

(Authority: 20 U.S.C. 7442, 25 U.S.C. 5304, 5307)

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 216

[Docket DARS-2024-0023]

RIN 0750-AL80

Defense Federal Acquisition Regulation Supplement: Task Order and Delivery Order Contracting for Architectural and Engineering Services (DFARS Case 2023-D007)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2023 that provides directions for awarding architectural and engineering service task orders and delivery orders under multiple-award contracts.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before September 27, 2024, to be considered in the formation of the final rule.

ADDRESSES: Submit comments identified by DFARS Case 2023-D007, using either of the following methods:

- *Federal eRulemaking Portal:* <https://regulations.gov>. Search for DFARS Case 2023-D007. Select “Comment” and follow the instructions to submit a comment. Please include “DFARS Case 2023-D007” on any attached documents.

- *Email:* osd.dfars@mail.mil. Include DFARS Case 2023-D007 in the subject line of the message.

Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check <https://www.regulations.gov>, approximately two to three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Ms. Kimberly R. Ziegler, telephone 703-901-3176.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to amend DFARS subpart 216.5, Indefinite-Delivery Contracts, to implement section 802 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2023 (Pub. L. 117-263), which amends 10 U.S.C. 3406. Section 802 added a requirement at 10 U.S.C. 3406(h)(1) for DoD contracting officers to use qualification-based selections when awarding task orders and delivery orders for architectural and engineering (AE) services in accordance with Federal Acquisition Regulation (FAR) subpart 36.6 and 40 U.S.C. chapter 11 (The Brooks Architect Engineer Act). Section 802 also added, at 10 U.S.C. 3406(h)(2), direction that prevents contracting officers from routinely requesting additional information regarding qualifications when awarding task orders or delivery orders under a multiple-award contract.

The final rule for FAR Case 2004-001, Improvements in Contracting for Architect-Engineer Services, was published in the **Federal Register** at 70 FR 57452 on September 30, 2005, to implement section 1427(b) of the NDAA for FY 2004 (Pub. L. 108-136). Section 1427(b) required the use of FAR subpart 36.6 procedures for the selection of contractors and placement of orders under multiple-award contracts, among other similar requirements. The final rule placed new direction pertaining to AE services at FAR 16.500(d), 16.505(a)(9), and 36.600. The requirement at 10 U.S.C. 3406(h)(1) closely resembles the direction provided at FAR 16.500(d). Since the direction at FAR 16.500(d) applies Governmentwide, DoD is currently complying with 10 U.S.C. 3406(h)(1).

II. Discussion and Analysis

The proposed rule implements 10 U.S.C. 3406(h)(1) by utilizing the existing Governmentwide direction at FAR 16.500(d) and reminds DoD contracting officers, at DFARS 216.500(d)(i), of the applicability of the Governmentwide guidance. This proposed rule adds the DoD-specific statutory guidance required by 10 U.S.C. 3406(h)(2), at DFARS 216.500(d)(ii), to direct contracting officers not to request additional information regarding qualifications unless necessary to determine qualifications for a particular task order or delivery order under a multiple-award contract.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Services and Commercial Products, Including Commercially Available Off-the-Shelf (COTS) Items

This proposed rule does not create any new solicitation provisions or contract clauses. It does not impact any existing solicitation provisions or contract clauses or their applicability to contracts valued at or below the simplified acquisition threshold, for commercial products including COTS items, or for commercial services.

IV. Expected Impact of the Rule

DoD does not expect the proposed rule, when finalized, to have a significant impact on the public because the rule maintains the status quo regarding procedures for awarding task orders or delivery orders for AE services under multiple-award contracts. The FAR currently provides those procedures at subpart 36.6. This DFARS proposed rule points to those procedures.

This proposed rule also adds language to prevent contracting officers from requesting unnecessary information regarding qualifications. Therefore, the proposed rule may reduce the resubmission of qualification information when competing for AE services under multiple-award contracts. Contracting officers will request additional information only when necessary to determine the most qualified offeror for the particular task order or delivery order.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, as amended.

VI. Regulatory Flexibility Act

DoD does not expect this proposed rule, when finalized, to 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 proposed rule reduces the burden on small entities participating on multiple-award contracts for AE services. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

This rule proposes to amend the DFARS to implement section 802 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2023 (Pub. L. 117–263), which amends 10 U.S.C. 3406. Section 802 requires DoD contracting officers to use qualification-based selections when awarding task orders and delivery orders for architectural and engineering (AE) services (10 U.S.C. 3406(h)(1)), a requirement that is already in Federal Acquisition Regulation (FAR) 16.500(d), 16.505(a)(9), and 36.600. Section 802 also prevents contracting officers from routinely requesting additional information regarding qualifications when awarding task orders or delivery orders under a multiple-award contract (10 U.S.C. 3406(h)(2)).

The objective of the rule is to ensure DoD contracting officers follow the new direction provided by 10 U.S.C. 3406(h)(2) when awarding task orders and delivery orders for AE services in accordance with current regulations and 10 U.S.C. 3406(h)(1). The legal basis of the rule is section 802 of the NDAA for FY 2023.

This proposed rule, when finalized, will apply to small entities performing AE services under multiple-award contracts, which includes indefinite-delivery, indefinite-quantity contracts. The proposed rule is expected to reduce the burden on small entities by preventing contracting officers, when awarding task orders or delivery orders, from requiring the submittal of qualification information that was

previously submitted and evaluated for the award of the basic multiple-award contract. The contracting officer may now request qualification information that is necessary to determine the most qualified offer for the particular task order or delivery order.

Data obtained from the Federal Procurement Data System for FY 2020, 2021, and 2022 indicates that DoD awards an average of 4,600 task orders and delivery orders for AE services annually. Of the estimated 4,600 orders, an average of approximately 2,600 awards are made annually to an estimated 453 unique small entities. For each task order or delivery order award, DoD estimates that 3 multiple-award contract awardees will submit an offer in response to a request for proposal. As a result, it is estimated that approximately 1,359 small entities will benefit from any reduction in burden provided by the proposed rule, when finalized.

The proposed rule does not impose any new reporting, recordkeeping, or compliance requirements.

The proposed rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no practical alternatives that will accomplish the objectives of the statute.

DoD invites comments from small business concerns and other interested parties on the expected impact of this proposed rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this proposed rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2023–D007), in correspondence.

VII. Paperwork Reduction Act

This proposed rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 216

Government Procurement.

Jennifer D. Johnson,
Editor/Publisher, Defense Acquisition Regulations System.

Therefore, the Defense Acquisition Regulations System proposes to amend 48 CFR part 216 as follows:

■ 1. The authority citation for 48 CFR part 216 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 216—TYPES OF CONTRACTS

■ 2. Add section 216.500 to read as follows:

216.500 Scope of subpart.

(d)(i) When awarding task orders or delivery orders for architect-engineer services under a multiple-award contract, follow the procedures for the selection of contractors and placement of orders at FAR 36.6 to implement 10 U.S.C. 3406(h)(1).

(ii) Contracting officers shall not request additional information related to contractor qualifications, unless it is necessary to determine the most highly qualified contractor for the particular task order or delivery order (10 U.S.C. 3406(h)(2)).

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