitute a clearly unwarranted invasion of personal privacy.

As we have redacted information referenced in the above paragraph(s) with the aforementioned FOIA exemption, this technically constitutes a partial denial of your FOIA request. You have the right to appeal the denial of the information being withheld. You may submit an appeal online at the following link (<https://www.foiaonline.gov/foiaonline/action/public/home>) or in writing to the following address:

U.S. General Services Administration  
FOIA Requester Service Center (LG)  
1800 F Street, NW  
Washington, DC 20405

Your appeal must be postmarked or electronically transmitted within 90 days of the date of the response to your request. In addition, your appeal must contain a brief statement of the reasons why the requested information should be released. Please enclose a copy of your initial request and this denial. Both the appeal letter and envelope or

online appeal submission should be prominently marked, "Freedom of Information Act Appeal."

This completes our action on this FOIA request. Should you have any questions, please contact the Regulatory Secretariat by email at [GSARegSec@gsa.gov](mailto:GSARegSec@gsa.gov). You may also contact the GSA FOIA Public Liaison, Mr. Seth Greenfeld at (202) 501-4560 or by email at [seth.greenfeld@gsa.gov](mailto:seth.greenfeld@gsa.gov) for any additional assistance.

Additionally, you may contact the Office of Government Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, email at [ogis@nara.gov](mailto:ogis@nara.gov); telephone at (202) 741-5770; toll free at (877) 684-6448; or facsimile at (202) 741-5769.

Sincerely,

*Travis Lewis*

**Travis Lewis**

FOIA Program Manager

Office of the General Counsel

General Services Administration

Enclosure(s)

Proposed Rule

Baseline· FAC 90-37

**6.101 [Amended]**

2 Section 6 101 is amended by revising paragraph 6 101(b) to read

"(b) Contracting officers shall provide for full and open competition through use of the competitive procedure, or combination of competitive procedures, contained in this subpart that is best suited to the circumstances of the contract action and is consistent with the need to efficiently fulfill the Government's requirements. Contracting officers must use good judgment in selecting the procedure that best meets the needs of the Government "

**15.407 [Amended]**

3 Section 15.407 is amended by removing the current 15 407(d)(4)(ii) and inserting the following as paragraphs (ii) and (iii):

"(ii) If awards are intended to be made without discussions with offerors within the competitive range, use the basic provision with its Alternate II

(iii) If the Government wishes to reserve the right to limit the competitive range to no more than a specific

*Encl 1*



**ADDRESSES:** Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th and F Streets, NW, Room 4037, Washington, D.C. 20405. Please cite FAR Case 96-303 in all correspondence related to this issue.

**FOR FURTHER INFORMATION CONTACT:** For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, D C. 20405 (202) 501-4755. Please cite FAR Case 96-303.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

Subsections 4101(a) and (b) of the Federal Acquisition Reform Act of 1996 (Pub L. 104-106) (the Act) require FAR implementation of the requirement to obtain full and open competition in a manner that is consistent with the need to efficiently fulfill the Government's requirements. Section 4103 of the Act provides that the contracting officer may limit the number of proposals in the competitive range, in accordance with criteria specified in the solicitation, to the greatest number that will permit an efficient competition. The proposed rule revises FAR 6.101(b), 15.404(d)(4), 15.609 and 52.215-16 to implement Sections 4101 and 4103. The integrity, fairness, and openness principles in FAR Subpart 1.102 are not changed.

**B. Regulatory Flexibility Act**



EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D C 20503

OFFICE OF FEDERAL  
PROCUREMENT POLICY

August 8, 1995

MEMORANDUM FOR AGENCY SENIOR PROCUREMENT EXECUTIVES  
AND THE DEPUTY UNDER SECRETARY OF DEFENSE  
(ACQUISITION REFORM)

FROM: Steven Kelman *SK*  
Administrator

SUBJECT: Use of DUNS Numbers

There are several numbering systems used to identify federal contractors doing business with the government. Concerns have been raised that the same numbering system should be used for reporting to the Federal Procurement Data System (FPDS) and identifying vendors in the FACNET vendor registration database. This would be more efficient, more cost effective, and reduce confusion in the procurement community.

Therefore, we have determined that the DUNS numbering system will be used for FPDS reporting purposes and to identify vendors in the FACNET vendor registration database. Please note that TINs will be retained for IRS reporting purposes.

We are working with GSA to make the transition from contractor establishment codes (CECs) to DUNS numbers in the FPDS. Beginning with FY 96 first quarter submissions to the Federal Procurement Data Center (FPDC), agencies may report either CECs or DUNS numbers. The FPDC will provide, upon request, conversion tapes from CECs to DUNS numbers.

Questions about the FPDS should be directed to Linda Williams on 202-395-3302 and about FACNET to Neil Lamb on 202-395-4551.

cc: FPDS Policy Advisory Board Members  
FPDS Agency Contacts  
Electronic Commerce Acquisition Program Management Office

competitive range for purposes of conducting an efficient competition among the most highly rated proposals.

(c) After evaluating offers, the contracting officer may determine that the number of proposals that would otherwise be included in the competitive range exceeds the number at which an efficient competition can be conducted. Provided the solicitation notifies offerors that the competitive range can be limited for purposes of efficiency, the contracting officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals. The basic solicitation provision at 52.215-16, Contract Award, reserves the contracting officer's right to limit the competitive range for purposes of efficiency.

(d) If the contracting officer determines that an offeror's proposal is no longer in the competitive range, the proposal shall no longer be considered for award. Written notice of this decision shall be provided to the unsuccessful offeror at the earliest practicable time (see 15.1002(b)).

(e) Offerors excluded from the competitive range may request a debriefing. When a debriefing is requested, see 15.1005."

**52.215-16 [Amended]**

Subject to this approval, please arrange to publish this proposed rule in the Federal Register. Questions relating to the case may be referred to Ralph De Stefano on (202) 501-1758

Enclosures

cc: Director, DARC

number, use the basic provision with its Alternate III, or the basic provision with both Alternates II and III."

**15.609 [Revised]**

4. Section 15.609 is revised to read:  
"15.609 Competitive range.

(a) The contracting officer shall determine the competitive range for the purpose of conducting written or oral discussions (see 15.610) based on cost or price and other factors in the solicitation. The competitive range consists of proposals having the greatest likelihood of award based on the factors and subfactors in the solicitation.

(b) In planning an acquisition, the contracting officer may determine that the number of proposals that would otherwise be included in the competitive range is expected to exceed the number at which an efficient competition can be conducted. In reaching such a conclusion, the contracting officer may consider such factors as the results of market research, historical data from previous acquisitions for similar supplies and services, and the resources available to conduct the source selection. Alternate III of 52.215-16, Contract Award may be used to indicate the Government's estimate of the greatest number of proposals that will be included in the

or before (60 days after publication) to be considered in the formulation of the final rule.

**ADDRESSES:** Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th and F Streets, NW, Room 4037, Washington, D C 20405 Please cite FAR Case 96-303 in all correspondence related to this issue.

**FOR FURTHER INFORMATION CONTACT:** For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, D.C. 20405 (202) 501-4755. Please cite FAR Case 96-303

**SUPPLEMENTARY INFORMATION:**

**A. Background**

Section 4103 of the Federal Acquisition Reform Act of 1996 (Pub L. 104-106) provides that the contracting officer may limit the number of proposals in the competitive range, in accordance with criteria specified in the solicitation, to the greatest number that will permit an efficient competition. The proposed rule revises FAR 15.407, 15.609 and 52.215-16 to implement Section 4103.

**B. Regulatory Flexibility Act**

The proposed rule may have a significant economic impact on a substantial number of small entities within the

Therefore, it is proposed that 48 CFR Parts 6, 15, and 52 be amended as set forth below:

1. The authority citation for 48 CFR Parts 6, 15, and 52 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

**6.101 [Amended]**

2. Section 6.101 is amended by revising paragraph 6.101(b) to read:

"(b) Contracting officers shall provide for full and open competition through use of the competitive procedure, or combination of competitive procedures, contained in this subpart that is best suited to the circumstances of the contract action and is consistent with the need to efficiently fulfill the Government's requirements. Contracting officers must use good judgment in selecting the procedure that best meets the needs of the Government "

**15.407 [Amended]**

3. Section 15.407 is amended by removing the current 15.407(d)(4)(11) and inserting the following as paragraphs (11) and (111):

"(11) If awards are intended to be made without discussions with offerors within the competitive range, use the basic provision with its Alternate II.

(111) If the Government wishes to reserve the right to limit the competitive range to no more than a specific

of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the Contracting Officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals.

Provision 52.215-16 is further amended by inserting a new Alternate III.

"Alternate III (XXX 1996). As prescribed in 15 406(d)(4)(111), insert the following paragraph (1) in the basic provision:

"(1) If the Contracting Officer exercises the Government's right to limit the number of proposals in the competitive range, the competitive range will be limited to no more than \_\_\_\_\_ (*insert number*) "



The proposed rule 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 revises the procedures for determining the competitive range in negotiated acquisitions. The size of the competitive range will be reduced in some negotiated acquisitions and some offerors may be eliminated from a competition earlier than they would be eliminated under existing procedures. However, bid and proposal costs are expected to decrease, as an offeror who is not likely to receive an award will be less likely to remain in a competition. 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 from small businesses and other interested parties. Comments from small entities concerning the affected FAR subpart will be considered in accordance with Section 610 of the Act. Such comments shall be submitted separately and cite FAR Case 96-303 in correspondence.

**C. Paperwork Reduction Act**

The Paperwork Reduction Act does not apply because the proposed regulation does not impose any additional reporting or information collection requirements which require Office



General Services Administration  
Office of Acquisition Policy  
Washington, DC 20405

96-303

MAY 31 1996

MEMORANDUM FOR FAR SECRETARIAT

FROM: (b) (6)  
EDWARD C. LOEB  
CHAIRMAN  
CIVILIAN AGENCY  
ACQUISITION COUNCIL

SUBJECT: FAR Case 96-303, Competitive Range Determinations,  
Federal Acquisition Reform Act, Section 4103

This memorandum provides the subject case for publication as  
a proposed rule

Section 4103 of the Federal Acquisition Reform Act of 1996  
(Pub L. 104-106) (FARA) provides that the contracting  
officer may limit the number of proposals in the competitive  
range, in accordance with criteria specified in the  
solicitation, to the greatest number that will permit an  
efficient competition. The proposed rule revises FAR 15 407,  
15 609 and 52 215-16 to implement Section 4103.

The case was reviewed by the CAAC through its review of the  
Part 15 Committee Rewrite Report. The CAAC's and the DARC's  
position on the Part 15 Rewrite was presented at the FAR  
Council meeting on April 22. Because this part of the Part  
15 Rewrite is also implementing Section 4103 of FARA, it is  
being processed on a separate track in order to meet the  
statutory implementation date. The following is enclosed for  
your information.

1. Rule  
Collateral requirements
2. DARC Memo

**This document shall not be sent to the Federal Register until  
specific approval is obtained from the Director.**

Subject to this approval, please arrange to publish this  
proposed rule in the Federal Register. Questions relating to  
the case may be referred to Ralph De Stefano on (202) 501-  
1758.

Enclosures

cc: Director, DARC



**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 6, 15, and 52**

**[FAR Case 96-303]**

**Federal Acquisition Regulation; Competitive Range**

**Determinations**

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Proposed rule with request for comments.

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**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council are proposing to amend the Federal Acquisition Regulation (FAR) Parts 6, 15, and 52 to implement Sections 4101 and 4103 of the Federal Acquisition Reform Act of 1996. The rule provides the contracting officer with the authority to limit the size of the competitive range, in accordance with criteria specified in the solicitation, to the greatest number that will permit an efficient competition.

**DATES:** Comments on the proposed rule should be submitted in writing to the FAR Secretariat at the address shown below on or before (60 days after publication) to be considered in the formulation of the final rule.



ACQUISITION AND  
TECHNOLOGY  
DP (DAR)

OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON  
WASHINGTON DC 20301-3000

June 20, 1996



In reply refer to  
FAR Case: 96-303

MEMORANDUM FOR MR. EDWARD C. LOEB, CHAIRMAN  
CIVILIAN AGENCY ACQUISITION COUNCIL

SUBJECT: Competitive Range Determinations

This confirms our mutual agreement to the attached revised proposed rule. In addition, this confirms that our staffs have agreed that the Regulatory Flexibility Act applies, as indicated in our April 17, 1996, memorandum

Please forward the revised rule to the FAR Secretariat for processing up to the point of publication. The revisions to the rule do not require revisions to the Initial Regulatory Flexibility Analysis attached to our April 17 memorandum. Our case manager is Ms. Melissa Rider, (703)601-0131.

(b) (6)

D. S. Parry  
Captain, SC USN  
Director, Defense Acquisition  
Regulations Council

Attachment



JUN 24 1996

interested parties. Comments from small entities concerning the affected FAR subpart will be considered in accordance with Section 610 of the Act. Such comments shall be submitted separately and cite FAR Case 96-303 in correspondence.

**C. Paperwork Reduction Act**

The Paperwork Reduction Act does not apply because the proposed regulation does not impose any additional reporting or information collection requirements which require Office of Management and Budget approval under 44 U.S.C. 3501, et seq.

**D. Introductory Item.**

Section 4101 of the Federal Acquisition Reform Act of 1996 (Pub. L. 104-106) (FARA) provides that the FAR shall ensure that the requirement to obtain full and open competition is implemented in a manner that is consistent with the need to efficiently fulfill the Government's requirements. Section 4103 of FARA provides that the contracting officer may limit the number of proposals in the competitive range, in accordance with criteria specified in the solicitation, to the greatest number that will permit an efficient competition. The proposed rule revises FAR 6.101(b), 15.404(d)(4), 15.609 and 52.215-16 to implement Sections 4101 and 4103.

## COLLATERAL REQUIREMENTS

**ACTION:** Proposed rule with request for comments

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**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council are proposing to amend the Federal Acquisition Regulation (FAR) Parts 6, 15 and 52 to implement Sections 4101 and 4103 of the Federal Acquisition Reform Act of 1996. The rule provides the contracting officer with the authority to limit the size of the competitive range, in accordance with criteria specified in the solicitation, to the greatest number that will permit an efficient competition

### **SUPPLEMENTARY INFORMATION:**

#### **A. Background**

Subsections 4101(a) and (b) of the Federal Acquisition Reform Act of 1996 (Pub L 104-106) (the Act) require FAR implementation of the requirement to obtain full and open competition in a manner that is consistent with the need to efficiently fulfill the Government's requirements. Section 4103 of the Act provides that the contracting officer may limit the number of proposals in the competitive range, in accordance with criteria specified in the solicitation, to the greatest number that will permit an efficient competition. The proposed rule revises FAR 6.101(b), 15.404(d)(4), 15.609 and 52.215-16 to implement Sections 4101 and 4103. The integrity, fairness, and openness principles in FAR Subpart 1.102 are not changed

#### **B. Regulatory Flexibility Act**

The proposed rule 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 revises the procedures for determining the competitive range in negotiated acquisitions. The size of the competitive range will be reduced in some negotiated acquisitions and some offerors may be eliminated from a competition earlier than they would be eliminated under existing procedures. However, bid and proposal costs are expected to decrease, as an offeror who is not likely to receive an award will be less likely to remain in a competition. An Initial Regulatory Flexibility Analysis (IFRA) has been prepared and submitted to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IFRA may be obtained from the FAR Secretariat. Comments are invited from small businesses and other

of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the Contracting Officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals

Provision 52 215-16 is further amended by inserting a new Alternate III

"Alternate III (XXX 1996) As prescribed in 15.406(d)(4)(iii), insert the following paragraph (1) in the basic provision:

"(1) If the Contracting Officer exercises the Government's right to limit the number of proposals in the competitive range, the competitive range will be limited to no more than \_\_\_\_\_ (insert number) "

number, use the basic provision with its Alternate III, or the basic provision with both Alternates II and III "

**15.609 [Revised]**

4 Section 15 609 is revised to read  
"15.609 Competitive range.

(a) The contracting officer shall determine the competitive range for the purpose of conducting written or oral discussion (see 15 610) based on cost or price and other factors in the solicitation. The competitive range consists of proposals having the greatest likelihood of award based on the factors and subfactors in the solicitation.

(b) In planning an acquisition, the contracting officer may determine that the number of proposals that would otherwise be included in the competitive range is expected to exceed the number at which an efficient competition can be conducted. In reaching such a conclusion, the contracting officer may consider such factors as the results of market research, historical data from previous acquisitions for similar supplies and services, and the resources available to conduct the source selection. Alternate III of 52.215-16, Contract Award may be used to indicate the Government's estimate of the greatest number of proposals that will be included in the



competitive range for purposes of conducting an efficient competition among the most highly rated proposals

(c) After evaluating offers, the contracting officer may determine that the number of proposals that would otherwise be included in the competitive range exceeds the number at which an efficient competition can be conducted. Provided the solicitation notifies offerors that the competitive range can be limited for purposes of efficiency, the contracting officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals. The basic solicitation provision at 52.215-16, Contract Award, reserves the contracting officer's right to limit the competitive range for purposes of efficiency.

(d) If the contracting officer determines that an offeror's proposal is no longer in the competitive range the proposal shall no longer be considered for award. Written notice of this decision shall be provided to the unsuccessful offeror at the earliest practicable time (see 15.1002(b)).

(e) Offerors excluded from the competitive range may request a debriefing. When a debriefing is requested, see 15.1005 "

**52.215-16 [Amended]**

of Management and Budget approval under 44 U.S.C. 3501, et  
seq.

**List of Subjects in 48 CFR Parts 6, 15, and 52**

Government procurement

**INITIAL REGULATORY FLEXIBILITY ANALYSIS**  
**FAR Case 96-303**

This initial regulatory flexibility analysis has been prepared in accordance with Section 603, Title 5, of the United States Code

**1. Reasons for the Proposed Action.**

This proposed rule amends the Federal Acquisition Regulation to allow contracting officers to limit the competitive range, in negotiated acquisitions, to the greatest number of proposals that will permit an efficient competition

**2. Objectives and Legal Basis.**

The proposed rule implements Section 4103 of the Federal Acquisition Reform Act of 1996 (Public Law 104-106). Section 4103 provides that, if the contracting officer determines that the number of offerors that would otherwise be included in the competitive range exceeds the number at which an efficient competition can be conducted, the contracting officer may limit the number of proposals in the competitive range, in accordance with the criteria specified in the solicitation, to the greatest number that will permit an efficient competition among the most highly rated offerors.

**3. Description and Estimate of the Number of Small Entities to Which the Proposed Rule Will Apply.**

The proposed rule will apply to all large and small entities who offer supplies or services to the Government in competitive negotiated acquisitions. The size of the competitive range will be reduced in some negotiated acquisitions, and some offerors may be eliminated from a competition earlier than they would be eliminated under existing procedures. However, bid and proposal costs are expected to decrease, as an offeror who is not likely to receive an award will be less likely to remain in a competition.

**4. Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule.**

The proposed rule does not impose any new reporting, recordkeeping, or other compliance requirements.

96-318



OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON  
WASHINGTON DC 20301-3000

February 13, 1996



ACQUISITION AND  
TECHNOLOGY

DP (DAR)

MEMORANDUM FOR CHAIRMAN, CIVILIAN AGENCY ACQUISITION COUNCIL

SUBJECT: Fiscal Year 1996 Defense Authorization Act

Attached is a list of FAR cases that we established to implement the Fiscal Year 1996 Defense Authorization Act.

We established all but three of these cases to implement the Federal Acquisition Reform Act of 1996 (FARA) portion of the Act. The three cases that are not part of FARA are FAR Case 96-300, Gratuities, FAR Case 96-318, Uniformed Services Treatment Facilities, and FAR Case 96-319, Information Technology

The FARA portion requires a proposed rule to be published in the Federal Register no later than 210 days after enactment, and a final rule to be published in the Federal Register no later than 330 days after enactment. The Information Technology section is effective 180 days after enactment.

(b) (6)

D. S. Parry  
Captain, SC, USN  
Director, Defense Acquisition  
Regulations Council

Attachment



FEB 16 1996

(b) CLERICAL AMENDMENT—The item relating to such section in the table of contents in section 1 of such Act is amended to read as follows.

**"1313 Audits"**

**SEC. 3527. PRESCRIPTION OF MEASUREMENT RULES AND RATES OF TOLLS.**

Section 1601 of the Panama Canal Act of 1979 (22 U.S.C. 3791) is amended to read as follows:

**"PRESCRIPTION OF MEASUREMENT RULES AND RATES OF TOLLS**

"SEC. 1601. The Commission may subject to the provisions of this Act prescribe and from time to time change—

"(1) the rules for the measurement of vessels for the Panama Canal and

"(2) the tolls that shall be levied for use of the Panama Canal."

**SEC. 3624. PROCEDURES FOR CHANGES IN RULES OF MEASUREMENT AND RATES OF TOLLS.**

Section 1604 of the Panama Canal Act of 1979 (22 U.S.C. 3794) is amended—

(1) in subsection (a) by striking out "1601(a)" in the first sentence and inserting in lieu thereof "1601";

(2) by striking out subsection (c) and inserting in lieu thereof the following new subsection (c)

"(c) After the proceedings have been conducted pursuant to subsections (a) and (b) the Commission may change the rules of measurement or rates of tolls as the case may be. The Commission shall publish notice of any such change in the Federal Register not less than 30 days before the effective date of the change, and

(3) by striking out subsections (d) and (e) and redesignating subsection (f) as subsection (d).

**SEC. 3528. MISCELLANEOUS TECHNICAL AMENDMENTS.**

The Panama Canal Act of 1979 is amended—

(1) in section 1205 (22 U.S.C. 3645) by striking out "appropriation" in the last sentence and inserting in lieu thereof "fund";

(2) in section 1303 (22 U.S.C. 3713) by striking out "The authority of this section may not be used for administrative expenses";

(3) in section 1321(d) (22 U.S.C. 3731(d)) by striking out "appropriations or" in the second sentence;

(4) in section 1401(c) (22 U.S.C. 3761(c)), by striking out "appropriated for or" in the first sentence;

(5) in section 1415 (22 U.S.C. 3775) by striking out "appropriated or" in the second sentence; and

(6) in section 1416 (22 U.S.C. 3776) by striking out "appropriated or" in the third sentence.

**SEC. 3630. CONFORMING AMENDMENT TO TITLE 31, UNITED STATES CODE.**

Section 9101(3) of title 31, United States Code is amended by adding at the end the following:

"(F) the Panama Canal Commission."

**DIVISION D—FEDERAL ACQUISITION REFORM**

**SEC. 4001. SHORT TITLE.**

This division may be cited as the "Federal Acquisition Reform Act of 1996."

**TITLE XII—COMPETITION**

**SEC. 4101. EFFICIENT COMPETITION.**

(a) ARMED SERVICES ACQUISITIONS—Section 2304 of title 10, United States Code is amended—

(1) by redesignating subsection (j) as subsection (k), and

(2) by inserting after subsection (i) the following new subsection (j):

"(j) The Federal Acquisition Regulation shall ensure that the requirement to obtain

full and open competition is implemented in a manner that is consistent with the need to efficiently fulfill the Government's requirements.

(b) CIVILIAN AGENCY ACQUISITIONS—Section 303 of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253) is amended—

(1) by redesignating subsection (h) as subsection (i), and

(2) by inserting after subsection (g) the following new subsection (h):

"(h) The Federal Acquisition Regulation shall ensure that the requirement to obtain full and open competition is implemented in a manner that is consistent with the need to efficiently fulfill the Government's requirements."

(c) REVISIONS TO NOTICE THRESHOLDS—Section 18(a)(1)(B) of the Office of Federal Procurement Policy Act (41 U.S.C. 416(a)(1)(B)) is amended—

(A) by striking out "subsection (f)—" and all that follows through the end of the subparagraph and inserting in lieu thereof "subsection (b), and", and

(B) by inserting after "property or services" the following for a price expected to exceed \$10,000, but not to exceed \$25,000:

**SEC. 4102. EFFICIENT APPROVAL PROCEDURES.**

(a) ARMED SERVICES ACQUISITIONS—Section 2304(f)(1)(B) of title 10, United States Code, is amended—

(1) in clause (i)—  
(A) by striking out "\$100,000 (but equal to or less than \$1,000,000)" and inserting in lieu thereof "\$500,000 (but equal to or less than \$10,000,000)", and

(B) by striking out "(ii), (iii) or (iv)" and inserting in lieu thereof "(ii) or (iii)";

(2) in clause (ii)—

(A) by striking out "\$1,000,000 (but equal to or less than \$10,000,000)" and inserting in lieu thereof "\$10,000,000 (but equal to or less than \$50,000,000)", and

(B) by adding "or" at the end,

(3) by striking out clause (iii), and

(4) by redesignating clause (iv) as clause (iii).

(b) CIVILIAN AGENCY ACQUISITIONS—Section 303(f)(1)(B) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(f)(1)(B)) is amended—

(1) in clause (i)—

(A) by striking out "\$100,000 (but equal to or less than \$1,000,000)" and inserting in lieu thereof "\$500,000 (but equal to or less than \$10,000,000)", and

(B) by striking out "(ii), (iii), or (iv)" and inserting in lieu thereof "(ii) or (iii)", and

(2) in clause (ii)—

(A) by striking out "\$1,000,000 (but equal to or less than \$10,000,000)" and inserting in lieu thereof "\$10,000,000 (but equal to or less than \$50,000,000)", and

(B) by striking out the semicolon after "civilian" and inserting in lieu thereof a comma and

(3) in clause (iii) by striking out "\$10,000,000" and inserting in lieu thereof "\$50,000,000."

**SEC. 4103. EFFICIENT COMPETITIVE RANGE DETERMINATIONS.**

(a) ARMED SERVICES ACQUISITIONS—Paragraph (4) of 2305(b) of title 10, United States Code is amended—

(1) in subparagraph (C), by striking out "(C)", by transferring the text to the end of subparagraph (B), and in that text by striking out "Subparagraph (B)" and inserting in lieu thereof "This subparagraph";

(2) by redesignating subparagraph (B) as subparagraph (C) and

(3) by inserting before subparagraph (C) (as so redesignated) the following new subparagraph (B):

"(B) If the contracting officer determines that the number of offerors that would oth-

erwise be included in the competitive range under subparagraph (A)(i) exceeds the number at which an efficient competition can be conducted, the contracting officer may limit the number of proposals in the competitive range, in accordance with the criteria specified in the solicitation, to the greatest number that will permit an efficient competition among the offerors rated most highly in accordance with such criteria."

(b) CIVILIAN AGENCY ACQUISITIONS—Section 303B(d) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253b(d)) is amended—

(1) by redesignating paragraph (2) as paragraph (3), and

(2) by inserting before paragraph (3) (as so redesignated) the following new paragraph (2):

"(2) If the contracting officer determines that the number of offerors that would otherwise be included in the competitive range under paragraph (1)(A) exceeds the number at which an efficient competition can be conducted, the contracting officer may limit the number of proposals in the competitive range in accordance with the criteria specified in the solicitation, to the greatest number that will permit an efficient competition among the offerors rated most highly in accordance with such criteria."

**SEC. 4104. PREAWARD DEBRIEFINGS.**

(a) ARMED SERVICES ACQUISITIONS—Section 2305(b) of title 10, United States Code is amended—

(1) by striking out subparagraph (F) of paragraph (5);

(2) by redesignating paragraph (6) as paragraph (9), and

(3) by inserting after paragraph (5) the following new paragraphs:

"(6)(A) When the contracting officer excludes an offeror submitting a competitive proposal from the competitive range (or otherwise excludes such an offeror from further consideration prior to the final source selection decision), the excluded offeror may request in writing within three days after the date on which the excluded offeror receives notice of its exclusion a debriefing prior to award. The contracting officer shall make every effort to debrief the unsuccessful offeror as soon as practicable but may refuse the request for a debriefing if it is not in the best interests of the Government to conduct a debriefing at that time.

(B) The contracting officer is required to debrief an excluded offeror in accordance with paragraph (5) of this section only if that offeror requested and was refused a preaward debriefing under subparagraph (A) of this paragraph.

"(C) The debriefing conducted under this subsection shall include—

(i) the executive agency's evaluation of the significant elements in the offeror's offer,

(ii) a summary of the rationale for the offeror's exclusion and

(iii) reasonable responses to relevant questions posed by the debriefed offeror as to whether source selection procedures set forth in the solicitation, applicable regulations, and other applicable authorities were followed by the executive agency.

(D) The debriefing conducted pursuant to this subsection may not disclose the number or identity of other offerors and shall not disclose information about the content, ranking or evaluation of other offerors' proposals.

"(7) The contracting officer shall include a summary of any debriefing conducted under paragraph (5) or (6) in the contract file.

(8) The Federal Acquisition Regulation shall include a provision encouraging the use of alternative dispute resolution techniques

(d[e]) The contracting officer shall notify in writing an unsuccessful offeror at the earliest practicable time that its proposal is no longer eligible for award (see 15.1002(b))

~~—— (e) At the earliest practicable time, the contracting officer shall notify offerors in writing that their proposals are no longer eligible for award (see 15.1002(b)). [Offerors excluded from the competitive range may request a debriefing. When a debriefing is requested, see FAR 15.1005.]~~

**Tab A**  
**Draft FAR Changes**  
**Implementation of FARA Section 4103**  
**Baseline: FAC 39**

**15.609 Competitive range.**

~~(a) The contracting officer shall determine which proposals are in the competitive range for the purpose of conducting written or oral discussion (see 15.610(b)). The competitive range shall be determined on the basis of cost or price and other factors that were stated in the solicitation and shall include all proposals that have a reasonable chance of being selected for award. When there is doubt as to whether a proposal is in the competitive range, the proposal should be included. [The contracting officer shall determine the competitive range for the purpose of conducting written or oral discussion (see 15.610(b)). The competitive range consists of proposals having the greatest likelihood of award, based on the criteria in the solicitation.]~~

(b) [If the contracting officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, and the solicitation permits further limiting the competitive range, (see 15.406-5(c)), the contracting officer may so limit the number of proposals in the competitive range to the greatest number of most highly rated proposals that will permit an efficient competition. (10 U.S.C. 2305(b) and 41 U.S.C. 253b(d)(2)).

(c) In determining the criteria for limiting the competitive range to permit an efficient competition, the contracting officer may consider the results of market research; historical data for previous acquisitions for similar supplies or services; the resources available to conduct the source selection; and other considerations, as appropriate. ]

(e[d]) If the contracting officer, ~~after complying with 15.610(b),~~ determines that a[n offeror's] proposal ~~no longer has a reasonable chance of~~ [is no longer likely to] being selected for contract award, ~~it~~ [the offeror] may ~~no longer be considered for selection~~ [be eliminated from the competitive range and no longer be considered for award.]

V. CONCURRENCE: All Part 15 Rewrite Team members concur with this report.

(b) (6)

MELISSA D. RIDER  
Chair, Part 15 Rewrite Team

Encl.  
Tab A. Proposed FAR Changes  
Tab B: FARA References

cc: TEAM MEMBERS  
Treasury, Mr McLaughlin  
ODUSD(AR), Mr. Drabkin  
Army, Ms. Scott  
Navy, Ms. Norrington  
Air Force, Mr. Benavides  
DLA, Ms. Davis  
GSA, Ms Moss  
NASA, Ms. Sullivan (Vice Chair)  
OFPP, Mr. Tash  
DOE, Mr. Simpson  
Counsel, Maj Van Maldeghem



C. The team deleted the "when in doubt leave them in" philosophy, in favor of language encouraging limiting the competitive range to those offerors with the greatest likelihood of receiving an award. This also supports the goal of efficient competition, as espoused in the Federal Acquisition Reform provisions of the Fiscal Year 1996 Defense Authorization Act.

D The team believes that the changes at Tab A should be published in the Federal Register as a separate case from the FAR Part 15 Rewrite. The proposed changes will allow field contracting personnel to operate more effectively and efficiently. We believe these changes should be implemented as soon as practicable.

#### IV. COLLATERALS

A. Federal Register publication is required. We recommend that the coverage at Tab A be published as a proposed rule

B Although the Regulatory Flexibility Act applies, we believe the rule will not have a significant negative 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 small businesses will no longer have to incur the expense of remaining in a competition where they are not likely to receive an award. This will result in lower bid and proposal costs. An Initial Regulatory Flexibility Analysis has been performed to document this determination. The team will address any comments received from small entities during the public comment period regarding this finding in the formulation of the final rule.

C The Paperwork Reduction Act does not apply because the rule will not impose any additional reporting or record keeping requirements that require Office of Management and Budget approval under 44 U S.C. 3501, et seq.

5. Provision 52.215-16 Contract Award, is amended by revising paragraph (c) of the Basic provision to read.

"(c) The Government intends to evaluate proposals and award a contract after conducting discussions with responsible offerors whose proposals have been determined to be within the competitive range. If the Contracting Officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the Contracting Officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals.

Therefore, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint." Provision 52.215-16 is further amended by revising Alternate II to read.

"(c) The Government intends to evaluate proposals and award a contract without discussions with offerors (except communications conducted for the purpose of minor clarification). Therefore, each individual offer should contain the offeror's best terms from a cost or price and technical standpoint. However, the Government reserves the right to conduct discussions if the Contracting Officer later determines them to be necessary. If discussions are held and the Contracting Officer determines that the number

**5. Relevant Federal Rules Which May Duplicate, Overlap, or Conflict With the Proposed Rule.**

The proposed rule does not duplicate, overlap, or conflict with any other Federal rules.

**6. Significant Alternatives to the Proposed Rule.**

There are no practical alternatives which would effectively implement the provisions of Section 4103 of Public Law 104-106

5 Provision 52.215-16 Contract Award, is amended by revising paragraph (c) of the Basic provision to read

"(c) The Government intends to evaluate proposals and award a contract after conducting discussions with responsible offerors whose proposals have been determined to be within the competitive range. If the Contracting Officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the Contracting Officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals.

Therefore, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint."

Provision 52.215-16 is further amended by revising Alternate II to read:

"(c) The Government intends to evaluate proposals and award a contract without discussions with offerors (except communications conducted for the purpose of minor clarification). Therefore, each individual offer should contain the offeror's best terms from a cost or price and technical standpoint. However, the Government reserves the right to conduct discussions if the Contracting Officer later determines them to be necessary. If discussions are held and the Contracting Officer determines that the number

meaning of the Regulatory Flexibility Act, 5 U.S.C 601 et seq., because the rule revises the procedures for determining the competitive range in negotiated acquisitions. The size of the competitive range will be reduced in some negotiated acquisitions, and some offerors may be eliminated from a competition earlier than they would be eliminated under existing procedures. However, bid and proposal costs are expected to decrease, as an offeror who is not likely to receive an award will be less likely to remain in a competition. An Initial Regulatory Flexibility Analysis (IFRA) has been prepared and submitted to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IFRA may be obtained from the FAR Secretariat. Comments are invited from small businesses and other interested parties. Comments from small entities concerning the affected FAR subpart will be considered in accordance with Section 610 of the Act. Such comments shall be submitted separately and cite FAR Case 96-303 in correspondence.

**C. Paperwork Reduction Act**

The Paperwork Reduction Act does not apply because the proposed regulation does not impose any additional reporting or information collection requirements which require Office

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 15 and 52

[FAR Case 96-303]

Federal Acquisition Regulation; Competitive Range

Determinations

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Proposed rule with request for comments.

---

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council are proposing to amend the Federal Acquisition Regulation (FAR) Parts 15 and 52 to implement Section 4103 of the Federal Acquisition Reform Act of 1996. The rule provides the contracting officer with the authority to limit the size of the competitive range, in accordance with criteria specified in the solicitation, to the greatest number that will permit an efficient competition.

**DATES:** Comments on the proposed rule should be submitted in writing to the FAR Secretariat at the address shown below on

[(d) Offerors excluded from the competitive range may request a debriefing. When a debriefing is requested, see 15.1005.]

~~(d)~~ [(e)]....

\* \* \* \* \*

52.215-16 Contract Award

As prescribed in 15.407(d)(4), insert the following provision:

CONTRACT AWARD (XXX 1996)

\* \* \*

(c) The Government intends to evaluate proposals and award a contract after conducting ~~written or oral~~ discussions with ~~all~~ responsible offerors whose proposals have been determined to be within the competitive range. [If the Contracting Officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the Contracting Officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals.] However, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint.

\* \* \* \* \*

Draft FAR Changes  
Implementation of FARA Section 4103  
Baseline: FAC 39

15.609 Competitive range.

(a) The contracting officer shall determine which proposals are in the competitive range for the purpose of conducting written or oral discussion (see 15.610(b)). The competitive range shall be determined on the basis of cost or price and other factors that were stated in the solicitation and shall include ~~all~~ proposals that have a reasonable chance of being selected for award. ~~When there is doubt as to whether a proposal is in the competitive range, the proposal should be included.~~

[(b) If the contracting officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the contracting officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals (10 U.S.C. 2305(b) and 41 U.S.C. 253b(d)(2)).]

~~(b [c]) If the contracting officer, after complying with 15.610(b), determines that a [n offeror's] proposal no longer has a reasonable chance of [is no longer in the competitive range] being selected for contract award, it [, the proposal shall ] may no longer be considered for selection [no longer be considered for award. Written notice of this decision shall be provided to unsuccessful offerors at the earliest practicable time (see 15.1002(b)).]~~

~~(c) The contracting officer shall notify in writing an unsuccessful offeror at the earliest practicable time that its proposal is no longer eligible for award (see 15.1002(b)).~~





ACQUISITION AND  
TECHNOLOGY

DP (DAR)

OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON  
WASHINGTON DC 20301-3000

April 17, 1996



In reply refer to  
FAR Case: 96-303

MEMORANDUM FOR MR. EDWARD C. LOEB, CHAIRMAN  
CIVILIAN AGENCY ACQUISITION COUNCIL

SUBJECT: Competitive Range Determinations, Federal Acquisition  
Reform Act, Section 4103

We have agreed to a proposed rule (Atch 1) which amends the Federal Acquisition Regulation (FAR) Part 15 to implement Section 4103 of the FY96 Defense Authorization Act. The rule amends FAR 15.609 to provide the contracting officer with the authority to limit the size of the competitive range, in accordance with criteria specified in the solicitation, to the greatest number that will permit an efficient competition, and amends 15.407 and 52.215-16 to make associated changes.

