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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 4, 5, 8, 13, and 16

[FAC 2005-42; FAR Case 2009-010; Item III; Docket 2009-0010, Sequence 1]

RIN 9000-AL24

Federal Acquisition Regulation; FAR Case 2009-010, American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Publicizing Contract Actions

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have adopted as final, with minor changes, an interim rule amending the Federal Acquisition Regulation (FAR) to implement the Office of Management and Budget (OMB) Memorandum M-09-10, entitled "Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009," (the Recovery Act) with respect to publicizing contract actions. The OMB issued Memorandum M-09-15, entitled "Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009," to supplement, amend, and clarify the initial guidance in OMB Memorandum M-09-10.

DATES: *Effective Date:* July 16, 2010.

Applicability Date: This rule applies on or after the effective date of this rule to: (1) solicitations issued, (2) contracts awarded, (3) orders issued under task and delivery order contracts, and (4) modifications to orders issued under task and delivery order contracts.

FOR FURTHER INFORMATION CONTACT: Michael Jackson, Procurement Analyst, at (202) 208-4949, for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755. Please cite FAC 2005-42, FAR Case 2009-010.

SUPPLEMENTARY INFORMATION:

A. Background

On February 17, 2009, the President signed the Recovery Act. On February 18, 2009, the Director of the Office of Management and Budget (OMB) issued initial implementing guidance, OMB Memorandum M-09-10. One of the provisions of the initial OMB guidance was to provide accountability and transparency relative to publicizing contract actions. The OMB guidance required that the FAR be amended to reflect—

1. Unique requirements for posting of presolicitation notices;
2. Unique requirements for announcing contract awards;
3. Unique requirements for entering awards into the Federal Procurement Data System (FPDS); and
4. Unique requirements for actions that are not fixed-price or competitive.

The OMB Memorandum M-09-15, dated April 3, 2009, entitled "Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009," supplements, amends, and clarifies the initial guidance issued on February 18, 2009. All significant updates to OMB Memorandum M-09-10 are outlined in section 1.5 of M-09-15. These updates are based on ongoing input received from the public, Congress, State and local government officials, grant and contract recipients, and Federal personnel.

The interim rule was published in the **Federal Register** at 74 FR 14636 on March 31, 2009, with a request for comments by June 1, 2009.

The interim rule implemented section 6.2 of the OMB Memorandum M-09-10. In addition, the interim rule enabled the Governmentwide Point of Entry (GPE) (<https://www.fedbizopps.gov>) to be leveraged for the purpose of fulfilling the requirements of sections 1526(c)(4) and 1554 of Division A of the Recovery Act.

Three respondents submitted seven comments in response to the interim rule.

B. Responses to Public Comments

Below are the comments received on the interim rule, along with the responses developed by the Councils.

1. *Comment:* In publicizing postaward notices, the Councils should require that contracting officers publicize the text of the entire contract awarded. A narrative description of the award only would hinder transparency since a summary would omit many key details that are essential benchmarks by which to measure the quality and effectiveness of Government contractors. Without this information, the public, Government

watchdogs, and the news media would have a difficult time identifying waste, fraud, and abuse and excellent contract work, as well. While the Recovery Act specifies that a description of contracts be posted online, the FAR should be amended in order to realize the intent of the Act.

Response: The public may obtain copies of contracts using the Freedom of Information Act (FOIA) process in accordance with FAR subpart 24.2. The costs associated with redacting every Recovery Act contract action to guard against improper disclosure of proprietary, business confidential, or national security information would be prohibitive.

2. *Comment:* The case would have contracting officers "post preaward notices for orders exceeding \$25,000 for 'informational purposes' only". On its face, this seems to apply to task and delivery orders placed competitively against multiple-award contract vehicles, such as indefinite-delivery-indefinite-quantity (IDIQ) contracts. Given that the regulations appear to be designed for non-FFP and/or non-competitive actions, can we confirm its justification and application to competitively awarded IDIQ orders?

Response: The requirement to post presolicitation and award notices on FedBizOpps GPE applies to all orders with a dollar value exceeding \$25,000 regardless of competition procedures or pricing arrangements used, including those orders placed under Federal Supply Schedules, Governmentwide acquisition contracts, multiple-agency contracts, blanket purchase agreements, basic ordering agreements, and indefinite delivery type contracts. Additionally, if noncompetitive procedures or non-fixed-price arrangements were used for award of the order, then the contracting officer must provide the rationale required by FAR 5.705(b) in the award notice.

3. *Comment:* The case mandates that FedBizOpps notices "describe supplies and services in a narrative that is clear and unambiguous to the general public." The phrase, "clear and unambiguous to the general public" is itself ambiguous. Will there be supplemental guidance or definitions to avoid inevitable protests based on subjective interpretations of requirements descriptions? Suggest replacing the term "clear and unambiguous to the general public" with specific content elements required to satisfy the goals of providing appropriate information.

