

(2) If using the GPE directly, select the “yes” radio button for the “Is this a Recovery and Reinvestment Act action” field on the “Notice Details” form (Step 2) located below the “NAICS Code” field. In addition, enter the word “Recovery” as the first word in the title field.

(c) In preparing the description required by 5.207(a)(16), use clear and concise language to describe the planned procurement. Use descriptions of the goods and services (including construction), that can be understood by the general public. Avoid the use of acronyms or terminology that is not widely understood by the general public.

■ 3. Amend section 5.705 by revising the section heading, paragraph (a), the introductory text of paragraph (b), and paragraph (c) to read as follows:

5.705 Publicizing postaward.

* * * * *

(a)(1) Publicize the award notice for any action exceeding \$500,000, funded in whole or in part by the Recovery Act, including—

- (i) Contracts;
- (ii) Modifications to existing contracts;
- (iii) Orders which are issued under task or delivery order contracts; and
- (iv) Modifications to orders under task or delivery order contracts.

(2) Contracting officers shall identify contract actions, funded in whole or in part by the Recovery Act, by using the following instructions which are also available in the Recovery FAQs under “Buyers/Engineers” at the Governmentwide Point of Entry (GPE) (<https://www.fedbizopps.gov>):

(i) If submitting notices electronically via ftp or email, enter the word “Recovery” as the first word in the title field.

(ii) If using the GPE directly, select the “yes” radio button for the “Is this a Recovery and Reinvestment Act action” field on the “Notice Details” form (Step 2) located below the “NAICS Code” field. In addition, enter the word “Recovery” as the first word in the title field.

(3) In preparing the description required by 5.207(a)(16), use clear and concise language to describe the planned procurement. Use descriptions of the goods and services (including construction), that can be understood by the general public. Avoid the use of acronyms or terminology that is not widely understood by the general public.

(b) Regardless of dollar value, if the contract action, including all modifications and orders under task or

delivery order contracts, is not both fixed-price and competitively awarded, publicize the award notice and include in the description the rationale for using other than a fixed-priced and/or competitive approach. Include in the description a statement specifically noting if the contract action was not awarded competitively, or was not fixed-price, or was neither competitive nor fixed-price. These notices and the rationale will be available to the public at the GPE, so do not include any proprietary information or information that would compromise national security. The following table provides examples for when a rationale is required.

* * * * *

(c) Contracting officers shall use the instructions available in the Recovery FAQs under “Buyers/Engineers” at the GPE (<https://www.fedbizopps.gov>) to identify actions funded in whole or in part by the Recovery Act.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 5, 6, 13, and 24

[FAC 2005-42; FAR Case 2008-003 Item IV; Docket 2008-0001, Sequence 27]

RIN 9000-AL13

Federal Acquisition Regulation; FAR Case 2008-003, Public Disclosure of Justification and Approval Documents for Noncompetitive Contracts—Section 844 of the National Defense Authorization Act for Fiscal Year 2008

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have adopted as final, with changes, an interim rule amending the Federal Acquisition Regulation (FAR) to implement the National Defense Authorization Act for Fiscal Year 2008, Section 844 “Public Disclosure of Justification and Approval Documents for Noncompetitive Contracts” (FY08 NDAA). Section 844 of the FY08 NDAA stipulates the requirements regarding

the public availability of justifications and approval documents after the award of Federal contracts, except for information exempt from public disclosure.

DATES: *Effective Date:* July 16, 2010.

FOR FURTHER INFORMATION CONTACT:

Ernest Woodson, Procurement Analyst, at (202) 501-3775, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAC 2005-42, FAR Case 2008-003.

SUPPLEMENTARY INFORMATION:

A. Background

The National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181, Section 844, entitled “Public Disclosure of Justification and Approval Documents for Noncompetitive Contracts,” amends 10 U.S.C. 2304 and 41 U.S.C. 253 regarding procurements made under subsection (c) (*i.e.*, other than competitive procedures) to require public availability of the justification and approval (J&A) documents after contract award, except for information exempt from public disclosure under 5 U.S.C. 552. The provisions of section 844 require the head of an executive agency to make certain J&A documents relating to the use of noncompetitive procedures in contracting available on the website of an agency and through a governmentwide website selected by the Administrator for Federal Procurement Policy (OFPP) within 14 days of contract award. In the case of noncompetitive contracts awarded on the basis of unusual and compelling urgency, the documents must be posted within 30 days of contract award. The Competition in Contracting Act (Pub. L. 98-369) already requires that such J&A documents be made available for public inspection, subject to the exemptions from public disclosure provided in the Freedom of Information Act (FOIA) (5 U.S.C. 552).