If you agree with this proposed rule, please forward it to the FAR Secretariat for processing up to the point of publication. A draft Federal Register notice is attached (Atch 2).

The Regulatory Flexibility Act applies and the rule may have a significant economic impact on a substantial number of small entities. Therefore, an Initial Regulatory Flexibility Analysis has been performed (Atch 3) The Paperwork Reduction Act does not apply because the proposed rule does not establish any new information or recordkeeping requirements. Our case manager is Ms. Melissa Rider, (703)602-0131.

(b) (6)

D. S. Parry  
Captain, SC, USN  
Director, Defense Acquisition  
Regulations Council

Attachments



APR 19 1996

Section 4103 of the Federal Acquisition Reform Act of 1996 (Pub L. 104-106) provides that the contracting officer may limit the number of proposals in the competitive range, in accordance with criteria specified in the solicitation, to the greatest number that will permit an efficient competition. The proposed rule revises FAR 15.407, 15.609 and 52.215-16 to implement Section 4103.

## **COLLATERAL REQUIREMENTS**

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council are proposing to amend the Federal Acquisition Regulation (FAR) Parts 15 and 52 to implement Section 4103 of the Federal Acquisition Reform Act of 1996. The rule provides the contracting officer with the authority to limit the size of the competitive range, in accordance with criteria specified in the solicitation, to the greatest number that will permit an efficient competition.

### **SUPPLEMENTARY INFORMATION:**

#### **A. Background**

Section 4103 of the Federal Acquisition Reform Act of 1996 (Pub. L. 104-106) provides that the contracting officer may limit the number of proposals in the competitive range, in accordance with criteria specified in the solicitation, to the greatest number that will permit an efficient competition. The proposed rule revises FAR 15.407, 15.609 and 52.215-16 to implement Section 4103.

#### **B. Regulatory Flexibility Act**

Although the Regulatory Flexibility Act applies, we believe the rule will not have a significant negative 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 small businesses will no longer have to incur the expense of remaining in a competition where they are not likely to receive an award. This will result in lower bid and proposal costs. An Initial Regulatory Flexibility Analysis has been performed to document this determination. Comments are invited from small businesses and other interested parties. Comments from small entities concerning the affected FAR subpart will be considered in accordance with Section 610 of the Act. Such comments shall be submitted separately and cite FAR Case 96-303 in correspondence.

#### **C. Paperwork Reduction Act**

The Paperwork Reduction Act does not apply because the proposed regulation does not impose any additional reporting or information collection requirements which require Office of Management and Budget approval under 44 U.S.C. 3501, et seq.

#### **D. Introductory Item**



ACQUISITION AND  
TECHNOLOGY

OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON  
WASHINGTON DC 20301-3000



MEMORANDUM FOR DIRECTOR, DAR COUNCIL 12 Mar 96

FROM: Part 15 Adhoc Team

SUBJ: FAR Case 96-303; Competitive Range Determinations, Federal  
Acquisition Reform Act, Section 4103

I PROBLEM

On February 5, 1996, the Defense Acquisition Regulations Council tasked the Part 15 Rewrite ad hoc team with implementation of Section 4103 of the Fiscal Year 1996 Defense Authorization Act in the Federal Acquisition Regulation

II RECOMMENDATION

That the FAR changes at Tab A be published as a proposed rule in the Federal Register.

III DISCUSSION:

A. Section 4103 of the Fiscal Year 1996 Department of Defense Authorization Act provides the contracting officer with the authority to limit the size of the competitive range, in accordance with criteria specified in the solicitation, to the greatest number that will permit an efficient competition. The proposed coverage implements this philosophy in paragraph (b).

B. The team was also asked to consider a recommendation of the Procurement Process Reform Process Action Team to delete the statement at FAR 15.609 that a proposal should be included in the competitive range for the purpose of conducting discussions, if there is doubt as to whether the proposal is in the competitive range. This was originally included in FAR Case 95-0008, which was published as a proposed rule in the Federal Register on November 6, 1995 (60 FR 56035). That case was subsequently withdrawn.



## REQUEST FOR SPECIAL HANDLING

FAR CASE 96-303, COMPETITIVE RANGE DETERMINATIONS;  
EXTENSION OF COMMENT PERIOD

I am requesting the following special handling for this document:

- Requested publication date:** Please publish this document on 10-8-96.
- Emergency filing or publication:** Attached is a letter explaining the need for emergency filing or publication.
- Confirm publication date:** Please call me to confirm the publication date and/or separate part number of this document.
- Separate Part:** Please publish this document in a separate part of the FEDERAL REGISTER. All other GSA/DoD/NASA documents published on the same date should appear in the same separate part..
- Photo prints:** Please supply \_\_\_\_\_ sets of photo prints. Charge these photo prints to:  
GPO Open Jacket Number 156-950  
or  
Agency Requisition Number 6-89192
- Disk Certification:** I hereby certify that the attached disk, in ASCII text, is identical to the hard copy of the attached DOD/GSA/NASA document "FAR Case 96-303, Competitive Range Determinations"

Signed 151 10/3/96  
BEVERLY FAYSON  
GSA FAR Secretariat Ph. 202-501-4786

cc: Official File-VRS, Reading File-VRS, VR  
MVR: RDeStefano:lf:501-4755:10/03/96 (FARDocs) (96PropRules)  
(FRTrans./96-303ext.),

Concurrences: MVR (Lantier) **(b) (6)** Date 10/3/96  
MVR (Loeb) \_\_\_\_\_ Date \_\_\_\_\_

**DATES:** Comments should be submitted on or before [60 days after Federal Register publication date] 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 & F Streets, NW, Room 4037  
Washington, DC 20405

Please cite FAR case 96-303 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 96-303.

**SUPPLEMENTARY INFORMATION.**

**A. Background**

Subsections 4101(a) and (b) of the Federal Acquisition Reform Act of 1996 (Public Law 104-106) (the Act) require FAR implementation of the requirement to obtain full and open competition in a manner that is consistent with the need to efficiently fulfill the Government's requirements. Section 4103 of the Act provides that the contracting officer may limit the number of proposals in the competitive range, in accordance with criteria specified in the solicitation, to the greatest number that will permit an efficient competition. The proposed rule revises FAR 6.101(b), 12.301(e), 15.407(d)(4), 15.609, 52.212-1(g) and 52.215-16 to

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 6, 12, 15 and 52

[FAR Case 96-303]

RIN: 9000-AH15

**Federal Acquisition Regulation; Competitive Range  
Determinations**

**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 Sections 4101 and 4103 of the Federal Acquisition Reform Act of 1996. The rule provides the contracting officer with the authority to limit the size of the competitive range, in accordance with criteria specified in the solicitation, to the greatest number that will permit an efficient competition. 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.

# REQUEST FOR PUBLICATION

FAR CASE 96-303, COMPETITIVE RANGE DETERMINATIONS

I am requesting the following special handling for this document:

- X       **Requested publication date:** Please publish this document on July 30, 1996. If there is a problem, please contact us in time for resolution.
- Emergency filing or publication:** Attached is a letter explaining the need for emergency filing or publication.
- X       **Confirm publication date:** Please call me to confirm the publication date, comment closing date, and/or separate part number of this document.
- X       **Separate Part:** Please publish this document in a separate part of the Federal Register. When there are other proposed, interim, or final rules appearing in the same issue, please combine them in the same separate part.
- X       **Diskette Certification:** I hereby certify that the electronic transmittal, in ASCII text, is identical to the hard copy document of FAR Case 96-303, Competitive Range Determinations

Signed \_\_\_\_\_

**(b) (6)**

Beverly Fayson  
FAR Secretariat

Date: \_\_\_\_\_

7-25-96

Telephone: 202-501-4755



(ii) If awards are intended to be made without discussions with offerors within the competitive range, use the basic provision with its Alternate II

(iii) If the Government wishes to reserve the right to limit the competitive range to no more than a specific number, use the basic provision with its Alternate III, or the basic provision with both Alternates II and III

\* \* \* \* \*

5 Section 15 609 is revised to read as follows

**15.609 Competitive range.**

(a) The contracting officer shall determine the competitive range for the purpose of conducting written or oral discussion (see 15 610(b)) based on cost or price and other factors in the solicitation. The competitive range consists of proposals having the greatest likelihood of award based on the factors and subfactors in the solicitation

(b) In planning an acquisition, the contracting officer may determine that the number of proposals that would otherwise be included in the competitive range is expected to exceed the number at which an efficient competition can be conducted. In reaching such a conclusion, the contracting officer may consider such factors as the results of market research, historical data from previous acquisitions for similar supplies and services, and the resources available to conduct the source selection. Alternate III of 52 215-16, Contract Award, may be used to indicate the Government's estimate of the greatest number or proposals that will be included in the competitive range for purposes of conducting an efficient competition among the most highly rated proposals

(c) After evaluating offers, the contracting officer may determine that the number of proposals that would otherwise be included in the competitive range exceeds the number at which an efficient competition can be conducted. Provided the solicitation notifies offerors that the competitive range can be limited for purposes of efficiency, the contracting officials may limit the number of proposals in the competitive range to the greatest

number that will permit an efficient competition among the most highly rated proposals. The basic solicitation provisions at 52 215-16, Contract Award, reserves the contracting officer's right to limit the competitive range for purposes of efficiency

(d) If the contracting officer determines that an offeror's proposal is no longer in the competitive range the proposal shall no longer be considered for award. Written notice of this decision shall be provided to the unsuccessful offeror at the earliest practicable time (see 15 1002(b))

(e) Offerors excluded from the competitive range may request a debriefing. When a debriefing is requested, see 15 1004

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

6 Section 52 212-1 is amended by revising the provision date and paragraph (g) to read as follows

**52 212-1 Instructions to Offerors—Commercial Items**

\* \* \* \* \*

**Instructions to Offerors—Commercial Items (Date)**

\* \* \* \* \*

(g) *Contract award (not applicable to Invitation for Bids)*. The Government intends to evaluate proposals and award a contract without discussions with offerors (except communications conducted for the purpose of minor clarification). Therefore, each individual offer should contain the offeror's best terms from a cost or price and technical standpoint. However, the Government reserves the right to conduct discussions if the Contracting Officer later determines them to be necessary. If discussions are held and the Contracting Officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the Contracting Officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals. The Government may reject any or all offers if such action is in the public interest, accept other than the lowest offer, and waive informalities and minor irregularities in offers received

\* \* \* \* \*

7 Section 52 215-16 is amended by revising the provision date and paragraph (c), revising Alternate II (c), and adding a new Alternate III to read as follows

**52 215-16 Contract Award**

\* \* \* \* \*

**Contract Award (Date)**

\* \* \* \* \*

(c) The Government intends to evaluate proposals and award a contract after conducting discussions with responsible offerors whose proposals have been determined to be within the competitive range. If the Contracting Officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the Contracting Officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals. Therefore, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint

\* \* \* \* \*

**Alternate II (Date) \* \* \***

(c) The Government intends to evaluate proposals and award a contract without discussions with offerors (except communications conducted for the purpose of minor clarification). Therefore, each individual offer should contain the offeror's best terms from a cost or price and technical standpoint. However, the Government reserves the right to conduct discussions if the Contracting Officer later determines them to be necessary. If discussions are to be held and the Contracting Officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the Contracting Officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals

**Alternate III (Date)**. As prescribed in 15 407(d)(4)(ii), insert the following paragraph (i) in the basic provision

(i) If the Contracting Officer exercises the Government's right to limit the number of proposals in the competitive range, the competitive range will be limited to no more than \_\_\_\_\_ (insert number)

[FR Doc 96-19351 Filed 7-30-96 8 45 am]

BILLING CODE 6820-EP-M

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 6, 12, 15, and 52

[FAR Case 96-303]

RIN 9000-AH15

Federal Acquisition Regulation; Competitive Range Determinations

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 Sections 4101 and 4103 of the Federal Acquisition Reform Act of 1996. The rule provides the contracting officer with the authority to limit the size of the competitive range, in accordance with criteria specified in the solicitation, to the greatest number that will permit an efficient competition. 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 September 30, 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 4037, Washington, DC 20405.

Please cite FAR case 96-303 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 96-303.

SUPPLEMENTARY INFORMATION:

A. Background

Subsections 4101 (a) and (b) of the Federal Acquisition Reform Act of 1996 (Pub. L. 104-106) (the Act) require FAR implementation of the requirement to obtain full and open competition in a manner that is consistent with the need

to efficiently fulfill the Government's requirements. Section 4103 of the Act provides that the contracting officer may limit the number of proposals in the competitive range, in accordance with criteria specified in the solicitation, to the greatest number that will permit an efficient competition. The proposed rule revises FAR 6.101(b), 12.301(e), 15.407(d)(4), 15.609, 52.212-1(g) and 52.215-16 to implement sections 4101 and 4103. The integrity, fairness, and openness principles in FAR subpart 1.102 are not changed.

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 revises the procedures for determining the competitive range in negotiated acquisitions. The size of the competitive range will be reduced in some negotiated acquisitions and some offerors may be eliminated from a competition earlier than they would be eliminated under existing procedures. However, bid and proposal costs are expected to decrease, as an offeror who is not likely to receive an award will be less likely to remain in a competition. An Initial Regulatory Flexibility Analysis has been performed and will be provided to the Chief Council for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the FAR Secretariat. Comments are invited from small businesses and other interested parties. Comments from small entities concerning the affected FAR subpart will be considered in accordance with section 610 of the Act. Such comments must be submitted separately and should cite 5 U.S.C. 601, et seq. (FAR case 96-303), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose any substantial change in 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 6, 12, 15 and 52

Government procurement

Dated July 25, 1996

Edward C. Loeb

Director, Federal Acquisition Policy Division

Therefore, it is proposed that 48 CFR Parts 6, 12, 15 and 52 be amended as set forth below.

1. The authority citation for 48 CFR Parts 6, 12, 15 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 6—COMPETITION REQUIREMENTS

2. Section 6.101 is amended by revising paragraph (b) to read as follows:

6.101 Policy

\* \* \* \* \*

(b) Contracting officers shall provide for full and open competition through use of the competitive procedure, or combination of competitive procedures, contained in this subpart that is best suited to the circumstances of the contract action and is consistent with the need to efficiently fulfill the Government's requirement. Contracting officers must use good judgment in selecting the procedure that best meets the needs of the Government.

PART 12.3—ACQUISITION OF COMMERCIAL ITEMS

3. Section 12.301 is amended by adding new paragraph (e)(4) to read as follows:

12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

\* \* \* \* \*

(e) \* \* \*

(4) The contracting officer may reserve the right to conduct discussions with offerors determined to be within the competitive range after evaluation of proposals and to limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals. 52.215-16, Contract Award, Alternate III, may be used in solicitations for this purpose.

\* \* \* \* \*

PART 15—CONTRACTING BY NEGOTIATION

4. Section 15.407 is amended by revising paragraph (d)(4)(ii) and adding new paragraph (d)(4)(iii) to read as follows:

15.407 Solicitation provisions

\* \* \* \* \*

(d) \* \* \*

(4) \* \* \*

Register on September 12, 1996 (61 FR 48380). Since it is important to consider the proposed rule for FAR Case 96-303, Competitive Range Determinations, in the broader context of FAR Part 15 as a whole, we encourage interested parties to express their positions on this rule as part of the public meeting on the rewrite of FAR Part 15, Phase I. That meeting is scheduled for November 8, 1996, from 10 a.m. to 5 p.m., local time at the NASA Headquarters Building Auditorium, 300 E St., SW, Washington D.C. 20024. If you wish to attend the meeting, or to make presentations on competitive range determinations, please contact the FAR Part 15 Rewrite Committee Chair, Ms. Melissa Rider, DAR Council, Attn: IMD 3D139, PDUSD(A&T)DP/DAR, 3062 Defense Pentagon, Washington, D.C. 20301-3062; telephone (703) 602-0131.

INCOMING VIA  
CC MAIL

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 6, 15, and 52

[FAR Case 96-303]

**Federal Acquisition Regulation; Competitive Range**

**Determinations**

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Proposed rule, extension of comment period.

---

**SUMMARY:** The public comment period for the proposed rule, which was published in the Federal Register on July 31, 1996 (61 FR 40116), is extended through November 19, 1996.

**FOR FURTHER INFORMATION CONTACT:** For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, D.C. 20405 (202) 501-4755. Please cite FAR Case 96-303.

**SUPPLEMENTARY INFORMATION:** The public comment period on the proposed rule is extended to conform with the public comment period on the proposed rule for the FAR Part 15 Rewrite-- Phase I, FAR Case 95-029, which was published in the Federal

implement Sections 4101 and 4103. The integrity, fairness, and openness principles in FAR Subpart 1.102 are not changed.

#### **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 revises the procedures for determining the competitive range in negotiated acquisitions. The size of the competitive range will be reduced in some negotiated acquisitions and some offerors may be eliminated from a competition earlier than they would be eliminated under existing procedures. However, bid and proposal costs are expected to decrease, as an offeror who is not likely to receive an award will be less likely to remain in a competition. An Initial Regulatory Flexibility Analysis has been performed and will be provided to the Chief Council for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the FAR Secretariat. Comments are invited from small businesses and other interested parties. Comments from small entities concerning the affected FAR subpart will be considered in accordance with section 610 of the Act. Such comments must be submitted separately and should cite 5 U.S.C. 601, et seq. (FAR case 96-303), in correspondence.

#### **C. Paperwork Reduction Act**

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose any substantial

PUB DATE 10/9/96

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 6, 12, 15 and 52

[FAR Case 96-303]

RIN: 9000-AH15

Federal Acquisition Regulation; Competitive Range  
Determinations

**AGENCIES:** Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA)

**ACTION** Proposed rule, extension of comment period

**SUMMARY.** The public comment period on the proposed rule which was published in the Federal Register at 61 FR 40116, July 31, 1996, is extended through November 19, 1996. The rule implements Sections 4101 and 4103 of the Federal Acquisition Reform Act of 1996 and relates to providing the contracting officer with the authority to limit the size of the competitive range, in accordance with criteria specified in the solicitation, to the greatest number that will permit an efficient competition.

The rule is extended to conform with the public comment period on the proposed rule for the FAR Part 15 Rewrite-- Phase I, FAR Case 95-029, which was published in the Federal Register at 61 FR 48380, September 12, 1996. Since it is important to consider the proposed rule for FAR Case 96-303,

Council, Attn: IMD 3D139, PDUSD(A&T)DP/DAR, 3062 Defense  
Pentagon, Washington, DC 20301-3062; telephone (703) 602-  
0131, facsimile ((703) 602-0350 by November 15, if possible.  
Please cite FAR case 96-303. For logistics information  
regarding the public meeting contact Jill Dickey, telephone  
(816) 926-7203, facsimile (816) 823-1167.

Dated: NOV 12 1996

(b) (6)

EDWARD C. LOEB  
Director,  
Federal Acquisition Policy Division.

*Certified alk 11-12-96*

scheduled for discussion, should contact the FAR Part 15 Committee Chair at the following address Ms Melissa Rider, DAR Council, Attn IMD 3D139, PDUSD(A&T) DP/DAR, 3062 Defense Pentagon, Washington, DC 20301-3062, Telephone (703) 602-0131

*Comments* Interested parties should submit written comments to General Services Administration, FAR Secretariat (MVRs), Attn Sharon Kiser 18th & F Streets, NW, Room 4037 Washington, DC 20405 Please cite FAR case 95-029 in all correspondence related to this issue

*Electronic Access* This proposed rule is posted on the Acquisition Reform Network (ARNET) at www-far-npr.gov Comments may be submitted electronically at that address

**FOR FURTHER INFORMATION CONTACT** For information regarding the public meeting, contact the FAR Part 15 Rewrite Committee Chair, Ms Melissa Rider, telephone (703) 602-0131 Fax (703) 602-0350 For general information, contact the FAR Secretariat, Attn Victoria Moss, Room 4037, GS Building Washington, DC 20405, telephone (202) 501-4755 Please cite FAR case 95-029

**SUPPLEMENTARY INFORMATION** The public comment period for the proposed rule, which was published in the Federal Register on September 12, 1996 (61 FR 48380), is extended through November 19, 1996 The public meeting date is changed from October 17, 1996, to November 8, 1996, to encourage increased participation by interested parties

Dated October 3, 1996  
Edward C Loeb  
Director Federal Acquisition Policy Division  
[FR Doc 96-25941 Filed 10-8-96, 8 45 am]  
BILLING CODE 6820-EP-P

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 6, 12, 15 and 52**  
[FAR Case 96-303]

RIN 9000-AH15

**Federal Acquisition Regulation, Competitive Range Determinations**

**AGENCIES** Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA)

**ACTION** Proposed rule, extension of comment period

**SUMMARY** The public comment period on the proposed rule which was published in the Federal Register at 61 FR 40116, July 31, 1996, is extended through November 19, 1996 The rule implements Sections 4101 and 4103 of the Federal Acquisition Reform Act of 1996 and relates to providing the contracting officer with the authority to limit the size of the competitive range, in accordance with criteria specified in the solicitation, to the greatest number that will permit an efficient competition

The public comment period is extended to conform with the public comment period on the proposed rule for the FAR Part 15 Rewrite—Phase I

FAR Case 95-029, which was published in the Federal Register at 61 FR 48380, September 12, 1996 Since it is important to consider the proposed rule for FAR Case 96-303, Competitive Range Determinations, in the broader context of FAR Part 15 as a whole, we encourage interested parties to express their positions on this rule as part of the public meeting on the rewrite of FAR Part 15 Phase I

**DATES** *Comments* Comments on the proposed rule should be submitted in writing to the GSA on or before November 19, 1996

*Public Meeting* The meeting is scheduled for November 8, 1996 from 10 a m to 5 p m, local time

**ADDRESSES** The location of the meeting will be the NASA Headquarters Building Auditorium, 300 E St SW, Washington DC 20546 If you wish to attend the meeting, or to make presentations on competitive range determinations please contact the FAR Part 15 Rewrite Committee Chair, Ms Melissa Rider, DAR Council, Attn IMD 3D139, PDUSD (A&T) DP/DAR 3062 Defense Pentagon, Washington, D C 20301-3062 telephone (703) 602-0131  
**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 96-303

List of Subjects in 48 CFR Parts 6, 12, 15 and 52

Government procurement  
Dated October 3 1996  
Edward C Loeb  
Director, Federal Acquisition Policy Division  
[FR Doc 96-25942 Filed 10-8-96 8 45 am]  
BILLING CODE 6820-EP-P



Register on September 12, 1996 (61 FR 48380). It is important to consider the proposed rule for FAR case 96-303, Competitive Range Determinations, in the broader context of FAR Part 15 as a whole. There are differences between the Competitive Range case and the FAR Part 15 Rewrite--Phase I case that are due primarily to the different baselines used. The Competitive Range case uses the baseline of the current FAR Parts 15 and 52, while the FAR Part 15 Rewrite--Phase I case uses a baseline of reorganized and revised Parts 15 and 52. Notwithstanding the minor differences between the cases, we encourage interested parties to express their positions on this rule as part of a second public meeting on the FAR Part 15 Rewrite--Phase I, which is being held in Kansas City, MO to allow small businesses in the Midwest an opportunity to participate more fully in the rulemaking process. That meeting is scheduled for November 18, 1996, from 9 a.m. to 12 p.m., local time at the Ramada Inn Benjamin Ranch, 6101 East 87th Street (I-435 and 87th Street Exit), Kansas City, MO, Sierra Rooms I, II, and III, telephone (816) 765-4331.

If you wish to attend the meeting, or to make presentations on competitive range determinations, please contact the FAR Part 15 Rewrite Committee Chair, Ms. Melissa Rider, DAR

*Special file*

**REQUEST FOR PUBLICATION**

**FAR CASE 96-303, COMPETITIVE RANGE DETERMINATIONS  
EXTENSION OF COMMENT PERIOD**

I am requesting the following special handling for this document


  X   **Emergency publication date:** Please publish this document on or before November 15, 1996 Because the meeting is scheduled for 11/18/96 and must coincide with another public meeting, this is an emergency request. If there is a problem, please contact us in time for resolution.

       **Emergency filing or publication:** Attached is a letter explaining the need for emergency filing or publication

  X   **Confirm publication date:** Please call me to confirm the publication date, comment closing date, and/or separate part number of this document.

  X   **Separate Part:** Please publish this document in a separate part of the Federal Register. When there are other proposed, interim, or final rules appearing in the same issue, please combine them in the same separate part.

  X   **Diskette Certification:** I hereby certify that the electronic transmittal, in ASCII text, is identical to the hard copy document of FAR Case 96-303, Competitive Range Determinations

Signed  Beverly Fayson  
*ja* FAR Secretariat

Date: 11-12-96

Telephone. 202-501-4755

**DEPARTMENT OF DEFENSE****GENERAL SERVICES  
ADMINISTRATION****NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION****48 CFR Parts 6, 15, and 52**

[FAR Case 96-303]

**Federal Acquisition Regulation,  
Competitive Range Determinations**

**AGENCIES** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA)

**ACTION:** Proposed rule, extension of comment period

**SUMMARY** The public comment period for the proposed rule, Competitive Range Determinations (96-303), which was published in the Federal Register on July 31, 1996 (61 FR 40116), is extended through November 26, 1996

**DATES** Comments on the proposed rule should be submitted by November 26, 1996

**FOR FURTHER INFORMATION CONTACT** Beverly Fayson, the FAR Secretariat, Room 4037, GS Building, Washington DC 20405, (202) 501-4755. Please cite FAR case 96-303.

**SUPPLEMENTARY INFORMATION** The public comment period on the proposed rule is extended to conform with the public comment period on the proposed rule for the FAR Part 15 Rewrite—Phase I, FAR Case 95-029, which was published in the Federal Register on September 12, 1996 (61 FR 48380). It is important to consider the proposed rule for FAR Case 96-303 Competitive Range Determinations, in the broader context of FAR Part 15 as a whole. There are differences between the Competitive Range case and the FAR Part 15 Rewrite—Phase I case that are due primarily to the different baselines used. The Competitive Range case uses the baseline of the current FAR Parts 15 and 52, while the FAR Part 15 Rewrite—Phase I case uses a baseline of reorganized and revised Parts 15 and 52. Notwithstanding the minor differences between the cases, we encourage interested parties to express their positions on this rule as part of a second public meeting on the FAR Part 15

Rewrite—Phase I, which is being held in Kansas City, MO to allow small businesses in the Midwest an opportunity to participate more fully in the rulemaking process. That meeting is scheduled for November 18, 1996, from 9 a.m. to 12 p.m. local time at the Ramada Inn Benjamin Ranch, 6101 East 87th Street (I-435 and 87th Street Exit), Kansas City, MO, Sierra Rooms I, II, and III, telephone (816) 765-4331.

If you wish to attend the meeting or to make presentations on competitive range determinations, please contact the FAR Part 15 Rewrite Committee Chair, Ms. Melissa Rider, DAR Council, Attn: IMD 3D139, PDUSD(A&T)DP/DAR, 3062 Defense Pentagon, Washington, DC 20301-3062, telephone (703) 602-0131, facsimile (703) 602-0350 by November 15, if possible. Please cite FAR Case 96-303. For logistics information regarding the public meeting contact Jill Dickey, telephone (816) 926-7203, facsimile (816) 823-1167.

Dated November 12, 1996

Edward C. Loeb

*Director, Federal Acquisition Policy Division*

[FR Doc. 96-29400 Filed 11-14-96 8:45 am]

BILLING CODE 6820-JC-P



General Services Administration  
Office of Acquisition Policy  
Washington, DC 20405

MAY 13 1997

MEMORANDUM FOR FAR SECRETARIAT

FROM: (b) (6)  
EDWARD C. LOEB  
CHAIRMAN  
CIVILIAN AGENCY  
ACQUISITION COUNCIL

SUBJECT: FAR Case 96-303, Competitive Range Determinations,  
Federal Acquisition Reform Act, Section 4103

Please close the subject FAR Case. The proposed rule under FAR Case 95-029 subsumed the proposed rule under FAR Case 96-303.

cc: Director, DARC

of Management and Budget approval under 44 U.S.C. 3501, et  
*seq.*

**List of Subjects in 48 CFR Parts 15 and 52**

Government procurement



General Services Administration  
Office of Acquisition Policy  
Washington, DC 20405

96-303

*Official File Copy*

JUN 25 1996

MEMORANDUM FOR FAR SECRETARIAT

FROM EDWARD C LOEB  
CHAIRMAN  
CIVILIAN AGENCY  
ACQUISITION COUNCIL

SUBJECT FAR Case 96-303, Competitive Range Determinations,  
Federal Acquisition Reform Act, Section 4103

This memorandum provides the subject case for publication as a proposed rule

Section 4101 of the Federal Acquisition Reform Act of 1996 (Pub L 104-106) (FARA) provides that the FAR shall ensure that the requirement to obtain full and open competition is implemented in a manner that is consistent with the need to efficiently fulfill the Government's requirements. Section 4103 of FARA provides that the contracting officer may limit the number of proposals in the competitive range, in accordance with criteria specified in the solicitation, to the greatest number that will permit an efficient competition. The proposed rule revises FAR 6.101(b), 15.404(d)(4), 15.609 and 52.215-16 to implement Sections 4101 and 4103.

The case was reviewed by the CAAC through its review of the Part 15 Committee Rewrite Report. The CAAC's and the DARC's position on the Part 15 Rewrite was presented at the FAR Council meeting on April 22. Because this part of the Part 15 Rewrite is also implementing Sections 4101 and 4103 of FARA, it is being processed on a separate track in order to meet the statutory implementation date. The following is enclosed for your information:

1. Rule  
Collateral requirements
2. DARC Memo

**This document shall not be sent to the Federal Register until specific approval is obtained from the Director.**

Competitive Range Determinations, in the broader context of FAR Part 15 as a whole, we encourage interested parties to express their positions on this rule as part of the public meeting on the rewrite of FAR Part 15, Phase I. That meeting is scheduled for November 8, 1996, from 10 a.m. to 5 p.m., local time at the NASA Headquarters Building Auditorium, 300 E St., SW, Washington D.C. 20024. If you wish to attend the meeting, or to make presentations on competitive range determinations, please contact the FAR Part 15 Rewrite Committee Chair, Ms. Melissa Rider, DAR Council, Attn: IMD 3D139, PDUSD(A&T)DP/DAR, 3062 Defense Pentagon, Washington, D.C. 20301-3062; telephone (703) 602-0131.

**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 96-303.

**List of Subjects in 48 CFR Parts 6, 12, 15 and 52:**

Government procurement.

Dated OCT 3 1996

**(b) (6)**

EDWARD C. LOEB,  
Director,  
Federal Acquisition  
Policy Division.

{BILLING CODE 6820-EP}

**INITIAL REGULATORY FLEXIBILITY ANALYSIS**  
**FAR CASE 96-303**

This initial regulatory flexibility analysis has been prepared in accordance with 5 U.S.C. 603.

**1. Reasons for the Proposed Action.**

This proposed rule amends the Federal Acquisition Regulation to allow contracting officers to limit the competitive range, in negotiated acquisitions, to the greatest number of proposals that will permit an efficient competition.

**2. Objectives and Legal Basis.**

The proposed rule implements Section 4103 of the Federal Acquisition Reform Act of 1996 (Public Law 104-106). Section 4103 provides that, if the contracting officer determines that the number of offerors that would otherwise be included in the competitive range exceeds the number at which an efficient competition can be conducted, the contracting officer may limit the number of proposals in the competitive range, in accordance with the criteria specified in the solicitation, to the greatest number that will permit an efficient competition among the most highly rated offerors.

**3 Description and Estimate of the Number of Small Entities to Which the Proposed Rule Will Apply.**

The proposed rule will apply to all large and small entities who offer supplies or services to the Government in competitive negotiated acquisitions. The size of the competitive range will be reduced in some negotiated acquisitions, and some offerors may be eliminated from a competition earlier than they would be eliminated under existing procedures. However, bid and proposal costs are expected to decrease, as an offeror who is not likely to receive an award will be less likely to remain in a competition.

**4 Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule.**

The proposed rule does not impose any new reporting, recordkeeping, or other compliance requirements.



**DEPARTMENT OF DEFENSE****GENERAL SERVICES  
ADMINISTRATION****NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION**

48 CFR Parts 6, 15, and 52

[FAR Case 96-303]

**Federal Acquisition Regulation,  
Competitive Range Determinations**

**AGENCIES** Department of Defense (DoD),  
General Services Administration (GSA),  
and National Aeronautics and Space  
Administration (NASA)

**ACTION** Proposed rule, extension of  
comment period

**SUMMARY** The public comment period  
for the proposed rule Competitive  
Range Determinations (96-303), which  
was published in the Federal Register  
on July 31, 1996 (61 FR 40116), is  
extended through November 26, 1996

**DATES** Comments on the proposed rule  
should be submitted by November 26,  
1996

**FOR FURTHER INFORMATION CONTACT**  
Beverly Fayson, the FAR Secretariat,  
Room 4037, GS Building, Washington,  
DC 20405, (202) 501-4755 Please cite  
FAR case 96-303

**SUPPLEMENTARY INFORMATION** The  
public comment period on the proposed  
rule is extended to conform with the  
public comment period on the proposed  
rule for the FAR Part 15 Rewrite—Phase  
I FAR Case 95-029, which was  
published in the Federal Register on  
September 12, 1996 (61 FR 48380) It is  
important to consider the proposed rule  
for FAR Case 96-303, Competitive  
Range Determinations, in the broader  
context of FAR Part 15 as a whole  
There are differences between the  
Competitive Range case and the FAR  
Part 15 Rewrite—Phase I case that are  
due primarily to the different baselines  
used The Competitive Range case uses  
the baseline of the current FAR Parts 15  
and 52, while the FAR Part 15 Rewrite—  
Phase I case uses a baseline of  
reorganized and revised Parts 15 and 52  
Notwithstanding the minor differences  
between the cases, we encourage  
interested parties to express their  
positions on this rule as part of a second  
public meeting on the FAR Part 15

Rewrite—Phase I, which is being held in  
Kansas City, MO to allow small  
businesses in the Midwest an  
opportunity to participate more fully in  
the rulemaking process That meeting is  
scheduled for November 18, 1996, from  
9 a m to 12 p m , local time at the  
Ramada Inn Benjamin Ranch, 6101 East  
87th Street (I-435 and 87th Street Exit),  
Kansas City, MO, Sierra Rooms I, II, and  
III, telephone (816) 765-4331

If you wish to attend the meeting, or  
to make presentations on competitive  
range determinations, please contact the  
FAR Part 15 Rewrite Committee Chair,  
Ms Melissa Rider, DAR Council Attn  
IMD 3D139 PDUSD(A&T)DP/DAR, 3062  
Defense Pentagon, Washington, DC  
20301-3062, telephone (703) 602-0131,  
facsimile (703) 602-0350 by November  
15 if possible Please cite FAR Case 96-  
303 For logistics information regarding  
the public meeting contact Jill Dickey,  
telephone (816) 926-7203, facsimile  
(816) 823-1167

Dated November 12 1996  
Edward C Loeb  
*Director Federal Acquisition Policy Division*  
[FR Doc 96-29400 Filed 11-14-96 8 45 am]  
**BILLING CODE 6820-JC-P**

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 6, 15, and 52**

**[FAR Case 96-303]**

**Federal Acquisition Regulation; Competitive Range**

**Determinations**

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Proposed rule, extension of comment period.

---

**SUMMARY:** The public comment period for the proposed rule, Competitive Range Determinations (96-303), which was published in the Federal Register on July 31, 1996 (61 FR 40116), is extended through November 26, 1996.

**FOR FURTHER INFORMATION CONTACT:** the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755.

Please cite FAR case 96-303.

**SUPPLEMENTARY INFORMATION:** The public comment period on the proposed rule is extended to conform with the public comment period on the proposed rule for the FAR Part 15 Rewrite-- Phase I, FAR Case 95-029, which was published in the Federal

change in 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 6, 12, 15 and 52:**

Government procurement.

Dated: 7/25/96

**(b) (6)**

EDWARD C LOEB,  
Director,  
Federal Acquisition Policy Division

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES  
ADMINISTRATION**

**NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION**

**48 CFR Parts 6, 12, 15, and 52**

[FAR Case 96-303]

RIN 9000-AH15

**Federal Acquisition Regulation,  
Competitive Range Determinations**

**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 Sections 4101 and 4103 of  
the Federal Acquisition Reform Act of  
1996. The rule provides the contracting  
officer with the authority to limit the  
size of the competitive range, in  
accordance with criteria specified in the  
solicitation, to the greatest number that  
will permit an efficient competition.  
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 September 30, 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 & F Streets,  
NW, Room 4037, Washington, DC  
20405.

Please cite FAR case 96-303 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 96-303.

**SUPPLEMENTARY INFORMATION\***

**A Background**

Subsections 4101 (a) and (b) of the  
Federal Acquisition Reform Act of 1996  
(Pub L 104-106) (the Act) require FAR  
implementation of the requirement to  
obtain full and open competition in a  
manner that is consistent with the need

to efficiently fulfill the Government's  
requirements. Section 4103 of the Act  
provides that the contracting officer may  
limit the number of proposals in the  
competitive range, in accordance with  
criteria specified in the solicitation, to  
the greatest number that will permit an  
efficient competition. The proposed rule  
revises FAR 6 101(b), 12 301(e),  
15 407(d)(4), 15 609, 52 212-1(g) and  
52 215-16 to implement sections 4101  
and 4103. The integrity, fairness, and  
openness principles in FAR subpart  
1 102 are not changed.

