VIA EMAIL AND REGULATORY PORTAL

Defense Acquisition Regulations System
Attn: Ms. Amy Williams
OUSD (AT&L), DPAP (DARS)
Room 3B855
3060 Defense Pentagon
Washington, D.C. 20301-3060


October 7, 2011

Dear Sir or Madam:

On behalf of the Section of Public Contract Law of the American Bar Association (the “Section”), I am submitting comments on the above Proposed Rulemaking: Defense Federal Acquisition Regulation Supplement; Only One Offer (hereafter “Proposed Rule”). The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section’s governing Council and substantive committees have members representing these three segments, to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.¹

The Section is authorized to submit comments on acquisition regulations under special authority granted by the Association’s Board of Governors. 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.²

¹ The Honorable Thomas C. Wheeler, a member of the Section’s Council, and Sharon L. Larkin, the Section Vice-Chair, did not participate in the Section’s consideration of these comments and abstained from the voting to approve and send this letter.

² This letter is available in pdf format under the topic “Acquisition Reform and Emerging Issues” at: http://apps.americanbar.org/contract/federal/regscomm/home.html.
The Proposed Rule implements initiatives presented by the Under Secretary of Defense for Acquisition, Technology, & Logistics, in September and November, 2010, and further implemented by memoranda from the Director, Defense Procurement and Acquisition Policy, dated November 24, 2010, and April 27, 2011. The Section commends the Department of Defense (“DoD”) for proposing rules aimed to promote competition and to reduce the instances when only one offer is received in response to a competitive solicitation. The Section fully endorses the Proposed Rule’s extension of solicitation periods, encouragement of revised statements of work in appropriate circumstances, and provision of enhanced notice of acquisitions to potential contractors. Amending solicitations and the rules under which they operate has proven to reduce market-entry barriers for would-be competitors, and will have the greatest impact in terms of increasing competition and reducing instances of receiving only one offer.

The Section submits these comments to express reservations regarding one of the Proposed Rule’s methods of ensuring competitive pricing after a single offer is received. Currently, the FAR provides agencies with discretion to determine that adequate price competition exists when only one offer is received if there is an expectation that more than one offer will be generated. The Proposed Rule establishes a “stricter” approach to ensure adequate competition by presuming that adequate competition can never be found upon receipt of a single offer after solicitations of 30 days or more without obtaining additional data from the offeror to establish price reasonableness. Although obtaining insight into some single offer procurements may be appropriate, we believe that this goal also could be achieved by better enforcement of existing rules that encourage contracting officers to determine the circumstances under which single offers should be examined against the backdrop of cost or pricing data. By contrast, requiring contractors to provide and contracting officers to evaluate cost or pricing data for nearly all single offers that exceed the simplified acquisition threshold may have the unintended effect of increasing prices, driving away competitors, and thus increasing the number of single offers received. The potential adverse effects of the Proposed Rule will be most apparent with respect to commercial and low-dollar contracts sought by small businesses, which are not exempt from the Proposed Rule. Moreover, the Proposed Rule potentially conflicts with underlying legislation and regulation that prohibit requesting cost or pricing data in certain circumstances. Accordingly, we recommend that DoD study this issue further, including consulting with industry and experts. Alternatively, if DoD pursues promulgation of a rule on this topic, we recommend that DoD exempt procurements for commercial items and services and contracts for under $10,000,000.
I. COMMENTS

The Proposed Rule adds a new section entitled “Only One Offer” in Part 215 – Contracting By Negotiation, at DFARS 215.371. 76 Fed. Reg. 44296. DoD’s stated policy is “that the circumstance of ‘reasonable expectation that two or more offerors, competing independently, would submit priced offers,’ as further described at FAR 15.403-1(c)(1)(ii), does not constitute adequate price competition if only one offer is received.”