The interim rule was published in the **Federal Register** at 74 FR 2731 on January 15, 2009, with an effective date of February 17, 2009, and a request for comments by March 16, 2009.

Nine respondents submitted nineteen comments in response to the interim rule. There were six categories of comments. These categories were applicability, exceptions, Federal Business Opportunities (FedBizOpps), protests, FOIA, and veterans.

Below are the comments received on the interim rule along with the responses developed by the Councils.

Applicability:

1. *Comment:* The rule states that the posting requirement applies to all contracts awarded under FAR 6.303–1 J&A documents. Is the intent to include sole-source justifications prepared under FAR subpart 13.5?

Response: Section 844 of the FY08 NDAA requires posting of documents containing the J&A required by subsection (f)(1) of 10 U.S.C. 2304 or 41 U.S.C. 253. Subsection (g) of those statutes provides for streamlined procedures that promote efficiency and economy in contracting and avoid unnecessary burdens for agencies and contractors for purchases not greater than the simplified acquisition threshold and for purchases made pursuant to the commercial-items test program. Accordingly, FAR 6.001 states that part 6 does not apply to acquisitions for contracts awarded using the simplified acquisition procedures and adds a reference to FAR 13.501 for the requirements pertaining to sole-source acquisitions of commercial items over the simplified acquisition threshold under subpart 13.5. FAR 13.501 implemented 10 U.S.C. 4052(g), which stipulates that an executive agency may not conduct a purchase on a sole-source basis unless the need to do so is justified in writing and approved in accordance with 10 U.S.C. 2304 or 41 U.S.C. 253. Thus, 10 U.S.C. 4052(g) imposed a justification process on sole-source actions over the simplified acquisition threshold done under the commercial-items test program. Similarly, though section 844 does not require posting of the FAR 13.501 J&As document, the Councils recommend, as a matter of policy, that J&As required by FAR 13.501 also be posted on FedBizOpps. Such posting is consistent with the President's focus on creating a "New Era of Open Government" and is reasonable because these actions exceed the simplified acquisition threshold and posting could enhance opportunities for competition on future requirements of such commercial items. It is also consistent with the existing requirement (FAR 5.102(a)(6)) to post a brand name justification in FedBizOpps along with the solicitation. Therefore, the rule has been revised to include the requirement to post FAR 13.501 justifications.

2. *Comment:* The rule states that the posting requirement applies to all contracts awarded under FAR 6.303–1 J&A document. Is the intent to include limited-source justifications for orders placed under Federal Supply Schedules in accordance with FAR 8.405–6?

Response: The posting requirement of Section 844 of the FY08 NDAA pertains

to J&As executed pursuant to FAR subpart 6.3, it does not apply to the placement of orders under the Federal Supply Schedules. However, a separate FAR Case will implement section 843 of the NDAA, which requires posting of sole source task or delivery orders in excess of the Simplified Acquisition Threshold that are placed against multiple award contracts.

Exceptions:

3. *Comment:* Will there be a dollar threshold for when we need to post the J&A to the FedBizOpps website?

Response: There is no dollar threshold that triggers the requirement to post the J&A.

4. *Comment:* If a purchase meets an exception at FAR 5.202 does it need to be posted? Recommend making exceptions to posting J&A consistent with the FAR exceptions to posting synopses (FAR 5.202), solicitation (FAR 5.102(a)(5)), or contract awards (FAR 5.301(b)).

