
Contracting Policy Bulletin

HQ AFSPC/LGCP

February 2001

HQ AFSPC/LGCP's monthly Contracting Policy Bulletin lists the latest updates to the FAR and FAR Supplements. In each issue the changes since the previous issue are highlighted. (For those reading this in Word 7.0, **all policy available on the Internet is hyperlinked directly to the web site where it is located. Just click on the blue text.**) Comments or recommendations regarding this Bulletin may be directed to Ms. Suzanne Snyder, e-mail: suzanne.snyder@peterson.af.mil or DSN 692-5498.

Current and past policy bulletins are posted on the HQ AFSPC/LGC Home Page (<http://www.peterson.af.mil/hqafspc/contracting/>).

Headlines

Executive Order 13126, Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor implements (FAR)

DoD exceeds 5 percent goal - Price Evaluation Adjustment for Small Disadvantaged Businesses Suspended for another year (DFARS Class Deviation)

Section 808 Update (Miscellaneous)

New DD 2579 Form (Miscellaneous)

SAF/AQC Reorganization (Miscellaneous)

Overview from Government Contracts Year in Review (Miscellaneous)

Tools: DoD Guidebook for Performance-Based Service Acquisition issued and draft AF Award Fee Guide out for comment (Miscellaneous)

FAR

FACs (Available at <http://farsite.hill.af.mil/regst1.htm#FAC>)

FAC 97-23 (FAR Case 1999-608) **Final rule.** Applicable to solicitations issued on or after February 20, 2001. This rule amends the Federal Acquisition Regulation (FAR) to implement the specific requirements of Executive Order 13126, Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor, as well as to prescribe further appropriate actions to comply with the broad policy of the Executive Order (i.e., to enforce laws prohibiting the manufacture or importation of products that have been mined, produced, or manufactured wholly or in part using forced or indentured child labor). This final rule adds a new FAR subpart on prohibition of acquisition of products produced by forced or indentured child labor (Subpart 22.15), adding a new certification

regarding knowledge of child labor for listed end products (FAR 52.212-3 and 52.222-18), and adding a clause at 52.222-19, that requires cooperation with authorities if the solicitation included the certification provision and provides remedies for violations relating to use of forced or indentured child labor.

DFARS

DFARS Change Notices (replaced DACs and Departmental Letters) (Available at <http://www.acq.osd.mil/dp/dars/dfars/changes.htm>)

No New DFARS Change Notices since DCN 20001213 was published on December 13, 2000.

Class Deviations (Available at <http://www.acq.osd.mil/dp/dars/classdev.html>)

CLASS DEVIATION: CD 2001-O0001, January 25, 2001 (Effective February 24, 2001) Suspension of the Price Evaluation Adjustment for Small Disadvantaged Businesses described in FAR Subpart 19.11. DoD exceeds the 5 percent goal for awards to SDBs. The deviation applies to all solicitations issued during the period Feb 21, 2001 to Feb 23, 2002.

Other Director of Defense Procurement Memos (Available at http://www.safaq.hq.af.mil/contracting/policy/ddp_memo.cfm)

No new memos since 2 Aug 00.

AFFARS

AFACS (Available at <http://farsite.hill.af.mil/regst1.htm#AFAC>)

No new AFACs have been issued since AFAC 96-4, issued 13 Oct 00. Effective 20 Oct 00.

Contracting Policy Memos (Available at http://www.safaq.hq.af.mil/contracting/policy/das_pol.cfm)

No new policy memos have been issued since OO-C-03 dated 27 Dec 00

Contracting Information Memos (Available at http://www.safaq.hq.af.mil/contracting/policy/das_info.shtml)

No new Contracting Information Memos have been issued since 15 Oct 99.

Contracting Related Memos (Available at <http://www.safaq.hq.af.mil/contracting/policy/conrelatedmemo.html>)

No new Contracting Related Memos have been issued since 4 Dec 00.

AFSPCFARS (Available at

<http://www.spacecom.af.mil/hqafspc/contracting/Policy/afspcfars1.htm>

No changes to the AFSPC FAR Supplement since AFSPCAC 2000-01 dated Nov 00.

Information (Policy) Letters (Available at http://www.spacecom.af.mil/hqafspc/contracting/Policy/hq_air_force_space_command.htm)

No new INFO.LTRs have been issued since INFO.LTR 2000-08 dated 14 Sep 00.