FAR 15.403-1(c)(1)(ii) provides that a price may be based on adequate price competition where “[t]here was a reasonable expectation, based on market research that two or more responsible offerors, competing independently, would submit priced offers in response to the solicitation’s expressed requirement, even though only one offer is received from a responsible offeror.” Whether there was a reasonable expectation of submission of more than one offer depends upon whether the offeror believed another offeror was capable of and intended to submit an offer. The contracting officer must also reasonably conclude that the offer was submitted with the expectation of competition and his or her decision has to be approved. FAR 15.403-1(c)(1)(ii)(A)-(B). Adequate price competition may also be found where “price analysis clearly demonstrates that the proposal price is reasonable in comparison with current or recent prices for the same or similar items . . . .” FAR 15.403-1(c)(1)(iii). Finally, where the goods or services are commercial, the regulations prohibit the contracting officer from requiring the submission of certified cost or pricing data. FAR 15.403-1(b)(3).

The Proposed Rule clarifies that, in contrast to the FAR, “additional cost or pricing data may be required if the contracting officer only receives one offer, when two or more offers were expected.” DFARS 215.371(b); 76 Fed. Reg. 44296. Unless an exception or waiver applies, the Proposed Rule directs contracting officers to notify potential offerors that they may be subject to submitting certified cost or pricing data or data other than certified cost or pricing data, and to determine what cost or pricing data may be required if only one offer is received.

The Proposed Rule states that if only one offer is received following a solicitation of less than 30 days, the contracting officer must resolicit for a minimum of an additional 30 days and consult with the requiring activity as to whether the statement of work should be revised in order to promote more competition. 76 Fed. Reg. 44296. If the solicitation already allowed 30 days for receipt of proposals, unless a waiver or exception applies, the contracting officer shall “obtain from the offeror any data necessary to establish a fair and reasonable price” and “determine through cost or price analysis, as appropriate, that the offered prices are fair and reasonable or enter into negotiations with the offeror.” Id., at proposed DFARS 215.371(c)(2). If the contracting officer decides to enter
negotiations, the negotiated price should not exceed the offered price. *Id.* at proposed DFARS 215.371(c)(2)(ii).

Two solicitation provisions – Notice of Intent to Resolicit and Only One Offer – are to be used in competitive solicitations open for less than 30 days, and all competitive solicitations, respectively, unless these requirements are waived or an exception applies. The waiver provision for single offers only applies to resolicitation, not the collection of cost or pricing data. 76 Fed. Reg. 44296, at proposed DFARS 215.371(d). Exceptions to the Proposed Rule include acquisitions at or below the simplified acquisition threshold or those in support of contingency, humanitarian or peacekeeping operation, or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack. 76 Fed. Reg. 44296, at proposed DFARS 215.371 (e).

A. **The Section Agrees That Allowing Ample Time for Receipt of Proposals and Reconsideration of Statements of Work Will Promote Competition And Reduce Instances Of Only One Offer.**

The Section agrees that by extending solicitation periods, encouraging revised statements of work in appropriate circumstances, and providing enhanced notice of acquisitions to potential contractors will likely result in a reduction of single offers and is in favor of these proposed DFARS revisions. These changes have all been recommended or sanctioned by a host of studies over the past several years. In 2007, an Acquisition Advisory (SARA) panel report discussed methods to encourage competition and focused on longer solicitations, as well as improved requirements generation and market research/industry communication.³ In 2008, the Office of Management and Budget (OMB) and Office of Federal Procurement Policy (OFPP) issued a memo detailing agencies efforts’ to improve competition where only one offer was received to assist the promulgation of these steps for use by the broader acquisition community.⁴ These steps likewise focused on pre-solicitation efforts, such as limiting contract length, minimizing unique or brand name specifications, and enhancing acquisition planning. Finally, in 2010, the Government Accountability Office (GAO) studied reasons why only one offer is received and concluded several factors, including a strong incumbent, restrictive government requirements and/or bundling of requirements into larger acquisitions all contributed.⁵ The report recommended an enhanced role of the agency

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⁴ Effective Practices for Enhancing Competition, OMB-OFPP memo to Chief Acquisition Officers, Senior Procurement Executives and Agency Competition Advocates, July 18, 2008.

⁵ GAO, Report to the Committee on Oversight and Government Reform, House of Representatives, Federal Contracting: Opportunities Exist To Increase Competition and Assess Reasons When Only One Offer Is Received, GAO-10-833, July 2010, at 18, 25-28.
competition advocate to assist the agency in improving requirements definitions and adding time to the solicitation process.

Amending solicitations and the rules under which they operate has proven to reduce market-entry barriers for would-be competitors, and will have the greatest impact in terms of increasing competition and reducing instances of receiving only one offer. Therefore, the Section commends DoD on these aspects of the Proposed Rule.