Response: The exceptions provided at FAR 5.102, 5.202, and 5.301 all derive from section 18 of the Office of Federal Procurement Policy (OFPP) Act. The requirement to make the J&A available for public inspection is not a new requirement, but previously implemented 10 U.S.C. 2304(f)(4) and 41 U.S.C. 253(f)(4). Only the requirement to post the J&A is new. Section 844 of the FY08 NDAA requires posting of the J&A and provides for exclusion of information exempt from public disclosure under section 552 of Title 5 U.S.C. (FOIA). As such, the FAR exceptions cannot automatically be applied to the posting of J&A. The Councils revised FAR 6.305 to add a new paragraph (e) to recognize that, in addition to redacting information in the J&A consistent with FOIA exemptions, there may also be cases where the J&A itself would be exempted from being posted per the FOIA exemptions. One such instance is when posting the J&A would disclose the executive agency's needs and disclosure would compromise national security or create other security risks. The Councils added this specific exception to the FAR because it is clearly consistent with FOIA and FAR 5.102, 5.202, and 5.301. Any other FOIA exemption that might authorize not posting the J&A must be determined in accordance with FAR subpart 24.2.

5. *Comment:* Under FAR 5.202(a), there are several items that would prevent the agency from posting information available on the web for a pre-solicitation announcement. Currently, there is no such exception to posting the J&A, which can lead to a

situation where the J&A gets posted while the award does not. When this happens, FedBizOpps rejects posting the J&A because it can't find the related award. FedBizOpps also rejects the J&A when a previously posted award has been placed in archive status.

Response: The Councils have confirmed that FedBizOpps allows for the posting of a J&A even if there was no prior synopsis.

6. *Comment:* A major concern for members of the intelligence community regards the potential security threat from publication of even unclassified material. Publicizing systems designed with the broader community in mind cannot always protect the sensitive but unclassified nature of the intelligence business. If this new requirement cannot be deleted in whole, then they request an exemption to the public disclosure requirement for the Office of the Director of National Intelligence until an ancillary classified database is developed for the intelligence community and others with sensitive information.

Response: The contracting officer already has the authority to determine when not to disclose information that would compromise national security or create other security risks, for example per FOIA exemptions 1 and 7. However, as explained in the response to comment 4, the Councils did revise FAR 6.305 to recognize that, in addition to redacting information in the J&A consistent with FOIA exemptions, there may also be cases where the J&A itself would be exempted from being posted per the FOIA exemptions.

Websites:

7. *Comment:* Is the award number a fill in-the-blank for FedBizOpps? Will the award date be a fill in-the-box? It would be helpful so vendors know that it was already awarded.

Response: When the Government is posting a J&A to FedBizOpps, it has the option of associating the J&A with an existing award notice in the system. In this case, the system will automatically populate the contract award number and award date. Otherwise, the Government will need to manually enter the contract award number and award date into the J&A notice form. (Note: An award number is not required for a brand-name J&A since a brand name J&A must be posted with the solicitation.)

Protests:

8. *Comment:* When a vendor sees a J&A posted, will they have protest rights?

Response: The statute did not change any protest rights, including any timeliness requirements. The rationale for posting is just to make the process more transparent.

9. *Comment:* One commenter recommends the rule should recognize the date publicized on FedBizOpps as the date upon which a basis of protest is known under GAO rules of procedure. Another commenter states that if the protest timeliness rules are revised, there will likely be more protests.

Response: Timeliness requirements have not been revised by the statute. The Councils cannot unilaterally change either the Government Accounting Office (GAO) timeliness rules or Court of Federal Claims statutory jurisdiction. This rule is merely to make the process more transparent and help contractors to be apprised of possible future requirements that in the past were awarded on a sole source basis.

10. *Comment:* The commenter wants to know why the Government is waiting up to 14 days as this will not help protesters compete, and if a protest is lodged, could result in delays and additional cost to the Government.

Response: The intent is not to help protesters compete for the current requirement, but for the future. Section 844 of the FY08 NDAA, which this rule implements, states that the J&A must be made publicly available within 14 days after contract award.

Freedom of Information Act (FOIA):

11. *Comment:* One commenter stated FAR 6.305(c) requires contracting officers to be guided by FOIA exemptions. FOIA procedures address very specific mechanisms and timelines for review and release of information. Referencing FOIA procedures implies that the contracting officer should consult with the sole source contractor prior to release of information. The commenter questions whether such a step could be accomplished within the 14-day to 30-day requirement. Another commenter recommends that contractors be given the right to review J&A documents prior to release to ensure no proprietary information is included in the document, consistent with FOIA.

Response: These commenters are referring to the requirements of Executive Order 12600, that agencies establish procedures to notify submitters of records containing confidential commercial information, the disclosure of which the department or agency has reason to believe could reasonably be expected to cause substantial competitive harm, when

those records are requested under the FOIA.