**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 revises the procedures  
for determining the competitive range in  
negotiated acquisitions. The size of the  
competitive range will be reduced in  
some negotiated acquisitions and some  
offerors may be eliminated from a  
competition earlier than they would be  
eliminated under existing procedures.  
However, bid and proposal costs are  
expected to decrease, as an offeror who  
is not likely to receive an award will be  
less likely to remain in a competition.  
An Initial Regulatory Flexibility  
Analysis has been performed and will  
be provided to the Chief Council for  
Advocacy of the Small Business  
Administration. A copy of the IRFA may  
be obtained from the FAR Secretariat.  
Comments are invited from small  
businesses and other interested parties.  
Comments from small entities  
concerning the affected FAR subpart  
will be considered in accordance with  
section 610 of the Act. Such comments  
must be submitted separately and  
should cite 5 U S C 601, *et seq* (FAR  
case 96-303), in correspondence.

**C Paperwork Reduction Act**

The Paperwork Reduction Act does  
not apply because the proposed changes  
to the FAR do not impose any  
substantial change in 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 6, 12,  
15 and 52

Government procurement

Dated July 25, 1996  
Edward C Loeb,  
Director, Federal Acquisition Policy Division

Therefore, it is proposed that 48 CFR  
Parts 6, 12, 15 and 52 be amended as set  
forth below.

1 The authority citation for 48 CFR  
Parts 6, 12, 15 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 6—COMPETITION  
REQUIREMENTS**

2 Section 6 101 is amended by  
revising paragraph (b) to read as follows:

**6 101 Policy**

\* \* \* \* \*

(b) Contracting officers shall provide  
for full and open competition through  
use of the competitive procedure, or  
combination of competitive procedures,  
contained in this subpart that is best  
suited to the circumstances of the  
contract action and is consistent with  
the need to efficiently fulfill the  
Government's requirement. Contracting  
officers must use good judgment in  
selecting the procedure that best meets  
the needs of the Government.

**PART 12 3—ACQUISITION OF  
COMMERCIAL ITEMS**

3 Section 12 301 is amended by  
adding new paragraph (e)(4) to read as  
follows:

**12 301 Solicitation provisions and  
contract clauses for the acquisition of  
commercial items**

\* \* \* \* \*

(e) \* \* \*

(4) The contracting officer may  
reserve the right to conduct discussions  
with offerors determined to be within  
the competitive range after evaluation of  
proposals and to limit the number of  
proposals in the competitive range to  
the greatest number that will permit an  
efficient competition among the most  
highly rated proposals. 52 215-16,  
Contract Award, Alternate III, may be  
used in solicitations for this purpose.

\* \* \* \* \*

**PART 15—CONTRACTING BY  
NEGOTIATION**

4 Section 15 407 is amended by  
revising paragraph (d)(4)(ii) and adding  
new paragraph (d)(4)(iii) to read as  
follows:

**15 407 Solicitation provisions**

\* \* \* \* \*

(d) \* \* \*

(4) \* \* \*



OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON  
WASHINGTON DC 20301-3000

June 26, 1996

96-303



ACQUISITION AND  
TECHNOLOGY

DP (DAR)

In reply refer to  
FAR Case: 96-303

MEMORANDUM FOR MR. EDWARD C. LOEB, CHAIRMAN  
CIVILIAN AGENCY ACQUISITION COUNCIL

SUBJECT: DoD Approval to Publish Proposed Rule

We have received DoD approval to publish the proposed rule  
under FAR Case 96-303, Competitive Range Determinations.

Please request clearance for publication from the Office of  
Management and Budget's Office of Information and Regulatory  
Affairs. Our case manager is Ms. Melissa Rider, (703)602-0131.

(b) (6)

D. S. Parry  
Captain, SC, USN  
Director, Defense Acquisition  
Regulations Council

JUL 5 1996



(ii) If awards are intended to be made without discussions with offerors within the competitive range, use the basic provision with its Alternate II

(iii) If the Government wishes to reserve the right to limit the competitive range to no more than a specific number, use the basic provision with its Alternate III, or the basic provision with both Alternates II and III

\* \* \* \* \*

5 Section 15 609 is revised to read as follows

**15 609 Competitive range**

(a) The contracting officer shall determine the competitive range for the purpose of conducting written or oral discussion (see 15 610(b)) based on cost or price and other factors in the solicitation. The competitive range consists of proposals having the greatest likelihood of award based on the factors and subfactors in the solicitation

(b) In planning an acquisition, the contracting officer may determine that the number of proposals that would otherwise be included in the competitive range is expected to exceed the number at which an efficient competition can be conducted. In reaching such a conclusion, the contracting officer may consider such factors as the results of market research, historical data from previous acquisitions for similar supplies and services, and the resources available to conduct the source selection. Alternate III of 52 215-16, Contract Award, may be used to indicate the Government's estimate of the greatest number or proposals that will be included in the competitive range for purposes of conducting an efficient competition among the most highly rated proposals

(c) After evaluating offers, the contracting officer may determine that the number of proposals that would otherwise be included in the competitive range exceeds the number at which an efficient competition can be conducted. Provided the solicitation notifies offerors that the competitive range can be limited for purposes of efficiency, the contracting officials may limit the number of proposals in the competitive range to the greatest

number that will permit an efficient competition among the most highly rated proposals. The basic solicitation provisions at 52 215-16, Contract Award, reserves the contracting officer's right to limit the competitive range for purposes of efficiency

(d) If the contracting officer determines that an offeror's proposal is no longer in the competitive range the proposal shall no longer be considered for award. Written notice of this decision shall be provided to the unsuccessful offeror at the earliest practicable time (see 15 1002(b))

(e) Offerors excluded from the competitive range may request a debriefing. When a debriefing is requested, see 15 1004

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

6 Section 52 212-1 is amended by revising the provision date and paragraph (g) to read as follows

**52 212-1 Instructions to Offerors—Commercial Items**

\* \* \* \* \*

**Instructions to Offerors—Commercial Items (Date)**

\* \* \* \* \*

(g) *Contract award (not applicable to Invitation for Bids)*. The Government intends to evaluate proposals and award a contract without discussions with offerors (except communications conducted for the purpose of minor clarification). Therefore, each individual offer should contain the offeror's best terms from a cost or price and technical standpoint. However, the Government reserves the right to conduct discussions if the Contracting Officer later determines them to be necessary. If discussions are held and the Contracting Officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the Contracting Officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals. The Government may reject any or all offers if such action is in the public interest, except other than the lowest offer, and waive informalities and minor irregularities in offers received

\* \* \* \* \*

7 Section 52 215-16 is amended by revising the provision date and paragraph (c), revising Alternate II (c), and adding a new Alternate III to read as follows

**52 215-16 Contract Award**

\* \* \* \* \*

**Contract Award (Date)**

\* \* \* \* \*

(c) The Government intends to evaluate proposals and award a contract after conducting discussions with responsible offerors whose proposals have been determined to be within the competitive range. If the Contracting Officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the Contracting Officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals. Therefore, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint

\* \* \* \* \*

**Alternate II (Date) \* \* \***

(c) The Government intends to evaluate proposals and award a contract without discussions with offerors (except communications conducted for the purpose of minor clarification). Therefore, each individual offer should contain the offeror's best terms from a cost or price and technical standpoint. However, the Government reserves the right to conduct discussions if the Contracting Officer later determines them to be necessary. If discussions are to be held and the Contracting Officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the Contracting Officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals

**Alternate III (Date)** As prescribed in 15 407(d)(4)(iii) insert the following paragraph (i) in the basic provision

(i) If the Contracting Officer exercises the Government's right to limit the number of proposals in the competitive range, the competitive range will be limited to no more than \_\_\_\_\_ (insert number)

INITIAL REGULATORY FLEXIBILITY ANALYSIS, page 2  
FAR CASE 96-303

**5 Relevant Federal Rules Which May Duplicate, Overlap, or Conflict With the Proposed Rule.**

The proposed rule does not duplicate, overlap, or conflict with any other Federal rules.

**6. Significant Alternatives to the Proposed Rule.**

The proposed rule implements the statutory requirement to permit contracting officers, in certain circumstances, to reduce the number of proposals in the competitive range, in accordance with the criteria specified in the solicitation, to the greatest number that will permit an efficient competition among the most highly rated offerors.

Under the proposed rule, source selection officials will continue to establish evaluation factors as provided in FAR 15.6, including any applicable preferences for small entities. Proposals will be evaluated in accordance with the criteria specified in the solicitation. The contracting officer may then reduce the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated offerors.

In drafting the rule, consideration was given to alternate language to describe the proposals that would remain in the competitive range, for instance, retaining the current FAR language that requires offerors with a reasonable chance of award to be retained within the competitive range. However, "the greatest number that will permit an efficient competition" conforms more closely with the actual language and intent of Section 4103.

None of the alternatives considered different treatment for proposals from small vs. large entities because one of the overarching concerns in drafting the proposed rule was to continue to provide for fair and equal treatment for all proposals. If any preferences for small entities apply to a specific procurement, such preferences will continue to apply, and to provide the intended benefits for small entities.

96-303



OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON  
WASHINGTON DC 20301-3000

July 2, 1996



ACQUISITION AND  
TECHNOLOGY  
DP (DAR)

In reply refer to  
FAR Case: 96-303

MEMORANDUM FOR MR. ED LOEB, CHAIRMAN  
CIVILIAN AGENCY ACQUISITION COUNCIL

SUBJECT: Competitive Range Determinations

Subsequent to our memo of June 26, 1996, in which we advised you that we have received DoD approval to publish the proposed rule, our staffs discussed the necessity of revising the Initial Regulatory Flexibility Analysis. Accordingly, we have prepared the attached revised analysis.

Please amend the Federal Register notice to reflect these revisions, and publish the proposed rule upon receipt of the appropriate clearance from OMB's Office of Information and Regulatory Affairs. Our case manager is Ms. Melissa Rider, (703) 602-0131.

(b) (6)

D. S. Parry  
Captain, SC, USN  
Director, Defense Acquisition  
Regulations Council

Attachment

JUL 5 1996





(g) *Contract award (not applicable to Invitation for Bids)* The Government intends to evaluate proposals and award a contract without discussions with offerors (except communications conducted for the purpose of minor clarification). Therefore, each individual offer should contain the offeror's best terms from a cost or price and technical standpoint. However, the Government reserves the right to conduct discussions if the Contracting Officer later determines them to be necessary. If discussions are held and the Contracting Officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the Contracting Officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals. The Government may reject any or all offers if such action is in the public interest, accept other than the lowest offer; and waive informalities and minor irregularities in offers received.

**[52.215-16 Contract Award**

**As prescribed in 15.407(d)(4), insert the following provision:**

**CONTRACT AWARD (XXX 1996)**

**\* \* \***

(c) The Government intends to evaluate proposals and award a contract after conducting ~~written or oral~~ discussions with all responsible offerors whose proposals have been determined to be within the competitive range. **[If the contracting officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the Contracting Officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals.]** However, each initial proposal should contain the offeror's best terms from a cost or price and technical standpoint

**SUBPART 12.3-SOLICITATION PROVISIONS AND CONTRACT CLAUSES  
FOR THE ACQUISITION OF COMMERCIAL ITEMS**

\* \* \* \* \*

**12.301 Solicitation provisions and contract clauses for the  
acquisition of commercial items.**

\* \* \* \* \*

(e) *Discretionary use of FAR provisions and clauses*

\* \* \* \* \*

(4) The contracting officer may reserve the right to conduct discussions with offerors determined to be within the competitive range after evaluation of proposals and to limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals. 52 215-16, Contract Award, Alternate III, may be used in solicitations for this purpose.

**52.212-1 Instructions to Offerors-Commercial Items.**

As prescribed in 12.301(b)(1), insert the following provision:

INSTRUCTIONS TO OFFERORS-COMMERCIAL ITEMS (xxx 1996)

\* \* \* \* \*

~~(g) Contract award (not applicable to Invitation for Bids). The Government intends to evaluate offers and award a contract without discussions with offerors. Therefore, the offeror's initial offer should contain the offeror's best terms from a price and technical standpoint. However, the Government reserves the right to conduct discussions if later determined by the Contracting Officer to be necessary. The Government may reject any or all offers if such action is in the public interest, accept other than the lowest offer, and waive informalities and minor irregularities in offers received.~~



General Services Administration  
Office of Acquisition Policy  
Washington, DC 20405

*Official File Copy*

Captain D S Parry, SC , USN  
Director  
Defense Acquisition Regulations Council  
ATTN: IMD 3D139  
PDUSD(A&T)  
3062 Defense Pentagon  
Washington, DC 20301-3062

Re FAR Case 96-303, Competitive Range Determinations

Dear Captain Parry.

This letter confirms the July 5, 1996, revisions to the subject proposed rule enclosed. By memorandum dated June 25, 1996, we provided a proposed rule for publication to the FAR Secretariat with a copy to you. The proposed rule revised FAR 6.101(b), 15.404(d)(4), 15.609, and 52.215-16 to implement Sections 4101 and 4103 of the Federal Acquisition Reform Act of 1996 (Pub L. 104-106). We will notify the FAR Secretariat of the revisions.

Sincerely,

*ESL*

EDWARD C. LOEB  
Chairman  
Civilian Agency  
Acquisition Council

Enclosure



July 17, 1996

Mr. Peter Weiss  
Office of Information and Regulatory Affairs  
Office of Management and Budget  
Docket Library, Room 10102  
725 17th Street, NW  
Washington, DC 20503

Dear Mr. Weiss:

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration have agreed to publish FAR case 96-303, Competitive Range Determinations, as a proposed rule. Enclosed are three copies of the draft rule for your review. This rule has been identified as "not significant."

If you have any questions regarding this rule, I can be reached at (202) 501-0692.

Sincerely,

BEVERLY FAYSON  
FAR Secretariat  
Federal Acquisition Policy Division

Enclosures

cc:Official File-MVRS:Reading File-MVR:R.DeStefano/MVRR  
BFayson:jpp:501-4787:7/12/96:FARDocs/96-303PR(REVISED)/Weiss

Therefore, it is proposed that 48 CFR Parts 6, 12, 15 and 52 be amended as set forth below:

1. The authority citation for 48 CFR Parts 6, 12, 15 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 6—COMPETITION REQUIREMENTS**

2. Section 6.101 is amended by revising paragraph (b) to read as follows

**6.101 Policy**

\* \* \* \* \*

(b) Contracting officers shall provide for full and open competition through use of the competitive procedure, or combination of competitive procedures, contained in this subpart that is best suited to the circumstances of the contract action and is consistent with the need to efficiently fulfill the Government's requirements.

Contracting officers must use good judgment in selecting the procedure that best meets the needs of the Government

**PART 12.3—ACQUISITION OF COMMERCIAL ITEMS**

3. Section 12.301 is amended by adding new paragraph (e)(4) to read as follows:

**12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.**

(e) \* \* \*

(4) The contracting officer may reserve the right to conduct discussions with offerors determined to be

Alternate III (DATE) As prescribed in 15.407(d)(4)(111),  
insert the following paragraph (1) in the basic provision:

(1) If the Contracting Officer exercises the  
Government's right to limit the number of proposals in the  
competitive range, the competitive range will be limited to  
no more than \_\_\_\_\_ (insert number)

[BILLING CODE 6820-EP]

proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals. The Government may reject any or all offers if such action is in the public interest, accept other than the lowest offer; and waive informalities and minor irregularities in offers received.

7 Section 52 215-16 is amended by revising the provision date and paragraph (c), revising Alternate II (c), and adding a new Alternate III to read as follows

**52.215-16 Contract Award.**

\* \* \* \* \*

CONTRACT AWARD (DATE)

\* \* \* \* \*

(c) The Government intends to evaluate proposals and award a contract after conducting discussions with responsible offerors whose proposals have been determined to be within the competitive range. If the Contracting Officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the Contracting Officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals. Therefore, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint.

\* \* \* \* \*

Alternate II (DATE) \* \* \*

(c) The Government intends to evaluate proposals and award a contract without discussions with offerors (except communications conducted for the purpose of minor clarification). Therefore, each individual offer should contain the offeror's best terms from a cost or price and technical standpoint. However, the Government reserves the right to conduct discussions if the Contracting Officer later determines them to be necessary. If discussions are to be held and the Contracting Officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the Contracting Officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals.

competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals. The basic solicitation provision at 52.215-16, Contract Award, reserves the contracting officer's right to limit the competitive range for purposes of efficiency.

(d) If the contracting officer determines that an offeror's proposal is no longer in the competitive range the proposal shall no longer be considered for award. Written notice of this decision shall be provided to the unsuccessful offeror at the earliest practicable time (see 15.1002(b)).

(e) Offerors excluded from the competitive range may request a debriefing. When a debriefing is requested, see 15.1004.

#### **PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

6 Section 52.212-1 is amended by revising the provision date and paragraph (g) to read as follows:

#### **52.212-1 Instructions to Offerors—Commercial Items.**

\* \* \* \* \*

#### INSTRUCTIONS TO OFFERORS—COMMERCIAL ITEMS (DATE)

\* \* \* \* \*

(g) Contract award (not applicable to Invitation for Bids). The Government intends to evaluate proposals and award a contract without discussions with offerors (except communications conducted for the purpose of minor clarification). Therefore, each individual offer should contain the offeror's best terms from a cost or price and technical standpoint. However, the Government reserves the right to conduct discussions if the Contracting Officer later determines them to be necessary. If discussions are held and the Contracting Officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the Contracting Officer may limit the number of



**Proposed Rule**  
**Implementation of FARA Section 4101 and 4103**  
**Baseline: FAC 90-38**

**15.609 Competitive range.**

(a) The contracting officer shall determine which proposals are in the competitive range for the purpose of conducting written or oral discussion (see 15.610(b)). The competitive range shall be determined on the basis of cost or price and other factors that were stated in the solicitation and shall include all proposals that have a reasonable chance of being selected for award. ~~When there is doubt as to whether a proposal is in the competitive range, the proposal should be included~~

[(b) If the contracting officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the contracting officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals (10 U.S.C. 2305(b) and 41 U.S.C. 253b(d)(2)).]

~~(b [c]) If the contracting officer, after complying with 15.610(b), determines that a [n offeror's] proposal no longer has a reasonable chance of [is no longer in the competitive range] being selected for contract award, it [the proposal shall ] may no longer be considered for selection [no longer be considered for award. Written notice of this decision shall be provided to unsuccessful offerors at the earliest practicable time (see 15.1002(b)).]~~

~~(c) The contracting officer shall notify in writing an unsuccessful offeror that its proposal is no longer eligible for award (see 15.1002(b)).~~

[(d) Offerors excluded from the competitive range may request a debriefing. When a debriefing is requested, see 15.1005.]

~~(d) [(e)]....~~

\* \* \* \* \*

*Encl.*

within the competitive range after evaluation of proposals and to limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals 52 215-16, Contract Award, Alternate III, may be used in solicitations for this purpose

**PART 15—CONTRACTING BY NEGOTIATION**

4 Section 15.407 is amended by revising paragraph (d)(4)(i1) and adding new paragraph (d)(4)(i11) to read as follows.

**15.407 Solicitation provisions.**

\* \* \* \* \*

(d) \* \* \*

\* \* \* \* \*

(4) \* \* \*

\* \* \* \* \*

(i1) If awards are intended to be made without discussions with offerors within the competitive range, use the basic provision with its Alternate II

(i11) If the Government wishes to reserve the right to limit the competitive range to no more than a specific number, use the basic provision with its Alternate III, or the basic provision with both Alternates II and III.

\* \* \* \* \*

5. Section 15.609 is revised to read as follows:

**15.609 Competitive range.**

(a) The contracting officer shall determine the competitive range for the purpose of conducting written or oral discussion (see 15.610(b)) based on cost or price and other factors in the solicitation. The competitive range consists of proposals having the greatest likelihood of award based on the factors and subfactors in the solicitation.

(b) In planning an acquisition, the contracting officer may determine that the number of proposals that would otherwise be included in the competitive range is expected to exceed the number at which an efficient competition can be conducted. In reaching such a conclusion, the contracting officer may consider such factors as the results of market research, historical data from previous acquisitions for similar supplies and services, and the resources available to conduct the source selection. Alternate III of 52.215-16, Contract Award, may be used to indicate the Government's estimate of the greatest number of proposals that will be included in the competitive range for purposes of conducting an efficient competition among the most highly rated proposals.

(c) After evaluating offers, the contracting officer may determine that the number of proposals that would otherwise be included in the competitive range exceeds the number at which an efficient competition can be conducted. Provided the solicitation notifies offerors that the competitive range can be limited for purposes of efficiency, the contracting officials may limit the number of proposals in the

otherwise qualified and competitive contractors as would be expected. Rather than providing guidance for consistent, government-wide implementation of this provision, the proposed rule again allows each contracting officer to concoct his or her own methodology (or none at all) for excluding some contractors and including others, as long as there is some nexus to (i e. "based on" ) the factors and subfactors in the solicitation.

However, the law and the statement of managers is more explicit -- the determinations must be "on the basis of price, quality and other factors specified in the solicitations for the evaluation of proposals " The contracting officer is not free to establish independent or extraneous factors in making this significant determinations -- but must make the initial thorough evaluation of all offers submitted based on all of the evaluation factors in the solicitation. The last sentence of 15 609(a) and the clause at 52.215-16(c) must be corrected.

Next, the proposal provides only limited guidance on the use of criteria for the determination of how to divine the number of proposals to be retained in the competitive range. The various subsections of the proposed revision to FAR 15 609 do not clearly set forth what the requirements are for a contracting officer to limit the competitive range to a number less all who submit responsive offers. Indeed, one must read and re-read the subsections just to ensure that the rather clear direction of the statute are even alluded to in the proposed rule

For example, subsection (c) states in part that "Provided the solicitation notifies offerors that the competitive range can be limited for purposes of efficiency, the contracting officials [officers?] may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals." No where does it state that the rating must be in accordance with all of the evaluation factors set forth in the solicitation. The closest provision in that regard is in subsection (a), with no suggestion that this is how the determination must be made. In fact, subparagraph (c) erroneously tells the contracting officer just to include the standard Contract Award clause and all will be fine!

Similarly, subsection (b) could easily lead a contracting officer to conclude that the simple way to limit the competitive range is to include the number of proposals he wants to review in the solicitation, and that there is even a standard form for this purpose with a blank space to be filled in with the number acceptable to the contracting officer. The clause at 52.215-16(c) Alternate III does not include the word "estimate" provided for in proposed 15.609(b); does not provide for any authority to increase the number of proposals in the competitive range if the actual receipt of highly-rated proposals exceeds the magical number selected at the time the solicitation is issued; and no recognition of the fact that a fewer number of initially evaluated proposals may remain.

Finally, FAR 15.609(a), as recommended in this rule, provides that-- "The contracting officer shall determine the competitive range for the purpose of conducting written or oral discussion (see 15.601(b)) based on cost or price and other factors in the solicitation. The competitive range consists of proposals having the greatest likelihood of award based on the factors and subfactors in the solicitation."

The last sentence of current 15.609(a) states: "When there is doubt as to whether a proposal is in the competitive range, the proposal shall be included." The new rule should retain this important last sentence. -- when in doubt, retain an offeror in the competitive range. This sentence, sought to be deleted in three separate rulemakings, takes on important new significance in light of the congressional direction in FARA, and is an appropriate way to fulfill the statutory call for "limiting the competitive range to the greatest number that would permit an efficient competition."

### **THE RULE IMPROPERLY IMPACTS COMMERCIAL ITEM PROCUREMENTS**

The proposed rule would add a new paragraph to FAR Section 12.301(e), as amended by FASA, that largely restates for commercial products the competitive range authority of Section 4103 of FARA, although there are some key differences. Part 12 was updated to implement FASA just before this proposed rule was published (FAC 90-40 on July 26, 1996), under-scoring the need to see all of the interrelated parts of the regulations in order to conduct a meaningful and thorough analysis.

Indeed, rather than providing government-wide guidance as the statute requires, the proposed rule would simply allow any contracting officer conducting a competitive solicitation for a commercial item to "reserve the right" to limit competition in advance of the receipt and evaluation of proposals. It is clear that FARA contemplated an affirmative contracting officer determination of these critical matters, but the proposed rule ignores that

This section of the rule also omits one of the critical safeguards required by FARA, namely that solicitations would set forth the criteria by which the competitive range decision would be made, and that decisions would be made in accordance with them. The requirement in the statute that competitive range determinations be made based solely on the evaluation factors and subfactors contained in the solicitation are conspicuously absent from new section 12.301(e)(4) of the proposed rule, and is a critical defect in the coverage.

The same defect of failing to include the language concerning criteria for competitive range determinations in the solicitation, is also missing from the proposed revisions to the Contract Award clause and Alternative II in the new proposed 52.215-16 contract clause. Furthermore, those proposed clauses explicitly allow each contracting officer to establish his or her own scheme for ranking the proposal that would result in the exclusion from offerors from competition, without regard to the mandatory evaluation of all offers submitted and without complying with the evaluation factors and subfactors listed in the solicitations.

Alternative III in item #7 of the proposed rule would allow each contracting officer to limit the number of competitors for a contract simply by filling in the blank in the form to whatever number he or she selects. No guidance is given regarding to how this selection should be made and no acknowledgment that there statutory requirements that apply is provided. Again, government-wide FAR guidance is eliminated and each contracting officer is provided more than a reasonable amount of discretion in excluding from competition otherwise qualified competition.

Finally, item #6 in the proposed rule would provide instructions to offerors of commercial items in situations other than IFBs. These instructions would provide different -- and in many regards more ruthless

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-- competitive range provisions than authorized by Sections 4101 and 4103 of FARA. We could not find any provisions in FARA that authorized these separate provisions or that allowed these competitive range changes other than for section 2305(b)(4) of title and section 253b(d) of title 41.

## CONCLUSION

The July 31 rule fails to fully and fairly implement several key elements of the statute. Where the proposed rule recognizes statutory changes that benefit only the government, the rule fails to balance the requirements with other required provisions of law, and fails to provide proper guidance to the contracting community on how these provisions are to operate in practice. Since there is conflicting coverage between this July rule and a more comprehensive rule published on September 12, this July rule should be withdrawn in its entirety.

Sincerely,

American Movers Conference  
American Subcontractors Association, Inc.  
Associated Builders and Contractors, Inc.  
Computing Technology Industry Association  
Household Goods Forwarders Association of America  
Small Business Legislative Council (*Includes 93 associations*)  
U.S. Chamber of Commerce



DEPARTMENT OF THE AIR FORCE  
WASHINGTON DC

96-30322



OFFICE OF THE ASSISTANT SECRETARY

25 NOV 1996

MEMORANDUM FOR GENERAL SERVICES ADMINISTRATION,  
FAR SECRETARIAT (MRVS)

FROM: SAF/AQC  
1060 Air Force Pentagon  
Washington, DC 20330-1060

SUBJECT: Comments on Proposed Rule Part 15 Rewrite  
(FAR Cases 95-029 & 96-303)

The Air Force has been an active participant in the Rewrite team's development of the proposed coverage in the subject cases. As part of the public comment process, we requested Air Force field input and used it to form this consolidated Air Force response. The comments we offer consist of significant policy issues (Atch 1) and numerous issues identified by the field as areas for clarification or administrative correction (Atch 2). Some of the inputs of our field activities demonstrate the uncertainty that will exist when long-standing policies and processes are so significantly revised.

One of the lessons learned as we have implemented acquisition reforms of the same magnitude as the rewrite of FAR Part 15 is that it requires a change in the mind-set of both industry and government acquisition personnel. Proposed changes, such as the concepts of increased openness and the sharing of information between government acquirers and industry suppliers closely mirror commercial practices which are substantially different from traditional government contracting methods. On the other hand, the increased reliance on the business judgments of government contracting officers, working in an environment less structured by regulation, is one that may concern some members of industry comfortable with the status quo. Extensive training will be required and there needs to be a carefully planned implementation. Lessons learned will begin to form the new framework for "Contracting by Negotiations" after the publication of this final rule and its subsequent use.

Lt Col Greg Waeber, SAF/AQCP, (703) 695-3859, will continue to be our representative on the Rewrite team as these comments and other issues are resolved.

(b) (6)

Attachments:

- 1. Significant Issues
- 2. Clarification Requests

TIMOTHY P. MALISHENKO, Brig Gen, USAF  
Deputy Assistant Secretary (Contracting)  
Assistant Secretary (Acquisition)

NOV 26 1996



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Attachment 1

**Air Force Input**  
**Significant issues.**

1. We are concerned that the proposed policy allowing substantial amendments to the solicitation right up to award (FAR 15.205) could result in offerors that have been eliminated from the competitive range (no longer eligible for award) being unable to reenter the competition even though requirements may have changed in such a way that they would now be a viable competitor

The proposed language at 15.205 (e) "If a change is so substantial that it warrants a complete revision . Contracting officer shall cancel the original solicitation and issue a new one" may be too restrictive to allow previously excluded offerors from having an opportunity to re-enter a competition when the requirement is changed but not changed enough (in the determination of the Contracting Officer) to merit cancellation

Recommendation: Add at the beginning of 15 205 (e) a new sentence "Consideration should be given to providing an eliminated offeror an opportunity to reenter if a solicitation is changed significantly after an offeror(s) has been eliminated from the competitive range

2 (Case 96-303) Reference proposed language at 15.407(d)(4)(iii), 15 609(b) and 52.215-16(c) (ALT III) We received numerous comments strongly disagreeing with establishing in the solicitation the number of proposals which will be retained in the competitive range. It is not realistic to predict this number before receipt of proposals. If a number is inserted in the Contract Award provision, it may be too high or low, depending on the actual proposals that are received. There is no benefit to be derived from establishing, in advance, the number of proposals in the competitive range. Recommend consideration be given to deleting this language. Allow the contracting officer to decide who and how many are retained in the competitive range, after proposal evaluation.

We understand that this is permissive and agencies could choose to not predetermine the competitive range, however, we believe that in a vast majority of the cases it is inappropriate anyway

Additionally, 15.406 subparagraphs (b) and (c) regarding efficient competition do not provide a definition of "efficient," nor does the provision 52 215-1 provide any additional information to prospective offerors as to what "efficient" means. We have a concern that without additional guidance on what is meant by "efficient" or a clearer definition of the term "efficient competition," the tendency on the part of the government will still be a preference towards leaving otherwise acceptable proposals in the competitive range rather than eliminating proposals for the purpose of "efficiency." If "efficient competitions" are to become practice, more guidance on how to determine efficiency is required

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competitive advantage over other offerors? Depending upon how "late" the submission is, the late offeror would effectively have had more time to prepare the proposal. Moreover, if the late proposal is evaluated and the late offeror is subsequently determined to be the successful offeror and awarded a contract, does the government open itself to claims of unfair treatment by the unsuccessful offerors who submitted on time? Does the team believe that the benefits of considering "late" proposals outweighs the increased risks associated with charges of unfair practice if the successful offeror's proposal was submitted past the designated proposal receipt date?

15.208(a) This paragraph references clause 52 215-1, Instructions to Offerors - Competitive Acquisition, but the clause in part 52 is titled Instructions to Offerors - Negotiated acquisition. These need to be consistent.

#### Subpart 15 4:

##### 15.401 Definitions

Need better definition of "deficiency." Rewrite defines as "A single material failure to meet a Government requirement or a single flaw that appreciably increases the risk of unsuccessful contract performance." Increased over what? Recommend changing the definition to read: "A deficiency as used in this subpart is a single material failure to meet a Government requirement or an element of risk which may adversely impact the successful contract performance."

Suggest adding at the end of the "discussions" definition the words "which may result in revisions to the proposal."

Suggest a definition of "clarification" be added, as follows: "Clarification, as used in this subpart, means communication both before and after establishment of the competitive range between the contracting officer and the offeror which do not require a proposal revision to obtain information to facilitate the Government's decision either to award without discussions or to determine the competitive range, to obtain information to explain or resolve ambiguities, or to correct proposal mistakes."

##### FAR 15 402-Source selection objective.

If the lowest price technically acceptable process is used, will contracting officers be able to use past performance as an evaluation criteria on a pass/fail basis? Recommend a statement which clarifies.

##### 15 403 Responsibilities:

Subparagraph (b)(1): Delete "an" after "includes," and delete "mix of" after "appropriate."

##### 15.404 Evaluation factors and subfactors.

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advantageous to the Government. Any deviations from the terms and conditions of the proposed contract, as well as the comparative advantages to the Government, shall be clearly identified and explicitly defined. The Government reserves the right to modify the solicitation to allow all offerors an opportunity to submit revised proposals based on the revised requirements."

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offeror's is not Recommend adding language which specifies the types of acquisition for which this technique is suitable, or, conversely, emphasizing that if the acquisition requires evaluating against criteria which can measure differences in the offerors proposals beyond "acceptable - non-acceptable," then the technique not be used

#### 15 102 Tradeoff process

Subparagraph (a)(1). Delete the word "significant" after "and" and before "subfactors." (This comment also applies to 15.404(a) and 15.404(d).)

#### 15.104 Oral presentations:

No differentiation is made between submitting proposals orally, and permitting the offerors to do oral presentations that reiterate, or summarize, what they submit in writing. Additionally, it must be made clear whether oral presentations or proposals will constitute "discussions" or only "communications" as defined in subpart 15 407 For these reasons, we think it is necessary to differentiate between oral proposals and oral presentations. Also, guidance regarding protests in the oral presentations/oral proposals environment is needed

#### Subpart 15 2. Solicitation and Receipt of Proposals

15.200(a). The changes to this part delete all references and definition of Request for Quotation (RFQ) Part 13, Simplified Acquisition Procedures, however, still uses the term as a method of solicitation for actions above the micro-purchase threshold. Part 13 needs to cover and define the RFQ.

15.202: Subparagraph (d): Recommend definition of "facsimile" be expanded to include digital methods of receiving and transmitting proposals such as computer fax/modems, email, or bulletin boards or homepages on the World Wide Web Subparagraph (e): The requirements cited here for a "letter RFP" are the same as those that are required for a full-blown RFP Suggest that the requirements for a letter RFP be more flexible to allow a procedure now being used on sole source acquisitions, whereby the contractor and government IPT write the contract together

15 202(d)(1)(iii) This paragraph discusses electronic commerce but it falls under paragraph (d) which only covers facsimile proposals. Was the intent for this to cover both facsimile proposals as well as electronic proposals? If so, it should be moved

15.203-4 Section IV, Contract Clauses is not clear on where special clauses should be placed in the new Model Contract Format. This paragraph states that Section IV only includes clauses not tailored to the acquisition.

#### 15.207 Submission, modification, revision, and withdrawal of proposals.

Subparagraph (b). If late proposals may be considered "if doing so is in the government's best interest," does this not potentially put the late offeror at a

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There is no discussion in this subparagraph about the evaluation team comparing the offeror proposals against the evaluation criteria specified in the solicitation. It appears that we are "leaping" into the comparative assessment of proposals. Was this intended? Is this not the place to state that the proposals must first be evaluated against the stated criteria by the evaluation team? Recommend new first sentence be inserted in the first paragraph which states "The source selection evaluation team must evaluate proposals received against the evaluation criteria stated in the solicitation." The sentence which follows would then need to be modified by inserting "then" between "shall" and "be."

**Subpart 15.803 Notification of unsuccessful offerors**

15 803(2)(b) Delete the word "for"

**Subpart 15 806 Postaward debriefing of offerors**

Subparagraph (a) May an offeror who was notified of exclusion from the competition prior to award and who received a preaward debriefing also request and receive a postaward debriefing? Such offerors may very well request a postaward debriefing for the purposes of obtaining information not available to them preaward. We should provide limited debriefings at the time competitors are excluded from the competitive range and complete debriefings once the source selection decision is announced.

**Provisions**

**52.215-1 Instructions to Offerors**

Negotiated Acquisition (a)(4) and (a)(5) This language reflects an inconsistency in definition of discussions. Subparagraph (a)(4) states that "Discussion means communication.." and subparagraph (a)(5) states the opposite: "Communication means interchanges ..which are not discussions." Correct by substituting the word "interchanges" for "communications" in subparagraph (a)(4). Also, use of the term "minor clarifications" in subparagraph (a)(5) is not consistent with the description of communications at 15 407. Recommend that the definition include the same language at 15 407 (b)(2) and (3).

52 215-1(a)(5) which defines communication as "interchanges with offerors which are not discussions. ." the subparagraph just above defines discussions (consistent with 15.401) as "communications after establishment of the competitive range between the CO and an offeror in the competitive range." To eliminate any confusion with the definition of communication in subpara (a) (5), suggest the definition be slightly revised as follows: "Communication means interchanges with offerors which are not discussions. They may be conducted to obtain information which explains or resolves ambiguities or for minor clarifications prior to the establishment of any competitive range"

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ATTACHMENT A

15.609 Competitive range.

(a) The contracting officer shall determine the competitive range for the purpose of conducting written or oral discussion (see 15 610(b)) based on cost or price and other factors in the solicitation. The competitive range consists of the greatest number of proposals, rated most highly in accordance with the factors and subfactors criteria specified in the solicitation, that can be efficiently included

(b) In planning an acquisition, the contracting officer may determine that the number of proposals that would otherwise be included in the competitive range is expected to exceed the number at which an efficient competition can be conducted. In reaching such a conclusion, the contracting officer may consider such factors as the results of market research and historical data from previous acquisitions for similar supplies and services, and the resources available to conduct the source selection.

(c) After the initial evaluation of all offers in accordance with the factors and subfactors in the solicitation, the contracting officer may determine that the number of proposals that would otherwise be included in the competitive range exceeds the number at which an efficient competition can be conducted. Provided the solicitation notifies offerors that the competitive range can be limited for purposes of efficiency, the contracting officials may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals. The number set for the competitive range shall take into account the relative evaluation ratings of all offers. If two or more offers are closely rated or rated equal and the contracting officer would otherwise include one but not the other(s), all such offers should be included. The basic solicitation provisions at 52 215-16,

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Subparagraph (b)(1): Delete "to be considered"

15 405 Proposal evaluation

Subparagraph (a) This paragraph makes the statement that the agency "should compare [the] relative qualities [of the proposals] " Is this statement referring to the integrated assessment that must be done by the SSA? If so, it should state this directly.

