



GSA Office of Governmentwide Policy

8/14/2020

Class Deviation CD-2020-14

MEMORANDUM FOR GSA CONTRACTING ACTIVITIES

FROM:

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SUBJECT:

FAR Class Deviation - Enhancing Competition at the Order level for
 Certain Indefinite Delivery, Indefinite Quantity Multiple-Award
 Contracts

1. Purpose. This memorandum approves a class deviation from the Federal Acquisition Regulation (FAR) requirement to consider price as an evaluation factor for the award of certain indefinite delivery, indefinite quantity (IDIQ) multiple-award contracts and establishes the approval requirements for use of the authority.
2. Background. Section 876 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 ([Pub. L. 115-232](#)) amended [41 U.S.C. 3306\(c\)](#) for purposes of increasing competition at the task order level. The amendment to 41 U.S.C. 3306(c) provides executive agencies an exception to the requirement to consider price as an evaluation factor for award of certain IDIQ multiple-award contracts and certain Federal Supply Schedule (FSS) contracts for services acquired on an hourly rate basis. [FAR Case 2018-014](#) has been opened by the FAR Council to implement this statutory change in the FAR.

This class deviation implements only part of the authority provided in 41 U.S.C. 3306(c)(3). Specifically, this class deviation implements the exception related to the award of certain IDIQ multiple-award contracts for services acquired on an hourly rate basis. This class deviation does not implement the authority provided under 41 U.S.C. 3306(c)(3) for FSS contracts. The goal is to obtain insight into and understanding of the success drivers and impacts when using this authority to inform future rulemaking. The Senior Procurement Executive (SPE) is also issuing an Advanced Notice of Proposed Rulemaking (ANPR) in the Federal Register for purposes of gathering feedback from all stakeholders.

3. Applicability. This class deviation applies to all GSA contracting activities.
4. Limitations. This class deviation is limited to new acquisitions that are—
 - a. For the award of indefinite delivery, indefinite quantity (IDIQ) multiple-award contracts for services that will be acquired on an hourly rate basis; and
 - b. Approved by the SPE.

5. Condition. To be eligible for consideration by the SPE, the predominant amount of the acquisition must be for services that will be acquired on an hourly rate basis.
6. Instructions.
 - a. The SPE will coordinate with the Services to identify acquisitions that could benefit from the use of the authority as authorized under this class deviation.
 - b. Contracting activities shall submit requests in accordance with GSAM 504.7104 and Service-level policy.
7. Authority. This class deviation is issued under the authority of FAR 1.404 and GSAM 501.404. This class deviation is issued following consultation with the Chair of the Civilian Agency Acquisition Council (CAAC) in accordance with FAR 1.404(a) and GSAM 501.404(a).
8. Deviation. See Attachment A for the Line-In/Line-Out FAR text as being amended by this class deviation. The following is a summary:
 - a. Amending FAR 4.1005-2(a)(2) to add an exception for these actions;
 - b. Amending FAR 13.106-1 and 15.304 to add citations to FAR 16.501-3; and
 - c. Amending FAR subpart 16.5 to implement the exception provided by 41 U.S.C. 3306(c)(3) for certain IDIQ multiple-award contracts.
 - d. Amending FAR 16.601(c) to add order for purposes of specifying fixed hourly rates.
9. Effective Date. This class deviation is effective upon signature and remains in effect until rescinded, amended, or otherwise incorporated into the FAR or GSAR.
10. Cancellations. Not applicable.
11. Additional information. Additional information about this class deviation will be made available on GSA's Acquisition Portal at <https://insite.gsa.gov/acquisitionportal>.
12. Point of Contact. Questions regarding this class deviation may be directed to GSARPolicy@gsa.gov.

Attachments

Attachment A - FAR Deviation Line-In/Line-Out Text

Attachment B - Excerpt of 41 U.S.C. 3306(c)

**ATTACHMENT A
FAR DEVIATION LINE-IN/LINE-OUT TEXT
FOR CLASS DEVIATION CD-2020-14**

FAR Baseline: FAC 2020-08 published on 08/13/2020

- Additions to baseline made by deviation are indicated by [bold text in brackets]
- Deletions to baseline made by deviation are indicated by ~~strikethroughs~~
- Five asterisks (*****) indicate that there are no revisions between the preceding and following parts, subparts, or sections
- Three asterisks (***) indicate that there are no revisions between the material shown within a section or subsection

PART 4—ADMINISTRATIVE AND INFORMATION MATTERS

Subpart 4.10 - Uniform Use of Line Items

4.1005–2 Exceptions.