Response: The phrase "clear and unambiguous to the general public" is being replaced with "clear and concise language" to alleviate some confusion

associated with the word “unambiguous.” This word is subject to interpretation by the reader. However, care must be taken not to tie the hands of the contracting officer with an overly restrictive description of the requirement that would result in limiting competition. The OMB Memorandum M–09–15 also advises that agencies should ensure that descriptions of procurements use language appropriate for a more general audience, avoiding industry-specific terms and acronyms without plain language explanations. This concept has been added to the FAR.

4. *Comment:* The case requires contracting officers to enter data in the Federal Procurement Data System on any action funded in whole or in part by the American Recovery and Reinvestment Act (ARRA) funds. However, there is a disconnect between reporting in FedBizOpps and FPDS–Next Generation (NG) since FPDS–NG Contract Action Reports do not have a field for appropriation. A field for appropriation (e.g., ARRA funds) needs to be added to FPDS–NG. Otherwise, research in two separate systems is required to determine if an award is actually using ARRA funds.

Response: Instructions for how to enter the Treasury Account Symbol (TAS) for the Recovery Act actions in FPDS are posted at the FPDS website and have been provided to every Federal agency through the OMB guidance. The TAS is being collected for the Recovery Act–funded awards. The full appropriation is not required by the statute or OMB guidance. The GSA is working on usability enhancements to FedBizOpps to allow for easier comparisons between the two systems.

5. *Comment:* In the instructions regarding the applicability date, recommend adding modifications to this sentence as follows: “This rule applies on or after the effective date of this rule to (1) solicitations issued, (2) contracts awarded, (3) orders issued under existing task and delivery order contracts, and (4) any monetary modifications as defined in the rule.”

Response: The Councils have expanded the instructions regarding the applicability date to add a fourth action to include: “modifications to orders issued under task and delivery order contracts.” This addition will address modifications that are subject to the Recovery Act postaward reporting. Modifications to orders issued under new contracts are covered by paragraph (2) “contracts awarded.”

6. *Comment:* Recommend revising FAR 5.704(a)(2) to clearly indicate that modifications to task and delivery

orders of \$25,000 or more also require publication in FedBizOpps. This could be achieved by revising FAR 5.704(a)(2) to read as follows: “In addition, notices of proposed contract actions are required for orders and modifications of orders of \$25,000 or more, funded in whole or in part by the Recovery Act, which are issued under task or delivery orders.”

Response: The Councils have not expanded the FAR to include posting preaward notices of modifications to orders; the FAR continues to cover modifications at the postaward notice stage.

7. *Comment:* This new rule is silent on FAR section 5.205, Special situations. There is no discussion on posting special notices on R&D, A&E, OMB Circular A–76, and 8(a). Guidance is needed in this area considering that a portion of ARRA funding should be awarded to American Indians, which comprise the largest percentage of 8(a) firms.

Response: Guidance is not necessary on this issue.

C. Changes to the FAR

The final rule makes the following amendments:

- FAR 5.704(a)(2) to clarify that modifications of orders are not required to be publicized at the preaward stage.
- FAR 5.704(b) to require contracting officers to identify proposed contract actions, funded in whole or in part by the Recovery Act, by using the instructions that are at FAR 5.704(b) and available in the Recovery FAQs at the GPE <https://www.fedbizopps.gov>.
- FAR 5.704(c) and 5.705(a) to ensure that the description required by FAR 5.207(a)(16) clearly defines the elements of the requirement to the general public.
- FAR 5.705(b) to require contracting officers to include in the description of the contract action a statement specifically noting if the action was not awarded competitively, or was not fixed-price, or was neither competitive nor fixed-price.

This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

D. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not 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 OMB guidance affects only internal Government operations and provides a strong preference for using small businesses for Recovery Act programs wherever possible. The final rule does not impose any additional requirements on small businesses.

E. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. chapter 35, *et seq.*

List of Subjects in 48 CFR Parts 4, 5, 8, 13, and 16

Government procurement.

Dated: June 2, 2010.

Edward Loeb,

Acting Director, Acquisition Policy Division.

■ Accordingly, the interim rule published in the **Federal Register** at 74 FR 14636 on March 31, 2009, is adopted as a final rule with the following changes:

PART 5—PUBLICIZING CONTRACT ACTIONS

■ 1. The authority citation for 48 CFR part 5 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

■ 2. Amend section 5.704 by revising the section heading, paragraphs (a)(2), (b), and (c) to read as follows:

5.704 Publicizing preaward.

(a) * * *

(2) In addition, notices of proposed contract actions are required for orders exceeding \$25,000, funded in whole or in part by the Recovery Act, which are issued under task or delivery order contracts. This does not include modifications to existing orders, but these modifications are covered postaward, see 5.705. These notices are for “informational purposes only,” therefore, 5.203 does not apply. Contracting officers should concurrently use their usual solicitation practice (e.g., e-Buy).

(b) Contracting officers shall identify proposed contract actions, funded in whole or in part by the Recovery Act, by using the following instructions which are also available in the Recovery FAQs under “Buyers/Engineers” at the Governmentwide Point of Entry (GPE) (<https://www.fedbizopps.gov>):

(1) If submitting notices electronically via ftp or email, enter the word “Recovery” as the first word in the title field.