Subparagraph (a)(3) Technical evaluation. This subparagraph states "If a technical evaluation is necessary beyond ensuring that the proposal meets the minimum requirements in the solicitation. ", and goes on to state what records must be included Does this mean if proposals are being evaluated only to determine if they meet minimum requirements, such as in the LPTA technique, that there is no requirement to document the evaluation?

Paragraph (a)(1) prohibits the performance of cost analysis on source selections for fixed price or fixed price with economic price adjustment type contracts unless the price of the otherwise successful offeror is determined to be unreasonable. We believe the contracting officer must have the ability to request other than cost or pricing data in order to perform a cost realism analysis on those contracts that warrant it Price analysis alone may be inadequate to determine whether the proposed cost/price realistically reflects the effort required on the contract Cost realism analysis is used for several reasons. to determine whether the price bid reflects the level of manning outlined in the technical proposal, to ensure the labor rates are in compliance with the requirements of Davis-Bacon or the Service Contract Act, and to protect the government from the risk associated with unrealistically low prices. Sometimes it is necessary to have cost information available to assess the impact on and to facilitate future modifications to the contract. Unrealistically low prices cannot always be determined based on price analysis alone A price that is unrealistic for contractor A may be realistic for contractor B due to efficiencies or structure of the company which affect G&A

NOTE. In researching this comment we've discovered that a conflict exists between Phase I's proposed language and Phase II's coverage Phase 2 explicitly allows the contracting officer, in exceptional cases, to perform a cost realism analysis for any Fixed Price type contract Phase I appears to allow cost realism only for cost type contracts or Fixed Price type contracts other than FFP and FFP EPA contracts. Suggest that the FAR 15 405 (a) (1) and Phase II's 15.504-1 language covering cost realism analysis be clarified between the Phases to eliminate confusion and that the FAR does not prohibit us from obtaining information required to perform the cost realism analysis when needed.

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15 405 (a)(2)-Past performance evaluation When a small business offeror's past performance is unsatisfactory, will the contracting officer be required to request a certificate of competency from the SBA as required by FAR Part 19?

15 405(a)(2)(i) states that past performance evaluation is separate from the responsibility determination in Subpart 9.1 Yet it fails to explain how this evaluation is any different from a responsibility determination done in a pure price competition or low price technically acceptable competition

#### 15.407 Communications with offerors:

Subparagraph (c) States "If a competitive range is established, the contracting officer shall conduct discussions at least once with all offerors in the competitive range (but see 15.410)." Reference is incorrect, and should be changed to "15 408, Award without discussions "

Also, why must the Government have discussions with all offerors in the competitive range "at least once"? If an offeror has an acceptable proposal with no deficiencies or clarifications needed, what would the Government discuss?

Same paragraph states "All evaluated deficiencies in an offeror's proposal, except those relating to past performance on which the offeror has already had an opportunity to comment " Why this exception for past performance? An issue could still be raised as to relevance of the past performance record to the instant acquisition This should be reconsidered.

Additionally any deficiencies which have already been addressed by the offeror should not require additional discussions, unless the offeror response was not sufficient to correct the deficiency

15.407(d)(4)(ii). This paragraph is somewhat misleading because if award is being made without discussions, there would be no need for a competitive range since the concept of competitive range is to decide with whom to have discussions Suggest deletion of the words "within the competitive range"

#### 15 409 Proposal revisions:

There is no longer a requirement to issue requests for Best and Final Offers (BAFOs), or apparently to formally close discussions Was this intended? If contracting officers wish to issue a request for BAFOs, may they still? Would this formally close discussions? Is the last sentence of subparagraph (a), which states "The contracting officer may establish a common cut off date for receipt of proposal revisions." really intended to be a form of BAFO?

#### 15.410 Source selection.



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Recommendation: Remove pre-determination of competitive range size provisions based on efficiency or provide much more information for government and industry as to the determination of efficient competition.

3 The Air Force supports moving to the MCF but believes it must be carefully planned with a phased implementation that recognizes the substantial upfront expenses that will be required. We note that several of our MAJCOMs expressed substantial concerns about the change from the Uniform Contract Format to the Model Contract Format. Specifically they were concerned that the cost and disruption of converting automated solicitation and contract preparation systems will be considerable, including educating the workforce and industry, and that these costs must be carefully compared to the benefits identified

4. We believe that a "fully responsive" proposal is necessary to establish discipline in the proposal process and to ensure that offerors are treated fairly. Based on this belief, we have concerns related to the proposed language on the submission and evaluation of Alternate proposals. At 15.202(a)(2)(i), "Contracting officers may allow offerors to propose alternative terms and conditions ..that is different from the model in the solicitation." If an offeror proposes alternate terms and conditions or an alternate CLIN structure, what happens if the government doesn't find it acceptable? In any other situation they would be considered non-responsive. The proposed language is silent on the requirement for responsive proposals to be submitted along with any alternatives. Recommend that a requirement be included for an offeror to submit a responsive proposal

Also, related to alternate proposals is the proposed coverage at 15.205 (f). This proposed FAR section apparently allows what used to be called alternate proposals minus the requirement for an initial proposal which meets all the stated requirements. However, it states "If the proposal considered to be most advantageous to the Government (determined according to the established evaluation criteria) involves a departure from the stated requirements." How can you determine a proposal is most advantageous to the Government according to the established evaluation criteria which are based on stated requirements if the proposal is changing the requirements? Is it not true that a departure from the requirements may result in a change to the evaluation criteria? This wording needs reconsideration. However, if departures from the stated requirements are to be acceptable as alternate proposals, recommend development of a standard solicitation provision which describes this process to potential offerors and which informs potential offerors that any proposed deviations from the stated requirements may be incorporated into a solicitation amendment. A solicitation provision like this would allow an offeror to make an informed decision on whether they want to submit revised requirements and would preclude a protest based on a Government failure to inform offerors that their proposals may result in RFP amendments. Suggested language for proposed provision.

"Offerors may submit proposals which depart from the stated requirements. Such proposals shall clearly identify why the acceptance of the proposal would be

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Contract Award, reserves the contracting officer's right to limit the competitive range for purposes of efficiency

(d) If the contracting officer determines that an offeror's proposal is no longer in the competitive range the proposal shall no longer be considered for award. Written notice of this decision shall be provided to the unsuccessful offeror at the earliest practicable time (see 15 1002(b))

(e) Offerors excluded from the competitive range may request a debriefing. When a debriefing is requested, a debriefing shall be conducted as soon as practicable. At a minimum, this preaward debriefing shall include the agency's evaluation of significant elements in the offeror's proposal, a summary of the rationale for eliminating the offeror from the competition, the relative ranking of the offeror and 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 eliminating the offeror from the competition. see 15 1004

**52.212-1 Instructions to Offerors - Commercial Items.**

**Instructions to Offerors - Commercial Items (Date)**

(g) Contract award (not applicable to Invitation for Bids) The Government intends to evaluate proposals and award a contract without discussions with offerors (except communications conducted for the purpose of minor clarification). Therefore, each individual offer should contain the offeror's best terms from a cost or price and technical standpoint. However, the Government reserves the right to conduct discussions if the Contracting Officer later determines them to be necessary. If discussions are held and the Contracting Officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the Contracting Officer

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the competitive range will be limited to no more than  
\_\_\_\_\_ (insert number)

Both proposed FAR 15 609(b) and 52 215-16, Alternate III, appear to conflict with FARA § 4103 which states

If the contracting officer determines that the number of offerors that would otherwise be included in the competitive range under subparagraph (A)(1) exceeds the number at which an efficient competition can be conducted, the contracting officer may limit the number of proposals in the competitive range, in accordance with the criteria specified in the solicitation, to the greatest number that would permit an efficient competition among the offerors rated most highly in accordance with such criteria

The statute requires the contracting officer to determine those "offerors that would otherwise be in the competitive range under subparagraph (A)(1)," before a determination that this number exceeds the number at which an efficient competition can be held. The referenced provision, 10 U S C 2305(b)(4)(A)(1), requires the agency to evaluate competitive proposals "after discussions with the offerors, provided that written or oral discussions have been conducted with all responsible offerors who submit proposals within the competitive range."

Moreover, the public interest may be better served by establishing the competitive range only after receipt of proposals and evaluation. Best value is most likely to be obtained in this manner. For example, assume that the contracting officer determines in advance to limit the competitive range to three based on market research and historical data from previous acquisitions. Then, after receipt of proposals and evaluation, the contracting officer determines that, of the eight offers received, offers three and four are essentially equal and are also competitive with offerors one and two.

Under these circumstances, if the contracting officer had selected Alternate III and stated in the solicitation that the competitive range was limited to no more than three, the contracting officer would be forced to either (a) only include offerors one and two and therefore lose competition from offerors three and four who were otherwise among the most highly rated proposals, or (b) make an arbitrary selection between offerors three and four even though they are rated essentially equal. Both choices could be said to violate

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FARA, which mandates inclusion of the offerors "rated most highly"<sup>1/</sup> This dilemma could be avoided if the proposed regulations were revised to delete (1) Alternate III under FAR 52 215-16, (2) the reference in 15 609(b) to the contracting officer's ability to state in the solicitation the greatest number of proposals that will be included in the competitive range, and (3) the reference in proposed FAR 15 407(d)(iii) to Alternate III See Attachment A

The policy argument in favor of the proposed regulations is that establishing the maximum number for the competitive range in advance would benefit both the government and the contractor community The argument is that by providing the information in the solicitation (a) the government would reduce the potential for manipulation of the number for other purposes, (b) offerors could challenge the number at a time when the government could more easily reconsider and find additional resources if the objection is well-founded, and (c) offerors could make more meaningful "bid/no-bid" decisions

The Section has given serious consideration to these meritorious concerns, but concludes that establishing a maximum in advance would not yield the desired benefit Before receipt of offers, it is difficult, if not impossible, for the agency to know the "greatest number" that would permit efficient competition while ensuring full and open competition Moreover, informing the offerors of the maximum number for the competitive range would not likely assist offerors in their "bid/no bid" decisions or proposal preparation Regardless of the number of offerors expected in the competitive range, each offeror has to make an independent decision based on its assessments of the agency's requirements Further, the offerors can only guess at the identity or number of other offerors In addition, any advance limitation on the competitive range will likely operate as a strong deterrent against the entry of new competitors

In addition, limiting the competitive range in advance could unduly restrict the contracting officer's exercise of discretion Announcing the efficient "limit" in advance would constrain the government's ability to include the most highly rated offerors Thus, if the government receives offers that are evaluated essentially equal, but that exceed the preannounced limit, it will have to either (a) make an arbitrary exclusion decision, or (b) change the rules of the competition, which would require a solicitation amendment or a resolicitation It is reasonable to anticipate, moreover, that any number selected in advance will be self-perpetuating and will compromise the agency's ability to obtain best value On the other hand, delaying a decision on the competitive range until offers have

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<sup>1/</sup> A third choice might be to revise the solicitation through amendment, or resolicit, with an expanded competitive range announcement, but these alternatives do not appear consistent with "efficiency," especially when better options are available

## Attachment 2

### 52 215-1 Instructions to Offerors--Negotiated Acquisition

As prescribed in 15 208(a), insert the following provision

#### Instructions to Offerors--Negotiated Acquisition (Date)

##### (a) Definitions

(1) Time, if stated as a number of days, will include Saturdays, Sundays, and Federal holidays

(2) In writing or written means any worded or numbered expression which can be read, reproduced, and later communicated, and includes electronically transmitted and stored information

(3) Revision means a revision of an offer requested by the contracting officer during discussions

(4) Discussion means communication after establishment of the competitive range between the contracting officer and an offeror in the competitive range

(5) Communication means interchanges with offerors which are not discussions. They may be conducted to obtain information which explains or resolves ambiguities or for minor clarifications

(b) Amendments to solicitations. If this solicitation is amended, all terms and conditions which are not modified remain unchanged. Offerors shall acknowledge receipt of any amendment to this solicitation by the date and time specified in the amendment(s)

(c) Submission, revision and withdrawal of offers. (1) Unless other methods (e.g. electronic commerce, facsimile, etc.) are permitted in the solicitation, offers and modifications to offers shall be submitted in paper media in sealed envelopes or packages (i) addressed to the office specified in the solicitation, and (ii) showing the time specified for receipt, the solicitation number, and the name and address of the offeror

(2) The first page of the offer must show--

(i) The solicitation number,

(ii) The name, address, and telephone number of the offeror,

(iii) A statement specifying the extent of agreement with all terms, conditions, and provisions included in the solicitation and agreement to furnish any or all items upon which prices are offered at the price set opposite each item,

(iv) Names, titles, and telephone numbers of persons authorized to negotiate on its behalf with the Government in connection with this solicitation, and

(v) Name, title, and signature of person authorized to sign the offer. Offers signed by an agent shall be accompanied by evidence of that agent's authority, unless that evidence has been previously furnished to the issuing office

(3) Offerors are responsible for submitting offers, and any requested revisions to them, to the Government office designated in the solicitation on time. Unless the solicitation states a specific time, the time for receipt is 4:30 p.m., local time, at the designated Government office on the date that offers or requested revisions are due. Offers, and requested revisions to them, that

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Subparagraph (b). Recommend deletion of second sentence Does not add value.

Subparagraph (c)(v)(3) Last sentence concludes with "at the Source Selection Authority's discretion." Reference our earlier comments in paragraph 4 d above relative to 15 207.

Subparagraph (e)(6): Recommend deletion. This statement is confusing and does not add value.

This provision does not address how the offeror is expected to acknowledge solicitation amendments. Recommend that this provision either address the means by which the offeror is to acknowledge receipt of the solicitation amendment, or at least reference the fact that the offeror must acknowledge receipt as instructed by the contracting officer, or as stated on the applicable solicitation amendment form.

It is also not clear what the difference between "modifications" and "revisions" is, or if a difference is intended.

Reference 52 215-1(c)(4) This paragraph states that the offeror may propose any item or combination of items unless otherwise specified. We are not comfortable with this as the "default" language in the clause This should be the exception rather than the rule For many acquisitions it is not practical to split the requirements and not award the entire effort

#### 52.215-5 Facsimile proposals

Recommend that either this provision be amended, or a new provision established, to permit submission of electronic proposals, and address virus checks to ensure proposals submitted electronically are "virus-free "

been evaluated is consistent with the language of FARA and gives the contracting officer maximum flexibility to balance the requirements for full and open competition against the particular efficiency constraints in a given procurement

**D. The Determination of Which Offerors to Include in the Competitive Range Should Not Be Made Until After the Agency Completes Its Initial Evaluation**

The proposed regulations should be revised to clearly state that the determination of which offerors to include in the competitive range cannot be made until after an evaluation of all offers *in accordance with the solicitation criteria*, as required by FARA. The statute does not permit the agency, in the interest of efficiency, to make the initial competitive range determination *before* conducting the evaluation required by the statute.

The Conference Report on FARA makes clear that the determination of which offerors to include in the competitive range must be based on *all* of the offerors' ratings *after the initial evaluation of proposals*. The Conference Report states

The conference agreement includes a provision that would allow a contracting officer, in procurements involving competitive negotiations, to limit the number of proposals in the competitive range to the greatest number that would permit an efficient competition among the most highly rated competitors. The conferees intend that *the determination of the competitive range be made after the initial evaluation of the proposals, on the basis of the rating of those proposals. The rating shall be made on the basis of price, quality and other factors specified in the solicitation for the evaluation of proposals*.

H R Conf Rep No 104-450 (emphasis added) To track the statutory language, the proposed regulations should be revised to clearly state that the initial competitive range determination shall be made *after* the initial evaluation of proposals based on the evaluation factors specified in the solicitation. The statutory mandate will be more closely met if the first sentence of proposed FAR 15.609(c) is revised as follows

After the initial evaluation of all offers in accordance with the factors and subfactors in the solicitation, the contracting officer may determine that the number of proposals that would otherwise be included in the competitive range exceeds the number at which an efficient competition can be conducted.

**E. The Exclusion of Offerors from the Competitive Range Based on Efficiency Should Not be Interpreted as Authority to Dilute Full and Open Competition**

The proposed regulations appear to assume that exclusion of offerors from the competitive range will always benefit the excluded offerors as well as the government agency. Supplementary information published in the *Federal Register* with the proposed regulations suggests that contractors will save bid and proposal costs due to reduction of the number of offerors in the competitive range.

The size of the competitive range will be reduced in some negotiated acquisitions and some offerors may be eliminated from a competition earlier than they would be eliminated under existing procedures. However, bid and proposal costs are expected to decrease, as an offeror who is not likely to receive an award will be less likely to remain in a competition.

61 Fed. Reg. 40116 (July 31, 1996). However, the bulk of bid and proposal costs are usually incurred in preparing the *initial* proposal -- *before* the competitive range is established. As the proposed regulation notes, the contractor's initial offer is supposed to contain its "best terms from a cost or price and technical standpoint."

A more effective way to increase efficiency, while reducing costs for both the government and prospective contractors, is to make sure that the solicitation defines the government's requirements as clearly as practicable. Techniques such as draft RFPs and presolicitation conferences will permit offerors to save money by providing them sufficient information to make more informed "bid/no-bid" decisions. In turn, the government will save money and have more efficient procurements as contractors that are not likely to satisfy the government's requirements decide not to submit initial proposals.

In any case, the unnecessary exclusion of an offeror from the procurement could deprive the government of the benefits of full and open competition. Accordingly, the Section recommends that the following sentence be added to proposed regulations 15.609(c), 52.212-1(c) and 52.215-16(c), Alternate II:

The number set for the competitive range shall take into account the relative evaluation ratings of all offers. If two or more offers are closely rated or rated equal and the contracting officer would otherwise include one but not the other(s), all such offers should be included.



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may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals The number set for the competitive range shall take into account the relative evaluation ratings of all offers. If two offers are closely rated and the contracting officer would otherwise include one but not the other due to efficiency, both offers should be included. The Government may reject any or all offers if such action is in the public interest, accept other than the lowest offer, and waive informalities and minor irregularities in offers received

**52.215-16 Contract Award.**

**Contract Award (Date)**

(c) The Government intends to evaluate proposals and award a contract after conducting discussions with responsible offerors whose proposals have been determined to be within the competitive range. If the Contracting Officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the Contracting Officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals. Therefore, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint

**Alternate II (Date)**

(c) The Government intends to evaluate proposals and award a contract without discussions with offerors (except communications conducted for the purpose of minor clarification). Therefore, each individual offer should contain the offeror's best terms from a cost or price and technical standpoint. However, the Government reserves the right to conduct discussions if the Contracting Officer later determines them to be necessary. If discussions are to be held and the Contracting Officer determines that the number of proposals that would

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The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as may be required

Sincerely,

(b) (6) *KJB*

John T Kuelbs  
Chair, Section of Public Contract Law

cc Marcia G Madsen  
David A Churchill  
Rand L Allen  
Lynda Troutman O'Sullivan  
Marshall J Doke, Jr  
Frank H Menaker, Jr  
John B Miller  
Alan C Brown  
Council Members  
Chair and Vice Chairs of the  
FAR Part 15 Rewrite Committee  
Alexander J Brittin

**THE RULE FAILS TO PROPERLY IMPLEMENT THE PROVISIONS ON "COMPETITIVE RANGE DETERMINATIONS" AS REQUIRED BY FARA**

FARA identically amends section 2305(b)(4) of title 10 U.S.C. and section 253b(d) of title 41 U.S.C. to provide that--

"If the contracting officer determines that the number of offerors that would otherwise be included in the competitive range under subparagraph (A)(i) exceeds the number at which an efficient competition can be conducted, the contracting officer may limit the number of proposals in the competitive range, in accordance with the criteria specified in the solicitation, to the greatest number that will permit an efficient competition among the offerors rated most highly in accordance with such criteria." Emphasis added.

The statement of managers accompanying the conference report provides in its entirety that --

"The conference agreement includes a provision that would allow a contracting officer, in procurements involving competitive negotiations, to limit the number of proposals in the competitive range to the greatest number that would permit an efficient competition among the most highly rated competitors. The conferees intend that the determination of the competitive range be made after the initial evaluation of proposals, on the basis of the ratings of those proposals. The rating shall be made on the basis of price, quality and other factors specified in the solicitation for the evaluation of the proposals."

The key to this FARA provision is that offerors must be told in the solicitation what the criteria will be for determining which of the offerors will be excluded from the competition and that those with the highest ratings will be included. However, this rule seeks to selectively apply some provisions of the law and the statement of managers without giving full accord to the entire law and legislative history. As such, the regulatory coverage violates the specific statutory provisions and statement of managers when seeking to provide coverage for establishing the competitive range. The proposed rule is deficient in several ways. The proposed rule does not provide the contracting officers any useful guidance on how to make the important determination to exclude

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otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the Contracting Officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals The number set for the competitive range shall take into account the relative evaluation ratings of all offers. If two or more offers are closely rated or rated equal and the contracting officer would otherwise include one but not the other(s), all such offers should be included

U.S. Chamber of Commerce  
11/26/96

September 30, 1996

General Services Administration  
FAR Secretariat (MVRS)  
Room 4037  
18th and F Streets, N.W.  
Washington, D.C. 20405

Attn. Ralph DeStefano

Re: FAR Case 96-303 "Competitive Range Determinations"

As associations representing the full breadth of American industries and business interests, we are pleased to submit comments on the proposed rule concerning Competitive Range Determinations published for comment by the Department of Defense, the General Services Administration and the National Aeronautics and Space Administration in the Federal Register of July 31, 1996 (Volume 61, Number 148) at page 40116.

## INTRODUCTION

The proposed rule seeks to implement two sections of the Federal Acquisition Reform Act ("FARA", or "Act"). Section 4101 of the Act requires the FAR to implement the requirement to obtain full and open competition in a manner that is consistent with the need to efficiently fulfill the Government's requirements. Section 4103 of the Act provides that the contracting officer may limit the number of proposals in the competitive range, in accordance with criteria specified in the solicitation, to the greatest number that will permit an efficient competition.

Congress affirmatively rejected a more far-reaching proposal from the House of Representatives (H.R. 1670) that "full and open competition" be replaced with "maximum practical competition". However, the rulemaking appears to recapture through administrative change exactly

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what the Congress refused to do legislatively. It fails to retain the priority of the statute to be accorded to "full and open" competition to efficiently fulfill requirements and instead elevates the mantra of efficiency in conducting the procurement process

In our view, the July 31 proposed rules fail to properly implement the statute, and would have a significant adverse impact on our members and on the federal acquisition system. We are strongly opposed to the rule in its current form. We have attached to these comments a September 18, 1996 letter to OFPP Administrator Kelman from the Full and Open Competition Coalition, which highlights our position on this rule

In light of our concerns and the publication of conflicting FAR coverage on this identical topic, we strongly recommend that the FAR Council immediately withdraw this July 31 rule. As an alternative to completely withdrawing the rule, we urge that the coverage be substantially rewritten. In addition, we recommend that the FAR agencies schedule a public meeting specifically on these proposed changes.

Further, the published supplementary information accompanying the rule acknowledges that this rule will have a significant impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. We have obtained a copy of the pro forma initial "reg flex" analysis, and we will separately be submitting comments (citing FAR case 96-303) on that aspect of this rule.

### **CONFLICTING FAR COVERAGE PUBLISHED**

On September 12, the FAR agencies published in the Federal Register a "phase I" rewrite of FAR Part 15, which includes sections on both "competition" and on "competitive range determinations", each also purporting to implement these same provisions of law.

While that Phase I FAR Part 15 rewrite is more comprehensive than the coverage in this rule, the treatment of these two topics differs slightly in that September publication from that in this July 31 publication. We have just begun our analysis of this more comprehensive rulemaking, and will be submitting comment on it, as well. We are considering appearing at the public meetings which are to be scheduled on the Phase I rewrite to raise our concerns about this July 31 rule, the differing treatment of these topics under the September 12 rule, and the insufficient Regulatory Flexibility Act analyses prepared for these rules.

However, our initial review of the Phase I FAR Pat 15 rewrite indicates that the coverage of the "competition" and the "competitive range determination" provisions in the September 12 version are no more compliant with the statute than the July 31 publication. Thus, as to these two elements of the September version, we are likely to strongly oppose them, as well

### **PIECEMEAL REGULATIONS MAKES ASSESSMENTS OF THE IMPACT OF THE CHANGES VIRTUALLY IMPOSSIBLE**

It is difficult to assess the full impact of the changes made by the July 31 proposed rule because of the unique piecemeal nature of the regulatory coverage proposed to implement these two sections of law. Traditionally, commentators would be able to take the language from the proposed rule and meld it into the existing regulatory coverage to make an assessment of the impact of the proposed changes. Here, however, your regulatory proposals confront commentators with two sets of problems.

First, since this July 31 rule includes only a small portion of the sections of the FAR that are directly affected by the statutory changes made in FARA, it is impossible to know what other directly associated portions of the existing FAR will remain unchanged and what additional directly associated portions will be further revised to "implement" both the statutory changes and discretionary administrative policy revisions. For example, this rule relies on coverage of pre-award debriefings, a central concept to determining whether any offeror deemed outside the competitive range will have any realistic rights of appeal. However, the current FAR does not provide for pre-award debriefings; and the rules to implement that statutory provisions in Section 4104 of FARA were only published as a proposed rule on June 14, 1996. It is impossible to know what that final rule will provide, and thus it is impossible to fully assess and comment on the obviously far-ranging impact of the changes recommended in this rule.

Second, in light of the publication of conflicting coverage on the identical subject in the Phase I rewrite, it is impossible to understand whether, and to what extent, this rule should be "taken seriously." Statements by senior government officials indicating that the July 31 publication "was a mistake to issue" or that it "should have been corrected before release" lend further confusion to the rulemaking process.

Therefore, in order to fully analyze the impact of these significant policy changes, commentators should be given the opportunity to see **all** of the statutorily required, and administratively-proposed, changes to the FAR at once so that we can fully appreciate the effects that any single set of changes will have. All changes to the FAR to implement the statute must be published no later than 210 days after enactment (i.e. by November 8). Accordingly, the FAR agencies should extend the deadline for comments on this proposed rule until after all proposed rules are issued.

### **THE JULY 31 RULE FAILS TO PROPERLY IMPLEMENT THE PROVISIONS ON "COMPETITION" AS REQUIRED BY FARA**

The proposed amendment to the Policy provisions of FAR Part 6 implement only part of the statute, but the failure to implement the entire statute results in a provision that is not authorized by law. This proposed change to the FAR's policy provisions also violates the commitment in the Statement of Managers in FARA's Conference Report.

Section 4101 of FARA states, in part, that --

"The Federal Acquisition Regulation shall ensure that the requirement to obtain full and open competition is implemented in a manner that is consistent with the need to efficiently fulfill the Government's requirements."

The statement of managers accompanying the conference report explains clearly that --

"This provision [FARA section 4101] makes no change to the requirement for full and open competition or to the definition of full and open competition."



FAR Section 6.101(b), as proposed to be amended by this rule, states --

“Contracting Officers shall provide for full and open competition through use of the competitive procedure or combination of competitive procedures contained in this subpart that is best suited to the circumstances of the contract action *and is consistent with the need to efficiently fulfill the Government’s requirement*. Contracting officers must use good judgment in selecting the procedure that best meets the needs of the Government.” Emphasis added [The italicized words are the proposed additions to existing section 6.101(b).]

The proposed policy provisions in 6.101(b) fails to implement the entire statutory provision -- namely, the requirement “that the FAR ensures” that the full and open competition provision is implemented consistent with efficiency. By adding only the italicized words to the existing policy, the proposal fundamentally changes the FARA requirement. Instead of having the FAR ensure that the requirements to obtain full and open competition is implemented in a manner that is consistent with the need to efficiently fulfill the Government’s requirements (as FARA provides), the proposed rule would allow each contracting officer to select procedures to implement this balance.

The proposed rule significantly changes the requirement of FARA which directed that this balance between retaining unchanged the fundamental requirement for “full and open competition” and the implementation of an “efficient competition” be “ensured” by the FAR, not delegated to the differing interpretations of thousands of contracting officers, for each of the 20 million annual contractual actions, under conditions that will be difficult, if not impossible, to review or challenge.

In fact, this single provision largely eliminates the FAR itself as a set of common procurement rules to guide both the Government and its contractors, since each contracting officer would be vested with the authority to “use good judgment” in fashioning the appropriate balance of procedures. Simply, each contracting officer would be authorized to decide when to deviate from the requirement from full and open competition, and a review of those decisions would focus solely on whether good judgment was used.

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*See Attachment A* This proposed revision will also address situations in which the contracting agency receives a number of proposals that are closely grouped in terms of cost and non-cost factors

The Section recognizes that one criticism of the present regulation is that too many marginal offers have been included in the competitive range. Thus, a primary purpose of FARA is to do away with the presumption that such offers must be included. The Section's proposed substitute regulatory language would provide contracting officers with maximum flexibility to balance the competing interests of efficiency and full and open competition. Under the Section's proposed language, a contracting officer would be permitted to exclude from the competitive range those offerors falling outside the group of the most highly rated proposals, as the statute requires. In some procurements, there may be a natural grouping or distinction between the top three offerors and the remainder. In other cases, the top three, four or five offerors may be so closely grouped that there is no material distinction and all should be included in the competitive range.

**F. Delays in Providing Debriefings to Offerors Excluded from the Competitive Range May Result in Additional Costs to the Government**

Proposed FAR 15.609(d) provides that if the contracting officer determines that an offeror's proposal is no longer in the competitive range, the offeror shall not be considered for award. The proposed regulation also provides that written notice of this decision shall be provided to the unsuccessful offeror at the earliest practicable time. Usually, the offeror will receive notice shortly after the decision has been made to exclude it from the competitive range, but well before award.

Proposed FAR 15.609(e) states that "Offerors excluded from the competitive range may request a debriefing. When a debriefing is requested, see 15.1004." The FAR Council has proposed to amend the FAR in accordance with FARA § 4104 to provide for preaward debriefings. 61 Fed. Reg. 32580 (June 14, 1996). Under FARA and the proposed FAR, the debriefing of an offeror excluded from the competitive range will be conducted before award unless it is not in the best interests of the government at the time it is requested.

Given the proposed changes to the competitive range regulations that make it more likely a competitive offeror will be excluded, it would be in the government's interest to conduct prompt debriefings for offerors excluded from the competitive range. This would help considerably in avoiding bid protests on competitive range issues filed months later, after award.

96-30326

conducted for the purpose of minor clarification)." See  
Comment 10.

Suggest revising the proposed second sentence to replace  
"individual" with "initial" to be consistent and more precise.

In Alternate III, suggest substituting "include no more  
than" for "be limited to no more than."

## RECOMMENDATION

Proposed section 15 406(e) must be revised to require that a preaward debriefing be conducted upon the written request of the disappointed offeror and be conducted within five days of receipt of that request unless both the offeror and the Government agree to another date

In order to assist the FAR Part 15 Rewrite Committee in understanding the precise changes we recommend to the proposed regulation, we have provided Attachments 1 and 2. These attachments conveniently juxtapose the Rewrite Committee's proposed regulations (which may or may not be line out) next to our proposed revisions which appear in bold face type.

FAR Section 6.101(b), as proposed to be amended by this rule, states --

“Contracting Officers shall provide for full and open competition through use of the competitive procedure or combination of competitive procedures contained in this subpart that is best suited to the circumstances of the contract action *and is consistent with the need to efficiently fulfill the Government’s requirement*. Contracting officers must use good judgment in selecting the procedure that best meets the needs of the Government.” Emphasis added. [The italicized words are the proposed additions to existing section 6.101(b).]

The proposed policy provisions in 6.101(b) fails to implement the entire statutory provision -- namely, the requirement “that the FAR ensures” that the full and open competition provision is implemented consistent with efficiency. By adding only the italicized words to the existing policy, the proposal fundamentally changes the FARA requirement. Instead of having the FAR ensure that the requirements to obtain full and open competition is implemented in a manner that is consistent with the need to efficiently fulfill the Government’s requirements (as FARA provides), the proposed rule would allow each contracting officer to select procedures to implement this balance.

The proposed rule significantly changes the requirement of FARA which directed that this balance between retaining unchanged the fundamental requirement for “full and open competition” and the implementation of an “efficient competition” be “ensured” by the FAR, not delegated to the differing interpretations of thousands of contracting officers, for each of the 20 million annual contractual actions, under conditions that will be difficult, if not impossible, to review or challenge.

In fact, this single provision largely eliminates the FAR itself as a set of common procurement rules to guide both the Government and its contractors, since each contracting officer would be vested with the authority to “use good judgment” in fashioning the appropriate balance of procedures. Simply, each contracting officer would be authorized to decide when to deviate from the requirement from full and open competition, and a review of those decisions would focus solely on whether good judgment was used.

are received in the designated Government office after the time for receipt are "late" and shall be considered at the Source Selection Authority's discretion

4) Unless otherwise specified in the solicitation, the offeror may propose any item or combination of items.

(5) Offers submitted in response to this solicitation shall be in the English language and shall be in terms of U S dollars, unless otherwise permitted in the solicitation.

(6) Offerors may not revise offers unless requested by the Contracting Officer.

(7) Offers may be withdrawn at any time prior to award. Withdrawals are effective upon receipt by the Contracting Officer.

(d) Period for acceptance of offers. Offers in response to this solicitation will be valid for the number of days specified on the solicitation cover sheet (unless a different period is proposed by the offeror).

(e) Restriction on disclosure and use of data. Offerors who include in their proposals data that they do not want disclosed to the public for any purpose or used by the Government except for evaluation purposes, shall--

(1) Mark the title page with the following legend

This proposal includes data that shall not be disclosed outside the Government and shall not be duplicated, used, or disclosed--in whole or in part--for any purpose other than to evaluate this proposal. If, however, a contract is awarded to this offeror as a result of--or in connection with--the submission of this data, the Government shall have the right to duplicate, use, or disclose the data to the extent provided in the resulting contract. This restriction does not limit the Government's right to use information contained in this data if it is obtained from another source without restriction. The data subject to this restriction are contained in sheets [insert numbers or other identification of sheets], and

(2) Mark each sheet of data it wishes to restrict with the following legend

Use or disclosure of data contained on this sheet is subject to the restriction on the title page of this proposal

(f) Contract award (1) The Government intends to award a contract or contracts resulting from this solicitation to the responsible offeror(s) whose offer(s) conforming to the solicitation represents the best value.

(2) The Government may reject any or all offers if such action is in the Government's interest.

(3) The Government may waive informalities and minor irregularities in offers received.

(4) The Government intends to evaluate proposals and award a contract without discussions with offerors (except communications). Therefore, each individual offer should contain the offeror's best terms from a cost or price and technical standpoint. The Government reserves the right to conduct discussions if the Contracting Officer later determines them to be necessary. ~~If the Contracting Officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can~~

~~be conducted, the Contracting Officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals~~

(5) The Government reserves the right to make an award on any item for a quantity less than the quantity offered, at the unit cost or prices offered, unless the offeror specifies otherwise in the offer

(6) Communications with offerors after receipt of an offer do not necessarily constitute a rejection or counteroffer by the Government

(7) The Government may determine that an offer is unacceptable if the prices proposed are materially unbalanced between line items or subline items. An offer is materially unbalanced when it is based on prices significantly less than cost for some work and prices which are significantly overstated in relation to cost for other work, and if there is a reasonable doubt that the offer will result in the lowest overall cost to the Government, even though it may be the low evaluated offer, or it is so unbalanced as to be tantamount to allowing an advance payment

(8) The Government reserves the right to make multiple awards if, after considering the additional administrative costs, it is in the Government's best interest to do so

(9) Award of a contract is effective upon transmittal of the contract signed by the Government

(10) The Government may disclose the following information in postaward debriefings to other offerors (i) the overall evaluated cost or price and technical rating of the successful offeror, (ii) the overall ranking of all offerors, when any ranking was developed by the agency during source selection, (iii) a summary of the rationale for award, and (iv) for acquisitions of commercial end items, the make and model of the item to be delivered by the successful offeror

(End of provision)

Alternate I (Date) As prescribed in 15 208(a)(1), substitute the following paragraph (f)(4) for paragraph (f)(4) of the basic provision

(4) The Government intends to evaluate proposals and award a contract after conducting discussions with responsible offerors whose proposals have been determined to be within the competitive range ~~If the Contracting Officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the Contracting Officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals.~~ Therefore, the An offeror's initial offer should contain the offeror's best terms from a price and technical standpoint

Alternate II (Date) As prescribed in 15 208(a)(2), add the following to paragraph (f)(4)

~~(4) If the Contracting Officer exercises the Government's right to limit the number of proposals in the competitive range, the competitive range will be limited to no more than \_\_\_\_\_ (insert number)~~



REPLY TO  
ATTENTION OF

AMP

DEFENSE COMMISSARY AGENCY  
HEADQUARTERS  
FORT LEE, VIRGINIA 23801-6300

96-303-26

NOV 27 1996

MEMORANDUM FOR GENERAL SERVICES ADMINISTRATION, FAR SECRETARIAT  
(MVR5), 18TH & F STREETS, NW, ROOM 4037,  
WASHINGTON, DC 20405

SUBJECT: Comments on FAR Case 96-303, Competitive Range  
Determinations

The attached comments are submitted in accordance with  
**Federal Register** notice dated November 15, 1996 (61 FR 58622) and  
are based on the proposed rule published on July 31, 1996 (61 FR  
40116).

The point of contact is Brenda Stewart, DSN 687-8821,  
Commercial 804-734-8821.