(a) ***

(2) *Indefinite-delivery indefinite-quantity (IDIQ) and requirements contracts.* (i) IDIQ and requirements contracts may omit the quantity at the line item level for the base award provided that the total contract minimum and maximum, or the estimate, respectively, is stated.

~~(ii) Multiple-award IDIQ contracts awarded using the procedures at 13.106-1(a)(2)(iv)(A) or 15.304(c)(1)(ii)(A) may omit price or cost at the line item or subline item level for the contract award, provided that the total contract minimum and maximum is stated (see 16.504(a)(1)).~~

[(ii) Multiple-award IDIQ contracts awarded using the price evaluation exception provided at 16.501-3 may omit price or cost at the line item or subline item level for the contract award.]

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

Subpart 13.1—Procedures

13.106 Soliciting competition, evaluation of quotations or offers, award and documentation.

13.106-1 Soliciting competition.

(a) * * *

(2)(i) When soliciting quotations or offers, the contracting officer shall notify potential quoters or offerors of the basis on which award will be made (price alone or price and other factors, e.g., past performance and quality). **[See 16.501-3 for an exception to the consideration of price as an evaluation factor when awarding certain indefinite-delivery, indefinite-quantity multiple-award contracts.]**

(ii) Contracting officers are encouraged to use best value.

(iii) Solicitations are not required to state the relative importance assigned to each evaluation factor and subfactor, nor are they required to include subfactors.

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PART 15—CONTRACTING BY NEGOTIATION

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Subpart 15.3—Source Selection

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15.304 Evaluation factors and significant subfactors.

* * *

(c) The evaluation factors and significant subfactors that apply to an acquisition and their relative importance are within the broad discretion of agency acquisition officials, subject to the following requirements:

(1)(i) Price or cost to the Government shall be evaluated in every source selection (10 U.S.C. 2305(a)(3)(A)(ii) and 41 U.S.C. 3306(c)(1)(B)) (also see part 36 for architect-engineer contracts), subject to the exception **[provided in 16.501-3 and the exception]** listed in paragraph (c)(1)(ii)(A) of this section for use by DoD, NASA, and the Coast Guard.

* * *

(e) Unless the exception at paragraph (c)(1)(ii)(A) **[or the exception at paragraph (c)(1)(i)]** of this section applies, the solicitation shall also state, at a minimum, whether all evaluation factors other than cost or price, when combined, are—

(1) Significantly more important than cost or price;

(2) Approximately equal to cost or price; or

(3) Significantly less important than cost or price (10 U.S.C. 2305(a)(3)(A)(iii) and 41 U.S.C. 3306(c)(1)(C)).

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PART 16—TYPES OF CONTRACTS

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Subpart 16.5—Indefinite-Delivery Contracts

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16.501-2 General.

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(c) Indefinite-delivery contracts may provide for any appropriate cost or pricing arrangement under part 16. Cost or pricing arrangements that provide for an estimated quantity of supplies or services (e.g., estimated number of labor hours) must comply with the appropriate procedures of this subpart. **[Cost or pricing arrangements may be established at the order level for certain indefinite-delivery, indefinite-quantity multiple-award contracts, see 16.501-3.]**

* * * * *

[16.501-3 Exception to consideration of price as an evaluation factor.

(a) **General.** A contracting officer need not consider price as an evaluation factor for award as required by 13.106-1(a)(2) and 15.304(c)(1) when all of the following conditions exist—

(1) The solicitation is to establish multiple-award indefinite-delivery, indefinite-quantity contracts for services to be acquired on an hourly rate basis;

(2) The solicitation states the Government intends to make award to each qualifying offeror and defines the criteria for what constitutes a qualifying offeror;

(3) The resultant contracts will feature individually competed task or delivery orders based on hourly rates; and

(4) Cost or price shall be considered in conjunction with the issuance of any task or delivery order issued under any contract resulting from the solicitation (see 16.505(b)).

(b) **Definition.** As used in paragraph (a)(2) of this subsection, the term "qualifying offeror" means an offeror that meets all of the following criteria—

(1) Is determined to be a responsible source;

(2) Submits a proposal that conforms to the requirements of the solicitation;

(3) Meets all technical requirements; and

(4) Is otherwise eligible for award.