B. **The Section Recommends that DoD Reevaluate Those Aspects of the Proposed Rule That Preclude A Finding of Adequate Price Competition When Only One Offer Is Received Despite The Expectation of Multiple Offers.**

The Section has reservations about the Proposed Rule’s apparent elimination of agency discretion to find adequate price competition when a single offer is received following the expectation of multiple offers. In particular, we are concerned that DoD’s proposed approach could have negative consequences – such as increased prices, reduced competition, and even a rise in the number of single offers received – that outweigh the benefits. These potential negative consequences may be most apparent with respect to commercial and low-dollar contracts sought by small businesses, which are not exempt from the Proposed Rule. Because the FAR does not reflect the same proposed approach, there is also a risk of confusion within the acquisition community. Moreover, DoD’s approach may conflict with underlying legislation and regulation that prohibit requesting cost or pricing data in certain circumstances. See 10 U.S.C. § 2306a(b) and (c)(2); 41 U.S.C. § 3504(b). For these reasons, the Section urges DoD to reconsider the portions of the Proposed Rule that redefine adequate price competition to exclude instances of single offers when more than one offer is anticipated.

1. **The Section Recommends That DoD Consult Existing Studies, and Consider Performing a Cost/Benefit Analysis Before Finalizing the Proposed Rule**

Several groups have recently studied methods of obtaining a greater level of competition in situations where only one offer is received in a competitive solicitation. These studies, discussed below, were generally in favor of pre-solicitation efforts, such as enhancing acquisition planning, limiting contract length, breaking apart bundled requirements, minimizing unique or brand name specifications, and using a competition advocate to reduce the number of single offers resulting from competitive solicitations. None of the studies recommended removing the discretion contracting officers currently have in finding adequate price competition when only one offer is received and more than one offer is anticipated.
In July 2010, the GAO reported that instances of receipt of only one offer have remained a flat 13 percent from 2005 to 2009, and cautioned that “recent congressional actions to strengthen competition opportunities in major defense programs may take some time to demonstrate results.”\(^6\) The GAO concluded that key action items to improving competition include:

establishing an effective, adequately trained team of contracting and program staff working together, starting early in the acquisition process. Competition opportunities should be considered when requirements are initially developed, and as complex programs mature and the government gains more knowledge about what it needs.\(^7\)

Although the GAO also recommended consideration of a FAR amendment to encourage competition, it did not suggest elimination of the discretion to find adequate price competition when a single offer is received. Instead, it suggested a requirement that agencies review and evaluate the circumstances leading to only one offer being received for recurring or other requirements and to identify additional steps that could be taken to increase the likelihood that multiple offers will be submitted, with results to be documented in the contract file. GAO thus advocated for an individualized analysis of single offers based on the requirements requested. This approach contrasts with the broad-brush approach adopted by DoD that would require all single offers to be re-examined under the assumption they are noncompetitive. GAO’s focus on pre-solicitation, case-by-case focus is also demonstrated within its recommendation for an enhanced role for the competition advocate, who could work with program offices to highlight opportunities to increase competition before solicitations are released.

The Proposed Rule does not indicate whether DoD has conducted its own studies to determine the best means to reduce the number of single offers received and to ensure that prices in single offers are competitive. Nevertheless, in 2009, DoD recognized:

\[T\]he receipt of a single offer does not necessarily indicate a lack of competition. Contractors have limited resources available for preparing bids and proposals, forcing firms to be selective in choosing what they bid on. Firms choose to bid on projects when they think they have a competitive advantage. So, to the extent that a firm expects others to bid on the same projects, the benefits

\(^6\) Supra, note 6 at 43.

\(^7\) Id.
of competition are being realized even if only one bid is actually received.\textsuperscript{8}

The Section recommends that DoD conduct studies, if it has not already done so, on whether the Proposed Rule’s approach will achieve the anticipated benefits when only one offer is received, but more than one offer is anticipated. Additional study may allow DoD to avoid revising the DFARS in a manner that could have the unintended consequences of increasing costs for a wide range of contracts to the detriment of its stated goal of increasing competition.