(b) (6)

CROSEY H. JOHNSON  
Director  
Acquisition Managment

Attachment:  
As Stated



96-303-26

COMMENTS ON PROPOSED RULE--FAR CASE 96-303

DEFENSE COMMISSARY AGENCY

NOVEMBER 26, 1996

1. FAR 6.101(b): Suggest you consider deleting the last sentence. We recognize that this is language which is currently in the FAR. However, contracting officers are expected to use good judgment in making all their decisions. It seems inappropriate to put this statement here and state the obvious, especially in view of the current emphasis on empowering the contracting officer.
2. FAR 12.301(e)(4): It appears as if there may be something missing here. The last sentence begins with a provision number. It also states that Alternate III may be used "for this purpose." If "for this purpose" means for the purpose of reserving the right to conduct discussions and to limit the number of proposals in the competitive range, then Alternate III is unnecessary. Provision 52.212-1(g) will reserve both those rights.

Alternate III addresses the insertion of the limit on the number of proposals in the competitive range if the Contracting Officer decides to establish a limit prior to releasing the solicitation. There is no language in 12.301(e)(4) which mentions this option; it should be added to clearly show that it is a separate option from limiting the competitive range after evaluation of proposals. In addition, if the intent is to have the contracting officer use the wording of Alternate III as an addition to 52.212-1, then the instructions should be rewritten. Alternate III is now constructed as an insertion in 52.215-16 and carries a paragraph designator (1). Provision 52.212-1 already has a paragraph (1).

3. FAR 15.407(d)(4)(ii): Suggest you consider leaving the current language. The revision substitutes awkward phraseology for straightforward language. The insertion of "with offerors within the competitive range" adds no value. FAR 15.609(a) adequately establishes the relationship between discussions and offerors in the competitive range.
4. FAR 15.407(d)(4)(iii): The words "reserve the right to limit the competitive range" in conjunction with Alternate III are not consistent with the language of the provision. Alternate III states the limit if the contracting officer exercises the Government's right to limit the competitive range. Suggest rewording as shown:

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number that will still permit competition among the offerors rated most highly in accordance with [solicitation] criteria " FARA § 4103 As previously discussed, until proposals are received and compared to the solicitation criteria, it could be argued that a competitive range determination consistent with FARA is not possible Indeed, as discussed below, the Conference Report clearly states that "the determination of the competitive range [should] be made after the initial evaluation of proposals, on the basis of the rating of those proposals " H R Conf Rep No 104-450

When analyses during acquisition planning indicate the competitive range may be overcrowded, the agency could re-evaluate how its needs have been described, and devise an evaluation method that can more efficiently select an awardee -- without arbitrarily limiting the number of proposals to be considered

In addition, the proposed phrase "resources available to conduct the source selection" could lead agencies to make competitive range decisions based on convenience alone, without regard to the requirement to conduct competition among the "greatest number" of "offerors most highly rated" as discussed above This is not to say that agency resource limitations cannot be considered, but rather that they must be considered in light of the full statutory mandate With this shift in emphasis, the government is more likely to obtain best value as well Accordingly, the Section suggests that the proposed regulation be revised to state that the competitive range may not be limited *solely* for considerations relating to available agency resources An efficient procurement is one that uses agency resources effectively and appropriately *to achieve full and open competition* "among the offerors most highly rated in accordance with [solicitation] criteria " See Attachment A

**C. It Can Be Argued That the Proposed Advance Determination of Competitive Range Violates FARA's Requirement That the Contracting Officer Include in the Competitive Range the Greatest Number of Proposals Rated Most Highly**

The proposed regulations include a provision that would allow the contracting officer to limit in advance the maximum number of proposals in the competitive range FAR 15 609(b) and 52 215-16, Alternate III Proposed FAR 15 609(b) provides that the contracting officer may include in the solicitation "the government's *estimate* of the greatest number of proposals that will be included in the competitive range for purposes of conducting an efficient competition among the most highly rated proposals " (Emphasis added ) This language, however, is not followed in the proposed solicitation provision Instead, proposed FAR 52 215-16, Alternate III, provides for a mandatory maximum

If the Contracting Officer exercises the Government's right to limit the number of proposals in the competitive range,

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the contracting officer may determine that the number of proposals in the competitive range exceeds the number at which an efficient competition can be conducted.

The last sentence of the proposed paragraph has been deleted and replaced by a parenthetical reference to the provision prescription to simplify the paragraph. Also, provisions at 52.215-16 do not "reserves the contracting officer's right," they "permit" the contracting officer to limit the competitive range.

8. FAR 15.609(d): Suggest revising this paragraph because there has been some confusion about the term "no longer in the competitive range." Suggest revision as follows:

(d) After the contracting officer excludes an offeror's proposal from the competitive range, the proposal shall no longer be considered for award. The contracting officer shall provide written notice of this decision to the unsuccessful offeror at the earliest practicable time (see 15.1002(b)).

9. FAR 15.609(e): If the proposed language for preaward debriefing is published as proposed under FAR Case 96-304, the reference to 15.1004 in this paragraph must be changed to 15.1005. If the proposed language for preaward debriefing is not published simultaneously with this FAR Case 96-303 language, the reference to 15.1004 will be incorrect because that citation refers only to debriefings after notices of contract award.

10. FAR 52.212-1(g): Suggest leaving the first sentence as it is in the current FAR. FAR 15.601 defines both "clarification" and "discussion," so it is unnecessary to repeat part of those definitions here. In addition, if this language is added now, it will need to be deleted later to avoid confusion when the definition of discussion is revised for the Part 15 rewrite.

Suggest leaving the second sentence as it is in the current FAR. The proposed revision to substitute "individual" for "initial" makes this language imprecise and inconsistent with 52.215-16(c) and other FAR language. The addition of "cost or" preceding "price and technical standpoint" is improper, because use of cost contracts with commercial acquisition procedures is prohibited.

11. FAR 52.215-16(c), Alternate II: Suggest revising the proposed first sentence to delete "(except communications

## RECOMMENDATION

We recommend that most of the language proposed in 15 406(c) be deleted and that the standard of establishing the competitive range be proposals having "more than a reasonable chance of being selected for award" and that the phrase "most highly rated proposals" be deleted

## ISSUE

15 406(e), optional preaward debriefing

## DISCUSSION

We agree with the Rewrite Committee's proposal that offerors be informed as soon as they are eliminated from the competitive range. Consistent with the time frames in FASA for post-award debriefings, we have recommended that an offeror eliminated from the competitive range must request a debriefing in writing within three days of receiving notice of its elimination.

However, 15 406(e) as proposed allows contracting officers to delay a debriefing until after the contract is awarded despite the limited amount of information that may be disclosed in a preaward debriefing pursuant to proposed 15 805. Further, 15 604(e) does not mention FARA's admonition that "contracting officers shall make every effort to debrief the unsuccessful offeror as soon as practicable." FARA, §4104. Since there may be a substantial time lag between notice of exclusion from the competitive range and eventual award, we believe that it is absolutely essential that offerors be provided a debriefing at the time they are eliminated from the competitive range, not after award. Immediate and informative debriefings will have the effect of preventing, rather than increasing, protests because most unsuccessful offerors are more interested in receiving information that will allow them to make future proposals more effective.

It appears that failure to provide an immediate and quality debriefing will only continue protests as offerors attempt to learn from the protest process (as distilled from attorneys under a protective order) what they could not learn from a timely and "efficient" (i.e., useful and informative) debriefing. In this regard, we note the experience of the Department of the Treasury's IRS has been that timely and informative debriefings virtually eliminate protests, demonstrate professionalism on the part of the source selection team and promote integrity and confidence in the IRS procurement system. We have every reason to believe that the IRS experience would be repeated throughout the federal agencies. The Government's ability to reduce protests will be contingent on the quality and timing of the Government's debriefing to excluded offerors, not the standard for establishing the competitive range. The Government's emphasis should be on eliminating frivolous or uninformed protests, not meritorious protests.



96-303-27



November 25, 1996

Ms Melissa Rider  
General Services Administration  
FAR Secretariat (MVRS)  
18th & F Streets NW  
Washington, DC 20405

Dear Ms Rider

The Aerospace Industries Association (AIA) appreciates the opportunity to provide comments on the proposed rule on the Phase I Rewrite of Federal Acquisition Regulation (FAR) Part 15, Contracting by Negotiation (FAR Case 95-029) This response also addresses FAR Case 96-303, Competitive Range Determination

AIA strongly supports the efforts of the FAR Council and the Part 15 Rewrite Committee to introduce innovative techniques into the source selection process, eliminate non-value added regulations and requirements which impose unnecessary burdens on industry and government, and promote best value for the government AIA believes that the proposed rewrite of Part 15 will accomplish many of the changes needed to make the government acquisition process more efficient and effective and facilitate the move toward a more commercial-like acquisition process

AIA presented a statement on the Part 15 rewrite at the first public meeting on November 8, 1996 We now would like to provide more detailed comments on some areas of the proposed rule Those comments are contained in the enclosure to this letter AIA also is working closely with CODSIA to develop an industry position on the Part 15 rewrite CODSIA comments should be submitted soon

AIA applauds the fine job that the FAR Council and the Part 15 Rewrite Committee have done in promoting procurement reform, and we appreciate the opportunity to be part of that effort Please do not hesitate to contact me at (202) 371-8522 if there are any questions or if we can be of further assistance

Sincerely,

(b) (6)

Patrick D Sullivan  
Assistant Vice President  
Procurement and Finance

Enclosure

Hand  
11-28-96

96-303-21

# Aerospace Industries Association

## Comments

### FAR Part 15 Rewrite - Phase I

#### (FAR Case 95-029)

**Section 2.101 Definitions.** The proposed rule places an emphasis on selection of the offer which represents the best value to the Government. This is evidenced by addition of a definition of best value in Section 2.101 and in the clear direction provided in Part 15 to select the offer which represents the best value to the Government.

AIA strongly supports the use of best value in source selection. Use of best value recognizes that selection of the lowest price technically acceptable offer does not necessarily result in the most advantageous contract for the Government. It also allows the contracting officer to select the offer which best fits the Government's needs. However, AIA feels that the definition of best value provided in the proposed rule is too broad. Therefore, we suggest that the definition be rewritten as follows to avoid confusion during the evaluation and source selection process:

“Best value’ means an offer or quote which is most advantageous to the Government, based on trade-offs among cost or price, quality, past performance, technical and management capabilities, and other appropriate factors.”

**Section 15.002 Negotiated Acquisition.** The introductory text to this section, which describes the types of acquisitions covered by the negotiated acquisition processes in Part 15, should be clarified to read as follows:

“This part applies to negotiated acquisition processes for (a) competitive acquisitions, and (b) to the maximum extent practicable, sole source acquisitions.”

The entire Section 15.002 (as rewritten) should be included under Section 15.000 Scope of Part.

**Subpart 15.1 Source Selection Processes and Techniques.** This subsection describes four acquisition processes or techniques which may be used individually or in combination to design appropriate acquisition strategies. Two of these are the lowest price technically acceptable process and the tradeoff process.

AIA supports the use of these two acquisition processes to select the offer which provides the best value to the Government. However, we are concerned about the emphasis on “the amount of Government resources available” as a factor in determining acquisition strategies. The amount of resources available to the Government to conduct source selection should *not* be a factor in

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determining the most appropriate acquisition process. Otherwise, the Government and contractors could expend resources in an acquisition process that would not produce the best value for the Government.

**Section 15.102 Tradeoff Process.** The tradeoff process is extremely important because it probably will be the most frequently used source selection technique. The process, as currently fashioned in 15.102(b)(3), does not require that specific tradeoffs be described in terms of cost or price impacts, nor is there a requirement that tradeoffs be quantified in any other manner.

While AIA supports the use of the tradeoff process, we feel that this language will not aid offerors in preparing the most responsive offer possible. The mere fact that tradeoffs will be considered will not be helpful in structuring proposals. Potential offerors need to know what kinds of tradeoffs will be considered and the relative importance of key parameters, *i.e.*, while providing a precise mathematical formula for tradeoffs is neither necessary nor practical, it would be useful to know that for a particular solicitation tradeoffs will be made, for example, between cost and past performance. Therefore, we recommend that the final sentence of 15.102(b)(3) be revised to read as follows:

“Specific tradeoffs in terms of cost or price impacts and noncost factors/subfactors should be identified in the solicitation whenever possible. Quantification of the tradeoffs may be identified in the solicitation, if feasible.”

**Section 15.103 Multiphase Acquisition Technique.** Another acquisition technique described in the proposed rule is the *multiphase acquisition technique*, formerly known as “two-phase” acquisition. This technique enables the Government initially to seek limited information, make one or more “down-selects,” and then require full proposals from a limited number of offerors. During the first phase of multiphase acquisition, the Government evaluates all offerors’ submissions and makes either a mandatory or an advisory down-select. In the case of an advisory down-select, offerors not selected will be provided with “supporting rationale” for the decision. Such offerors still may submit a proposal for the second phase which the Government must evaluate.

AIA supports the concept of multiphase acquisition. Because of the down-select process, multiphase acquisition has the potential to save a contractor significant amounts of bid and proposal money which could be better spent bidding on other projects where the contractor is competitive.

However, AIA is concerned that an offeror informed as the result of an advisory down-select that it is “unlikely to receive an award” will be faced with a dilemma. The offeror must decide whether to expend additional resources to prepare a proposal for the next phase of the competition, knowing that the chance of award is slight, or not submit a proposal and withdraw from the competition, all on the basis of “supporting rationale” provided by the Government.

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Therefore, AIA recommends that 15 103(d)(2)(ii) be amended to provide that the "supporting rationale" provided such offerors contain sufficient information that an offeror is able to make an informed decision whether or not to participate in the next phase of the acquisition

**Section 15.104 Oral Presentations.** The fourth "new" acquisition technique described in the proposed rule is the use of oral presentations for submission of all or part of a proposal. AIA supports use of oral presentations when it is beneficial to both the offeror and the Government. Oral presentations can be an excellent substitute for paper intensive, time consuming written submissions under appropriate circumstances. However, the proposed rule should be amended to include a requirement for a permanent record of the oral presentation (e.g., a videotape or tape recording). A permanent record is necessary to establish accountability and to ensure that Government evaluators hear and/or see the same presentation.

**Section 15.201 Presolicitation Exchanges with Industry.** AIA supports presolicitation exchange of information between the Government and industry as advantageous to both industry and Government. Presolicitation communications will enable the Government to better tailor its acquisitions in order to obtain quality products and services at reasonable prices and will increase the efficiency of the acquisition process. In addition, it will help identify and resolve issues regarding acquisition strategy, while facilitating resolution of other concerns or questions that industry or the Government might have. It also will allow industry to be more responsive to the Government's needs and make the most efficient use of industry resources in responding to Government requirements.

The draft Request for Proposal (RFP) (one of the techniques identified in 15 201(c) as a means to promote early exchange of information) is an especially effective means of promoting industry involvement early in the acquisition process. Draft RFP's allow the Government to obtain feedback in such critical areas as evaluation factors, terms and conditions, and requirements definition. When used effectively, draft RFP's reduce the need for time consuming modifications to RFP's and subsequent costly contract amendments. Draft RFP's allow industry to better understand the Government's requirements and help Government understand what industry is able to provide.

**Section 15.202 Requests for Proposals.** Under 15 202(a)(2)(I) the contracting officer may allow offerors to propose alternative terms and conditions, including a new contract line item number (CLIN) structure.

AIA supports providing offerors the opportunity to propose alternate terms and conditions and CLIN structures in response to a solicitation, especially in proposals for commercial items. This will allow the contractor to propose the terms and conditions best suited to the acquisition and will result in the best value for the Government. However, in addition to the caveat already expressed in 15 202(a)(2)(ii), 15.202(a)(2) should include guidance to the contracting officer explaining that where the solicitation allows differing CLIN structures, the cost evaluation model



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also must be able to accommodate the differing CLIN structures and result in comparable calculations and equitable evaluations for all offers

Therefore, 15 202(a)(2)(ii) should be renumbered as 15 202(a)(2)(iii) and a new 15 202(a)(2)(ii) should be inserted as follows

“Before soliciting or accepting proposals with alternate CLIN structures, the contracting officer must ensure that the Government’s cost model for both proposal and evaluation purposes can accommodate different CLIN structures ”

AIA also notes that 15 202(e) introduces the undefined term “letter RFPs ” This term should be defined

**Section 15.207 Submission, Modification, Revision, and Withdrawal of Proposals.** The rule governing late proposals has been revised in this section to *emphasize* that an offeror is responsible for timely delivery of its offer However, the rule also allows late offers to be considered if doing so is *in the best interests of the Government* (Government mishandling or fault no longer need be established to accept a late offer )

AIA believes that the proposed standard for consideration of late proposals is too open-ended The rule should be revised to provide that, as a general rule, the contracting officer may accept late proposals *only* if the contractor has an “excusable delay” which prevented timely delivery of the offer, such as inclement weather or other circumstances which are beyond the contractor’s control A reasonable time limit for acceptance of late offers (*e g* , 48 hours) should be established, also In addition, determination of whether a late proposal is “timely” should be made *before* the proposal price or its contents are revealed In any event, the rule should ensure that consideration of late offers does not create a material competitive advantage for late offerors over offerors that submitted their proposals on time. These changes would avoid excessive delay in contract award and eliminate unnecessary protests

**Section 15.405 Proposal Evaluation.**

**Preaward testing/product demonstration.** Under 15 405(a) use of preaward testing or product demonstration is authorized without a formal test plan, provided that all offerors are evaluated against the same criteria The evaluation method need not be disclosed in the solicitation

AIA supports preaward testing and product demonstration without a formal test plan *as long as the evaluation criteria are provided in the solicitation* This would comport with the requirements in 15.404(e) and 15 405(a) that all evaluation factors that will affect contract award be stated *clearly* in the solicitation and that proposals be evaluated *solely* on the factors specified in the solicitation

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**Cost or price evaluation.** Cost analysis is specifically prohibited under 15 405(a)(1) when there is adequate price competition if contracting on a firm fixed price or firm fixed price with economic price adjustment basis, unless the price of the otherwise successful offer is determined to be unreasonable. AIA applauds this clear statement of policy.

**Past performance.** Sections 15 404(d)(3) and 15 405(a)(2) discuss a significant factor in evaluation of a contractor's proposal - evaluation of the contractor's past performance. This is required in every source selection, unless the contracting officer documents the reason past performance is not an appropriate evaluation factor.

AIA strongly supports use of past performance information in source selection as a good (although not infallible) indicator of a contractor's ability to perform future contracts. However, it is important to ensure that past performance information is used fairly, accurately and consistently when making determinations of nonresponsibility or evaluating offerors in order to award without discussions or make competitive range determinations. *Agencies should be required to notify an offeror of any negative past performance information that will be used in the source selection process and provide an opportunity for the offeror to comment on that information prior to its use.* The source of the negative past performance information also should be identified to the offeror. Past performance information related to a contract which is the subject of a dispute or litigation should *not* be relied upon in evaluating a contractor's past performance. Such information is inherently suspect.

Section 15 405(a)(2) should be modified to reflect these changes. In addition 15 407(b) should be amended to require that *all* offerors be provided an opportunity to rebut negative past performance information prior to its use in the source selection process. 15 407(d)(4) and 15 806(e)(4) should be rewritten to allow the contracting officer to disclose the source of negative past performance information.

**Section 15.406 Competitive Range.** The regulation establishes a new standard for inclusion in the competitive range - only those offerors which have the *greatest likelihood of award* based on the factors and subfactors in the solicitation will be included in the competitive range.

The contracting officer is allowed to further limit the competitive range in the *interest of efficiency*. In planning an acquisition, the contracting officer may determine that the number of proposals that otherwise would be included in the competitive range is expected to exceed the number at which an efficient competition can be conducted. An "estimate" of the greatest number of proposals that will be included in the competitive range for purposes of conducting an efficient competition among the most highly rated proposals may be indicated in the solicitation. If the solicitation contains proper notification, the contracting officer may determine *after* evaluation of offers to limit the competitive range for the sake of efficiency.

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At the time of solicitation, if the contracting officer wishes to limit the number of proposals in the competitive range to a specific number, use the basic provision with its Alternate III, or the basic provision with both Alternates II and III.

5. FAR 15.609(a): As written, the paragraph twice addresses the basis for establishing the competitive range in slightly different language. Suggest leaving the first sentence in this paragraph as it reads in the current FAR, rewording the second sentence and deleting the third sentence. The revised paragraph would read as follows:

The contracting officer shall determine which proposals are in the competitive range for the purpose of conducting written or oral discussion (see 15.610(b)). The competitive range shall be determined on the basis of cost or price and other evaluation factors stated in the solicitation and shall include proposals that have the greatest likelihood of being selected for award.

6. FAR 15.609(b): To improve clarity, suggest the first sentence of proposed coverage be revised to read as follows:

When planning an acquisition, the contracting officer may conclude that the number of proposals expected to be included in the competitive range will exceed the number at which an efficient competition can be conducted.

Suggest the third sentence of proposed coverage be revised to read as follows:

When the contracting officer decides to limit the competitive range before issuing the solicitation, use Alternate III of 52.215-16, Contract Award, to insert in the solicitation the Government's estimate of the greatest number of proposals that will be included in the competitive range.

7. FAR 15.609(c): Suggest revising the language of this paragraph as shown to eliminate redundant language and correct "contracting officials" to "contracting officer."

If the solicitation notified offerors of the Government's right to limit the competitive range (see 15.407(d)(4)(ii) and (iii)), after evaluating offers,

# COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS

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96-303-25

November 26, 1996  
CODSIA Case 19-96

General Services Administration  
FAR Secretariat (VRS)  
18th & F Streets, N W  
Washington, D.C. 20405

Subject FAR Case No 95-029 15-406-Competitive Range  
FAR Case No 96-303 Competitive Range Determinations

Dear DAR Council and CAA Council

The undersigned members of the Council of Defense and Space Industry Associations (CODSIA) appreciate the opportunity to comment on the proposed rules which were published in the *Federal Register* on July 31, 1996 and September 12, 1996 (FAR Case No 96-303, 61 *Fed Reg* 40116 and FAR Case No 95-029, 61 *Fed Reg*. 48380 respectively) Under this submission, we are submitting our comments on FAR Case No 96-303, "Competitive Range Determinations" With the agreement of the FAR Part 15 Rewrite Committee Chair, CODSIA is limiting these comments to the proposed "15 406--Competitive Range" and those parts of proposed 52 215-1 "Instructions to Offerors--Negotiated Acquisitions" that relate specifically to competitive range determinations We will forward the remainder of our comments on the FAR Part 15 Rewrite in the near future

Formed in 1964 by industry associations with common interests in the defense and space fields, CODSIA is currently composed of ten associations representing over 4,000 member companies across the nation. Participation in CODSIA projects is voluntary Therefore, a decision by any member association to abstain from participating in a particular activity is not necessarily an indication of dissent

CODSIA members agree that it is appropriate to raise the standard for determination of the competitive range to a standard higher than "reasonable chance of being selected for award" However, we strongly recommend language that modifies the standard from "greatest likelihood of award" because the communications that will ensue from the FAR Part 15 Rewrite Committee's proposed 15 407 should permit the Government to establish the competitive range on a more realistic basis We believe that under our revised 15 406(a) protests previously based on the "reasonable" and "doubt" standard can be eliminated

CODSIA members further agree that "efficiency" is a proper goal of all procurement actions A more efficient acquisition benefits the industry as well as the Government Nevertheless, we are concerned that the proposed 15 406 elevates "efficiency" as the sole focus of an acquisition Rather, we believe "efficiency," while important, is but one of

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me

CP 303-22

The American Movers Conference is the principal national trade association representing household goods moving companies. AMC's 3,000 members include every aspect of the industry: national van lines with affiliated agents, agents affiliated with van lines, and independent national and regional carriers without an agency network. The vast majority of these companies are small businesses.

The household goods moving industry has long provided relocation services to the federal government. These services include international, interstate, intrastate and local moves. These relocation services have been available through the individual federal agencies, the General Services Administration and the Department of Defense. Approximately 170,000 household goods shipments are transported on behalf of the federal government every year.

The services associated with moving an individual household are unique and differ greatly from other services contracted by the government. A successful move depends in large part on highly individualized services in at least two locations: origin and destination. The packing, loading, storage and unloading of household goods are as unique as the actual transportation of household shipments. The moving industry depends upon individual companies located throughout the world which provide these services. For the most part, these companies are small businesses.

Furthermore, over 50% of the moves in the U.S. take place between May and September of each year. During much of the summer every available tractor-trailer,

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truck and driver is still not sufficient to meet the relocation demands of its customers. This demand includes the relocating of federal employees.

In the past, the federal government has not used FAR based contracts for household goods transportation. However, DOD is now proposing to test a FAR based procurement system. AMC believes a more efficient, simplified method of procurement is to include only those FAR clauses which are specifically needed by the government. The concern is that the inadvertent inclusion of standard FAR clauses that are inappropriate to a contract for the packing and transportation of household goods will unduly complicate DOD's relationship with its service providers and create needless administrative burden on both parties.

DOD also contends that because other types of contractors do business with the government under FAR-based contracts, there is no reason household movers cannot do likewise. This conclusion ignores the fact that the domestic household moving industry is unique. It is a three tier system consisting of van lines and their agents, carriers that are authorized in their own right to transport traffic or as agents of van lines and independent owner-operators (drivers). Each component of the industry must meet established standards, either regulatory or contractual, before they qualify to transport DOD shipments. The interdependence of each segment requires a high degree of industry acceptance of the contractual relationships carriers enter into with their customers, whether they are military or commercial. If any component of the industry is unduly burdened by a regulatory morass such as FAR that hampers its ability to operate, the entire system will not

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function effectively. This is no doubt an important reason why contracts for household goods moving have always been exempted under FAR § 47.200 (d) (3).

As disturbing as inclusion in the FAR is for the household goods moving industry, the changes proposed in both FAR Case 95-029 and FAR Case 96-303 are even more so. Specifically, AMC offers comment herein on the effect limitations to the competitive range will have on the moving industry.

### **General Comments**

The proposed changes to the competitive range expedites bureaucratic functions while dismissing the needs of small business. By allowing a contracting officer to limit the competitive range, the federal bid process will become a proposal writing contest. Small businesses do not have extensive marketing, legal and other resources available to effectively compete in such an environment. The individual writing the bid is often the same individual signing payroll, answering phones and completing the business at hand. the owner. Instead of focusing on ease of administration, the regulations should focus on awarding contracts to any business which can satisfactorily complete the requirements.

With regard to the moving industry and its responsibility for relocating federal employees, the proposed regulations will have a detrimental effect on the federal government. The ability to move shipments within a limited window of time takes multiple participants. Not even the most seasoned relocation expert can always completely predict when these resources may be necessary. A major corporate relocation may divert necessary drivers and equipment from military and government

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shipments Likewise, a shift in military personnel may cause capacity and similar problems in other areas of the country

Moving companies have attempted to tackle the problem of predicting capacity needs However, these predictions are not always accurate and even when they are, bottlenecks occur It is impractical to hire drivers and purchase trucks for a seasonal business that always contracts in the winter Therefore, any prudent traffic manager will need access to multiple moving companies which may or may not be called in to perform services

DOD has long wrestled with this problem During the peak season (May through September) DOD has periodically experienced a lack of equipment and personnel to meet its needs The answer to this problem is not to exclude the very companies which own trucks and warehouses - small business movers The answer is to encourage small business movers participation in the DOD program and continued viability as successful service providers Limiting the competitive opportunities of these companies will discourage their very existence

DOD's solution to the capacity problem is to begin the use of third-party brokers which in turn contract with moving companies for services The industry seriously questions the ability of these companies to meet all of the needs of the DOD In addition, this practice flies in the face of encouraging and developing small businesses throughout this country Third party relocation brokers are national and international corporations If these companies are allowed to become prime contractors then movers will only exist as subcontracting entities This decreases



small business profits and allows the prime contractor to set operational and other standards. More importantly it still does not address the primary concern of the federal government: to ensure adequate and quality service to relocating personnel. Until that becomes the primary focus of the contracting system both small movers and federal personnel will suffer.

### **FAR Case 96-303**

In the proposed Section 12.301 (e) (4) a contracting officer could limit the number of proposals in the competitive range without guidance or standards. The section goes on to modestly require that this limitation would include "the greatest number that will permit an efficient competition among the most highly rated proposals." However, there are no standards attached to this limitation and no explanation of how a contracting officer could reach a determination of what number, if any, produces efficient competition.

Furthermore, this standard seemingly allows a contracting officer to establish a limitation prior to reviewing the contracts. A contracting officer could arbitrarily determine a number which meets their time limitations or other needs. Finally, AMC believes that any blanket standards may never fit the needs of the household goods moving industry. Although reviewing a set number of proposals may give a contracting officer sufficient grounds for awarding some services that number may not ensure sufficient equipment and drivers to meet the government's needs during a busy moving season. Any attempt to meet these needs with a finite group of bidders will lead to contract awards to a very few national corporations relegating many quality small movers to subcontractor status.

96-303-2B

**FAR CASE 95-029**

Although the proposed regulations in FAR Case 95-029 are more complete, they still place the needs of the contracting officer before the ability of small companies to compete. The proposal in 95-029 is preferable to the one in 96-303 because it does state that factors and sub-factors must be stated in the solicitation. However, 95-029 still allows a contracting officer to preset the competitive range which will limit the number of businesses competing for a contract.

By proposing these regulations, the federal government has determined that "efficient" competition is the most important element in determining the breadth of acceptable bidders. Although 95-029 provides that "the contracting officer may consider such factors as the results of market research, historical data from previous acquisitions for similar supplies and services, and the resources available to conduct the source selection" nothing requires the contracting officer to do so. This type of information has routinely proved inadequate to track capacity requirements for the household goods industry.

Finally, 95-029 presents cold comfort to the small businesses of this country by providing an opportunity for notice. To tell competitors in advance that their proposal will most likely be disregarded stifles competition and growth. Such a system will not serve either the industry or the government well.

Attachment 1

15 406 Competitive range

(a) The contracting officer shall establish a competitive range for the purpose of conducting written or oral discussions (see 15 4097(c)) The competitive range shall include proposals having ~~the greatest likelihood of award~~ **more than a reasonable chance of being selected for award** based on the factors and subfactors in the solicitation After evaluating offers, the contracting officer may limit the number of proposals in the competitive range to **those with more than a reasonable chance of being selected for award. Solely for reasons of efficiency in the source selection process, the contracting officer may at times limit the proposals in the competitive range to the offerors with more than a reasonable chance of being selected for award, but in no event to fewer than three.**

~~(b) In planning an acquisition, the contracting officer may determine that the number of proposals that would otherwise be included in the competitive range is expected to exceed the number at which an efficient competition can be conducted. In reaching such a conclusion, the contracting officer may consider such factors as the results of market research, historical data from previous acquisitions for similar supplies and services, and the resources available to conduct the source selection. Alternate II of 52-215-1, Information to Offerors - Competitive Acquisition, may be used to indicate the Government's estimate of the greatest number of proposals that will be included in the competitive range for purposes of conducting an efficient competition among the most highly rated proposals~~

~~(c) After evaluating offers, the contracting officer may determine that the number of proposals that would otherwise be included in the competitive range exceeds the number at which an efficient competition can be conducted. Provided the solicitation notifies offerors that the competitive range can be limited for purposes of efficiency, the contracting officer may limit the number of proposals in the competitive range to the that will permit an efficient competition among most highly rated proposals. The solicitation provision at 52-215-1, Instruction to Offerors - Competitive Acquisition, reserves the contracting officer's right to limit the competitive range for purposes of efficiency~~

(d) If the contracting officer determines that an offeror's proposal is no longer in the competitive range the proposal shall no longer be considered for award Written notice of this decision shall be provided to unsuccessful offerors at the earliest practicable time (see 15 803(a)(1))

(e) Offerors excluded from the competitive range may request a debriefing When a debriefing is requested ~~see 15 805~~ **the request must be in writing and made within three days following receipt of the notice. The contracting officer shall make every effort to debrief the unsuccessful offeror as soon as practicable in accordance with 15.805 but no later than within five days of the request unless the contracting officer and the offeror mutually agree to a later date**

96-303-24

**NORTHROP GRUMMAN**

Northrop Grumman Corporation  
1840 Century Park East  
Los Angeles California 90067 2199  
Telephone 310-553 6262

November 26, 1996

Ms Melissa Rider  
General Services Administration  
FAR Secretariat (MVRS)  
18th & F Street NW  
Washington, DC 02405

Subject **FAR Case 95-029, FAR 15 Re-Write**  
**FAR Case 96-303, Competitive Range Determination**

Dear Ms Rider

Northrop Grumman strongly supports Government efforts to streamline the acquisition process and appreciates the opportunity to comment on the subject proposed rules. The Company has analyzed changes included in the proposed rules and participated in Industry and Government discussions on this important subject matter. To avoid reiteration of what others have articulated so well, Northrop Grumman hereby endorses comments prepared and submitted to GSA by the Aerospace Industries Association (AIA).

The processes to be employed under the proposed rule provide wide latitude to the PCO. At the same time, the consolidation within DoD and reductions-in-force have reduced the number of experienced procurement personnel. Accordingly, we believe that an aggressive training program and continued oversight is imperative to ensure the new rule is effectively and fairly implemented.

Sincerely,

(b) (6)

James L. Sanford  
Vice President  
Corporate Contracts and Pricing



96-303-23

**COMMENTS OF  
AMERICAN MOVERS CONFERENCE  
ON  
PROPOSED CHANGES TO  
FEDERAL ACQUISITION REGULATION  
FAR CASE 96-303  
FAR CASE 95-029**

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**Joseph M. Harrison  
President**

**L. Ann Wilson  
Vice President, Governmental Affairs**



**November 26, 1996**

NOV . 6

several factors, all of which are driven primarily by the complexity and criticality of the requirement. We realize that the FAR Rewrite Committee does not intend this result, but the proposed language may be interpreted to substitute "efficiency" for evaluation. Consequently, we strongly recommend deleting all of 15 406(b) and much of the proposed language for 15 406(c).

We are especially pleased to see proposed language establishing a connection between elimination from the competitive range and debriefings. In the past, many protests have been filed and then subsequently withdrawn when the offeror received an expensive and time-consuming debriefing in the form of a contracting officer's bid protest report. In order to eliminate as many protests as possible, we not only agree that an offeror excluded from the competitive range should receive an informative and timely debriefing as soon as possible, we are adamant that the debriefing must occur before award. To do otherwise (i.e., delay a debriefing until after award) is a disservice to any offeror who made a legitimate and expensive effort to obtain a government contract. With this in mind, we have recommended language for 15 406(e) that essentially makes a debriefing required within five days following the offeror's written request. Given the Government's ability to communicate, as set forth in the Rewrite Committee's proposed 15 407, and the ongoing training of Government acquisition professionals, we believe that an informative and timely debriefing at the competitive range phase of an acquisition will result in significant efficiencies to the acquisition process, far fewer protests, and continuing respect for the integrity and professionalism of government acquisition personnel.

We appreciate the opportunity to comment on the Rewrite Committee's proposal on the competitive range. It is a difficult area of procurement, but nevertheless one of the most fundamental areas. It is somewhat difficult to comment only on Phase I when we have not had the opportunity to review and evaluate how the proposed changes in Phase I will interact with the Phase II pricing-related issues. Nevertheless, the FAR 15 Rewrite Committee is to be congratulated on its efforts and we encourage further efforts by the Councils to simplify the acquisition process for industry and Government alike.

If you have any questions about CODSIA's comments, we will be pleased to make available representatives from CODSIA's Operating Committee who are evaluating the proposed FAR Part 15 Rewrite.

Sincerely,

**SEE CODSIA SIGNATORIES NEXT PAGE**

cc Administrator, Office of Federal Procurement Policy  
Deputy Under Secretary of Defense for Acquisition Reform  
Director of Defense Procurement

(b) (6)

Lawrence F Skibbie  
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American Defense Preparedness Association

William T Archey  
President & Chief Executive Officer  
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President  
Shipbuilders Council of America

## FAR Part 15 Rewrite Committee's Proposed 15.406 Competitive Range

(a) The contracting officer shall establish a competitive range for the purpose of conducting written or oral discussion (see 15.409(c)). The competitive range shall include proposals having the greatest likelihood of award based on the factors and subfactors in the solicitation.

(b) In planning an acquisition, the contracting officer may determine that the number of proposals that would otherwise be included in the competitive range is expected to exceed the number at which an efficient competition can be conducted. In reaching such a conclusion, the contracting officer may consider such factors as the results of market research, historical data from previous acquisitions for similar supplies and services, and the resources available to conduct the source selection. Alternate II of 52.215-1, Information to Offerors--Competitive Acquisition, may be used to indicate the Government's estimate of the greatest number or proposals that will be included in the competitive range for purposes of conducting an efficient competition among the most highly rated proposals.

(c) After evaluating offers, the contracting officer may determine that the number of proposals that would otherwise be included in the competitive range exceeds the number at which an efficient competition can be conducted. Provided the solicitation notifies offerors that the competitive range can be limited for purposes of efficiency, the contracting officer may limit the number or proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals. The solicitation provision at 52.215-1, Instruction to Offerors-Competitive Acquisition, reserves the contracting officer's right to limit the competitive range for purposes of efficiency.

(d) If the contracting officer determines that an offeror's proposal is no longer in the competitive range the proposal shall no longer be considered for award. Written notice of this decision shall be provided to unsuccessful offerors at the earliest practicable time (see 15.803(a)(1)).

(e) Offerors excluded from the competitive range may request a debriefing. When a debriefing is requested, see 15.805.

### ISSUE

Section 15.406(a), establishment of the competitive range

### DISCUSSION

Subparagraph (a) changes the standard currently in effect for determining the competitive range ("all proposals that have a reasonable chance of being selected for award;" *see* FAR 15.609(a)). The standard has been raised to "greatest likelihood of award" in 15.406(a) and "most highly rated proposals" in 15.406(c). CODSIA agrees that, assuming proper communications between offerors and the Government (as envisioned elsewhere in the proposed regulation, *i.e.* 15.407), it is appropriate to raise the standard.



