Exception to Requirements for Certified Cost or Pricing Data

On October 7, 1996, the Section submitted comments to the General Services Administration addressing its proposed rule regarding an exception to the requirement for certified cost or pricing data under contracts for commercial items. The Section noted that the proposed rule generally implemented the requirements of the Federal Acquisition Reform Act of 1996.

The Section offered several specific suggestions and recommendations to improve the proposed rule. First, the Section suggested that the reference to "cost information" as "information other than cost or pricing data" be deleted from section 15.802(a)(2)(ii). Second, the Section expressed concern regarding requiring a contracting officer to make a determination about the subjective beliefs of an offeror concerning the expectation of adequate price competition. Finally, the Section recommended retention rather than deletion of certain language concerning representations in requests for exceptions in sections 52.512-41 and 52.215-42.

1100 Wilson Blvd.
Suite 2000
Arlington, VA 22209-2249
(703) 284-4355
(703) 525-6598 - Fax

October 7, 1996

Mr. Jeremy Olson
General Services Administration
FAR Secretariat (MVRS)
18th & F Streets, N.W.
Room 4037
Washington, D.C. 20405


Dear Mr. Olson:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced matter. The 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 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.

The Section is pleased to offer the following comments and suggestions concerning the Proposed Rule in
FAR Case No. 96-306 for the implementation of changes in the exceptions to the Truth In Negotiations Act
("TINA") that were included in Section 4201 of Division D of the National Defense Authorization Act for
Fiscal Year 1996, Pub. L. 104-106 -- known as the Federal Acquisition Reform Act of 1996 ("FARA").

Implementation of FARA

The Section notes that the Proposed Rule correctly implements the significant changes to the cost or
pricing data regulations that are required by FARA. First, the Proposed Rule implements the clarification by
Congress that the commercial item exception is "co-equal" with the exceptions for "adequate price
competition" and "prices set by law or regulation." The statutory exception stated as applying to "the
acquisition of a commercial item" (10 U.S.C. 2306a(b)(1)(A); 41 U.S.C. 254b(b)(1)(A)) is implemented at
proposed 15.804-1(a)(2) and (b)(3).

Moreover, the Proposed Rule would eliminate the confusion in current 15.804-1(a)(4) regarding contract
modifications. This provision currently states that the cost or pricing data requirement will be inapplicable
for modifications to contracts for "commercial items" if the initial contract was awarded under one of the
three exceptions under existing 15.804-1(a)(1). This result is not required by the statute and is clearly at
odds with the mandate to encourage commercial item contracting. Therefore, the Section agrees with the
proposed correction to 15.804-1(a)(4); that a contract that was initially exempt as a contract for a
commercial item would continue to be exempt unless the contract is changed to a contract for the
acquisition of other than a commercial item.

Second, the Proposed Rule implements the elimination of the TINA exception for "established catalog or
market prices of commercial items;" which has been superseded by the broader TINA exception for
"commercial items." 10 U.S.C. 2306a(b)(1)(A); 41 U.S.C. 254b(b)(1)(A). Thus, the Proposed Rule correctly
deletes the provisions relating to the established catalog or market price exception at existing 15.804-
1(a)(1) and (b)(2), and the references to that exception at 15.812-1, 52.215-41 and 52.215-42 are properly
converted to references and guidance applicable to commercial items.

Third, the Proposed Rule implements the provisions of FARA that substantially curtailed the TINA
requirements with respect to submission of information other than cost or pricing data. Proposed 15.804-
5(a)(2) correctly reflects the statutory provisions at 10 U.S.C. 2306a(d)(1) and 41 U.S.C. 254b(d)(1). The
Section also welcomes the simplification of the language in 15.804-5, as well as the elimination of the
redundant language in existing 15.804-1(b)(4) and 15.804-5(c).

Fourth, FARA deleted the statutory authority in former paragraph (d)(3) of TINA, which had provided for a
two-year post-award audit for commercial item procurements not based on adequate price competition,
because Congress chose to rely on the audit access rights of the General Accounting Office to protect the
Government's interests.[1] Thus, the Proposed Rule properly deletes FAR Clause 52.215-43 Audit --
Commercial Items, and the provisions at 15.106-2 that call for the use of the clause.

Suggested Improvements

The Section believes that the Proposed Rule could be further improved by including several suggested
changes patterned after the goal established by the Clinton Administration in its "Reinventing Government"
Report, which directed the revision of "purchasing procedures and rules to allow . . . agencies to buy
commercial products whenever practical and to take advantage of market conditions."[2]

First, the Section notes that the direction in existing 15.804-1(a)(4) to demand "cost information" as
"information other than cost or pricing data" is deleted in the Proposed Rule. Requesting such information
could result unwittingly in the application of the Cost Accounting Standards, so the Section agrees with the
deletion of this language. The Proposed Rule, however, fails to delete the same reference to "cost information" as a type of "information other than cost or pricing data" at 15.802(a)(2)(ii). The Section suggests that the changes in the Proposed Rule be conformed by deleting 15.802(a)(2)(ii).