(c) **Solicitation requirements.** The contracting officer shall include the following content within the solicitation:

(1) The definition provided in paragraph (b) of this subsection;

(2) A statement that the Government intends to make an award to each qualifying offeror; and

(3) Language describing in additional detail each of the four criteria that constitutes a qualifying offeror, such as—

(i) The Government's basis for determining responsibility (e.g., FAR subpart 9.1);

(ii) The requirements of the solicitation to which an offeror must conform;

(iii) All the technical requirements that an offer must meet; and

(iv) Any other requirements for being eligible for award (e.g., an offeror must be in top 45 rated offerors).

(d) **Pricing orders.** When pricing for services to be acquired on an hourly rate basis is not established by the contract and the resultant order is to include such pricing, the ordering activity contracting officer shall—

(1) Evaluate all quotes or offers received using the evaluation criteria provided to the offerors, considering the level of effort and the mix of labor proposed to perform the services being ordered; and

(2) Make a determination of fair and reasonable price concerning the services being acquired on an hourly rate basis.

(e) Exceptions to the fair opportunity process. This subsection does not prohibit the use of the exceptions to the fair opportunity process described in 16.505(b)(2).]

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16.505 Ordering.

* * *

(b) Orders under multiple-award contracts— * * *

(2) Exceptions to the fair opportunity process. [When pricing for services to be acquired on an hourly rate basis is not established by the contract, see 16.501-3(c).]

* * *

(3) Pricing orders. If the contract did not establish the price for the supply or service, the contracting officer must establish prices for each order using the policies and methods in subpart 15.4. **[See also 16.501-3(c) if the order includes services to be acquired on an hourly rate basis and pricing was not established by the contract.]**

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16.601 Time-and-materials contracts.

* * *

(c) Application. * * *

(2) Fixed hourly rates.

(i) The contract **[or order]** shall specify separate fixed hourly rates that include wages, overhead, general and administrative expenses, and profit for each category of labor (see 16.601(f)(1)).

(ii) For acquisitions of noncommercial items awarded without adequate price competition (see 15.403-1(c)(1)), the contract **[or order]** shall specify separate fixed hourly rates that include wages, overhead, general and administrative expenses, and profit for each category of labor to be performed by— * * *

* * * * *

**ATTACHMENT B
EXCERPT OF 41 U.S.C. 3306(c)**

§3306. Planning and solicitation requirements

“(c) Evaluation Factors.-

(1) In general.-In prescribing the evaluation factors to be included in each solicitation for competitive proposals, an executive agency shall-

(A) establish clearly the relative importance assigned to the evaluation factors and subfactors, including the quality of the product or services to be provided (including technical capability, management capability, prior experience, and past performance of the offeror);

(B) except as provided in paragraph (3), include cost or price to the Federal Government as an evaluation factor that must be considered in the evaluation of proposals; and

(C) except as provided in paragraph (3), disclose to offerors whether all evaluation factors other than cost or price, when combined, are-

- (i) significantly more important than cost or price;
- (ii) approximately equal in importance to cost or price; or
- (iii) significantly less important than cost or price.

(2) Restriction on implementing regulations.-Regulations implementing paragraph (1)(C) may not define the terms "significantly more important" and "significantly less important" as specific numeric weights that would be applied uniformly to all solicitations or a class of solicitations.

(3) Exceptions for certain indefinite delivery, indefinite quantity multiple-award contracts and certain federal supply schedule contracts for services acquired on an hourly rate.-If an executive agency issues a solicitation for one or more contracts for services to be acquired on an hourly rate basis under the authority of sections 4103 and 4106 of this title or section 152(3) of this title and section 501(b) of title 40 and the executive agency intends to make a contract award to each qualifying offeror and the contract or contracts will feature individually competed task or delivery orders based on hourly rates-

(A) the contracting officer need not consider price as an evaluation factor for contract award; and

(B) if, pursuant to subparagraph (A), price is not considered as an evaluation factor for contract award, cost or price to the Federal Government shall be considered in conjunction with the issuance pursuant to sections 4106(c) and 152(3) of this title of any task or delivery order under any contract resulting from the solicitation.

(4) Definition.-In paragraph (3), the term "qualifying offeror" means an offeror that-

- (A) is determined to be a responsible source;
- (B) submits a proposal that conforms to the requirements of the solicitation;
- (C) meets all technical requirements; and
- (D) is otherwise eligible for award."