However, CODSIA members believe that the standard has been raised too high. The standard has been raised too high because, even assuming that communications are useful in determining the efficacy of some proposals and the futility of others, there will still be a range of proposals where the "greatest likelihood of award" or "most highly rated proposal" standard will eliminate them prior to discussions with no opportunity to revise their proposal. Consistent with the Competition in Contracting Act, these proposals should receive continuing attention by the evaluators. At the moment, having two different phrases to describe the proposals left in the competitive range is confusing and would lead to unnecessary protests. Moreover, using similar language contained in the present FAR will only facilitate the necessary training programs that are the foundation of the proposed rewrite.

### RECOMMENDATION

We strongly recommend raising the standard for inclusion in the competitive range to those proposals having "more than a reasonable chance of being selected for award."

### ISSUE

15 406(b) acquisition planning and efficient competitions

### DISCUSSION

Subparagraph (b) of this section appears to restrict the concepts of full and open competition and competitive range determinations based on an evaluation. Neither of these restrictions are required by FARA, § 4101, which amended 10 U.S.C. 2305(j) and 41 U.S.C. 253(h) to "ensure that the requirement to obtain full and open competition is implemented in a manner that is consistent with the need to efficiently fulfill the Government's requirements." Under FARA, §4103, a contracting officer is permitted, but not required, to limit proposals in the competitive range "to the greatest number that will permit an efficient competition among the offerors rated most highly." In subparagraph (b) as proposed, however, that determination can be made during acquisition planning. In other words, because FARA makes no reference to eliminating offerors from the competitive range as part of an "efficient" acquisition plan, the proposed language in 15 406(b) does not appear to be an accurate reflection of the statute. We strongly oppose a regulation where "efficiency" is used as the basis for limiting competition in advance of an evaluation of the proposals (which the FAR Rewrite Committee may not intend). As drafted, 15.406(b) appears to be unsupported by FARA and contrary to 10 U.S.C. §2305(b)(4)(A). For example, if a solicitation receives 30 proposals, the contracting officer may (but is not required to) limit the number in the competitive range "to the greatest number that will permit an efficient competition," but all 30 proposals must be evaluated before "the greatest number" can be identified.

Clearly, there is nothing in this provision that instructs the Government to limit or "pre-evaluate" the competitive range based on speculation during "acquisition planning" that such a large number of offers will be received so as to preclude an "efficient" competition. The law assumes an evaluation as a condition precedent to the establishment of the competitive range.

Based on the above, we strongly recommend that all of subparagraph (b) be deleted. CODSIA endorses the proposal that the government's marketing research and past procurement history be a factor in acquisition planning. We recommend that the Government place that information in the solicitation for potential offerors to review and evaluate.

### RECOMMENDATION

We strongly recommend that all of 15.406(b) be deleted.

### ISSUE

15.406(b), Alternate II of 52.215-1, Information to Offerors -- Competitive Acquisition

### DISCUSSION

The proposed language encourages the use of Alternate II when government acquisition personnel know, or think they know, prior to release of the solicitation, the greatest number of proposals that will be included in the competitive range. As outlined above, this appears to require a decision to be made in the absence of information on the actual number of solicitations that will be received, their content, and how they will be evaluated.

CODSIA members believe that the correct reading of FARA § 4103, "Efficient Competitive Range Determinations," authorizes the contracting officer to limit the number of offerors included in the competitive range only after proposals have been received and initial evaluations have been conducted in accordance with criteria specified in the solicitation. As noted previously, there is no statutory basis for setting such a limitation prior to release of proposals. Further, it is not efficient, appropriate or legal to authorize a cutoff--at any point during proposal evaluation--based on any factors (e.g., "the resources available to conduct the source selection," "market research") other than those evaluation factors or subfactors set forth in the solicitation. Any predisposed cutoff of the competitive range should be based, not on an arbitrary number perhaps prematurely identified by the contracting officer, but rather on a minimum evaluation score. This approach retains the concept of efficient competition while pairing it with the other essential component, fair competition. This latter type of competitive range limitation is consonant with our recommended procedure set forth in 15.406(a), which enables the

contracting officer to limit the number of proposals in the competitive range after evaluating offers. Moreover, and when appropriate, our recommended procedure has the additional advantage of allowing a contracting officer to identify material breakpoints in the evaluation process.

In summary, we support the approach contained in § 4101 of FARA that promotes "efficient" competitions, but believe that the FAR Rewrite Committee has gone well beyond the statutory language.

### RECOMMENDATION

We recommend that 15.406(b), 52 215-1, Alternate II, be eliminated. Further, we recommend that such factors as "the resources available to conduct the source selection" should not be utilized as a primary criterion in source selection.

### ISSUE

15 406(c) - competitive range determinations based on "efficiency"

### DISCUSSION

CODSIA members stress that Government "efficiency" is not an evaluation criterion and under virtually all circumstances should not constitute a basis to eliminate a proposal from further consideration. This is particularly so if the communications now permitted by the proposed regulation in 15 407 are properly used. During those communications, the contracting officer can make an informed decision on whether a particular proposal has (as we suggest) a "more than a reasonable chance of being selected for award". The focus of the government's effort should be on a fair evaluation of the proposal, not the efficiency of the acquisition process or the availability of contracting personnel. The language we recommend maintains the rights of the contracting officer, assumes that proper and continuous training will be provided to acquisition personnel, and permits the communications during the evaluation process to maintain the "efficient" acquisition process that both the Government and industry desire.

CODSIA members recognize, however, that circumstances may occur where the acquisition process may benefit by reducing the number of offerors in the competitive range solely for the sake of "efficiency". In those rare cases, we agree that a contracting officer may limit the competitive range solely in the name of efficiency, but may in no case reduce the number to less than three.

96-303-23

## Conclusion

Ultimately, these proposals will lead to participation by only large companies in the government procurement of household goods moving services. Contracting officers will believe that their needs can be met by contracting with only a few large corporations only to subsequently discover that even their capacity might not be sufficient. Small movers will either be relegated to subcontractor status, forced to seek non-governmental business or close their business altogether. This will not be in the best interest of either the relocating federal employee or the federal government.

As indicated, larger movers cannot provide all the capacity needed during a summer moving season. Furthermore, in the moving industry, it is the small, local moving companies that own most of the transportation equipment, hire drivers and own warehouses. To relegate those entities with assets, payroll and risks to subcontractor status disregards the importance of these companies to our nation's economy and national defense. Therefore, AMC urges these rules to be retracted. Efforts should be made to meet the needs of the contracting officer while encouraging the continued existence of small business.

96-303-7

legal office, small business office, competition advocate), (2) the risk of multiple Freedom of Information Act requests for the documentation supporting the contracting officer's determination, and (3) the risk of instigating preemptive protests from one or more prospective offerors

This paragraph will not streamline the source selection process. If anything, it will ensure that contracting officers will not use the new policy—or will use it less often than they could—in order to avoid work and trouble. Why not let them make the necessary determination after the receipt and evaluation of proposals? If, after the evaluation of proposals, there are too many firms in the competitive range, then the contracting officer can limit the number to be included in discussions and document the file at that time.

I recommend that you delete this entire paragraph (See my comments below, regarding the proposed revisions to 52.215-16 and proposed paragraph 15.407(d)(4)(iii) )

**15.609(c):** *“After evaluating offers, the contracting officer may determine that the number of proposals that would otherwise be included in the competitive range exceeds the number at which an efficient competition can be conducted. Provided the solicitation notifies offerors that the competitive range can be limited for purposes of efficiency, the contracting officials may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals. The basic solicitation provisions at 52.215-16, Contract Award, reserves the contracting officer’s right to limit the competitive range for purposes of efficiency.”*

This paragraph, when read in conjunction with proposed paragraph 15.609(a), would require that contracting officers classify each proposal as either (1) having the greatest likelihood of award, or (2) not having the greatest likelihood of award. Then, if the set of proposals having the greatest likelihood of award is too large, the contracting officer must further classify each such proposal as either (1a) having the greatest likelihood of award, and included in the competitive range, or (1b) having the greatest likelihood of award, but not included in the competitive range.

Thus, the wording of the proposed rule would force contracting officers to exclude some proposals that have been classified as “having the greatest likelihood of award.” The proposed rule is silent about what should be the principle of subdivision, despite the fact that this is certain to be a controversial issue. This is a serious problem, one which requires rethinking of the concepts of “greatest likelihood of award” and “greatest number that will permit an efficient competition.”

One clue to the solution of the problem may be found in the procedure that is used to select architect-engineer contractors. FAR 36.602-3 simply requires that agencies conduct discussions with “at least three of the most highly qualified firms,” and that agency evaluation boards rec-

\$100,000,000 and it will have significant adverse impact on competition. Executive Order 12866 requires a cost benefit assessment of a significant regulatory action of this magnitude before publication of the proposed rule for public comment. We urge that the FAR Secretariat comply with the requirements of this Executive Order and then republish the rule for comment.

2. We also object to the proposed rule on the ground that it is too indefinite because there is no definition of "effective competition", which is the sole basis provided in the rule authorizing a contracting officer to limit the number of offerors in the competitive range. As a result, the proposed rule grants contracting officers unlimited discretion. The exercise of this authority in absence of limitations specified in the rule is likely to have a disproportionate adverse impact on the ability of small business concerns to compete for government contracts. The household goods forwarder industry, represented by the HHGFAA, is particularly vulnerable under the proposed rule, which would give MTMC's contracting officers unfettered discretion to eliminate small business forwarders from the competitive range under the excuse that such exclusion is necessary for effective competition.

3. The HHGFAA also objects to the provision in the proposed rule (proposed FAR 52.216-16 (Alternate VI)) that allows contracting officers to specify, in the solicitation, the limited number of offers to be considered in the competitive range. We object to this provision because it could be used by contracting officers to discourage small business concerns from submitting offers.

CONCLUSION

For the above reasons, we request that the competitive range determination rule, as proposed, not be adopted and that any further proposed rule be submitted for OMB review in accordance with Executive Order No. 12866.

Respectfully submitted:

HOUSEHOLD GOODS FORWARDERS  
ASSOCIATION OF AMERICA, INC.

By 

Alan F. Wohlstetter  
General Counsel

96-303-4

# HOUSEHOLD GOODS FORWARDERS ASSOCIATION OF AMERICA, INC.®



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September 25, 1996

General Services Administration  
FAR Secretariat (MVRS)  
18th & F Streets, N.W.  
Room 4037  
Washington, D.C. 20405

Re: **FAR Case 96-303 -  
Federal Acquisition Regulation  
Competitive Range Determinations**

DONALD H MENSCH  
*President*  
Alexandria, Virginia

RICHARD W CURRY  
*Chairman*  
Orange, California

HAN HELDERS  
*Vice Chairman*  
Carlsbad, California

JEFFREY J BELL  
*Executive Committee  
Member at Large*  
Orange Park, Florida

GEORGE A FOUCH  
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Representative*  
St Thomas, U S Virgin Islands

TERRY R HEAD  
*Associate Members'  
Representative at Large*  
Alexandria, Virginia

ALAN F WOHLSTETTER  
*General Counsel*  
Washington, DC

The Household Goods Forwarders Association of America, Inc. (HHGFAA) submits this addendum to its Comments, dated September 17, 1996, in opposition to the proposed amendments to the Federal Acquisition Regulation (FAR) which, if adopted, will grant contracting officers unrestricted authority to exclude offerors from the competitive range. (61 Fed. Reg. 40116-40117, July 31, 1996).

By this addendum, the HHGFAA joins the Office of Advocacy of the Small Business Administration in opposing the proposed rule on the further ground that the Initial Regulatory Flexibility Analysis (IRFA) does not satisfy all of the requirements of the Regulatory Flexibility Act, 5 U.S.C. §601, et seq. The HHGFAA specifically concurs in the position set forth in the Office of Advocacy's letter of August 27, 1996 to the FAR Secretariat (attached to the HHGFAA's Comments) that the IRFA "doesn't even begin to quantify the rule's impact on small business", and is deficient because, inter alia:

1. The summary of the IRFA in the Federal Register does not measure or discuss the impact on small business or alternatives considered and "[a]s a result, small businesses do not have a sufficient basis upon which to comment meaningfully on the rule."

2. The IRFA does not provide an "estimated measure or quantification of small business impact or number and dollar volume of federal contracts likely affected."

96-303-4

3. The IRFA does not discuss the available alternatives to the proposed rule except to suggest and reject the alternative of retaining the existing FAR language to "...require offerors with a reasonable chance of award to be retained within the competitive range." (See HHGFAA Comments, p. 3).

For these reasons and those stated in its Comments, dated September 17, 1996, the HHGFAA opposes the proposed competitive range determination rule.

Respectfully submitted:

HOUSEHOLD GOODS FORWARDERS  
ASSOCIATION OF AMERICA, INC.

(b) (6)

By

~~Alan F. Wohlstetter~~  
General Counsel



96-303-5



DEPARTMENT OF THE ARMY  
U S ARMY CHEMICAL AND BIOLOGICAL DEFENSE COMMAND  
ABERDEEN PROVING GROUND, MARYLAND 21010-5423



REPLY TO  
ATTENTION OF  
AMSCB-PO (25-30q)

24 September 1996

MEMORANDUM FOR General Services Administration, FAR Secretariat  
(MVRS), 18th & F Streets, NW, Room 4037,  
Washington, DC 20405

SUBJECT: Federal Register: 31 July 1996, (Volume 61, Number  
148), Proposed Rules, Page 40115-40117, Federal Acquisition  
Regulations; Competitive Range Determinations; Proposed Rule, FAR  
Case 96-303

1. We have reviewed the proposed rule to amend the Federal  
Acquisition Regulation (FAR) to implement Section 4104 of the  
Federal Acquisition Reform Act of 1996. The U.S. Army Chemical  
and Biological Defense Command (CBDCOM) submits the following  
comment and recommendation on the proposed rule:

Comment:

Paragraph 15.609(e) states:

"Offerors excluded from the competitive range may request a  
debriefing. When a debriefing is requested, see 15.1004."

Recommendation:

Please change the FAR reference in paragraph 15.609(e) from  
15.1004 to 15.1005 for consistency with the changes proposed  
under FAR Case 96-304, assuming that proposed rule is adopted as  
a final rule. See Federal Register: 24 June 1996 (Volume 61,  
Number 122), Page 32579 - 32582. Under that proposed rule, FAR  
15.1004 refers to notification to successful offeror and FAR  
15.1005 refers to preaward debriefing of offerors where 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)).

2. Thank you for the opportunity to comment on FAR Case 96-304.  
If you have any questions regarding our response, please contact  
Mr. Dennis Longo, AMSCB-PO, 410-612-8609.

(b) (6)

JAMES K. WARRINGTON  
Principal Assistant Responsible  
for Contracting

SEP 30 1996

96-303-6

# Council of Defense and Space Industry Associations

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1250 Eye Street, NW, Suite 1200  
Washington, DC 20005  
(202) 371-8414  
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## FAX TRANSMISSION COVER SHEET

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**Date:** September 30, 1996  
**To:** Ralph DeStefano  
**Fax:** (202) 501-4067  
**Re:** Proposed FAR Rule Competitive Range Determinations (FAR Case 96-303)  
**Sender:** Ruth W. Franklin, Administrative Officer

---

**YOU SHOULD RECEIVE 1 PAGE(S), INCLUDING THIS COVER SHEET IF  
YOU DO NOT RECEIVE ALL THE PAGES, PLEASE CALL (202) 371-8414**

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Mr DeStefano --

The Council of Defense and Space Industry Associations is most interested in commenting on this important issue. Our review of the proposed rule will be included in our general comments on Phase I of the FAR Part 15 (Contracting by Negotiation) rewrite, due at the FAR Secretariat by 12 November.

If you have any questions, please contact our action officer Stan Soloway of the Contract Services Association at (202) 347-0600, or call me at the number above.

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otherwise qualified and competitive contractors as would be expected. Rather than providing guidance for consistent, government-wide implementation of this provision, the proposed rule again allows each contracting officer to concoct his or her own methodology (or none at all) for excluding some contractors and including others, as long as there is some nexus to (i.e. "based on" ) the factors and subfactors in the solicitation.

However, the law and the statement of managers is more explicit -- the determinations must be "on the basis of price, quality and other factors specified in the solicitations for the evaluation of proposals." The contracting officer is not free to establish independent or extraneous factors in making this significant determinations -- but must make the initial thorough evaluation of all offers submitted based on all of the evaluation factors in the solicitation. The last sentence of 15.609(a) and the clause at 52.215-16(c) must be corrected.

Next, the proposal provides only limited guidance on the use of criteria for the determination of how to divine the number of proposals to be retained in the competitive range. The various subsections of the proposed revision to FAR 15.609 do not clearly set forth what the requirements are for a contracting officer to limit the competitive range to a number less all who submit responsive offers. Indeed, one must read and re-read the subsections just to ensure that the rather clear direction of the statute are even alluded to in the proposed rule.

For example, subsection (c) states in part that "Provided the solicitation notifies offerors that the competitive range can be limited for purposes of efficiency, the contracting officials [officers?] may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals." No where does it state that the rating must be in accordance with all of the evaluation factors set forth in the solicitation. The closest provision in that regard is in subsection (a), with no suggestion that this is how the determination must be made. In fact, subparagraph (c) erroneously tells the contracting officer just to include the standard Contract Award clause and all will be fine!

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The determination of the competitive range is a problem in classification. The contracting officer must divide the set of all offerors into two subsets (1) the set of all offerors that are in the competitive range, and (2) the set of all offerors that are not in the competitive range. In order to do this the contracting officer needs a principle of division. At present, that principle is: An offeror is in the competitive range if the contracting officer thinks it has a reasonable chance of being selected for award, or if the contracting officer is doubtful about its chance. What is the principle under the proposed rule?

The new rule must provide clearer guidance to field level personnel about the principle of division. The language in the current edition of FAR 15.609(a), "include all proposals that have a reasonable chance of being selected for award," is clear, despite the fact that the principle is subjective, and it does not entail the counterintuitive notion of multiple greatest likelihoods.

The problem of excessive numbers of proposals in the competitive range arises from two primary causes: (1) the language in FAR 15.609(a) about including doubtful proposals, and (2) fear among contracting officers and their legal advisors that excluding a firm will instigate a protest. The second cause may be the more deeply rooted and troublesome, and the oddity and vagueness of the new language may exacerbate the fear of protests instead of putting it to rest.

I recommend that you discard the proposed 15.609(a) and, instead, simply delete the requirement in the FAR to include doubtful proposals. Please see my comments about 15.609(c) and the recommended language which I included under that heading.

**15.609(b): "In planning an acquisition, the contracting officer may determine that the number of proposals that would otherwise be included in the competitive range is expected to exceed the number at which an efficient competition can be conducted. In reaching such a conclusion, the contracting officer may consider such factors as the results of market research, historical data from previous acquisitions for similar supplies and services, and the resources available to conduct the source selection. Alternative III of 52.215-16, Contract Award, may be used to indicate the Government's estimate of the greatest number of proposals that will be included in the competitive range for purposes of conducting an efficient competition among the most highly rated proposals."**

Why do you propose that contracting officers decide whether or not to limit the competitive range before they issue the solicitation? The statute does not require this. Most contracting officers will interpret this paragraph, especially in conjunction with paragraph 15.609(c), to require that (1) they must determine their course of action prior to releasing the solicitation, and (2) they must conduct research, document the research, and write a memorandum to justify their decision to limit the size of the competitive range. They will recognize that these measures will entail (1) multiple internal reviews and approvals of the determination (contracts office, technical office,

96-303-3

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September 17, 1996

- DONALD H MENSCH  
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Alexandria, Virginia
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- RICHARD W CURRY  
*Chairman*  
Orange, California
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- HAN HELDERS  
*Vice Chairman*  
Carlsbad, California
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General Services Administration  
FAR Secretariat (MVRs)  
18th & F Streets, N.W.  
Room 4037  
Washington, D.C. 20405

**Re: FAR Case 96-303 -  
Federal Acquisition Regulation  
Competitive Range Determinations**

The Household Goods Forwarders Association of America, Inc. (HHGFAA) submits these comments in opposition to the proposed amendments to the Federal Acquisition Regulation (FAR) that will grant contracting officers unrestricted authority to exclude offerors from the competitive range. (61 Fed. Reg. 40116-40117, July 31, 1996).

The HHGFAA is an association consisting of, inter alia, household goods freight forwarders, all of whom are engaged in contracting directly with the Department of Defense (DOD) in the forwarding of household goods and personal effects of military service members and their dependents, as participants in the DOD's domestic and international personal property programs administered by the Military Traffic Management Command (MTMC).

The HHGFAA opposes the proposed FAR rule because, if adopted, it inevitably will result in the exclusion of many household goods freight forwarders, which are predominantly small business concerns, from competing for contracts in the DOD programs, which DOD has announced will be placed under the FAR, effective January 1, 1997.

Presently, approximately 150 household goods freight forwarders participate as prime contractors in the DOD international program. Upwards of 400 compa-

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commend, "in order of preference, at least three firms that are considered to be the most highly qualified" for award. I recommend that you rewrite the proposed rule as follows:

**15.609 Competitive Range**

(a) If the government decides to conduct discussions, then the contracting officer shall determine which offerors are in the competitive range and will be included in discussions. The competitive range shall include all offerors that have a reasonable chance of being selected for award on the basis of the evaluation factors in the solicitation. When in doubt about an offeror's chance of being selected, the contracting officer should exclude the offeror, but may include the offeror at his or her discretion. In the event that only one offeror has a reasonable chance of being selected for award, but award without discussions is not in the best interests of the government, then the contracting officer may limit the competitive range to only the one offeror.

(b) If the contracting officer determines that the number of offerors in the competitive range exceeds the number that will permit the conduct of an efficient competition, then the contracting officer may further limit the number of offerors included in discussions. If the contracting officer decides, for purposes of efficiency, to further limit the number of offerors included in discussions, then the further limitation must be based on rank order of value and on the marginal differences in value among the offerors, and must include at least the three most highly valued offerors.

(c) If, during or after discussions, the contracting officer determines that an offeror does not have a reasonable chance of being selected for award, then the contracting officer may exclude that offeror from further discussions and refuse to solicit or entertain any changes to the offeror's proposal.

(d) The contracting officer shall notify an offeror of its exclusion from the competitive range, from discussions, or from further discussions, at the earliest practicable time.

(e) Any offeror that is excluded from the competitive range, from discussions, or from further discussions, may request a debriefing before award.

This language eliminates the problem of multiple greatest likelihoods and provides field personnel with clearer guidance about how to limit the number of offerors invited to discussions. It also preserves and makes explicit the option of keeping only one firm in the

96-303-7

competitive range, which is well-established in Comptroller General protest case law. It clearly provides for the elimination of doubtful offerors at the contracting officer's discretion. Finally, it also eliminates the needlessly complicated and potentially troublesome procedure of having to predetermine the prospective size of the competitive range.

**52.215-16(c).** In lieu of the proposed change, simply rewrite the October 1995 edition of this provision by inserting the following sentence between the first and second sentences:

The contracting officer may limit the number of offerors in the competitive range in order to provide for an efficient competition.

This change will eliminate the need for changes to Alternate II, and will eliminate the need for the proposed Alternate III.

**15.407(d)(4)(iii).** The changes that I have recommended above will eliminate the need for this paragraph.

**12.301(e)(4).** The changes that I have recommended above will eliminate the need for this paragraph.

**52.212-1(g).** The changes that I have recommended above will eliminate the need for the proposed added sentence.

I urge the FAR councils to consider and adopt these recommendations, or to make other changes to the proposed rule that will reduce the very great potential for confusion and protests. If any member of the councils would like to discuss these recommendations, please telephone me at (503) 335-8302.

Sincerely,

(b) (6)

Vernon J. Edwards  
Instructor

cc Steven Kelman  
Ralph Nash



96-303-8

## THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

1957 E Street, NW • Washington, DC 20006 • (202) 393-2040 • FAX (202) 347-4004

LEE WRAY RUSSELL, *President*

J HOWARD MOCK, *Senior Vice President*

PETER KW WERI, *Vice President*

PETER D WICK, JR., *Treasurer*

THORNE AUCHTER, *Executive Vice President*

September 30, 1996

FAR Secretariat (MVRS)  
General Services Administration  
18th & F Streets, N W  
Room 4037  
Washington, D C 20405

**RE: FAR Case 96-303**

Dear FAR Secretariat

The Associated General Contractors of America (AGC) represents more than 32,000 of the construction industry's leading firms including 8,000 of its general construction contractors. Many AGC members compete for, and perform, federal construction contracts and would be impacted by the proposed FAR changes providing the contracting officer authority to limit the number of proposals in the competitive range "to the greatest number that will permit an efficient competition among the most highly rated proposals" (See proposed rule Section 15.609 (c)).

AGC is concerned that the proposed rule lacks a definition of "efficient competition". In the absence of a definition, there are no objective criteria on which the contracting officer can make crucial procurement determinations regarding (1) the "greatest number" of offerors to be permitted to compete and (2) factors pertinent to a specific procurement which would constitute "efficient competition". Under the proposed rule changes, crucial procurement decisions are left entirely, and inappropriately, to the subjective discretion of the contracting officer.

AGC believes that in the interest of full and open competition, the proposed rule should be revised to provide clear and objective criteria as the basis for its competitive procedures and for the award of federal contracts.

Sincerely,

(b) (6)

Christopher S Monek  
Director, Building Division

SEP 30 1996





96-303-9

September 30, 1996

General Services Administration  
FAR Secretariat (MVRS)  
18<sup>th</sup> and F Streets, NW  
Room 4037  
Washington, D C 20405

ATTN Ralph DeStefano

Re. FAR Case 96-303  
Competitive Range Determinations

The American Movers Conference (AMC) represents nearly 3,000 household goods movers nationwide. AMC members consist of major national van lines with an affiliated agency network, agents affiliated with national van lines, and independent carriers without an agency network. The vast majority of AMC's members have revenue of less than \$18 million a year.

On behalf of these members, AMC submits this letter as its comments regarding the proposed changes to FAR published in the Federal Register on July 31, 1996. It is my understanding that consideration is being given to consolidating the proposal of July 31, 1996, with a further proposal dated September 12, 1996. AMC supports the consolidation.

The moving industry is a major relocation service provider. The industry depends heavily on interwoven relationships through agency networks, interlining, and pooling agreements to relocate families and individuals all over this country and throughout the world. The relocation markets fall primarily into three categories of customers: national account, COD, and government. Government traffic (civilian and military) represents approximately 16% of total interstate shipments annually transported by AMC members.

The industry and the customers it serves depend heavily on small businesses to accomplish household goods moves. The vast majority of relocations in this country take place from May through mid-September of every year. To complete these moves, all of the industry's customers depend on the services of the entire industry. The military particularly has experienced stressful moving seasons due to the increased demand for relocation and the industry's lack of adequate capacity during peak periods in the summer months. To exclude small businesses from competing as prime contractors by the use of a FAR-based contract vehicle, will hamper the government's ability to receive satisfactory service during the summer.

Government traffic has traditionally moved on a government bill of lading but the military has used the Federal Acquisition Regulations for local move contracts. However, the Department of Defense (DOD) through the Military Traffic Management Command (MTMC) is in the process of re-engineering the personal property program and has proposed to use a FAR Part 12 contract. Furthermore, the Army is in the process of initiating a test program at Hunter Army Airfield using a FAR contract.

AMC is opposed to any proposal which would allow contracting officers to limit the number of proposals in the competitive range prior to evaluation. Such a proposal would create an environment whereby some businesses will automatically be excluded without the benefit of review. This will fall particularly hard on small businesses. Small business has demonstrated an ability to provide a quality product for a reasonable price. The federal government should not be in the business of permitting exclusion from competition merely on the grounds of convenience for the contracting officer.

Furthermore, AMC believes that proposals of this type will force moving companies, especially small movers, into the role of subcontractor. The bright line test of competition for federal contracts should not be the ease and convenience the system provides to contracting officers. The test should be the ability to provide a quality product to the government. Anti-trust laws do not permit moving companies to discuss price with competitors. Small movers will be forced to decide whether to remain a potential bidder or to relegate itself to a subcontracting role. It is impossible to do both if the mover intends to have any discussion of price and level of service. To limit the number of bidders prior to any meaningful evaluation makes it that much more difficult for small companies to appear as potentially successful bidders.

#### Part 12 Proposal

The proposed changes to Part 12.3, Section 301 should be retracted and revised to provide for better clarity. As proposed in the July 31 Federal Register it is unclear when the contracting officer can limit the number of proposals. Regulations should provide both the government and industry with sufficient clarity to understand the rules of the game. However, as proposed Section 12.301 seems to permit a contracting officer to limit the number of offers before evaluation. This would be contrary to legislative intent. Therefore, the proposed regulation should be rescinded and rewritten.

#### Part 15 Proposal

Of primary concern to the moving industry is the proposal in Alternate III which would allow a contracting officer to set the number of offers to be accepted prior to initiating the bids. As previously discussed in our comments, the government needs the services of as many movers as possible. To pre-determine the number of bids which will be accepted may arbitrarily dismiss the bid of a mover quite capable of providing quality moving services to the government. This will seriously jeopardize small businesses while failing to meet the government's own needs.

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In conclusion, AMC is seriously concerned with the intent of these proposals. AMC and its members support a system which will provide a streamlined, efficient contracting system for the government. However, these proposals present an arbitrary system with too much discretion left to individual contracting officers. The extreme latitude afforded the contracting officer will not serve the needs of the government or those who desire to offer services to the government. For the foregoing reasons, I urge you to rescind the July 31 proposal.

Sincerely,

(b) (6)

President



96-303-7

NATIONAL LAW CENTER

September 27, 1996

General Services Administration  
FAR Secretariat (MVRs)  
18<sup>th</sup> & F Streets, NW, Room 4037  
Washington, D C 20405

Subject FAR Case 96-303, Competitive Range Determinations

Dear Colleagues

I am writing to comment about the proposed rule for competitive range determinations, published July 31, 1996 (61 FR 40115) I believe that, as written, the proposed rule will confuse government and industry personnel and will instigate protests, but will not streamline the source selection process. In the following pages, I address parts of the proposed rule on a paragraph-by-paragraph basis, and recommend some changes.

**15.609(a):** *"The contracting officer shall determine the competitive range for the purpose of conducting written or oral discussions (see 15.610(b)) based on cost or price and other factors in the solicitation. The competitive range consists of proposals having the greatest likelihood of award based on the factors and subfactors in the solicitation."*

The notion that more than one proposal will have the "greatest" likelihood of award is odd and confusing. Except in the case of multiple awards, if we evaluate a set of offerors and determine for each offeror the probability (likelihood) that it will receive the award, then the sum of the probabilities for all of the offerors must equal 1. For example, if there are four offerors, the probability of award could be .3 for the first, .2 for the second, .4 for the third, and .1 for the fourth. The first and third offerors each have a greater likelihood of award than either the second or the fourth, but does it make sense to say that they each have the greatest likelihood of award? That statement would make sense only in the event of a tie between them. The idea that there may be more than one "greatest likelihood" seems contrary to ordinary probabilistic reasoning, and counterintuitive.

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MEMORANDUM FOR CAPTAIN D.S. PARRY, SC, USN  
DIRECTOR  
DEFENSE ACQUISITION REGULATIONS COUNCIL

FROM: SHARON A. KISER  
FAR SECRETARIAT

151

SUBJECT. FAR Case 96-303, Competitive Range Determinations

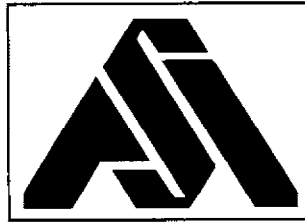
Attached is a late comment received on the subject FAR case published at 61 FR 40116; July 31, 1996. The comment closing date was extended to November 26, 1996. Comments 1 through 17 were previously sent in October

<u>Response Number</u>	<u>Date Received</u>	<u>Comment Date</u>	<u>Commenter</u>
96-303-27	11/28/96	11/25/96	AIA

Attachment

cc: MVR Official File. Reading File MVRR MV  
VRS S KISER lme.501-0692 11/29/96.96-303.doc

96-303-17



September 30, 1996

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

Attn Ralph DeStefano

RE FAR Case 96-303 "Competitive Range Determinations"

The American Subcontractors Association, is pleased to submit comments on the proposed rule concerning Competitive Range Determinations published for comment by the Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration in the Federal Register of July 31, 1996, (Volume 61, Number 148) beginning on page 40116

### **Introduction**

The proposed rule seeks to implement two sections of the Federal Acquisition Reform Act. Section 4101 of the Act requires the FAR to implement the requirement to obtain full and open competition in a manner that is consistent with the need to efficiently fulfill the government's requirements. Section 4103 of the Act provides that the contracting officer may limit the number of proposals in the competitive range, in accordance with criteria specified in the solicitation, to the greatest number that will permit an efficient competition.

In passing the legislation, Congress affirmatively rejected a more far-reaching proposal from the House of Representatives (H R 1670) that "full and open competition" be replaced with "maximum practical competition." However, the rulemaking appears to recapture through administrative change exactly what the Congress refused to do legislatively.

In ASA's view, the July 31 proposed rule fails to properly implement the statute, and would have a significant adverse impact on our members and on the federal acquisition system. We are strongly opposed to the rule in its current form. In light of our concerns and the publication of conflicting FAR coverage on this identical topic, we strongly recommend that the FAR Council immediately withdraw this July 31 proposed rule. As an alternative to completely withdrawing the rule, we urge that the coverage be

**AMERICAN SUBCONTRACTORS ASSOCIATION, INC**

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OCT 1 1996

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- 6 -

AIA supports the concept of more realistic competitive range determinations, which will benefit both Government and contractors. More realistic competitive range determinations mean that offerors will not be kept in a competitive range artificially if they are not likely to receive award. Although this might cause a contractor to expend more in bid and proposal funds up front to ensure that its initial proposal has the greatest likelihood of being included in the competitive range, it also will avoid unnecessary expenditure of time and resources trying to remain in a competition when there is little likelihood of securing the contract. Concomitantly, the Government will not expend time and resources unnecessarily on those same proposals. Properly implemented, this policy will enable contractors to make intelligent decisions regarding appropriate use of scarce bid and proposal funds and will enable the Government to allocate its scarce resources appropriately, also.

AIA believes, however, that additional guidance should be provided in 15.406(b) regarding the factors to be considered in determining the size of the estimated competitive range at which an efficient competition can be conducted. Recognizing that such a range is but an estimate and not a final predetermination of the competitive range, factors such as market research and historical data from previous similar acquisitions provide objective standards against which to measure the contracting officer's determination of the estimated range, but *lack of resources* does not.

The amount of resources available to the Government to conduct the source selection should *not* be a factor in determining the most efficient size for the competitive range. If it is used as a factor, both the Government and the contractor may expend resources unnecessarily on a source selection process which could exclude the very proposal that would result in the best value for the Government, simply because there were insufficient Government resources to evaluate that proposal.

AIA also recommends that Alternate II of 52.215-1 Instructions to Offerors - Negotiated Acquisition be amended to conform to the language of 15.406(b) which states that Alternate II may be used to indicate the Government's *estimate* of the greatest number of proposals that will be included in the competitive range for purposes of conducting an efficient competition among the most highly rated proposals. As currently written, Alternate II gives an *absolute* number of proposals that will be included in the competitive range.

**Section 15.407 Communications with Offerors.** One of the major policy changes in the proposed rule is the shift to a narrower definition of "discussions." Communications with offerors prior to establishment of the competitive range are not considered discussions, and the contracting officer is *not* required to communicate with *all* offerors. Once the competitive range has been established, communications with offerors are considered discussions. The contracting officer is required to conduct discussions *at least once with all offerors in the competitive range*, but is not required to hold discussions an equal number of times with each offeror. Discussions remain open until contract award.

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MEMORANDUM FOR CAPTAIN D.S. PARRY, SC, USN  
DIRECTOR  
DEFENSE ACQUISITION REGULATIONS COUNCIL

FROM: SHARON A. KISER  
FAR SECRETARIAT

151

SUBJECT: FAR Case 96-303, Competitive Range Determinations

Attached are comments received on the subject FAR case published at 61 FR 40116; July 31, 1996. The comment closing date was September 30, 1996.

<u>Response Number</u>	<u>Date Received</u>	<u>Comment Date</u>	<u>Commenter</u>
96-303-1	09/04/96	09/03/96	Interior
96-303-2	09/09/96	08/27/96	SBA
96-303-3	09/18/96	09/17/96	Household Goods Forwarders Assoc., of America, Inc.
96-303-4 (Addendum to 96-303-3)	09/18/96	09/25/96	Household Goods Forwarders Assoc., of America, Inc.
96-303-5	09/30/96	09/24/96	Department of Army
96-303-6	09/30/96	09/30/96	CODSIA
96-303-7	09/30/96	09/27/96	G.W. University
96-303-8	09/30/96	09/30/96	AGC of America
96-303-9	09/30/96	09/30/96	AMC



<u>Response Number</u>	<u>Date Received</u>	<u>Comment Date</u>	<u>Commenter</u>
96-303-10	09/30/96	09/30/96	NASBP
96-303-11	09/30/96	09/30/96	CCIA
96-303-12	09/30/96	09/30/96	Sundstrand
96-303-13	09/30/96	09/30/96	ITAA
96-303-14	10/01/96	09/26/96	Department of State
96-303-15	10/01/96	09/30/96	Chamber of Commerce Full and Open Competition Coalition

**Attachments**

cc: MVR Official File: Reading: MVRR: MVR:  
cc: MVR:S.KISER:lme:10/30/96:501-0692:g/admin/  
comments/96-303.doc

OCT 2 1996

MEMORANDUM FOR CAPTAIN D.S. PARRY, SC, USN  
DIRECTOR  
DEFENSE ACQUISITION REGULATIONS COUNCIL

FROM: SHARON A. KISER  
FAR SECRETARIAT

151

SUBJECT: FAR Case 96-303, Competitive Range Determinations

Attached are late comments received on the subject FAR case published at 61 FR 40116; July 31, 1996. The comment closing date was September 30, 1996.