C. \textbf{The Section Recommends that DoD Consider the Potential Negative Consequences of Requiring Cost or Price Analysis for Single Offers Received Following An Expectation of Competition}

As DoD recognized as recently as 2009, the receipt of a single offer does not necessarily indicate a lack of competition. Nevertheless, the Proposed Rule eliminates any discretion a contracting officer has to find adequate price competition upon receipt of only one offer when more than one offer is anticipated, without additional data or negotiation with that offeror. The rationale for the Proposed Rule’s different approach is that agencies can gain more savings from a single-bid negotiation with contractors, based on cost or pricing data, than can be gained from the expectation of competition.\textsuperscript{9} We believe, however, that long-standing policy underlying numerous statutes and regulations promoting competitive acquisition demonstrate that the costs associated with issuing a competitive solicitation are offset by the lower price offered by the companies competing, which rationally lower their bids as much as possible in order to secure the contract. Competition, not negotiation, has long been viewed as the most effective means to obtain cost savings. See, e.g., The Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 3301; 10 U.S.C. § 2304.

The Proposed Rule may also create more burden on procurement professionals and contractors that are not commensurate with the benefits anticipated. The FAR provides that contracting officers shall obtain the type and quality of data necessary to establish a fair and reasonable price, “but not more data than is necessary” FAR 15.402(a)(3). The FAR cautions that “[r]equesting unnecessary data can lead to increased proposal preparation costs, generally extend acquisition lead time, and consume additional contractor and Government


recourses.” *Id.* We endorse the FAR’s balanced approach and recommend that DoD refrain from deviating from this approach and potentially creating the increased proposal costs, acquisition lead times, and burdens that the FAR seeks to avoid.

The Proposed Rule also will affect a significant number of procurements. According to the Proposed Rule, there were 71,369 competitive awards valued above the simplified acquisition threshold. Of those, 27 percent, or 19,366, resulted in only one offer, and of those, 5,148 came from small business. In fiscal year 2009, DoD’s *2009 Competition Report* estimated that 20 percent of all DoD competitive contract actions resulted in the receipt of only one offer, a number comparable to civilian agencies.\(^1\)\(^\text{10}\) Given the number of procurements and small businesses (over 25 percent of single bid offerors) that will be impacted by the Proposed Rule, we recommend that DoD consider additional analysis of the possible impact on the contracting community and DoD.

Moreover, the Proposed Rule may discourage companies, especially nontraditional suppliers, from submitting offers because of the uncertainty at the time of offer as to whether cost or pricing data later will be required, imposing an unanticipated burden of gathering such data. In particular, small businesses, which may lack the resources to provide cost or pricing data in these procurements, may be disproportionately impacted. Consequently, it is possible that the Proposed Rule could discourage contractors from pursuing contracts with DoD, resulting in less, not more, competition, and a greater number of single offers. Indeed, as DoD has recognized, “ununnecessarily requiring the submission of cost or pricing data is not in the best interests of the Department of Defense because it leads to increased proposal preparation costs, extends procurement lead-times, and wastes both contractor and government resources.”\(^1\)\(^\text{11}\)

Although the Section recommends that DoD conduct further analysis regarding adequate price competition when only one offer is received and more than one offer is anticipated, if DoD proceeds, we recommend that DoD exempt procurements for commercial items and services, discussed further below, and contracts valued at under $10,000,000. By doing so, DoD would be appropriately


\(^{11}\) Memorandum re Adequate Price Competition, Dep. Ass. Sec. of Defense for Procurement Eleanor R. Spector (May 1, 1987) ; see also Memorandum re Competition and Profit Policy for Negotiated Contracts, Ass. Sec. of the Navy (Shipbuilding and Logistics) Everett Pyatt (April 10, 1987) (“Placing emphasis on the use of market forces, as opposed to negotiation, creates opportunities for realizing important savings in time and effort by streamlining our procurement procedures … When the contracting officer has a reasonable expectation that adequate price competition will be achieved, the solicitation shall not require the submission of cost or pricing data.”).
narrowing the scope of its Proposed Rule to those contracts that might return the highest level of benefit from the burdens imposed by submission of cost or pricing data and negotiation.

