

FR 43577, July 27, 2005, is adopted as a final rule without change.

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 2, 5, 7, 14, 37, and 52

[FAC 2005-09; FAR Case 2004-021; Item III; Docket FAR-2006-0020]

RIN 9000-AK25

#### Federal Acquisition Regulation; FAR Case 2004-021, OMB Circular A-76

**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 agreed on a final rule amending the Federal Acquisition Regulation (FAR) to provide language that is consistent with OMB Circular A-76 (Revised), *Performance of Commercial Activities*, dated May 29, 2003.

**DATES:** *Effective Date:* May 19, 2006.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Mr. Gerald Zaffos, Procurement Analyst, at (202) 208-6091. Please cite FAC 2005-09, FAR case 2004-021. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 70 FR 43107, July 26, 2005. One commenter submitted two comments in response. The first comment is that "7.302(a)(4) [sic] and 52.207-1(d) reference 'contest(s)'. Should that be protests?" The word "contest" was meant, not "protest." The A-76 Circular created an additional procedure called a "contest", discussed at Attachment B, paragraph F.

The second comment says that there is a conflict between the language in paragraph (c) of the provision at FAR 52.207-1 which states that, if a performance decision resulting from standard competition favors a private

sector offeror, a contract will be awarded, and paragraph (c) of the provision at FAR 52.207-2 which states that, if a performance decision resulting from a streamlined competition favors private sector performance, the contracting officer will either award a contract or issue a competitive solicitation. The Councils see no conflict and note that the language is consistent with the Circular. In a streamlined competition, an agency may estimate the cost of private sector performance by conducting market research or by soliciting cost proposals in accordance with the FAR (OMB Circ. A-76, Att. B, para. C.1.b.). If the performance decision favors private sector performance, the contracting officer may either award a contract resulting from the solicitation of cost proposals or issue a competitive solicitation to determine a private sector provider (OMB Cir. A-76, Att. B, para. C.3.d.(1).) Therefore, the final rule adopts the proposed rule language without change.

This is not a significant regulatory action and, therefore, was not 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 does not impose any costs on either small or large businesses.

##### C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 96-511) 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. 3501, *et seq.*

##### List of Subjects in 48 CFR Parts 2, 5, 7, 14, 37, and 52

Government procurement.

Dated: April 12, 2006.

Gerald Zaffos,

Director, Contract Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 5, 7, 14, 37, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 5, 7, 14, 37, and 52 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 2—DEFINITIONS OF WORDS AND TERMS

### 2.101 [Amended]

■ 2. Amend section 2.101 in paragraph (b), in the definition "Inherently governmental function", by removing the last sentence in paragraph (2).

## PART 5—PUBLICIZING CONTRACT ACTIONS

■ 3. Amend section 5.205 by revising paragraph (e) to read as follows:

### 5.205 Special situations.

\* \* \* \* \*

(e) *Public-private competitions under OMB Circular A-76.* (1) The contracting officer shall make a formal public announcement for each streamlined or standard competition. The public announcement shall include, at a minimum, the agency, agency component, location, type of competition (streamlined or standard), activity being competed, incumbent service providers, number of Government personnel performing the activity, name of the Competitive Sourcing Official, name of the contracting officer, name of the Agency Tender Official, and projected end date of the competition.

(2) The contracting officer shall announce the end of the streamlined or standard competition by making a formal public announcement of the performance decision. (See OMB Circular A-76.)

\* \* \* \* \*

## PART 7—ACQUISITION PLANNING

■ 4. Amend section 7.105 by revising paragraph (b)(9) to read as follows:

### 7.105 Contents of written acquisition plans.

\* \* \* \* \*

(b) \* \* \*

(9) *Inherently governmental functions.* Address the consideration given to Subpart 7.5.

\* \* \* \* \*

■ 5. Revise Subpart 7.3 to read as follows:

### Subpart 7.3—Contractor Versus Government Performance

Sec.

7.300 [Reserved]

7.301 Definitions.

7.302 Policy.

- 7.303 [Reserved]
- 7.304 [Reserved]
- 7.305 Solicitation provisions and contract clause.

**7.300 [Reserved]**

**7.301 Definitions.**

Definitions of “inherently governmental activity” and other terms applicable to this subpart are set forth at Attachment D of the Office of Management and Budget Circular No. A-76 (Revised), Performance of Commercial Activities, dated May 29, 2003 (the Circular).

**7.302 Policy.**

(a) The Circular provides that it is the policy of the Government to—

(1) Perform inherently governmental activities with Government personnel; and

(2) Subject commercial activities to the forces of competition.