MISCELLANEOUS

Section 808 update from Mr. Mike McAdams, Assistant Division Chief:

“As you probably all know by now, Section 808 of the FY01 National Defense Authorization Act imposed new requirements on DoD contracting people. The Act requires persons occupying positions as GS 1102s and military members filling “similar occupational specialty” must have a Bachelor’s degree and 24 semester hours of business courses. It provides an exception for personnel already in an 1102 position or military equivalent on 30 Sep 00.

Inclusion of this language in the Authorization Act was unexpected. The Air Force Acquisition leadership immediately began working with OSD and Congress to explain its impact, especially on our enlisted contracting force, which provides the critical core of all DoD contingency contracting support. BGen Scott, Mr. Beyland and CMSgt Durrett have met with the Director of Defense Procurement and staff members from both the Senate and House Armed Services Committees. All have been receptive to the need for changes in the legislation.

Two concurrent efforts are on going to modify the impact of the changes. OSD is developing implementation guidance consistent with the intent of the change, as reflected in the Legislative Report language, that will clearly state the following: the new requirements are applicable to new entrants only; all military and civilian employees in contracting positions as of 30 Sep 00 are exempt from all requirements of the new standards; and the waiver provisions of the new standards are available for all non-contracting personnel who were employees as of 30 Sep 00. The Air Force is also working a proposed process to allow MAJCOM contracting directors/division chiefs to be the approving authority for such waivers.

In addition, OSD is developing proposed legislative language that, in addition to confirming the legislative intent described above, will make two critical changes. First, it would allow the Secretary of Defense to determine that members of the contingency contracting force (primarily our enlisted contracting force) should be exempt from the requirements. It would also give the Secretary flexibility to approve new entrant development programs that would allow us to bring in new employees who have college degrees but lack 24 hours of business, with a requirement and plan for these people to achieve the business education within a specified period, say three years.

It’s important to note that the above changes have not yet been approved or implemented. Pending any changes, the Air Force is currently accessing only civilians and officers who meet the section 808 requirements. As soon as any change is formalized, it will be disseminated through both contracting and personnel channels.

Two messages should be clear to all Air Force contracting people. First, the enlisted contracting force is absolutely critical to our ability to provide direct support to war and contingency operations for the entire Department of Defense. Second, while the changes being proposed for waiver authority level and new entrant development programs will provide some necessary management flexibility, all civilians in the future will need both a degree and business education to be competitive for promotions at every level."

A new DD2579 form dated Dec 2000 has been published. The new form has been updated to include blocks for NAICS Code (Block 8), HUBZONE preference program (Block 9), and Acquisition History information (block 10). Previous edition (Apr 99) is obsolete and should not be used. DD2579 can be found at the following web site:

<http://web1.whs.osd.mil/icdhome/DDEFORMS.HTM>

DoD Guidebook for Performance-Based Service Acquisition The site below has the latest version issued December 2000.

<http://www.acq.osd.mil/ar/doc/pbsaguide010201.pdf>

Javits-Wagner-O'Day (JWOD) Home Page This site provides access to the JWOD site. To see if a product or service is already on the Federal Procurement List select the button marked "Products and Services".

<http://www.jwod.gov/default.asp>

AF Draft Award Fee Guide available for review comments due 16 March 2001 available for review at <http://www.safaq.hq.af.mil/contracting/whatsnew/> AFSPC personnel should send comments to Luther Haas

SAF/AQC Reorganization SAF/AQC re-organized into three divisions: 1) Resources and Analysis Division (AQCX); 2) Policy & Implementation Division (AQCP); and 3) Contracting Operations Division (AQCK). In addition to the three major divisions, they have established a Contracting Action Group, or CAG (AQCA). A brief description of each division's responsibilities follows:

1. Resources and Analysis (AQCX) - Responsibility for contracting workforce and organizational structure is located in AQCX. This division will provide Air Force-wide contracting workforce career management for civilian, officer, and enlisted members. Duties include professional development, formal training, and education of the contracting workforce. The Resources and Analysis Division is also responsible for all Manpower and Organization issues impacting installation-level, weapon system, R&D, and other contracting units. The contingency contracting program has been added to this division. AQCX has been charged to build the analysis capability necessary for a systemic understanding of contracting workload, buying patterns and trends, contractor performance, and workforce trends and for contract reporting. In addition to all this, AQCX will conduct all conferences, manage the Contracting Squadron Commanders' Board process and manage the Contracting Awards Program. They also retain many traditional functions, such as POC for Protests and Congressional Inquiries.