This executive order applies to the FOIA process that is used to determine financial information that might be exempt from public disclosure. Section 844 of the FY08 NDAA states only that the requirement to post J&As does not require the public availability of information that is exempt from public disclosure under FOIA. It does not mandate the FOIA process.

Additionally, FAR 5.102(a)(6) and 5.705(b) also require posting of J&As for brand name and the rationale for non-competitive awards in support of the Recovery Act, respectively. The FAR requires that these documents be redacted as necessary to preclude disclosure of proprietary information or information that would otherwise compromise national security. In these instances, the FOIA exemptions to public disclosure apply, but not the FOIA process.

Even though the FOIA process and, specifically, the submitter notification process in Executive Order 12600 do not apply, the Councils recognize there is an obligation to ensure that contractor proprietary information is not revealed. To ensure this does not happen, the Councils added language at FAR 6.305(e) that the contracting officer should provide the contractor an opportunity to review, but that this process must not delay posting within the established timelines.

12. *Comment:* Recommend FAR 6.305 be revised to clarify that contracting officers shall remove information from J&As that reveals sensitive or unclassified information such as Operations Security (OPSEC) that could harm the Government if released to the public.

Response: See Council's responses to comments 4 and 6.

13. *Comment:* Recommend removing names, titles, telephone numbers and email addresses of Government employees who develop, review, or approve the J&A, except for publicly known points of contact, such as buyers or contracting officers to protect key Government personnel from harm and to funnel queries from potential offerors to appropriate contracting personnel.

Response: Agencies have the flexibility to establish procedures whereby the actual J&A document includes only the names that the FAR requires for certification (FAR 6.303–2(a)(12) and (b)) and approval (FAR 6.304) purposes.

14. *Comment:* Recommend removing estimated values from the J&As that could reveal the Government's negotiating position on future buys.

Response: FAR 6.305(e) states that “(c)ontracting officers shall also be guided by the exemptions to disclosure of information contained in the Freedom of Information Act...”. Therefore, additional detail on information that is exempt from release, e.g., estimated values, should not be in the FAR. Attempting to provide guidance in the FAR would most likely not list all possibilities, thereby creating the dangerous interpretation that, if it is not listed, it can be released. However, the contracting officer should consult as necessary with the local FOIA office and counsel to determine which information should be exempt from disclosure.

15. *Comment:* Recommend issuing implementing guidance on what to redact to promote consistency in understanding and application.

Response: See Council's response to comment number 14. The FAR is not the governing regulatory document for FOIA. Each agency's implementation of FOIA is located in its respective title of the Code of Federal Regulations. The interim rule amended the FOIA part of the FAR at 24.203(b) to add a reference to the excellent FOIA resources available from the Department of Justice.

16. *Comment:* A commenter asked how long a J&A posted on an agency website must remain available for public inspection.

Response: FedBizOpps requires a 30-day minimum posting requirement, although agencies are not precluded from posting the J&A for a longer period of time. The final rule revises FAR 6.305 to state J&As must remain posted for a minimum of 30 days.

17. *Comment:* The commenter recommends the Councils consider integrating the J&A documents into the database located at www.usaspending.gov.

Response: The law requires posting on the agency website and through a governmentwide website selected by the Administrator for Federal Procurement Policy. The Administrator for Federal Procurement Policy selected FedBizOpps as the governmentwide website.

Veterans:

18. *Comment:* This interim rule is an obstacle to veteran-owned small businesses obtaining Federal business opportunities on a sole source basis, which was the intent of Pub. L. 109–461. Contracting officers will see section 844 as reinforcing their position that soliciting on a competitive basis will provide a fair and reasonable price without having to prepare a J&A.

Response: This interim rule does not alter the criteria that must be satisfied before making a decision that an acquisition will be conducted on a sole-source basis. It also does not alter what documentation must be prepared to support that decision. This interim rule does not impact the authority the Department of Veterans Affairs was given under Pub. L. 109-461 to conduct noncompetitive sourcing under certain conditions or the procedures that the Department of Veterans Affairs puts in place to carry out noncompetitive sourcing. This interim rule merely states that, if a justification for other than full and open competition is issued pursuant to FAR 6.303-1 or 13.501, then that justification must be made publically available on the Government Point of Entry (GPE) website and the agency's website.