<u>Response Number</u>	<u>Date Received</u>	<u>Comment Date</u>	<u>Commenter</u>
96-303-16	10/01/96	09/27/96	ASA
96-303-17 Addendum to 96-303-16	10/01/96	09/30/96	ASA

Attachments

cc: MVR Official File; Reading File: MVRR MV  
VRS: S.KISER:lme:501-0692:10/02/96:Working/Industry  
ltr/96-303

MEMORANDUM FOR CAPTAIN D.S. PARRY, SC, USN  
DIRECTOR  
DEFENSE ACQUISITION REGULATIONS COUNCIL

FROM: SHARON A. KISER  
FAR SECRETARIAT

SUBJECT: FAR Case 96-303, Competitive Range Determinations

Attached are comments received on the subject FAR case published at 61 FR 40116; July 31, 1996. The comment closing date was extended to November 26, 1996. Comments 1 through 17 were previously sent in October.

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96-303-18	10/03/96	09/30/96	ABC
96-303-19	10/03/96	10/03/96	Department of Army
96-303-20	10/10/96	10/07/96	ABA
96-303-21	11/26/96	09/30/96	Chamber of Commerce
96-303-22	11/26/96	11/25/96	Department of Air Force
96-303-23	11/26/96	11/26/96	AMC
96-303-24	11/27/96	11/26/96	Northrop Grumman
96-303-25	11/27/96	11/26/96	CODSIA
96-303-26	11/27/96	11/27/96	Defense Commissary Agency

Attachment

cc: MVR Official File: Reading File: MVRR MV  
VRS: S.KISER:lme:501-0692:11/29/96:96-303.doc

"consideration as MTMC developed its proposal, and has resulted in MTMC's change from proposed regional or installation global contract to proposed smaller, channel oriented contracts." (Report, p. 5).

Under the present FAR 15.609(a), small business forwarders would be able to compete for DOD personal property contracts because all offers in the competitive range must be evaluated and an offeror cannot be excluded so long as its proposal has a reasonable chance of receiving a contract award. Adoption of this proposed rule will adversely impact household goods forwarders by allowing contracting officers to eliminate offerors from the competitive range to achieve "effective competition". Adoption of this proposal will likely have a disproportionate adverse impact on small business forwarders who would be within the competitive range under the present FAR, as recognized in the Initial Regulatory Flexibility Analysis Summary, which states "some offerors may be eliminated from a competition earlier than they would be eliminated under existing procedures." (61 Fed. Reg. at 40116).

The FAR Council attempts to justify this exclusion of bidders by stating that "bid and proposal costs are expected to decrease because few offerors will remain in competition." (61 Fed. Reg. at 40116). This is not an acceptable justification. The HHGFAA members want to continue to contract with DOD; their purpose and desire is not to save on bid and proposal costs. If the purpose of the rule is to help our members, we respectfully say "Thanks - but no thanks."

Further, the objectional provisions of the proposed rule are not required by the Federal Acquisition Reform Act of 1996 (FARA) pursuant to which the proposed rule is issued. As recognized in the Initial Regulatory Flexibility Analysis, alternatives were considered, including "retaining the current FAR language that requires offerors with a reasonable chance of award to be retained within the competitive range." We submit that this alternative and others should be considered.

The HHGFAA further opposes the proposed rule for the following reasons:

1. We support the position of the U.S. Small Business Administration, Office of Advocacy, set forth in its August 27, 1996 letter to the FAR Secretariat (attached), that the proposed competitive range determination rule is a major rule subject to Office of Management and Budget (OMB) review under Executive Order 12866, because its annual economic impact will exceed

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The proposed regulations require that the contracting officer *promptly* notify an offeror when its proposal is excluded from the competitive range or otherwise is excluded from competition. The regulations require further that the contracting officer provide a preaward debriefing to the offeror *as soon as practicable*. However, the contracting officer is allowed to delay the preaward debriefing if providing a debriefing is *not in the best interest of the Government* at the time it is requested.

AIA recommends that the proposed regulation be revised to state that preaward debriefings may be delayed *only* if there are *compelling circumstances* for the delay. The contracting officer should be required to document the file with the supporting rationale for the delay. Otherwise, there is potential risk that preaward debriefings could be delayed merely because it is not *convenient* to provide a debriefing at the time. This would essentially deprive the unsuccessful offeror of its right to a preaward debriefing.

Under Section 15.805(c), the preaward debriefing should contain as much information as possible in order to make the debriefing "meaningful" [cf 15.806(d)]. This type of meaningful communication during the evaluation process should reduce the chance of protest, because the unsuccessful offeror should better understand the reasons for elimination from the competition and be more likely to feel that it has received fair treatment in the source selection process.

AIA also proposes that 15.805 and 15.806 be amended to allow an offeror which has received a preaward debriefing to request a postaward debriefing, as well. The information provided in a postaward debriefing is more extensive than the information provided in a preaward debriefing and would be more useful to the unsuccessful offeror.

## **Part 52 Solicitation Provisions and Contract Clauses.**

**52.215-5 Facsimile proposals.** 52.215-5(d) states that the Government is not responsible for any failure attributable to the transmission or receipt of a facsimile proposal if the offeror chooses to transmit a facsimile proposal.

AIA supports the use of facsimile proposals. Facsimile proposals *and* electronic proposals will drastically reduce proposal turn-around time. However, AIA also recommends that a facsimile proposal be treated the same as an electronic proposal is treated under 15.206(c), which allows retransmission of unreadable proposals or (at the contracting officer's discretion) resubmittal of the proposal in another format.

**52.215-7 Annual representations and certifications - negotiation.** Maintaining a system of required representations on an annual basis is an excellent idea. However, it should not be necessary for the offeror to *certify* to their existence. The certification requirement in the proposed clause should be deleted, consistent with FAR Case 96-312 which modifies existing clause 52.215-35 to delete the certification requirement.

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nies participate as prime contractors in the DOD domestic program. In addition, there are hundreds of small moving and storage companies which participate in both these programs as subcontractors and which provide many of the required physical facilities, viz., trucks and warehouses. Many of these companies are small business concerns. Further, many of these small business concerns have developed to meet the needs of the DOD and their continued existence is dependent upon their ability to continue participation in DOD's personal property programs.

MTMC advised Congress that, in placing its billion dollar plus household goods programs under the FAR, it did not intend to "adversely impact the small businessperson" stating:

"We are committed to structuring an approach that offers, to the maximum extent possible, small forwarders the opportunity to fairly compete for our business.... It is not our intention to force the small businessperson out of our program. On the contrary, it is the small business that provides the resources and capacity needed for this industry. We understand the important role they play. Consequently, we have structured an approach that provides business opportunities for all segments of this industry, especially small business, to compete fairly...."↓

Further, in its Small Business Impact Report to DOD, dated January 29, 1996, MTMC further emphasized the importance of small business concerns to the DOD Personal Property Programs, stating:

"...As part of its design of a proposed new program, MTMC reviewed the existing program and concluded that small businesses were an essential element of any present or future program. The bulk of approved carriers and almost all agents fall into the small business category. Even large national or international carriers rely on networks of agents, who are small businesses, to provide the actual transportation services. Accordingly, MTMC concluded that continued participation by small businesses was vital to the government and public interest. This conclusion was made a design

---

1. Statement of Robert H. Moore, Deputy Chief of Staff for Operations, MTMC. Before the House Committee on Small Business on the Reengineering of DOD's Personal Property Program, October 11, 1995.

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 6, 12, 15, and 52**

[FAR Case 96-303]

RIN 9000-AH15

**Federal Acquisition Regulation; Competitive Range Determinations**

**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 Sections 4101 and 4103 of the Federal Acquisition Reform Act of 1996. The rule provides the contracting officer with the authority to limit the size of the competitive range, in accordance with criteria specified in the solicitation, to the greatest number that will permit an efficient competition. 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 September 30, 1996 to be considered in the formulation of a final rule.

**ADDRESSES:** Interested parties should submit written comments to General Services Administration, FAR Secretariat (MVR5), 18th & F Streets, NW, Room 4037, Washington, DC 20405.

Please cite FAR case 96-303 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 96-303.

**SUPPLEMENTARY INFORMATION:**

**A Background**

Subsections 4101 (a) and (b) of the Federal Acquisition Reform Act of 1996 (Pub L 104-106) (the Act) require FAR implementation of the requirement to obtain full and open competition in a manner that is consistent with the need

to efficiently fulfill the Government's requirements. Section 4103 of the Act provides that the contracting officer may limit the number of proposals in the competitive range, in accordance with criteria specified in the solicitation, to the greatest number that will permit an efficient competition. The proposed rule revises FAR 6 101(b), 12 301(e), 15 407(d)(4), 15 609, 52 212-1(g) and 52 215-16 to implement sections 4101 and 4103. The integrity, fairness, and openness principles in FAR subpart 1 102 are not changed.

**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 revises the procedures for determining the competitive range in negotiated acquisitions. The size of the competitive range will be reduced in some negotiated acquisitions and some offerors may be eliminated from a competition earlier than they would be eliminated under existing procedures. However, bid and proposal costs are expected to decrease, as an offeror who is not likely to receive an award will be less likely to remain in a competition. An Initial Regulatory Flexibility Analysis has been performed and will be provided to the Chief Council for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the FAR Secretariat. Comments are invited from small businesses and other interested parties. Comments from small entities concerning the affected FAR subpart will be considered in accordance with section 610 of the Act. Such comments must be submitted separately and should cite 5 U S C 601, *et seq.* (FAR case 96-303), in correspondence.

**C Paperwork Reduction Act**

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose any substantial change in 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 6, 12, 15 and 52

Government procurement

Dated July 25, 1996

Edward C. Loeb,

Director, Federal Acquisition Policy Division

Therefore, it is proposed that 48 CFR Parts 6, 12, 15 and 52 be amended as set forth below.

1 The authority citation for 48 CFR Parts 6, 12, 15 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(e).

**PART 6—COMPETITION REQUIREMENTS**

2 Section 6 101 is amended by revising paragraph (b) to read as follows:

**6 101 Policy**

\* \* \* \* \*

(b) Contracting officers shall provide for full and open competition through use of the competitive procedure, or combination of competitive procedures, contained in this subpart that is best suited to the circumstances of the contract action and is consistent with the need to efficiently fulfill the Government's requirement. Contracting officers must use good judgment in selecting the procedure that best meets the needs of the Government.

**PART 12.3—ACQUISITION OF COMMERCIAL ITEMS**

3 Section 12 301 is amended by adding new paragraph (e)(4) to read as follows:

**12 301 Solicitation provisions and contract clauses for the acquisition of commercial items**

\* \* \* \* \*

(e) \* \* \*

(4) The contracting officer may reserve the right to conduct discussions with offerors determined to be within the competitive range after evaluation of proposals and to limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals. 52 215-16, Contract Award, Alternate III, may be used in solicitations for this purpose.

\* \* \* \* \*

**PART 15—CONTRACTING BY NEGOTIATION**

4 Section 15 407 is amended by revising paragraph (d)(4)(ii) and adding new paragraph (d)(4)(iii) to read as follows:

**15 407 Solicitation provisions**

\* \* \* \* \*

(d) \* \* \*

(4) \* \* \*

(ii) If awards are intended to be made without discussions with offerors within the competitive range, use the basic provision with its Alternate II

(iii) If the Government wishes to reserve the right to limit the competitive range to no more than a specific number, use the basic provision with its Alternate III, or the basic provision with both Alternates II and III

\* \* \* \* \*

5 Section 15 609 is revised to read as follows

**15.609 Competitive range.**

(a) The contracting officer shall determine the competitive range for the purpose of conducting written or oral discussion (see 15 610(b)) based on cost or price and other factors in the solicitation. The competitive range consists of proposals having the greatest likelihood of award based on the factors and subfactors in the solicitation

(b) In planning an acquisition, the contracting officer may determine that the number of proposals that would otherwise be included in the competitive range is expected to exceed the number at which an efficient competition can be conducted. In reaching such a conclusion, the contracting officer may consider such factors as the results of market research, historical data from previous acquisitions for similar supplies and services, and the resources available to conduct the source selection. Alternate III of 52 215-16, Contract Award, may be used to indicate the Government's estimate of the greatest number or proposals that will be included in the competitive range for purposes of conducting an efficient competition among the most highly rated proposals

(c) After evaluating offers, the contracting officer may determine that the number of proposals that would otherwise be included in the competitive range exceeds the number at which an efficient competition can be conducted. Provided the solicitation notifies offerors that the competitive range can be limited for purposes of efficiency, the contracting officials may limit the number of proposals in the competitive range to the greatest

number that will permit an efficient competition among the most highly rated proposals. The basic solicitation provisions at 52 215-16, Contract Award, reserves the contracting officer's right to limit the competitive range for purposes of efficiency

(d) If the contracting officer determines that an offeror's proposal is no longer in the competitive range the proposal shall no longer be considered for award. Written notice of this decision shall be provided to the unsuccessful offeror at the earliest practicable time (see 15 1002(b))

(e) Offerors excluded from the competitive range may request a debriefing. When a debriefing is requested, see 15 1004

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

6 Section 52 212-1 is amended by revising the provision date and paragraph (g) to read as follows

**52 212-1 Instructions to Offerors—Commercial Items**

\* \* \* \* \*

**Instructions to Offerors—Commercial Items (Date)**

\* \* \* \* \*

(g) *Contract award (not applicable to Invitation for Bids)*. The Government intends to evaluate proposals and award a contract without discussions with offerors (except communications conducted for the purpose of minor clarification). Therefore, each individual offer should contain the offeror's best terms from a cost or price and technical standpoint. However, the Government reserves the right to conduct discussions if the Contracting Officer later determines them to be necessary. If discussions are held and the Contracting Officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the Contracting Officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals. The Government may reject any or all offers if such action is in the public interest, except other than the lowest offer, and waive informalities and minor irregularities in offers received

\* \* \* \* \*

7 Section 52 215-16 is amended by revising the provision date and paragraph (c), revising Alternate II (c), and adding a new Alternate III to read as follows

**52 215-16 Contract Award**

\* \* \* \* \*

**Contract Award (Date)**

\* \* \* \* \*

(c) The Government intends to evaluate proposals and award a contract after conducting discussions with responsible offerors whose proposals have been determined to be within the competitive range. If the Contracting Officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the Contracting Officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals. Therefore, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint

\* \* \* \* \*

**Alternate II (Date) \* \* \***

(c) The Government intends to evaluate proposals and award a contract without discussions with offerors (except communications conducted for the purpose of minor clarification). Therefore, each individual offer should contain the offeror's best terms from a cost or price and technical standpoint. However, the Government reserves the right to conduct discussions if the Contracting Officer later determines them to be necessary. If discussions are held and the Contracting Officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the Contracting Officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals

**Alternate III (Date)**. As prescribed in 15 407(d)(4)(iii), insert the following paragraph (i) in the basic provision

(i) If the Contracting Officer exercises the Government's right to limit the number of proposals in the competitive range, the competitive range will be limited to no more than \_\_\_\_\_ (insert number)

[FR Doc 96-19351 Filed 7-30-96 8 45 am]

BILLING CODE 6820-EP-M





# United States Department of the Interior

96-303-1

OFFICE OF THE SECRETARY  
Washington, D C 20240

General Services Administration  
FAR Secretariat (MVRS)  
18th & F Streets, NW, Room 4037  
Washington, D C 20405

SEP 3 - 1996

Ladies and Gentlemen

Our comments mainly concern FAR Case 96-303 (Federal Register, July 31, 1996), **Limiting the Competitive Range**, but may also concern FAR Case 96-304 (Federal Register, June 24, 1996) on **Preaward Debriefings**

1 Procedures/Criteria The "Summary" to the proposed rule discusses "limiting the size of the competitive range, in accordance with criteria specified in the solicitation," and the solicitation provisions and clauses use the phrase "an efficient competition among the most highly rated proposals" However, **no specific procedures or criteria are given for narrowing the competitive range to an "efficient" number of firms**

If it is likely that firms will be eliminated from the competitive range based on a limitation for the purpose of efficiency, **it is important that the contracting officer's method for doing so neither appear to be, nor actually be, arbitrary** One way to accomplish this is to **include in the solicitation the procedures or criteria to be used to reduce the size of the competitive range**

2 Tradeoff The stated reason for reducing the size of the competitive range is to make the procurement "efficient," but if eliminating a number of firms causes an increase in the number of preaward debriefings, where is the efficiency? It seems that a contracting officer who decides to limit the number of firms to be considered within the competitive range must also be willing to accept the tradeoff of an increased number of debriefings as a result of that decision

If you have any questions, please call Frank Gisondi of my staff on (202) 208-4907

Sincerely,

(b) (6)

Ralph W Rausch, Acting Director  
Office of Small and Disadvantaged  
Business Utilization

SEP 4 1996



U.S. SMALL BUSINESS ADMINISTRATION  
WASHINGTON, D C 20416

96-303-2

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

AUG 27 1996

General Services Administration  
FAR Secretariat (MVRs)  
18th & F Streets, N.W.  
Room 4037  
Washington, DC 20405

Subject: Federal Acquisition Regulation; Competitive Range  
Determinations [FAR Case 96-303]

Dear FAR Secretariat:

This concerns a proposed rule published in the Federal Register on July 31, 1996, entitled "Federal Acquisition Regulation; Competitive Range Determinations."

The Office of Advocacy, in accordance with its responsibility to ensure that federal agencies consider the impact of their rules and policies on small business, finds the subject rule to be deficient in satisfying the requirements of the Regulatory Flexibility Act (RFA). Advocacy's concerns are heightened by the recent passage of the Small Business Regulatory Enforcement Fairness Act which is intended to provide additional regulatory relief for small businesses, including judicial review of agency compliance with the law.

In addition, the Office of Advocacy believes this rule should be considered a major rule, subject to Office of Management and Budget (OMB) review under Executive Order 12,866. A major rule is defined as one with an annual economic impact of greater than \$100 million or having significant adverse effects on competition. This regulatory change will significantly and adversely impact competition in government contracting.

The initial regulatory flexibility analysis (IRFA) prepared for this rule doesn't even begin to quantify the rule's impact on small businesses. The following preliminary deficiencies are noted:

1. The proposed rule does not include the required initial regulatory flexibility analysis or summary in the Federal Register. The rule is summarized in section B. Regulatory Flexibility Act, but there is no measurement or discussion of small business impact and alternatives considered. The IRFA was sent under separate cover to the Chief Council for Advocacy. As a result, small businesses do not have a sufficient basis upon which to comment meaningfully on the rule.
2. The IRFA indicates only that the proposed rule will apply to

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96-303-2

all large and small entities who offer goods and services to the government in competitive negotiated acquisitions. There is no estimated measure or quantification of small business impact or number and dollar value of federal contracts likely affected.

- 3. The IRFA suggests only one alternative, that of maintaining existing FAR language to ..."require offerors with a reasonable chance of award to be retained within the competitive range." This alternative is rejected in the next sentence.

There are many alternatives available in implementing sections 4101 and 4103 (competition requirements) of the Federal Acquisition Reform Act of 1996 that satisfy the efficiency needs of the government and minimize the impact on small businesses. Many of these alternatives were discussed during the legislative debates on this issue.

In more extensive comments that will be prepared on this rule, the Office of Advocacy will provide "alternatives" for consideration.

Advocacy reminds the FAR Council of its outreach requirements under section 609 of the RFA. This is a very controversial proposal that could significantly impact small firms. Sufficient outreach should be exercised to generate input from the small business community.

The Office of Advocacy urges the FAR Council to re-publish this rule as a proposed regulation, subject to OMB review under Executive Order 12,866, after completing a proper initial regulatory flexibility analysis.

Sincerely,

(b) (6)

Jere W. Glover  
Chief Counsel  
Office of Advocacy

cc: The Honorable Sally Katzen, OMB, OIRA  
The Honorable Steve Kelman, OMB, OFPP

96-303-11

FAR Secretariat  
Page 2  
September 30, 1996

CCIA detected considerable interest in removing FAR Case 96-303 at the September 27 meeting. Accordingly, CCIA is assuming that at least most of the work on the competitive range proposal will occur in the context of the FAR Part 15 rewrite. Accordingly, we will submit only abbreviated comments at this time regarding the competitive range.

As a threshold matter, there are a number of reasons to avoid restrictive definitions of the competitive range. The competitive range is established relatively early in the procurement process. Experience has shown that the range may be set when the Government has incorrectly evaluated the offeror's proposal, or the offeror has not fully understood the Government's requirements. Moreover, the proposal evaluation process invariably provides additional information to both Government and industry that is used to refine the vendor's proposal. Finally, it is not uncommon to see procurements change significantly through the RFP amendment process. These concerns do not engender significant problems so long as doubts are resolved in favor of including proposals in the competitive range, and offerors are permitted to compete if they have a "reasonable chance for award." If the ground rules shift so that drastic cuts in the number of competitors occur when the possibility of error is high on both sides, the resulting diminution of competition will be inconsistent with both the requirements of full and open competition, and good business sense.

CCIA acknowledges that the acquisition statutes now permit the contracting officer to limit the number of proposals in the competitive range, "if the contracting officer determines that the number of offerors that would otherwise be included in the competitive range . . . exceeds the number at which an efficient competition can be conducted . . ." However, this language is not carte blanche authority for arbitrary exclusions. First, FARA specifically subordinates efficiency to "the requirement for full and open competition. . . ." See e.g., FARA, § 4101. Second, FARA does not permit contracting officers to limit the competitive range on the basis of efficiency in every procurement. The limitation is only appropriate if the contracting officer makes a specific determination that the number of offerors exceeds the number of proposals that permit an efficient competition among the most highly selected offerors.

The proposed regulation is inconsistent with the statutory structure that it is supposed to implement. First, it imports into FAR 15.609(a) a competitive range test for all procurements that is only supposed to apply when the CO is permitted by statute to limit the competitive range based on efficiency. Under proposed FAR 15.609(a), the Government is always permitted to limit the competitive range to those proposals "having the greatest likelihood of award

AIA strongly supports increased communication between the Government and offerors to allow the contracting officer to better understand an offeror's intent and make an informed decision whether to determine a competitive range or award without discussions. However, there is some concern that the ability to communicate with *individual* competing offerors prior to determination of the competitive range, coupled with the fact that communications need not be conducted with all offerors and the ability to conduct discussions more than once with individual members of the competitive range *and* request successive proposal revisions, could raise issues of fairness or the appearance of favoring one offeror over another.

As a practical matter, we believe that there are steps the Government can take to alleviate these concerns. One is to ensure that contracting officers have the professional credentials and training necessary to exercise good business judgment. Another is to establish sufficient supervisory oversight to ensure that discretion is not abused. In addition, it should be *emphasized* in the Section 15.407(c) of the proposed rule that when discussions are held, the contracting officer is *required* to disclose to the offeror all *known* weaknesses and deficiencies in the offeror's proposal and provide an opportunity for the offeror to respond to those weaknesses and deficiencies.

**Section 15.409 Proposal Revisions.** Elimination of the requirement for Best and Final Offers (BAFO's) and the requirement for a common cutoff date for proposal revisions is another major change in the way the Government proposes to conduct source selection.

AIA supports these changes, which would streamline the current burdensome, expensive and time consuming acquisition process for both industry and the Government by allowing the Government to conduct discussions and request proposals as needed. However, it is important to *ensure* that no disparity exists in the number of revisions requested or the cutoff dates that creates an unfair advantage for one offeror over the other offerors. All offerors must be provided an equitable opportunity to compete on essentially the same basis.

**Section 15.410 Source Selection.** In Section 15.410(b) it is stated that the basis for the source selection decision shall be documented and shall reflect the rationale for any tradeoffs among factors, subfactors and business judgments. However, specific tradeoffs need not be described in terms of cost/price impacts, nor do tradeoffs need to be quantified in any other manner.

While quantification of cost/other factor tradeoffs is not necessary in the solicitation (see comment to Section 15.102), AIA feels that it is appropriate to require more specificity in documenting the reasons for the source selection decision. Therefore, we recommend that 15.410(b) be revised accordingly.

**Section 15.805 Preaward Debriefing of Offerors.** AIA also has several concerns relative to preaward debriefings. One of those concerns relates to delay of preaward debriefings under 15.805(b).

page (3)

Further, ABC contends that the proposed rule fails to properly implement the provisions on "competitive range determinations" as required under FARA. The law amends section 2305(b)(4) of title 10 U S C and section 253b(d) of title 41 U S C to read --

"If the contracting officer determines that the number of offerors that would otherwise be included in the competitive range under subparagraph (A)(1) exceeds the number at which an efficient competition can be conducted, the contracting officer may limit the number of proposals in the competitive range, in accordance with the criteria specified in the solicitation, to the greatest number that will permit an efficient competition among the offerors rated most highly in accordance with such criteria."

Our concern is that the proposed rule does not provide the contracting officer any systematic guidance on how to make the determination to exclude otherwise qualified and competitive contractors from the process. Rather than providing guidance for consistent, government-wide implementation of this provision, the proposed rule again allows thousands of contracting officers to formulate their own logic for excluding some contractors and selecting others. Also in this proposal, the contracting officer only has to provide limited reference to factors and/or subfactors in the solicitation. The law and the statement of managers accompanying the conference report spell out more explicit determination criteria. The determinations must be "on the basis of price, quality and other factors specified in the solicitations for evaluation of proposals." The law and statement of managers does not give the contracting officer the liberty to institute independent or superfluous factors in making their determination.

In summary, ABC is strongly opposed to the rule in its current form. Taking the above concerns in mind and the September 12, 1996 publication of conflicting FAR coverage on this identical topic, we strongly recommend that the FAR Council withdraw this July 31, 1996 rule.

On behalf of its over 18,500 members, ABC thanks the General Services Administration for the opportunity to express the concerns of many small contractors, subcontractors, material suppliers, and related firms.

(b) (6)

Michael E. Wilson  
Manager, Federal Regulations



96-303-10

# National Association of Surety Bond Producers

5301 Wisconsin Avenue, NW, Suite 450  
Washington, DC 20015-2015  
(202) 686-3700 • FAX (202) 686-3656

September 30, 1996

General Services Administration  
FAR Secretariat (MVRS)  
18th & F Streets, N W.  
Room 4037  
Washington, D C 20405

**RE: FAR CASE 96-303**

Dear FAR Secretariat

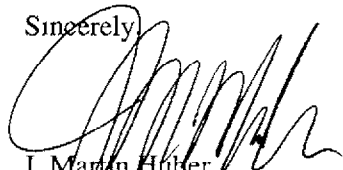
The National Association of Surety Bond Producers is an organization of 560 insurance agencies and brokerages recognized as specialists in providing statutory surety bonds to construction contractors. Surety bonds guarantee construction bids, performance and payment. The bid bond prequalifies the bidder and guarantees that if awarded the contract, the bidder will enter into the contract within the specified time frame and provide a performance and payment bond, as required by the Miller Act (40 U.S.C. Section 270a - 270d) or as otherwise specified. The performance bond guarantees to the government that the contractor will perform the contract within their plans and specifications. The payment bond guarantees that subcontractors, suppliers and laborers will be paid by the prime contractor/bidder.

The proposed rule on competitive range determinations (FAR case 96-303) published in the July 31, 1996 Federal Register (Volume 61, Number 148) may be a misappropriation of the Competition in Contracting Act's full and open competition standard depending on how it is implemented by contracting officers. The use of "competitive range determinations," in which there is no public bid opening cannot prevent discussion in secret after proposals are submitted, between contracting officers and certain bidders, but not others. Bidders may offer, or be asked, to lower their price with little or no knowledge as to how their price related to their competitors. At some point, the contracting officer may ask a bidder for their best and final offer only to come back later for a "final" best and final offer.

In construction, proprietary information such as construction methods from the bidders proposal, may be transferred by the government to other bidders under competitive range determinations. Construction firms may go months without knowing what their relative standing is in relation to other offerors. Meanwhile their surety credit is diminished in the amount of the job under negotiation.

Only contracts awarded to the lowest responsible bidder after a full and open competitive bidding procedure has taken place, can the following national interests be protected. 1) No bidder could be discriminated against for subjective reasons; 2) Favoritism on the part of contracting officers who might prefer one bidder over another for a variety of reasons is barred; and 3) Taxpayers receive the maximum benefit for their dollars.

Please rescind this proposal in favor of the proposed FAR Part 15 rewrite published in the September 12, 1996 Federal Register (FAR CASE No 95-029)

Sincerely,  
  
J. Martin Huber  
Executive Vice President

SEP 30 1996

96-303-15

**FULL AND OPEN COMPETITION COALITION**

September 18, 1996

The Honorable Steven Kelman  
Administrator  
Office of Federal Procurement Policy  
Old Executive Office Building, Room 352  
Washington, D C 20503

Dear Dr Kelman

As associations representing the full breadth of American industries and business interests, we are writing to express our deep concerns regarding the proposed rule for FAR Part 15 (FAR Case 96-303) as published in the Federal Register on July 31, 1996 entitled "Competitive Range Determinations"

It is our collective position that this rule is bad public policy and inconsistent with the letter and legislative intent of the Federal Acquisition Reform Act ("FARA") If implemented in its present form, this rule would serve to decrease the current level of competition in the procurement process, eliminate small and many medium- and large-sized businesses from participating, and would have a significant negative impact on the American economy. For example, although the report language accompanying the Federal Acquisition Reform Act specifically states that the limitation of the number of offerors in the competitive range can take place only after the initial evaluation of the proposals submitted, the proposed rule allows for a pre-submission determination of the number of proposals in the competitive range This procedure to permit pre-bid limitations of the competitive range not only obstructs the competitive nature of the bid process, but refocuses the locus of action away from normal market forces of providing a customer the best quality product for the lowest possible price Under this proposed rule, the new determination appears to be based on the ability of an offeror to market his or her services to the contracting officer who is tasked with unilaterally determining those offers who will be permitted to remain in the competitive range

Another example of our concern is reflected in the fact that there is no provision in the proposed rule for a minimum number of offers that must be included in the competitive range or a requirement that a contracting officer specify the maximum number of offers to be considered. The contracting officer is being furnished the power to arbitrarily establish a competitive range of as few as two offerors In addition, there are no guidelines or standards established in the FAR by the proposed rule to govern the method or reasons for eliminating a



9-10-2008-15

potential offeror from the competitive range. Aside from having an obvious adverse effect on competition, this approach is directly contrary to the statutory provisions of Sections 4101 and 4103 of FARA

Considering the wide range of industries that will be impacted by this proposed rule, there will be a significant impact on the economy. It is our estimate that the proposed rule would have at a minimum an economic impact well in excess of \$100 million

Therefore, because of its adverse effect upon competition and its significant economic impact, it is also our position that this proposed rule is a major rule subject to the Office of Management and Budget review under Executive Order 12866. The above are just a few examples of our concerns regarding this proposed rule, its failure to comply with FARA, and its significant adverse effects on competition and small business interests. We urge you to withdraw this proposal and rewrite the rule to conform to the letter and spirit of FARA.

Respectfully,

American Movers Conference  
American Subcontractors Association, Inc  
Associated Builders and Contractors, Inc  
Computer and Communications Industry Association  
Computing Technology Industry Association  
Household Goods Forwarders Association of America  
Small Business Legislative Council (*Includes 93 Associations*)  
U S Chamber of Commerce

cc Representative Jan Meyers  
Representative John LaFalce  
Senator Christopher Bond  
Senator Dale Bumpers  
The Honorable Phil Lader  
The Honorable Sally Katzen

96-303-16

*Competitive Range Determinations - Reg Flex -- Page 2*

alternatives proposed by the IRFA. The IRFA suggests only one alternative — to maintain the existing FAR language to “require offerors with a reasonable chance of award to be retained within the competitive range.” This alternative is rejected in the very next sentence.

There are numerous alternatives available in implementing sections 4101 and 4103 (competition requirements) of the FARA that would satisfy the government's needs and minimize the impact on small businesses. A good number of these alternatives were discussed during the legislative debates on this issue.

ASA urges OMB to order the re-publishing of this as a proposed rule, subject of OMB review under Executive Order 12866 after completing a proper initial regulatory flexibility analysis.

Sincerely,

(b) (6)

Brian T. Pallasch, CAE  
Director of Government Relations

cc The Honorable Sally Katzen, OMB, OIRA  
The Honorable Steve Kellman, OMB, OFPP

substantially rewritten. In addition, we recommend that the FAR agencies schedule a public meeting specifically on these proposed changes.

### **July 31 Proposed Rule Would Adversely Affect Competition, and Negatively Affect Small Businesses**

The July 31 proposed rule would severely limit competition in a number of ways. First, the rule would allow the contracting officer to limit the number of offerors prior to solicitation. The proposed rule states:

"In planning an acquisition, the contracting officer may determine that the number of proposals that would otherwise be included in the competitive range is expected to exceed the number at which an efficient competition can be conducted." Alternate III of 52 215-16 Contract Award may be used to indicate the Government's best estimate of the greatest number of proposals that will be included in the competitive range for purposes of conducting an efficient competition among the most highly rated proposals." 15 609 (b) Competitive Range

Limiting the number of offerors prior to solicitation is clearly anti-competitive and will have a negative affect on small business.

Second, offerors could be arbitrarily knocked out of the bidding at any point. Alternate III of Section 542 205-16 states:

"(i) if the Contracting Officer exercises the Government's right to limit the number of proposals in the competitive range, the competitive range will be limited to no more than \_\_\_ (insert number)

Third, the factors to be used to reach a competitive range are not clearly defined and appear discretionary in the proposed rule. The only reference to criteria in this proposed rule is found in 15 609(b) which states:

"In reaching such a conclusion, the contracting officer may consider such factors as the results of market research, historical data from previous acquisitions for similar supplies and services, and the resources available to conduct the source selection."

None of the options listed is clearly defined, and all leave far too much room for interpretation. If "data from previous acquisitions" is to be used, will those criteria from the past acquisition be spelled out? Will contractors be allowed to protest if they disagree with a contracting officer if the evaluation was inappropriate? If past performance evaluations are to be used will these criteria be clearly spelled out?

96-303-17

Even more vague is the “resources available” criteria. Does this mean that a contracting officer with too much work to do can cut the number of offerors just to lighten their workload. This is certainly not in the best interest of full and open competition.

Finally, we have concerns that the rule as proposed violates the letter and intent of the Federal Acquisition Reform Act. For a more detailed explanation of those concerns, please see the comments submitted by the Full and Open Competition Coalition of which ASA is a member.

In sum, it is our belief that this proposed rule will lead to an acquisition process that will be prone to improvisation and influence peddling, and not to one which fosters full and open competition.

Through these and other proposed changes in the FAR, the government will no doubt have a less costly procurement process, however, what will likely occur is that the government will achieve this economy at the expense of higher costs for procured goods due to a lack of full and open competition.

(b) (6)

Brian T. Pallasch, CAE  
Director of Government Relations

Indeed, rather than providing government-wide guidance as the statute requires, the proposed rule would simply allow any contracting officer conducting a competitive solicitation for a commercial item to “reserve the right” to limit competition in advance of the receipt and evaluation of proposals. It is clear that FARA contemplated an affirmative contracting officer determination of these critical matters, but the proposed rule ignores that.

This section of the rule also omits one of the critical safeguards required by FARA, namely that solicitations would set forth the criteria by which the competitive range decision would be made, and that decisions would be made in accordance with them. The requirement in the statute that competitive range determinations be made based solely on the evaluation factors and subfactors contained in the solicitation are conspicuously absent from new section 12.301(e)(4) of the proposed rule, and is a critical defect in the coverage.

The same defect of failing to include the language concerning criteria for competitive range determinations in the solicitation, is also missing from the proposed revisions to the Contract Award clause and Alternative II in the new proposed 52.215-16 contract clause. Furthermore, those proposed clauses explicitly allow each contracting officer to establish his or her own scheme for ranking the proposal that would result in the exclusion from offerors from competition, without regard to the mandatory evaluation of all offers submitted and without complying with the evaluation factors and subfactors listed in the solicitations.

Alternative III in item #7 of the proposed rule would allow each contracting officer to limit the number of competitors for a contract simply by filling in the blank in the form to whatever number he or she selects. No guidance is given regarding to how this selection should be made and no acknowledgment that there statutory requirements that apply is provided. Again, government-wide FAR guidance is eliminated and each contracting officer is provided more than a reasonable amount of discretion in excluding from competition otherwise qualified competition.

Finally, item #6 in the proposed rule would provide instructions to offerors of commercial items in situations other than IFBs. These instructions would provide different -- and in many regards more ruthless

page (2)

reaffirmed in the legislative process. It is ABC's view that the July 31, 1996 proposed rule fails to properly implement the statute and would have a significant adverse impact on small business and the fairness of the federal acquisition system. For these reasons, we request that the FAR Council withdraw consideration of this rule.

The rule also fails to properly address the provisions on "competition" as set forth by FARA. In the proposed amendment to the Policy provisions of FAR Part 6, the language addresses only a part of the statutory requirement and, in so doing, is not authorized by FARA and breaches the commitment put forth in the Statement of Managers in FARA's Conference Report.

Section 4101 of FARA states, in part, that

"The Federal Acquisition Regulation shall ensure that the requirement to obtain full and open competition is implemented in a manner that is consistent with the need to efficiently fulfill the Government's requirements."

The statement of managers accompanying the conference report on FARA unquestionably asserts that --

"This provision [FARA section 4101] makes no change to the requirement for full and open competition or to the definition of full and open competition."

However, in the proposed policy provisions of 6.101(b), language fails to "ensure" full and open competition. The amended rule states --

"Contracting officers shall provide for full and open competition through use of the competitive procedure or combination of competitive procedures contained in this subpart that is best suited to the circumstances of the contract action and is consistent with the need to efficiently fulfill the Government's requirement. Contracting officers must use good judgment in selecting the procedure that best meets the needs of the Government."

By adding "and is consistent with the need to efficiently fulfill the Government's requirement" to the policy, the proposal essentially alters the FARA requirement. The new regulatory language would allow thousands of contracting officers to arbitrarily select procedures to implement the balance between "full and open competition" and the implementation of "efficient competition." The FARA statutory requirement, however, stipulates that the fundamental requirements must be **guaranteed** by the FAR. In the proposed system, conditions of awards will be difficult, if not impossible, to review or challenge.