2. Policy & Implementation Division (AQCP) - Responsibility for developing, writing, interpreting, and disseminating Air Force contracting policy has been consolidated into the Policy & Implementation Division. This includes all elements of the contracting mission--weapon system, R&D, installation-level, etc. Much of the portfolio remains the

same as "old 'P'," but they are tasked to determine the effectiveness and adequacy of current contracting policy through improved follow-up and accountability processes. Responsibility for Procurement Management Reviews (PMRs) is part of follow-up and accountability. Finally, the "Implementation" part signals intent for the division to focus on developing and deploying training and tools to implement contracting policy.

3. Contracting Operations Division (AQCK) - The Contracting Operations Division is responsible for providing direct contracting/acquisition support to all contracting organizations throughout the Air Force in the execution of their acquisition programs & contracts. This support will be provided to all MAJCOMS, Program Executive Officers (PEOs), Designated Acquisition Commanders (DACs), Direct Reporting Units (DRUs), and Field Operating Activities (FOAs). Two of "K's" teams provide field support: the PEO/DAC Support Team and the Installations & Logistics Support Team. These teams will use the "desk officer" concept. Each desk officer is responsible for a "portfolio" that's keyed to specific customers. Desk officers provide a single entry point within SAF/AQ for reviewing, processing, facilitating, and acquiring Secretariat-level approval for acquisition documents (Acquisition Plans, waivers, deviations, lease agreements, etc). Desk officers also provide advice on the execution of contractual actions not requiring Secretariat-level approval. But perhaps most important, desk officers provide an integrated view of all the issues affecting their portfolio, and bring the appropriate AQC and other Air Staff resources together to work your issues. The third team in SAF/AQCK, the Contracting Systems Support Team, will manage Air Force Contracting's information technology efforts, processes, training, funding, standardization, and execution.

4. Contracting Action Group (CAG) (AQCA) - This is a new change to SAF/AQC organizational structure. The CAG will have a staff of 2-3 officers/civilians who will work topics, issues, and customer concerns requiring intense, dedicated effort beyond existing division resources. They work directly for the Deputy Assistant Secretary (Contracting) and receive work assignments from the SAF/AQC Front Office.

Government Contracts Year in Review Highlights 2000

This conference highlights the trends and topics that punctuated federal procurement during the year. The section summarized below focuses on one of the most valuable sessions, "Ask GAO - Bid Protest Trends." Some of the trends may not seem new but, when GAO speaks, it is in our best interest to listen. Here are the GAO "theme songs", by topic area, extracted from the conference notes prepared by West Group.

1. Documentation of evaluation and source selection record
 - The rationale for a reasonable award decision depends on having that decision adequately documented. (*Future-Tec Management Systems Inc; Computer Hi-Tech Management, Inc., B-283793.5, B-283793.6*) --The requirement for adequate documentation extends to documentation for oral presentations (*J&J Maintenance Inc., B-284708*).
2. Evaluations and tradeoffs
 - Agencies must evaluate proposals in accordance with the terms of the solicitation See *ENMAX Corp., B-281965* where despite a failure to met requirements of terms in solicitation, the offeror was given a "pass" rating.
 - Agency reliance on purely mechanical/mathematical tradeoff method is problematic. See *Opti-Lite Optical, B-281693* in which the agency mechanically compared total proposal point scores but made no qualitative assessment of the

technical differences in proposal to determine if it was worth paying a premium for technically superior proposal.