(b) As provided in the Circular, agencies shall—

(1) Not use contractors to perform inherently governmental activities;

(2) Conduct public-private competitions in accordance with the provisions of the Circular and, as applicable, these regulations;

(3) Give appropriate consideration relative to cost when making performance decisions between agency and contractor performance in public-private competitions;

(4) Consider the Agency Tender Official an interested party in accordance with 31 U.S.C. 3551 to 3553 for purposes of filing a protest at the Government Accountability Office; and

(5) Hear contests in accordance with OMB Circular A-76, Attachment B, Paragraph F.

(c) When using sealed bidding in public-private competitions under OMB Circular A-76, contracting officers shall not hold discussions to correct deficiencies.

**7.303 [Reserved]**

**7.304 [Reserved]**

**7.305 Solicitation provisions and contract clause.**

(a) The contracting officer shall, when soliciting offers and tenders, insert in solicitations issued for standard competitions the provision at 52.207-1, Notice of Standard Competition.

(b) The contracting officer shall, when soliciting offers, insert in solicitations issued for streamlined competitions the provision at 52.207-2, Notice of Streamlined Competition.

(c) The contracting officer shall insert the clause at 52.207-3, Right of First Refusal of Employment, in all

solicitations which may result in a conversion from in-house performance to contract performance of work currently being performed by the Government and in contracts that result from the solicitations, whether or not a public-private competition is conducted. The 10-day period in the clause may be varied by the contracting officer up to a period of 90 days.

**7.500 [Amended]**

■ 6. Amend section 7.500 by removing the last sentence.

**PART 14—SEALED BIDDING**

**14.203-2 [Amended]**

■ 7. Amend section 14.203-2 by removing the paragraph designation “(a)” and by removing paragraph (b).

**PART 37—SERVICE CONTRACTING**

■ 8. Amend section 37.503 by revising paragraph (c) to read as follows:

**37.503 Agency-head responsibilities.**

\* \* \* \* \*

(c) Specific procedures are in place before contracting for services to ensure that inherently governmental functions are performed by Government personnel; and

\* \* \* \* \*

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

■ 9. Revise section 52.207-1 to read as follows:

**52.207-1 Notice of Standard Competition.**

As prescribed in 7.305(a), insert the following provision:

**NOTICE OF STANDARD COMPETITION (MAY 2006)**

(a) This solicitation is part of a standard competition under Office of Management and Budget Circular No. A-76 (Revised), Performance of Commercial Activities, dated May 29, 2003 (hereafter “the Circular”), to determine whether to accomplish the specified work under contract or by Government performance.

(b) The Government will evaluate private sector offers, the agency tender, and public reimbursable tenders, as provided in this solicitation and the Circular.

(c) A performance decision resulting from this standard competition will be publicly announced in accordance with the Circular. If the performance decision favors a private sector offeror, a contract will be awarded. If the performance decision favors an agency or a public reimbursable tender, the Contracting Officer shall establish, respectively, either a Most Efficient Organization letter of obligation or a fee-for-service agreement, as those terms are defined in the Circular.

(d) As provided in the Circular, directly interested parties may file contests, which are governed by the procedures in Federal

Acquisition Regulation 33.103. Until resolution of any contest, or the expiration of the time for filing a contest, only legal agents for directly interested parties shall have access to the certified standard competition form, the agency tender, and public reimbursable tenders.

(End of provision)

■ 10. Revise section 52.207-2 to read as follows:

**52.207-2 Notice of Streamlined Competition.**

As prescribed in 7.305(b), insert the following provision:

**NOTICE OF STREAMLINED COMPETITION (MAY 2006)**

(a) This solicitation is part of a streamlined competition under Office of Management and Budget Circular No. A-76 (Revised), Performance of Commercial Activities, dated May 29, 2003 (hereafter “the Circular”), to determine whether to accomplish the specified work under contract or by Government performance.

(b) The Government will evaluate the cost of private sector and Agency or public reimbursable performance, as provided in this solicitation and the Circular.

(c) A performance decision resulting from this streamlined competition will be publicly announced in accordance with the Circular. If the performance decision favors private sector performance, the Contracting Officer shall either award a contract or issue a competitive solicitation for private sector offers. If the performance decision favors Agency or public reimbursable performance, the Agency shall establish, respectively, either a letter of obligation or a fee-for-service agreement, as those terms are defined in the Circular.

(End of provision)

**52.207-3 [Amended]**

■ 11. Amend section 52.207-3 by revising the date of the clause to read “(MAY 2006)”; and by removing from paragraphs (a) and (b) of the clause the word “employees” and adding “personnel” in its place.

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