(2) If using the GPE directly, select the “yes” radio button for the “Is this a Recovery and Reinvestment Act action” field on the “Notice Details” form (Step 2) located below the “NAICS Code” field. In addition, enter the word “Recovery” as the first word in the title field.

(c) In preparing the description required by 5.207(a)(16), use clear and concise language to describe the planned procurement. Use descriptions of the goods and services (including construction), that can be understood by the general public. Avoid the use of acronyms or terminology that is not widely understood by the general public.

■ 3. Amend section 5.705 by revising the section heading, paragraph (a), the introductory text of paragraph (b), and paragraph (c) to read as follows:

5.705 Publicizing postaward.

* * * * *

(a)(1) Publicize the award notice for any action exceeding \$500,000, funded in whole or in part by the Recovery Act, including—

- (i) Contracts;
- (ii) Modifications to existing contracts;
- (iii) Orders which are issued under task or delivery order contracts; and
- (iv) Modifications to orders under task or delivery order contracts.

(2) Contracting officers shall identify contract actions, funded in whole or in part by the Recovery Act, by using the following instructions which are also available in the Recovery FAQs under “Buyers/Engineers” at the Governmentwide Point of Entry (GPE) (<https://www.fedbizopps.gov>):

(i) If submitting notices electronically via ftp or email, enter the word “Recovery” as the first word in the title field.

(ii) If using the GPE directly, select the “yes” radio button for the “Is this a Recovery and Reinvestment Act action” field on the “Notice Details” form (Step 2) located below the “NAICS Code” field. In addition, enter the word “Recovery” as the first word in the title field.

(3) In preparing the description required by 5.207(a)(16), use clear and concise language to describe the planned procurement. Use descriptions of the goods and services (including construction), that can be understood by the general public. Avoid the use of acronyms or terminology that is not widely understood by the general public.

(b) Regardless of dollar value, if the contract action, including all modifications and orders under task or

delivery order contracts, is not both fixed-price and competitively awarded, publicize the award notice and include in the description the rationale for using other than a fixed-priced and/or competitive approach. Include in the description a statement specifically noting if the contract action was not awarded competitively, or was not fixed-price, or was neither competitive nor fixed-price. These notices and the rationale will be available to the public at the GPE, so do not include any proprietary information or information that would compromise national security. The following table provides examples for when a rationale is required.

* * * * *

(c) Contracting officers shall use the instructions available in the Recovery FAQs under “Buyers/Engineers” at the GPE (<https://www.fedbizopps.gov>) to identify actions funded in whole or in part by the Recovery Act.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 5, 6, 13, and 24

[FAC 2005-42; FAR Case 2008-003 Item IV; Docket 2008-0001, Sequence 27]

RIN 9000-AL13

Federal Acquisition Regulation; FAR Case 2008-003, Public Disclosure of Justification and Approval Documents for Noncompetitive Contracts—Section 844 of the National Defense Authorization Act for Fiscal Year 2008

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have adopted as final, with changes, an interim rule amending the Federal Acquisition Regulation (FAR) to implement the National Defense Authorization Act for Fiscal Year 2008, Section 844 “Public Disclosure of Justification and Approval Documents for Noncompetitive Contracts” (FY08 NDAA). Section 844 of the FY08 NDAA stipulates the requirements regarding

the public availability of justifications and approval documents after the award of Federal contracts, except for information exempt from public disclosure.

DATES: *Effective Date:* July 16, 2010.

FOR FURTHER INFORMATION CONTACT:

Ernest Woodson, Procurement Analyst, at (202) 501-3775, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAC 2005-42, FAR Case 2008-003.

SUPPLEMENTARY INFORMATION:

A. Background

The National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181, Section 844, entitled “Public Disclosure of Justification and Approval Documents for Noncompetitive Contracts,” amends 10 U.S.C. 2304 and 41 U.S.C. 253 regarding procurements made under subsection (c) (*i.e.*, other than competitive procedures) to require public availability of the justification and approval (J&A) documents after contract award, except for information exempt from public disclosure under 5 U.S.C. 552. The provisions of section 844 require the head of an executive agency to make certain J&A documents relating to the use of noncompetitive procedures in contracting available on the website of an agency and through a governmentwide website selected by the Administrator for Federal Procurement Policy (OFPP) within 14 days of contract award. In the case of noncompetitive contracts awarded on the basis of unusual and compelling urgency, the documents must be posted within 30 days of contract award. The Competition in Contracting Act (Pub. L. 98-369) already requires that such J&A documents be made available for public inspection, subject to the exemptions from public disclosure provided in the Freedom of Information Act (FOIA) (5 U.S.C. 552).

The interim rule was published in the **Federal Register** at 74 FR 2731 on January 15, 2009, with an effective date of February 17, 2009, and a request for comments by March 16, 2009.

Nine respondents submitted nineteen comments in response to the interim rule. There were six categories of comments. These categories were applicability, exceptions, Federal Business Opportunities (FedBizOpps), protests, FOIA, and veterans.

Below are the comments received on the interim rule along with the responses developed by the Councils.