Similarly, subsection (b) could easily lead a contracting officer to conclude that the simple way to limit the competitive range is to include the number of proposals he wants to review in the solicitation, and that there is even a standard form for this purpose with a blank space to be filled in with the number acceptable to the contracting officer. The clause at 52.215-16(c) Alternate III does not include the word "estimate" provided for in proposed 15.609(b); does not provide for any authority to increase the number of proposals in the competitive range if the actual receipt of highly-rated pro-posals exceeds the magical number selected at the time the solicitation is issued; and no recognition of the fact that a fewer number of initially evaluated proposals may remain.

Finally, FAR 15. 609(a), as recommended in this rule, provides that-- "The contracting officer shall determine the competitive range for the purpose of conducting written or oral discussion (see 15.601(b)) based on cost or price and other factors in the solicitation. The competitive range consists of proposals having the greatest likelihood of award based on the factors and subfactors in the solicitation."

The last sentence of current 15.609(a) states: "When there is doubt as to whether a proposal is in the competitive range, the proposal shall be included." The new rule should retain this important last sentence. -- when in doubt, retain an offeror in the competitive range. This sentence, sought to be deleted in three separate rulemakings, takes on important new significance in light of the congressional direction in FARA, and is an appropriate way to fulfill the statutory call for "limiting the competitive range to the greatest number that would permit an efficient competition."

## **THE RULE IMPROPERLY IMPACTS COMMERCIAL ITEM PROCUREMENTS**

The proposed rule would add a new paragraph to FAR Section 12.301(e), as amended by FASA, that largely restates for commercial products the competitive range authority of Section 4103 of FARA, although there are some key differences. Part 12 was updated to implement FASA just before this proposed rule was published (FAC 90-40 on July 26, 1996), under-scoring the need to see all of the interrelated parts of the regulations in order to conduct a meaningful and thorough analysis.



REPLY TO  
ATTENTION OF

DEPARTMENT OF THE ARMY  
OFFICE OF THE SECRETARY OF THE ARMY  
WASHINGTON, DC 20310-0101

01 OCT 1996



SADBU

Mr. Ralph DeStafano  
General Services Administration  
FAR Secretariat (MVRS), Rm 4037  
18th & F Streets, N. W  
Washington, D. C. 20405

Dear Mr. DeStafano

The Army Small and Disadvantaged Business Utilization Office has reviewed the subject proposed rule regarding FAR Case 96-303, Federal Acquisition Regulation; Competitive Range Determinations, published in the Federal Register on July 31, 1996, the stated purpose of which is to implement Sections 4101 and 4103 of the Federal Acquisition Reform Act of 1996. The rule provides the contracting officer with the authority to limit the size of the competitive range, in accordance with the criteria specified in the solicitation, to the greatest number that will permit an efficient competition.

The following is a brief discussion of our concerns:

We are concerned that limiting the number of proposals in the competitive range, to the greatest number of proposals that will permit an efficient competition, may also unnecessarily eliminate small businesses from the process. The rule discusses "limiting the size of the competitive range, in accordance with criteria specified in the solicitation." In order to maintain the integrity of the procurement process, we suggest that the solicitations include what method will be used by the contracting officer to restrict or narrow the competitive range. Additionally, that method should ensure that to the greatest extent possible a fair proportion of small business and small disadvantaged business concerns will be included in the range.

OCT 3 1996



96-303-

While we recognize that we must utilize our dwindling resources in the most cost effective manner, it is important to also note that the majority of the cost expended in proposal preparation occurs in its initial development. Proposal revisions in response to BAFOs, might only require minor inexpensive modification. Companies, especially small businesses, invest a considerable amount of funds in developing their initial proposals and can least afford having their proposals excluded, without knowing their risk of exclusion early in the process.

Limiting the number of proposals in the competitive range may have some short term benefits to the government. However, in the long run, it may drive small businesses from the federal procurement process. Newly entering small businesses into the federal market may find it too expensive to prepare proposals when they are consistently rated outside the competitive range.

Since past performance is a critical evaluation factor, small business firms may find it extremely difficult to receive high performance ratings or be considered if they are consistently eliminated from the competitive range.

Procedures that encourage limiting the number of companies in the competitive range may in the long run have a negative effect that will stifle or restrict competition, and thereby violate statutory and regulatory requirements designed to increase the use of small businesses to the maximum extent possible. Furthermore, this procedure may ultimately drive prices up in certain products or services that tend to be competed for by a limited number of firms.

96-303-

Should you have any questions regarding our comments my point of contact is Ms Sarah A Cross, she can be reached at (703) 697 2868.

(b) (6)

Tracey L. Pinson  
Director, Office of  
Small and Disadvantaged Business Utilization

**AMERICAN BAR ASSOCIATION**

**Section of Public Contract Law**  
Writer's Address and Telephone



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1996 1997

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October 7, 1996

General Services Administration  
FAR Secretariate (MVRS)  
18th & F Streets, N W  
Room 4037  
Washington, DC 20405

Re Proposed Rule, Competitive Range Determinations,  
FAR Case No 96-303, 61 Fed Reg 40116 (July 31, 1996)

Dear Sir or Madam

On behalf of the Section of Public Contract Law of the American Bar Association ("Section"), I am submitting comments on the above-referenced matter. The Public Contract Law Section consists of attorneys and associated professionals in private practice, industry and government service. The Section's governing council and substantive committees contain a balance of members representing these three segments, to ensure that all points of view are considered. In this manner, the Section seeks to improve the process of public contracting for needed supplies, services and public works.

The Section is authorized to submit comments on acquisition regulations under special authority granted by the Association's Board of Directors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.

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## INTRODUCTION

The Federal Acquisition Reform Act of 1996, Pub L 104-106 ("FARA" or the "Act"), requires that the Federal Acquisition Regulation ("FAR") be amended to provide that the "contracting officer may limit the number of proposals in the competitive range, in accordance with the criteria specified in the solicitation, to the greatest number that will permit an efficient competition among the offerors rated most highly in accordance with such criteria" FARA § 4103 FARA also requires that the FAR be amended to "ensure that the requirement to obtain full and open competition is implemented in a manner that is consistent with the need to efficiently fulfill the government's requirements" FARA § 4101 The Conference Report on FARA emphasizes that "This provision makes no change to the requirement for full and open competition or to the definition of full and open competition" H R Conf Rep No 104-450, § 4101 (1996)

Preliminarily, the Section notes that many of the government's concerns regarding efficiency could be addressed prior to establishing the competitive range For example, procurements would be more efficient if the government's requirements were more clearly stated in advance of the solicitation The Section encourages the continued use of draft RFPs, presolicitation conferences and other initiatives to discuss the government's requirements with prospective offerors in advance of the solicitation closing date The earlier a potential offeror becomes aware it cannot meet the government's requirements, the less time and money will be spent pursuing and evaluating a fruitless proposal

The Section supports the effort to obtain more efficient competition The Section is concerned, however, that in seeking that goal, the proposed regulations do not give appropriate emphasis to the statutory mandate for full and open competition In these comments, the Section will (a) invite attention to possible vulnerabilities in the proposed regulations that could give rise to successful legal challenges, and (b) make suggestions for corrective language

In particular, the proposal to allow the contracting officer to limit in advance the number of offerors in the competitive range cannot be reconciled with the Conference Report on the legislation that states, in pertinent part "The conferees intend that the determination of the competitive range be made *after* the initial evaluation of the proposals, on the basis of the rating of those proposals" H R Conf Rep No 104-450 (emphasis added) Under the proposed regulation, however, a proposal practically equal to others could be excluded simply because it is one more proposal than the number the agency decided, in advance, to evaluate Moreover, to exclude such a proposal may not comport with the FARA requirement to arrive at a competitive range that consists of the greatest number that will permit an efficient competition among the offerors "rated most highly in accordance with such criteria" FARA § 4103

96-303-

Additionally, the proposed regulations do not clearly state that the initial evaluation of offerors before establishment of the competitive range must include consideration of all factors stated in the solicitation. As written, the regulations could permit the incorrect conclusion that agencies may conduct a cursory initial evaluation, focusing on only one evaluation criteria, and ignoring other specified criteria. The Competition in Contracting Act ("CICA") and FARA require that this initial evaluation include *all* the criteria specified in the solicitation. Accordingly, as discussed in further detail below, the Section proposes that the draft regulation be revised to clarify that the initial evaluation must include all evaluation factors, including cost and non-cost factors.

### DISCUSSION

The Section recognizes that FARA reflects congressional concern that the present regulations may not permit adequate agency efficiency and could result in the inclusion of offerors in the competitive range that have no likelihood of receiving award. On the other hand, it is clear from the legislative history that Congress did not intend FARA to replace the full and open competition standard. Some members of Congress had sought to replace the full and open competition standard with a "maximum practicable" competition standard. *See, e.g.*, H R Rep No 1670 (the "Clinger-Spence Bill"). Instead, however, Congress chose a middle ground that preserves the mandate for full and open competition at the same time the goal of efficiency is sought.

#### **A. The Proposed Regulations Should Conform to the Statutory Language Regarding the Definition of the Competitive Range**

Proposed FAR 15.609(a) states in part

The competitive range consists of proposals having the greatest likelihood of award based on the factors and subfactors in the solicitation.

FARA, however, provides that the contracting officer "may limit the number of proposals in the competitive range, in accordance with the criteria specified in the solicitation, to the greatest number that will permit an efficient competition among the offerors rated most highly in accordance with such criteria." FARA § 4103. The statutory language focuses on the "*greatest number*" of proposals "*rated most highly*," while the proposed regulation could be interpreted to permit a cursory evaluation of a lesser number for competitive range purposes. Thus, a convincing argument could be made that the regulation does not comport with the statute. The concern is that the proposed regulation does not mention that the competitive range must include the "greatest number" of most highly ranked proposals that can be efficiently considered. Without implementation of the statutory mandate, that key goal may be ignored.

96-303-18



September 30, 1996

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

Re FAR Case 96-303 "Competitive Range Determinations"

Dear Madam or Sir

Associated Builders and Contractors (ABC), a national trade association representing over 18,500 construction and construction related firms, appreciates this opportunity to comment on the proposed rule concerning Competitive Range Determinations, which was published for comment by the Department of Defense, the General Services Administration and the National Aeronautics and Space Administration in the Federal Register on July 31, 1996

At a meeting with Dr Steven Kelman, Administrator for Federal Office of Procurement Policy, and Colleen Preston, Deputy Under Secretary for Acquisition Reform, on Friday, September 27, 1996, it was determined that a subsequent September 12, 1996 publication has conflicting language on this topic. Dr Kelman and Ms Preston were not previously aware of the discrepancy but did express their view that the September 12, 1996 proposed rule would take precedence. Therefore, ABC strongly recommends that the Federal Acquisition Regulatory Council go ahead and withdraw this July 31, 1996 rule.

As written, the July 31, 1996 proposed rule aims to fulfill requirements spelled out in two sections of the Federal Acquisition Reform Act (FARA) signed into law by President Clinton on February 10, 1996. Section 4101 of FARA obligates the Federal Acquisition Regulations (FAR) to implement the requirement to obtain full and open competition in a manner that is consistent with the need to efficiently fulfill the Government's provisions. Section 4103 of the Act provides that the contracting officer may limit the number of proposals in the competitive range, in accordance with criteria specified in the solicitation, to the greatest number that will permit an efficient competition.

Our association along with many other concerned groups and individuals helped solidify retention of the Competition in Contracting Act's requirement for "full and open competition." This rulemaking seems, however, to discard exactly what Congress

OCT 3 1996



96-303-14  
United States Department of State

Washington, D C 20520

September 26, 1996

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

Subject FAR Cases 96-303 and 96-311

The Department of State's Office of Small and Disadvantaged Business Utilization (SDBU) offers the following comments regarding the subject FAR cases

SDBU is concerned regarding the proposed provisions in FAR 15 609(b) allowing the contracting officer to predetermine the number of offerors in the competitive range, based on previous experience. While it is understood that this proposed change is contained in the Federal Acquisition Reform Act of 1996 and must be implemented, SDBU recommends that this provision not be used when small business or 8(a) competitive set-aside procedures are employed. The reasoning is as follows:

In conducting competitions using small business or 8(a) competitive set-asides, the Department of State has had experience in which the number of proposals received exceeds the number that a contracting officer would expect to receive based on historical data. In one instance, had the contracting officer predetermined during the acquisition planning stage the number of offerors to be in the competitive range, up to four small businesses would have been out of the running before their proposals were ever evaluated. In another instance, we received up to ten proposals on an 8(a) competition, where the norm, using full and open procedures, was in the 4 - 7 range. This limitation, combined with the option to award without oral or written discussion now allowed under certain conditions, would produce a benefit of expediency. Such expediency may not necessarily be in the best interests of small and 8(a) firms.

With regard to FAR Case 96-311 and FAR clause 52 237-xx, *Identification of Uncompensated Overtime*, the *Federal Register* analysis of the clause acknowledges the negative economic impact this clause may have on small entities, due to the burden associated with identifying uncompensated overtime hours and rates. Conversely, it may help level the playing field for small businesses when evaluating cost proposals received on full and open solicitations. The business practice of requiring uncompensated overtime by direct charge company employees exempt from the Fair Labor Standards Act is more prevalent among big businesses than those that are small. It is a strategy that has been used by some businesses to deflate actual labor rates by lowballing the labor hours it would seemingly require to accomplish a task. In the past, small businesses who have not

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Accordingly, the Section suggests that proposed FAR 15 609 (a) be revised to conform to the statute, as follows

The competitive range consists of the greatest number of proposals, rated most highly in accordance with the factors and subfactors specified in the solicitation, that can be efficiently included

(See Attachment A, suggested revised text )

FARA did not change the CICA requirement that offers be evaluated in accordance with the evaluation criteria stated in the solicitation See 10 U S C § 2305(b)(4)(A), 41 U S C 253b(d)(1) Accordingly, the determination of which offers to include in the competitive range must be accomplished based on *all* evaluation criteria

**B. “Efficient Competition” Cannot Be Determined Without Regard to Identification of the “Greatest Number” of “Offerors Rated Most Highly”**

The proposed regulations permit the contracting officer to limit the number of offerors in the competitive range based on efficiency (a) in advance, during acquisition planning, and (b) after evaluating offers FAR 15 609 (b)-(c) The determining factor under both proposed provisions is the steps necessary to ensure an “efficient competition”

The statute, however, requires that the “greatest number” of offers that can be considered efficiently be included Moreover, the proposed regulations provide little instruction on the meaning of “efficiency” The only coverage is in proposed FAR 15 609(b), which addresses limiting the competitive range during acquisition planning The proposed regulation states

In planning an acquisition, the contracting officer may determine that the number of proposals that would otherwise be included in the competitive range is expected to exceed the number at which an efficient competition can be conducted In reaching such a conclusion, the contracting officer may consider such factors as the results of market research, historical data from previous acquisitions for similar supplies and services, and the resources available to conduct the source selection

61 Fed Reg 40117 (July 31, 1996) The first sentence of the proposal suggests that the competitive range may be limited in advance of receipt of proposals This is difficult to reconcile with the mandate of Congress to conduct competition among “the greatest



96-303-1

based on the factors and subfactors in the solicitation " This is virtually the same test prescribed by FARA for use when the number of offerors "exceeds the number at which an efficient competition can be conducted" By limiting the use of this standard to a defined set of procurements, Congress implicitly barred the FAR drafters from importing the standard into all competitive range determinations. This conclusion is further reinforced by the language of the statutory predicate for "efficient" competitive range determinations, i.e., "the contracting officer determines that the number of offerors that would otherwise be included in the competitive range" exceeds the number needed for efficient procurement. (emphasis added). FARA, § 4101. This reference assumes that there is another criterion for determining the competitive range that would govern if efficiency considerations did not apply. FAR Case 96-303 obliterates this distinction, and imposes a single standard, regardless of whether efficiency considerations are warranted or not.

Second, the statutory language strongly suggests that the determination to limit the competitive range based on efficiency must occur after receipt of proposals. The Contracting Officer cannot make a rational determination that the number of proposals that "would otherwise be included in the competitive range" is "inefficient" unless the CO knows the number of proposals received Proposed FAR 15 609(b) encourages the CO to guess the number of proposals that the procurement will attract, and then apply limitations to the competitive range before the first offer is received. This is inconsistent with the statutory scheme.

"Alternate III," which implements proposed FAR 15.609(b), permits a contracting officer to arbitrarily limit the number of proposals that will be included in the competitive range before the first proposal is received. This is unconscionable. Under the draft, the Contracting Officer could determine on Day One that he or she will only allow two proposals to receive consideration throughout the procurement. This determination would be made before the CO knew the number or quality of the proposals "Alternate III's" invitation to arbitrary rejections should be removed. We note that this alternative is not included in Part I of the FAR 15 Rewrite, and hope that this exclusion reflects current, Government policy. We would also go further, and propose the addition of language that banned the use of any pre-conceived, a priori limitation on the number of proposals that will be considered in the competitive range.

A graver problem in FAR Case 96-303 is the complete absence of any definition of "efficient competition." CCIA has serious concerns regarding the choice of factors that are supposed to underlie the calculation of efficiency The

inclusion of the factor "resources available to conduct the source selection" is an open invitation to elevate bureaucratic convenience over statutory requirements for full and open competition. Moreover, inclusion of this criterion will remove incentives for agencies to develop innovative methods of proposal evaluation and preparation. CCIA believes that this criterion should be removed.

The proposed regulation is also deficient because it fails to balance the proven, fiscal benefits of competition against the proposal's undefined notion of "efficiency." Under FAR Case 96-303's proposed policy, a Contracting Officer could bypass a \$50,000,000 reduction in proposed costs of the procured goods or services to save \$50,000 on the grounds of "administrative efficiency." The proposed policy does not even consider savings achieved through vigorous competition as a factor in determining the size of the competitive range

Much of the disagreement between industry and Government over this proposal arises because it reduces the number of proposals that can compete, and gives the Government sole, and sometimes arbitrary, control over the number of players. CCIA suggests that the objectives of both Government (to discourage marginal vendors from continuing in the procurement) and industry (to reduce bid and proposal expenditures on marginal bid opportunities) can be achieved through an optional down-select procedure. Before supporting a draconian tightening of the competitive range, the Government should at least experiment with an optional down-select that would silence industry's concerns by giving the offeror, not the Government, the ability to exclude proposals that do not have the "greatest likelihood of award based on the factors and subfactors in the solicitation" (proposed FAR 15.609(a)).

Under this proposal, the Government would first determine the competitive range using current, regulatory criteria. The Government could then advise the remaining offerors regarding the results of their initial evaluations, and their relative standing in the procurement. Based on this information, the offeror could make a reasoned business judgment whether it made sense to continue in the procurement. To the extent there is a problem with receipt of too many proposals (a point that CCIA seriously doubts), providing offerors with an informed basis to evaluate their likelihood of success will reduce the number of vendors that continue through the entire process. And since the decision to continue or not continue rests with the vendor, the Government will also reduce the likelihood of protests when it determines the competitive range. This will achieve a benefit sought by some within the Government policy community, namely reducing the tendency to keep vendors in the competitive range to avoid pre-award protests.

96-303-11

FAR Secretariat  
Page 5  
September 30, 1996

CCIA appreciates your consideration of these preliminary comments regarding the determination of the competitive range. We will provide more detailed comments that relate directly to the proposed language in the FAR Part 15 Rewrite, which we assume, based on the September 27 meeting, contains the Government's definitive proposal for revising the ground rules of negotiated procurement.

Sincerely,

(b) (6)

Edward J. Black  
President  
Computer & Communications Industry Association



96-303-12

4747 HARRISON AVENUE • PO BOX 7002 • ROCKFORD, IL 61125-7002  
(815) 226-6000 • FAX 226-7488 • TWX 910-631-4255 • TELEX 25-7440

September 30, 1996  
L957-996-0567

General Services Administration  
FAR Secretariat (VRS)  
18th and F Streets  
NW  
Room 4037  
Washington, D C 20405

SUBJECT            Written Comments Regarding the FAR Proposed Rule Competitive  
Range Determinations as Cited in the *Federal Register*, Vol 61,  
No 148, July 31, 1996

REFERENCE        FAR CASE 96-303

Gentlemen

Thank you for the opportunity to review the above proposed rule and comment on it. We have reviewed the rule and would like to offer the following comments. We would like to see clearer direction to the change at FAR 12.301(e)(4). Specifically, we would like an indication of the types of conversations the contracting officer would be able to discuss with the offerors. Should there be limitation to price, delivery incentive issues? Clarification of these items would enhance the proposed rule.

If you have any questions regarding these comments, please feel free to contact me at (815) 226-5226.

Sincerely,

SUNDSTRAND AEROSPACE

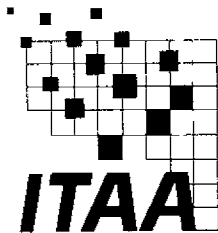
(b) (6)

Art Charles, Vice President  
Aerospace Contracts, Compliance and Management Services

ARC/gp

1996

OCT 3 1996



96-303-13

September 30, 1996

FAR Secretariat (MVRs)  
General Services Administration  
18<sup>th</sup> & F Streets, NW, Room 4037  
Washington, DC 20405

VIA Facsimile 202/501-4067 & US Mail

RE FAR Case 96-303  
Competitive Range Determinations

Dear FAR Secretariat

ITAA, the Information Technology Association of America is pleased to provide comments on the proposed revision to FAR §15 609 in response to the proposed rule on competitive range determinations published in the *Federal Register* on July 31, 1996

The preamble to the proposed rule states that its purpose is to implement subsection 4103 of the Federal Acquisition Reform Act (FARA) which states that a contracting officer may, in accordance with criteria specified in the solicitation, limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the offerors rated most highly in accordance with such criteria" Subsections (b) and (c) of the proposed rule implement this provision of FARA, and ITAA generally supports the proposed subsection (b) and (c) language, subject to the comments stated below

Subsection (a) of the proposed rule however, appears to go beyond subsection 4103 of FARA in one very important respect It eliminates the longstanding rule, reflected in the current §15 609 that all proposals that have a reasonable chance of being selected for award must be included in the competitive range and permits contracting officers (even without considering the efficiency criterion of FARA and proposed subsections (b) and (c)) to limit the competitive range to those proposals "having the greatest likelihood of award" For example, as we understand the proposed rule, a contracting officer might receive ten proposals

Information Technology Association of America

OCT 1 1996

-- competitive range provisions than authorized by Sections 4101 and 4103 of FARA. We could not find any provisions in FARA that authorized these separate provisions or that allowed these competitive range changes other than for section 2305(b)(4) of title and section 253b(d) of title 41.

## CONCLUSION

The July 31 rule fails to fully and fairly implement several key elements of the statute. Where the proposed rule recognizes statutory changes that benefit only the government, the rule fails to balance the requirements with other required provisions of law, and fails to provide proper guidance to the contracting community on how these provisions are to operate in practice. Since there is conflicting coverage between this July rule and a more comprehensive rule published on September 12, this July rule should be withdrawn in its entirety.

Sincerely,

American Movers Conference  
American Subcontractors Association, Inc.  
Associated Builders and Contractors, Inc.  
Computing Technology Industry Association  
Household Goods Forwarders Association of America  
Small Business Legislative Council (*Includes 93 associations*)  
U.S. Chamber of Commerce

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FAR Secretariat/FAR Case 96-303

September 30, 1996

Page 3

evaluation of the proposals submitted, and shall not exclude a proposal that is close in overall value to a proposal included in the competitive range

Third, it should be made clear that a shortage of agency resources is not enough in itself to justify limiting the competitive range. In these days of tight budgets, if the FAR does not require agency resources to be expended on a particular procurement, they will have a tendency to become "unavailable" for that procurement. This creates a circular situation -- an agency justifies not evaluating all acceptable offers because it lacks resources, but it lacks resources because it is no longer required to evaluate all acceptable offers. It would be a disservice to contractors and the public if contracting agencies were allowed to exclude qualified offerors solely because there is not enough time, or agencies have not committed enough time, to consider their proposals fully and fairly.

Fourth, it should be made clear that the language in subsection (b) allowing the contracting officer to consider such factors as "market research [and] historical data from previous acquisitions" does not mean that the contracting officer may consider such information in the evaluation of competing proposals. We understand that this data may be considered only in determining how many proposals are necessary to permit an efficient competition.

ITAA would be pleased to provide additional comments on our statements.

Sincerely,

(b) (6)

Olga Grkavac

Senior Vice President

Systems Integration Division



96-303-11



Computer & Communications Industry Association Washington, D C 20001

666 Eleventh Street N.W Sixth Floor (202) 783-0070 Facsimile (202) 783-0534

September 30, 1996

General Services Administration  
FAR Secretariat (MVRS)  
18th & F Streets, N.W --Room 4037  
Washington, D C 20403

BY HAND

Attn: Mr. Ralph DeStefano  
Re: FAR Case 96-303

Dear Mr. DeStefano:

The Computer & Communications Industry Association (CCIA) is pleased to submit its comments on FAR Case 96-303, a proposed rule that would amend FAR parts 6, 12, 15 and 52 in order to allow contracting officers to limit the size of the competitive range.

This FAR Case contains language that is similar, but not always identical, to Part I of the rewrite of FAR 15. Consequently, it is not clear whether the definitive language is contained in FAR Case 96-303 or the proposed FAR 15 rewrite. At a meeting on September 27 between industry, the Office of Federal Procurement Policy and the Department of Defense, industry representatives strongly suggested pulling FAR Case 96-303, and considering all competitive range issues in connection with the FAR Part 15 rewrite. CCIA strongly supports this position. It will avoid needless duplication of comments. It will also present a single proposal for comment, and reconcile conflicts that currently exist between the two drafts. Furthermore, the issues surrounding the competitive range are interwoven with proposed revisions to the competitive negotiation process. It is far more appropriate to consider these issues as an integrated whole, rather than as a set of piecemeal, disconnected proposals.

Pulling FAR Case 96-303 is also consistent with the September 18 letter to Steven Kelman from the Full and Open Competition Coalition. That letter, which followed previous correspondence by the Coalition and the U.S. Small Business Administration, pointed out that the regulatory flexibility analysis underlying 96-303 was flawed, and that this FAR Case should be considered as a major rule. By pulling FAR Case 96-303, the FAR Councils can remove this problem as well.

CLP 30 495



done a lot of work with the government may not have possessed the business wiles to use this tactic This new clause may assist in this regard

Thank you for the opportunity to comment on the proposed FAR changes Should you have any questions regarding these comments, please contact Durie White in the Office of Small and Disadvantaged Business Utilization Ms White may be reached on (703) 875-6824

Sincerely,

(b) (6)

Lloyd W Pratsch  
Procurement Executive

cc A/SDBU - Durie White

96-303-15

September 30, 1996

General Services Administration  
FAR Secretariat (MVRS)  
Room 4037  
18th and F Streets, N.W.  
Washington, D.C. 20405

Attn: Ralph DeStefano

Re: FAR Case 96-303 "Competitive Range Determinations"

As associations representing the full breadth of American industries and business interests, we are pleased to submit comments on the proposed rule concerning Competitive Range Determinations published for comment by the Department of Defense, the General Services Administration and the National Aeronautics and Space Administration in the Federal Register of July 31, 1996 (Volume 61, Number 148) at page 40116.

**INTRODUCTION**

The proposed rule seeks to implement two sections of the Federal Acquisition Reform Act ("FARA", or "Act"). Section 4101 of the Act requires the FAR to implement the requirement to obtain full and open competition in a manner that is consistent with the need to efficiently fulfill the Government's requirements. Section 4103 of the Act provides that the contracting officer may limit the number of proposals in the competitive range, in accordance with criteria specified in the solicitation, to the greatest number that will permit an efficient competition.

Congress affirmatively rejected a more far-reaching proposal from the House of Representatives (H.R. 1670) that "full and open competition" be replaced with "maximum practical competition". However, the rulemaking appears to recapture through administrative change exactly

what the Congress refused to do legislatively. It fails to retain the priority of the statute to be accorded to “full and open” competition to efficiently fulfill requirements and instead elevates the mantra of efficiency in conducting the procurement process.

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In our view, the July 31 proposed rules fail to properly implement the statute, and would have a significant adverse impact on our members and on the federal acquisition system. We are strongly opposed to the rule in its current form. We have attached to these comments a September 18, 1996 letter to OFPP Administrator Kelman from the Full and Open Competition Coalition, which highlights our position on this rule.

In light of our concerns and the publication of conflicting FAR coverage on this identical topic, we strongly recommend that the FAR Council immediately withdraw this July 31 rule. As an alternative to completely withdrawing the rule, we urge that the coverage be substantially rewritten. In addition, we recommend that the FAR agencies schedule a public meeting specifically on these proposed changes.

Further, the published supplementary information accompanying the rule acknowledges that this rule will have a significant impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. We have obtained a copy of the pro forma initial “reg flex” analysis, and we will separately be submitting comments (citing FAR case 96-303) on that aspect of this rule.

### **CONFLICTING FAR COVERAGE PUBLISHED**

On September 12, the FAR agencies published in the Federal Register a “phase I” rewrite of FAR Part 15, which includes sections on both “competition” and on “competitive range determinations”, each also purporting to implement these same provisions of law.

While that Phase I FAR Part 15 rewrite is more comprehensive than the coverage in this rule, the treatment of these two topics differs slightly in that September publication from that in this July 31 publication. We have just begun our analysis of this more comprehensive rulemaking, and will be submitting comment on it, as well. We are considering appearing at the public meetings which are to be scheduled on the Phase I rewrite to raise our concerns about this July 31 rule, the differing treatment of these topics under the September 12 rule, and the insufficient Regulatory Flexibility Act analyses prepared for these rules.

However, our initial review of the Phase I FAR Pat 15 rewrite indicates that the coverage of the “competition” and the “competitive range determination” provisions in the September 12 version are no more compliant with the statute than the July 31 publication. Thus, as to these two elements of the September version, we are likely to strongly oppose them, as well.

### **PIECEMEAL REGULATIONS MAKES ASSESSMENTS OF THE IMPACT OF THE CHANGES VIRTUALLY IMPOSSIBLE**

It is difficult to assess the full impact of the changes made by the July 31 proposed rule because of the unique piecemeal nature of the regulatory coverage proposed to implement these two sections of law. Traditionally, commentators would be able to take the language from the proposed rule and meld it into the existing regulatory coverage to make an assessment of the impact of the proposed changes. Here, however, your regulatory proposals confront commentators with two sets of problems.

First, since this July 31 rule includes only a small portion of the sections of the FAR that are directly affected by the statutory changes made in FARA, it is impossible to know what other directly associated portions of the existing FAR will remain unchanged and what additional directly associated portions will be further revised to “implement” both the statutory changes and discretionary administrative policy revisions. For example, this rule relies on coverage of pre-award debriefings, a central concept to determining whether any offeror deemed outside the competitive range will have any realistic rights of appeal. However, the current FAR does not provide for pre-award debriefings; and the rules to implement that statutory provisions in Section 4104 of FARA were only published as a proposed rule on June 14, 1996. It is impossible to know what that final rule will provide, and thus it is impossible to fully assess and comment on the obviously far-ranging impact of the changes recommended in this rule.

Second, in light of the publication of conflicting coverage on the identical subject in the Phase I rewrite, it is impossible to understand whether, and to what extent, this rule should be “taken seriously.” Statements by senior government officials indicating that the July 31 publication “was a mistake to issue” or that it “should have been corrected before release” lend further confusion to the rulemaking process.

Therefore, in order to fully analyze the impact of these significant policy changes, commentators should be given the opportunity to see **all** of the statutorily required, and administratively-proposed, changes to the FAR at once so that we can fully appreciate the effects that any single set of changes will have. All changes to the FAR to implement the statute must be published no later than 210 days after enactment (i.e. by November 8). Accordingly, the FAR agencies should extend the deadline for comments on this proposed rule until after all proposed rules are issued.

### **THE JULY 31 RULE FAILS TO PROPERLY IMPLEMENT THE PROVISIONS ON “COMPETITION” AS REQUIRED BY FARA**

The proposed amendment to the Policy provisions of FAR Part 6 implement only part of the statute, but the failure to implement the entire statute results in a provision that is not authorized by law. This proposed change to the FAR’s policy provisions also violates the commitment in the Statement of Managers in FARA’s Conference Report.

Section 4101 of FARA states, in part, that --

“The Federal Acquisition Regulation shall ensure that the requirement to obtain full and open competition is implemented in a manner that is consistent with the need to efficiently fulfill the Government’s requirements.”

The statement of managers accompanying the conference report explains clearly that --

“This provision [FARA section 4101] makes no change to the requirement for full and open competition or to the definition of full and open competition.”

**THE RULE FAILS TO PROPERLY IMPLEMENT THE PROVISIONS ON "COMPETITIVE RANGE DETERMINATIONS" AS REQUIRED BY FARA**

FARA identically amends section 2305(b)(4) of title 10 U.S.C. and section 253b(d) of title 41 U.S.C. to provide that--

"If the contracting officer determines that the number of offerors that would otherwise be included in the competitive range under subparagraph (A)(1) exceeds the number at which an efficient competition can be conducted, the contracting officer may limit the number of proposals in the competitive range, in accordance with the criteria specified in the solicitation, to the greatest number that will permit an efficient competition among the offerors rated most highly in accordance with such criteria." Emphasis added.

The statement of managers accompanying the conference report provides in its entirety that --

"The conference agreement includes a provision that would allow a contracting officer, in procurements involving competitive negotiations, to limit the number of proposals in the competitive range to the greatest number that would permit an efficient competition among the most highly rated competitors. The conferees intend that the determination of the competitive range be made after the initial evaluation of proposals, on the basis of the ratings of those proposals. The rating shall be made on the basis of price, quality and other factors specified in the solicitation for the evaluation of the proposals."

The key to this FARA provision is that offerors must be told in the solicitation what the criteria will be for determining which of the offerors will be excluded from the competition and that those with the highest ratings will be included. However, this rule seeks to selectively apply some provisions of the law and the statement of managers without giving full accord to the entire law and legislative history. As such, the regulatory coverage violates the specific statutory provisions and statement of managers when seeking to provide coverage for establishing the competitive range. The proposed rule is deficient in several ways. The proposed rule does not provide the contracting officers any useful guidance on how to make the important determination to exclude

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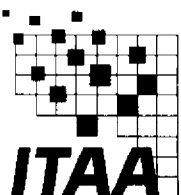
determine that seven have a reasonable chance of being accepted but that three proposals have the "greatest likelihood of award" In these circumstances the proposed §15 609 would apparently permit the contracting officer to limit the competitive range to three proposals, even if an "efficient competition" could be conducted among all seven acceptable proposals

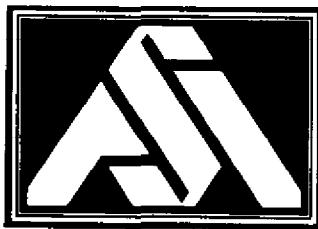
Nothing in FARA requires this very significant change in the FAR's longstanding competitive range rules Whether such a non-statutory change is advisable as a matter of policy is a question that deserves the fullest consideration, based on the thoughtful input of all concerned ITAA notes that the question of how the competitive range should be determined is one of the key questions addressed by the recent proposed revision of FAR Part 15 (61 *Federal Register* 48380, September 12, 1996) Since the version of §15 609 (renumbered §15 406) proposed in the FAR Part 15 revision also contains the "greatest likelihood of award" standard, ITAA respectfully submits that any changes to subsection (a) of §15 609 should be considered not at this time, but rather in the context of the proposed FAR Part 15 revision ITAA would oppose any change to subsection (a) in the context of the current FAR case, but is prepared to consider the proposed change fully and fairly in the context of the FAR Part 15 revision

As indicated above, ITAA generally supports the implementation of FARA subsection 4103 reflected in subsections (b) and (c) of the proposed §15 609 ITAA, however, does have several comments

First, subsection (c) should emphasize that the competitive range cannot be limited more than is strictly necessary to achieve an "efficient competition" For example, if an efficient competition can be conducted with between three and five proposals, the competitive range should not include fewer than five proposals

Second, any cut-off imposed under subsection (c) should be at a clear "break-point" in the ordering of proposals For example, if combined scores of competing firms were 95, 95, 94, 93, 80, 70 and 60, considerations of efficiency should not under any circumstances allow the competitive range to be limited to three proposals ITAA suggests adding the following language "In making the determination of the firms to be included in the competitive range, the contracting officer shall consider the relative distribution of proposal ratings resulting from the





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RE FAR Case 96-303 "Competitive Range Determinations"

The American Subcontractors Association (ASA), is pleased to submit comments on the proposed rule concerning Competitive Range Determinations published for comment by the Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration in the Federal Register of July 31, 1996 (Volume 61, Number 148) beginning at page 40116

The purpose of this letter is to solely comment on the flawed regulatory flexibility analysis done by the FAR Council. ASA will also be submitting detailed comments on the proposed rule by the September 30, 1996 deadline.

ASA believes that the FAR Council has not fulfilled its responsibilities and requirements with regard to Regulatory Flexibility Act. These concerns are heightened by the recent passage of the Small Business Regulatory Enforcement Act which is intended to provide additional regulatory relief for small businesses, including judicial review of agency compliance with the law.

Additionally, ASA disagrees with the Office of Management and Budget's assertion that the proposed rule should not be subject to review under Executive Order 12866.

Alone and in aggregation with other proposed federal acquisition regulation changes the proposed rule on competitive range determination would clearly affect more than \$100 million in federal government acquisitions. A major rule is defined as one with an annual economic impact of greater than \$100 million or having significant adverse effects on competition. This regulatory change will significantly and adversely impact competition in government contracting, in addition to crossing the \$100 million threshold.

The initial regulatory flexibility analysis (IRFA) prepared for this rule does a poor job of quantifying the rule's impact on small business. The most glaring flaw is the lack of

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