On October 7, 1996, the Section submitted comments to the General Services Administration regarding its proposed rule for competitive range determinations. The Section encouraged continued use of draft RFPs, presolicitation conferences and other initiatives to discuss the government's requirements with prospective offerors in advance of the closing date.

The Section recommended that the proposed regulation be revised to state that the determination of the number of offerors to be included in the competitive range cannot be made until after an initial evaluation of all offers in accordance with the solicitation criteria. By limiting the competitive range in advance, the proposed rule violates FAR's requirement that the contracting officer include in the competitive range the greatest number of proposals rated most highly. The Section also suggested that the proposed regulation be revised to state that the competitive range may not be limited solely for considerations relating to available agency resources or efficiency.

The Section further recommended that given the proposed changes to the competitive range regulations making it more likely that a competitive offeror will be excluded, the government should conduct prompt debriefings for excluded offerors.

October 7, 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.

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.

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 FAR 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.

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. 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.

"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 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.

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, 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)(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 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)(i)," 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)(i), 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 FAR, which mandates inclusion of the offerors "rated most highly."[1] 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 been evaluated is consistent with the language of FAR 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.
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 FAR. 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.

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.

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.

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.

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

Sincerely,

John T. Kuelbs
Chair, Section of Public Contract Law
Competitive Range Determinations

cc: Marcia G. Madsen  
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ENDNOTES

1. 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 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, 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
Competitive Range Determinations

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 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 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.

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