3. Past Performance Evaluations
 - Downgrading an offerors past performance rating simply because the offeror filed claims or protests is impermissible. *Nova Group, Inc., B-282947 and AmClyde Engineering Prods. Corp. Inc., B-282271.*
 - “Same or Similar” past performance ratings and neutral ratings continue to be troublesome and determination of what is similar needs to be clearly conveyed. (*ACS Govern’t Solutions Group, Inc., B-282098 and National Aerospace Group Inc., B-281959*)
4. Cost Evaluations
 - Cost realism analyses continue to cause difficulties for evaluation teams. In one case, rates proposed were accepted as realistic even when significant less than rate approved by DCAA (*E.L.Hamm & Assocs. Inc., B-280766.3*). In another the evaluators accepted costs based on an unaudited summary of indirect rates as being realistic (*L-3 Communications Corp., Ocean Sys. Div.*).
 - Cost or price **must** be considered in the evaluation of competing proposals, including multiple-award IDIQ contracts. See *S.J. Thomas Co., Inc., B-283192* which highlights that consideration of proposed markups alone in IDIQ contract comparison does not necessarily indicate relative cost to government. Also see *Kathpal Techs., Inc.; Computer & Hi-Tech Management, Inc., B-283137.3 et al.* where agency improperly excluded technically acceptable proposals without considering price.
5. Competitive Ranges of one is permissible under FAR 15, *Clean Serv. Co., Inc., B-281141.3*
6. Discussions must be meaningful! In *Cotton & Co., LLP, B-282808* the agency failed to clearly identify deficiencies in either written or oral discussions and failed to respond when in oral discussions it became clear the protestor misunderstood the agency’s concerns.
7. Task and delivery orders must be within the scope of the contract (*Marko Janitorial Servs., Inc., B-282690 and Floro & Associates, B-285451.3, B-285451.4*)
8. GAO generally will not question an agency’s determination to implement Part 12 but will consider whether a requirement in a solicitation issued under Part 12 is consistent with customary commercial practice (*Smelkinson Sysco Food Servs., B-281631*)
9. Even in simplified acquisitions or schedule buy, agencies must treat vendors fairly and reasonably (*Universal Bldg. Maintenance Inc., B-282456*).
10. Purchases from Federal Supply Schedules must be: in accordance with the schedule limitations (*T-L-C Systems, B-285687.2; Pyxis Corp., B-284702*); be fair (*Sales Resource Consultants, Inc., B-284943*); follow the rules in the solicitation (*Computer Prods., Inc., B-284702*) and contain rationale for exclusion of an FSS vendor when a competition is conducted (*Delta Int’l Inc., B-284364.2*). In addition, in *T-L-C Systems, B-285687.2; Pyxis Corp., B-284702* GAO affirmed that items purchased under an order issued to an FSS vendor that are not listed on the schedule cannot exceed the micro-purchase threshold.
11. Bundling continues to be a concern and requires careful acquisition planning and market research to support anticipated benefits and or sales (*S&K Elecs., B-282167*).
12. Issues on A-76 constituted large part of docket for 2000. Problems included the following: fairness of cost comparison to apply same standard to MEO and to the private sector competitors (*Aberdeen Technical Servs., B-283727.2, Rice Servs., Ltd., B-284997; Trajen, Inc., B-284310, B-284310.2*); organizational conflicts of

interest (*IT Facility Servs.- Joint Venture, B-285841*) and re-emphasis that unions and employees of the MEO are not actual or prospective offerors and thus are not parties eligible to maintain a protest. (*American Fed'n of Gov't Employees, AFL-CIO et al., B-282904.2*)

13. Sole source awards need to be adequately justified as *really* being sole source (*National Aerospace Group, Inc., B-282843*).
14. Transmission of source selection material needs to be done with care. During the question/answer period GAO discussed their pilot program to provide an electronic means to send information related to bid protests. Currently, when the GAO attorney supporting the case permits electronic transmission, information that is not protected under FAR 3.104 can be sent via e-mail. They affirmed that, unless encrypted, e-mail cannot be used to transmit protected information of any sort.

PROTEST SUMMARIES Jump this website and then click on case you would like to read (<http://www.gao.gov/decisions/bidpro/bidpro.htm>) The follow provides a sampling of recent protest cases.

Newfield Construction, Inc., B-286912, February 6, 2001 – Missing line item price could not be determined. Agency improperly accepted bid that was actually nonresponsive because the bid, as submitted, precluded a determination of the exact nature of the error and the intended price for the omitted bid item. As a general rule, where, as here, an IFB provides that award will be made to the low aggregate bidder, a bid that fails to include a price for every item required by the IFB must be rejected as nonresponsive. (HH&K Builders, B-232140, Oct. 20, 1988, 88-2 CPD ¶ 379 at 2, recon. denied, B-232140.2, Nov. 30, 1988, 88-2 CPD ¶ 537). This rule reflects the legal principle that a bidder who has failed to submit a price for an item generally cannot be said to be obligated to furnish that item. (United Food Servs., B-218228.3, Dec. 30, 1985, 85-2 CPD ¶ 727 at 3). GAO held that the omission of a price for a certain line item may be corrected in the rare circumstance where the price for the omitted item can be determined from the initial bid submitted based upon the difference between the total bid price and the sum of the line item prices present on the face of the bid (which was not the case in this protest).