In the case of commercial contracts, competitive pricing often can be verified without resort to additional data from the contractor, which is one rationale for rules and underlying legislation that prohibit requesting certified cost or pricing data for commercial contracts. See 10 U.S.C. § 2306a(b) and (c)(2); 41 U.S.C. § 3504(b). In the case of establishing a higher threshold for the Proposed Rule’s application to non-commercial solicitations, it is reasonable to conclude that the lower the dollar amount of the contract, the less potential savings there are to be gleaned from negotiation following expected competition. Thus, for lower value procurements, the burden and costs associated with submission of cost or pricing data and negotiation, for both contractors or acquisition professionals, may not be worth the potential benefits. By limiting the scope of the proposed rule to contracts for $10,000,000 or more, the Proposed Rule would reduce the risk of exceeding the potential savings obtained from negotiation of full cost or pricing data.

D. **The Proposed Rule Should Be Clarified To Ensure That Any Request For Certified Cost Or Pricing Data Complies With Existing Law.**

As discussed above, we recommend that DoD clarify the Proposed Rule to exempt procurements for commercial items and services, if it proceeds with a rule regarding situations in which only one offer is received. Exempting these types of procurements appropriately narrows the scope of the Proposed Rule.
In particular, narrowing the scope of the Proposed Rule is consistent with existing regulations and statutes. For example, the FAR provides that agencies should not require the submission of certified cost or pricing data to support any action – contract, subcontract, or modification – where: (1) the price is based on adequate price competition; (2) prices are set by law or regulations; (3) a commercial item is being acquired;\(^{12}\) or (4) a where a waiver has been granted. FAR 15.403-1(b). Although agencies formerly had discretion to require certified cost or pricing data where an exception applied, the Federal Acquisition Streamlining Act and the Clinger-Cohen Act amendments to the Truth in Negotiations Act removed this discretion. See Pub. L. Nos. 103-355, § 1202, 108 Stat. 3274 (1994); Pub. L. No. 104-106, Div. D, Title XLII, § 4201, 110 Stat. 649 (1996); see H.R. Rep. No. 103-712, at 187 (1994) reprinted in 1994 U.S.C.C.A.N. 2617 (“Under the conference agreement, an agency would be prohibited from requiring the submission of full, certified cost or pricing data where one of the statutory exemptions applies”).

Agencies are now statutorily prohibited from requiring certified cost or pricing data where any exception applies. See 10 U.S.C. § 2306a(c)(2); 41 U.S.C. § 3504(b) (“[t]he head of the procuring activity may not require certified cost or pricing data to be submitted under this paragraph for any contract or subcontract, or modification of a contract or subcontract, covered by the exceptions . . . .”). Where an agency has determined that adequate price competition exists or the procurement is for a commercial item, determinations made prior to issuance of a solicitation “based on market research or other assessment,” the prohibition against obtaining cost or pricing data is stated in 10 U.S.C. § 2306a(b): “Submission of certified cost or pricing data shall not be required in the case of a contract, a subcontract, or modification of a contract or subcontract . . . (A) for which the price agreed upon is based on . . . adequate price competition; or . . . (B) for the acquisition of a commercial item.”

The Section recommends that if DoD does not adopt the Section’s recommendation to study the potential advantages and disadvantages of the Proposed Rule further, DoD should clarify the Proposed Rule to ensure that contracting officers do not request certified cost or pricing data in cases where the law does not permit agencies to request such data. Specifically, we recommend that DoD revise the Proposed Rule to exempt procurements for commercial items and services.

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\(^{12}\) While the general prohibition against collection of cost or pricing data for commercial items is applicable to acquisitions by DoD, NASA, and the Coast Guard, the prohibition does not apply to certain modifications of commercial items pursuant to FAR 15.403-1(c).
II. CONCLUSION

The Section again commends DoD for those aspects of the Proposed Rule that extend solicitation periods, encourage revised statements of work in appropriate circumstances, and provide enhanced notice of acquisitions to potential contractors in an effort to improve competition. We recommend that DoD consider further study to assess the best means of encouraging requests for cost or pricing data upon receipt of single offers and to avoid the potential negative consequences outlined in our comments. If DoD proceeds with rules concerning this acquisition scenario, we recommend that DoD exempt from the Proposed Rule procurements commercial items and services and for contracts valued at under $10,000,000.

The Section is available to provide additional information and assistance as you may require.

Sincerely,

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