19. *Comment:* This interim rule is just another obstacle to the Department of Veterans Affairs determining how to implement Pub. L. 109-461.

Response: The interim rule implementing section 844 of the FY08 NDAA has no direct bearing on the implementation of Pub. L. 109-461.

Changes to the Interim rule. The final rule:

- Adds a new paragraph FAR 6.305(c) to require that, if the justification is a brand-name justification under FAR 6.302-1(c), then it must be posted with the solicitation;

- Requires that the justification remain posted for a minimum of 30 days;

- Adds a new paragraph FAR 6.305(f), to clarify that posting the justification does not apply if it would disclose the executive agency's needs and disclosure of such needs would compromise national security or create other security risks; and

- Establishes procedures at FAR 13.501 similar to procedures at FAR 6.305(b), 6.305(d), 6.305(e), and 6.305(f).

This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule addresses internal Federal agency procedures and will benefit small business entities by providing the

opportunity for the review of J&A documents for contracts awarded noncompetitively, thereby increasing the opportunity for competition for future awards.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. chapter 35, *et seq.*

List of Subjects in 48 CFR Parts 5, 6, 13, and 24

Government procurement.

Dated: June 2, 2010.

Edward Loeb,

Acting Director, Acquisition Policy Division.

■ Accordingly, the interim rule published in the **Federal Register** at 74 FR 2731 on January 15, 2009, is adopted as a final rule with the following changes:

■ 1. The authority citation for 48 CFR parts 6 and 13 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 6—COMPETITION REQUIREMENTS

■ 2. Revise section 6.305 to read as follows:

6.305 Availability of the justification.

(a) The agency shall make publicly available the justification required by 6.303-1 as required by 10 U.S.C. 2304(l) and 41 U.S.C. 253(j). Except for the circumstances in paragraphs (b) and (c) of this section, the justification shall be made publicly available within 14 days after contract award.

(b) In the case of a contract award permitted under 6.302-2, the justification shall be posted within 30 days after contract award.

(c) In the case of a brand name justification under 6.302-1(c), the justification shall be posted with the solicitation (see 5.102(a)(6)).

(d) The justifications shall be made publicly available—

(1) At the Government Point of Entry (GPE) www.fedbizopps.gov;

(2) On the website of the agency, which may provide access to the justifications by linking to the GPE; and

(3) Must remain posted for a minimum of 30 days.

(e) Contracting officers shall carefully screen all justifications for contractor proprietary data and remove all such data, and such references and citations as are necessary to protect the

proprietary data, before making the justifications available for public inspection. Contracting officers shall also be guided by the exemptions to disclosure of information contained in the Freedom of Information Act (5 U.S.C. 552) and the prohibitions against disclosure in 24.202 in determining whether the justification, or portions of it, are exempt from posting. Although the submitter notice process set out in EO 12600, entitled "Predisclosure Notification Procedures for Confidential Commercial Information," does not apply, if the justification appears to contain proprietary data, the contracting officer should provide the contractor that submitted the information an opportunity to review the justification for proprietary data, before making the justification available for public inspection, redacted as necessary. This process must not prevent or delay the posting of the justification in accordance with the timeframes required in paragraphs (a) through (c).

(f) The requirements of paragraphs (a) through (d) do not apply if posting the justification would disclose the executive agency's needs and disclosure of such needs would compromise national security or create other security risks.

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

■ 3. Amend section 13.501 by—

■ a. Removing from paragraph (a)(1)(i) "section; and" and adding "section;" in its place;

■ b. Removing from paragraph (a)(1)(ii) "(41 U.S.C. 428a)." and adding "(41 U.S.C. 428a);" in its place; and

■ c. Adding paragraphs (a)(1)(iii) and (a)(1)(iv) to read as follows:

13.501 Special documentation requirements.

(a) * * *

(1) * * *

(iii) Make publicly available the justifications (excluding brand name) required by 6.305(a) within 14 days after contract award or in the case of unusual and compelling urgency within 30 days after contract award, in accordance with 6.305 procedures at paragraphs (b), (d), (e), and (f); and

(iv) Make publicly available brand name justifications with the solicitation, in accordance with 5.102(a)(6).

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