Inventory Accounting Service, B-286814, February 7, 2001 – requirements not considered restrictive where agency demonstrates reasonable basis for limitation. In solicitation for rental and maintenance of washers and dryers, requirement that, throughout contract term, machines be no more than 2 or 3 years old, is not unduly restrictive where, based on agency's experience, machines reaching these ages malfunction more frequently than newer machines. Here, the found that the Army demonstrated a reasonable basis for the age limitation and replacement requirements. Also focusing on the same topic is **Schering Corporation, B-286329.3; B-286329.4, February 2, 2001**

G & J Small Construction, Inc., B-286716, February 5, 2001 – difference in signatures not enough to reject bid. A bid containing signatures of the president that differed in appearance was improperly rejected where the agency failed to consider the post-bid-opening explanation of the bidder. In this case the president readily admitted that one the signatures was not his and explained that the individual who had brought the bid noticed that the president had not signed block 30B of the SF 1442 and telephoned the president to discuss what to do. The president went on to explain he informed the individual that, because he had power-of-attorney to sign for the president,

"he could sign [the president's] name on [the] contract." This explanation by the president was accompanied by a copy of the power-of-attorney and a statement from the president that the signatures "guarantee my intent to be bound to the contract." Despite this explanation, the agency rejected the bid.

Jackson Enterprises, B-286688, February 5, 2001 – Failure to acknowledge amendment may not be enough to render bid nonresponsive. Agency improperly rejected bid for failure to acknowledge amendment where amendment does not contain material information and does not alter bidders' legal obligations. An amendment is not material where it does not impose any legal obligations on the bidder different from those imposed by the original solicitation; that is, for example, where it merely clarifies an existing requirement or is a matter of form. See FAR 14.405 that states a bidder's failure to acknowledge an amendment that is not material is waivable as a minor informality. See **Christolow Fire Protection Systems, B-286585, January 12, 2001** for recent case in which failure to acknowledge a material amendment properly lead to rejection of offer as nonresponsive.

OSI Collection Services, Inc., B-286597; B-286597.2, January 17, 2001 – “Just say no to numbers” and document rationale for past performance assessment. Protests against award of federal supply schedule task order contracts for private collection agency services are sustained where the record shows that the contracting agency's evaluation of offerors' past performance, which largely relied upon a mechanical comparison of past performance scores for incumbent contractors, was unsupported and unreasonable. The contemporaneous evaluation documentation showed that the agency's past performance evaluation contained virtually no analysis of individual offerors' past performance. “To the extent the agency performed any qualitative analysis, it is not documented.” GAO states that point scores can only be aids in decision-making -- they must be used in a defensible way. In addition, GAO cited the agency's failure to review relevant performance data in its possession and to make reasoned judgments as to its value to arrive at an accurate assessment of each offeror's past performance.

Satellite Services, Inc., B-286508; B-286508.2, January 18, 2001 - evaluate in accordance with the criteria and document basis for best value decision. Protest that agency's source selection decision was unreasonable is sustained where the evaluation did not comport with the solicitation's evaluation criteria and the source selection decision failed to reasonably assess the significance of the technical differences (in particular, the substantial difference in the proposed level of effort) between the lower-rated proposal of the awardee and the higher-rated proposal of the protester.

Comprehensive Health Services, Inc., B-285048.3; B-285048.4; B-285048.5; B-285048.6, January 22, 2001 1. Agency determination that protester's proposal to hire incumbent contractor's employees to perform contract presented a risk to the agency was reasonable where protester did not furnish required letters of intent from proposed personnel, and protester proposed a lower salary and fewer benefits than the incumbent employer. 2. Best-value analysis was reasonable where agency fully considered the difference in awardee's and protester's proposed prices and determined that the additional benefits offered by the awardee were worth its higher price.