Second, the Section continues to be concerned about the requirement in 15.804-1(b)(1)(ii) that the Contracting Officer make a determination regarding the subjective beliefs of an offeror concerning the expectation of adequate price competition. Specifically, the regulation directs the Contracting Officer to determine whether "[t]he offeror believed that at least one other offeror was capable of submitting a meaningful, responsive offer" and/or whether "[t]he offeror had no reason to believe that other potential offerors did not intend to submit an offer."

Because it is unclear what type of proof could be offered of the offeror's subjective belief or would be reasonably acceptable to the Government, the Section is concerned that the proposed rule would result in the imposition of more rather than fewer certifications, as well as an unnecessary increase in associated legal risks to offerors. The Section has previously offered suggestions of alternative language with more objective tests that could be used in place of the subjective test in the existing rule. This alternative language is attached for reference as Exhibit 1 hereto.

Third, the Proposed Rule would delete the following language at 52.215-41 and 52.215-42: "by submitting information to qualify for an exception, an offeror is not representing that this is the only exception that may apply." This language was included in the final rule published on September 18, 1995, in order to alleviate concerns that the government might allege that one exception (for example, the commercial item exception) might not apply if the offeror had requested another exception (for example, the exception for prices set by law or regulation). Indeed, it would be absurd if the adequate price competition exception would not apply because of a request by an offeror for an exception for a commercial item. Elimination of this language in the Proposed Rule serves no purpose, and would only result in confusing and discouraging potential commercial item contractors. The language should be retained.

Implementation of these suggested changes to the Proposed Rule would accomplish the mandate to provide procuring agencies with ready access to the commercial market by eliminating unnecessary barriers to the participation of commercial contractors in government procurements. We urge that these changes be included in the final rule.

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

Sincerely,

John T. Kuelbs
Chair, Section of Public Contract Law

cc: Marcia G. Madsen
    David A. Churchill
    Rand L. Allen
    Lynda Troutman O'Sullivan
    Marshall J. Doke, Jr.
    Frank H. Menaker, Jr.
    John B. Miller
    Alan C. Brown
    Council Members
    Chair and Vice Chairs of the Accounting, Cost and Pricing Committee
    Alexander J. Brittin

ENDNOTES

2. Fostering "reliance on the commercial marketplace" in government procurement was an explicit goal identified by the Clinton Administration in its 1993 "Reinventing Government" report, which recommended that "all agency heads be instructed to review and revise internal purchasing procedures and rules to allow their agencies to buy commercial products whenever practical and to take advantage of market conditions." Vice President Al Gore, Creating A Government That Works Better & Costs Less, Report of the National Performance Review at 30 (Sept. 7, 1993).

Exhibit 1

Suggested Changes to 15.804-1(b)(1)(ii)

(1) Adequate price competition. A price is based on adequate price competition if --

\ldots

(ii) There was a reasonable expectation, based on market analysis or other assessment, that two or more responsible offerors, competing independently, would submit priced offers responsive to the solicitation's expressed requirement, even though only one offer is received from a responsible, responsive offeror and if --

(A) the contracting officer makes a determination, which is approved at a level above the contracting officer, that

(1) a reasonable offeror would have believed that at least one other offeror was capable of submitting a meaningful responsive offer; or

(2) objective circumstances such as the following indicate that the Government has received the benefit of price competition:

(a) Other competitive offers were received late and considered untimely;

(b) Other competitive offers were considered non-responsive according to the strict terms of the solicitation, but substantially complied with the Government's needs or were sufficiently similar to the responsive and responsible offer to provide a basis for price comparison;

(c) Other offerors submitted competitive offers, but were subsequently determined not to be responsible or were otherwise disqualified for other than for non-conformity to solicitation requirements;

(d) Multiple competitive offers have been received in recent procurements of the same or similar items;

or (e) Circumstances indicate that the offeror had no reason to believe that other potential offerors did not intend to submit an offer; and

(A) Based on the offer received, the contracting officer can reasonably conclude that the offer was submitted with the expectation of competition, e.g., circumstances indicate that—
(1) The offeror believed that at least one other offeror was capable of submitting a meaningful, responsive offer.

(2) The offeror had no reason to believe that other potential offerors did not intend to submit an offer; and

(B) The determination is approved at a level above the contracting officer that therefore the proposed price is based on adequate price competition and is reasonable; or . . .

Return to Regulatory Coordinating Committee Home Page