Regulatory Coordinating Committee

Special Simplified Procedures for Commercial Item Acquisitions

On November 5, 1996, the Section submitted comments to the General Services Administration regarding its proposed rule on special simplified procedures for commercial item acquisitions up to $5 million.

The proposed rule would replace references to "minimum needs" with "needs" on the basis that the term "minimum" historically has been misinterpreted. The Section urged that the minimum needs language should be maintained for both legal and policy reasons as a reminder to contracting officers that they must be able to provide reasonable justifications for their purchases. The Section observed that the minimum needs doctrine flowed from the principle that it cannot be implied that Congress intended to confer authority to contract for more than the government's minimum needs, because the authority to contract is derived from an appropriation of money. Case law applying this doctrine has required contracting agencies to provide a reasonable basis for their requirements.

The Section also commented on a new FAR subsection 13.604 entitled "Alternative Negotiation Techniques," which would permit price auctions and price and technical leveling. The Section expressed concern that these provisions could be applied in a manner that would violate the fundamental principle and the statutory requirement that all competitors be given the opportunity to compete on a common basis. The Section recommended that, at a minimum, a provision be included that reiterates the contracting officer's obligation to treat all offerors equally and fairly, as set forth in FAR § 1.602-2(b).

November 5, 1996

FAR Secretariat (VRS)
General Services Administration
18th and F Streets, N.W.
Room 4037
Washington, D.C. 20405

Re: Proposed Rule Regarding Special Simplified Procedures for Commercial Item Acquisitions Up to $5 Million,
FAR Case 96-307; 61 Fed. Reg. 47384 (Sep. 6, 1996)

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-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. 96-307 for the implementation of Section 4202 of the Federal Acquisition Reform Act of 1996 ("FARA") providing for special simplified procedures for commercial item acquisitions up to $5 million.

Elimination of Minimum Needs Requirement

The proposal would replace references to "minimum needs" with "needs" on the basis that the term "minimum" historically has been misinterpreted. The proposed rule offers no support or explanation for the position that "minimum" has been misinterpreted. Moreover, this change would apply to all acquisitions, not just to acquisitions of commercial items. Such an across-the-board change is not appropriate in the context of proposed regulations that are suppose to be limited to the acquisition of commercial items up to the $5 million threshold. There is no reason for such a change.

The minimum needs doctrine has been followed for over 100 years and relates to the Government's authority to enter into contracts. When the authority to contract is derived from an appropriation of money, it cannot be implied that Congress intended to confer authority to contract for more than the Government's minimum needs. Thus, it has long been held that appropriated funds "are available only for uses reasonably and clearly necessary to the accomplishment of the thing authorized by the appropriation to be done." 10 Comp. Gen. 294, 300 (1931).

The statement in the background to the proposed regulation is incorrect to the extent that it implies that the minimum needs doctrine requires the Government to "describe its needs in terms of the lowest level of technical capabilities or features that will address the requirement." It is clearly established that contracting agencies have broad discretion in determining their minimum needs and the appropriate method for accommodating them. Clarke Industries, Inc., Comp. Gen. B-261693, 95-2 CPD 183. The contracting agencies' determination of their minimum needs and the best way to satisfy them will not be questioned so long as they have a reasonable basis. ERC International, Inc., Comp. Gen. B-255956.2, 94-1 CPD 387; Isatrex, Inc., Comp. Gen. B-253691, 93-2 CPD 221. Agencies have the discretion to set their minimum needs to the highest possible standards where there is a reasonable basis for such requirements, such as human safety or national defense. World-Wide Security Service, Inc., Comp. Gen. B-228718, 87-2 CPD 490. These well-established principles do not detract from the goal of simplified acquisition procedures. Indeed, if contracting agencies cannot provide a reasonable basis for their requirements, simplifying such purchases is a vice and not a virtue.

The minimum needs doctrine is an expression of the concept that the Government should be buying only what it needs, not what it wants or desires. 32 Comp. Gen. 384, 387 (1953). To proceed otherwise may not be in the Government's best interests. For example, the program manager for the B-2 program had a motto, "Better is worse than good enough," which emphasized that the cost of a design feature that exceeded the requirement could mean that funds would not be available for other needed design features. Similarly, when the requirements for one contract exceed an agency's minimum needs, other legitimate requirements of the agency may not be filled for lack of funds. Therefore, the Section urges that the minimum needs language should be maintained for both legal and policy reasons as a reminder to contracting officers that they must be able to provide reasonable justifications for their purchases.

Alternative Negotiation Techniques
The proposal would add a new FAR Subsection 13.604 "Alternative Negotiation Techniques," which could permit price auctions and price and technical leveling. The proposed provision at FAR 13.604-3(b) states, among other things, that contracting officers may disclose during negotiations a price or other requirement as an area needing improvement or as a condition for further consideration; that such requirements may be based on an evaluation of other offers and that such disclosures need not be the same for all offerors. While the intent of these provisions is to provide as much flexibility as possible to contracting officers in simplified procurements, the Section is concerned that these provisions could be applied in a manner that would violate the fundamental principle and the statutory requirement that all competitors be given the opportunity to compete on a common basis. See, e.g., Panafax Corp., Comp. Gen. B-201176, 81-1 CPD 515, aff'd on recon., 81-2 CPD 220 (1981) (where GAO sustained a protest because information about one competitor was disclosed to the ultimate awardee which resulted in an unfair competitive advantage for the awardee). The Section recommends that, at a minimum, a provision be included that reiterates the contracting officer's obligation to treat all offerors equally and fairly, as set forth in FAR 1.602-2(b).

Reference to Proprietary Information

This provision at FAR 13.604-3(b) goes on to prohibit the contracting officer from disclosing "proprietary information." However, no definition of "proprietary information" is provided or otherwise referenced. The Section recommends for purposes of clarity that a reference be added in FAR 13.604-3(b)(4) to the definition of "proprietary information" in FAR 3.104-4(j).

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
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Return to Regulatory Coordinating Committee Home Page