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GSA Office of Governmentwide Policy

APR 8 2003

MEMORANDUM FOR RONALD POUSSARD
DIRECTOR
DEFENSE ACQUISITION REGULATIONS COUNCIL

FROM: RODNEY P. LANTIER
DIRECTOR
REGULATORY SECRETARIAT

SUBJECT: FAR Case, 2002-014, Debriefing-Competitive Acquisition

Attached are comments received on the subject FAR case published at 68 FR 5778; February 4, 2003. The comment closing date was April 7, 2003.

Response Number	Date Received	Comment Date	Commenter
2002-014-1	02/12/03	02/12/03	Rosemary Ficalora
2002-014-2	04/07/03	04/07/03	DoD/DLA

Attachments

U.S. General Services Administration
1800 F Street, NW
Washington, DC 20405-0002
www.gsa.gov

2002-014-1

"Rosemary Ann"
<contractsprofessional
@yahoo.com>
02/12/2003 02:09 PM

To: farcase.2002-014@gsa.gov
cc: erfoddrell@msn.com
Subject: REVISED & CORRECTED: Proposed Rules, DEBRIEFING COMMERCIAL AND COMPETITVE ACQUISITION -- FAR Case 2002-014, 48 CFR Part 52 (Formulation: April 7, 2003)

Corrected and Resent - edits in blue.

Rosemary Ann <contractsprofessional@yahoo.com> wrote:
Date: Wed, 12 Feb 2003 07:53:38 -0800 (PST)
From: Rosemary Ann
Subject: Proposed Rules, DEBRIEFING COMMERCIAL AND COMPETITIVE ACQUISITION -- FAR Case 2002-014, 48 CFR Part 52 (Formulation: April 7, 2003)
To: farcase.2002-014@gsa.gov
CC: erfoddrell@msn.com

Gentleperson:

I am currently enrolled in a University of Northern Virginia -- Contracts Graduate Program, and am currently taking a course entitled: **FAR Standards For Actions and Decisions taught by Prof. Michael E. Giboney**.

One or our recent assignments was the **study** of proposed regulatory reform as it affects Federal contracting, specifically the FAR. A fellow-student and myself came across the above-referenced Proposed Rule for "**Debriefing**" proposed by the Acquisition Councils to amend the FAR to implement Sections 1014 and 1064 of FASA. We reviewed and discussed the Federal Register summary provided on the FAR site and obtained your e-mail address.

The summary stated:

" Interested parties should submit comments in writing on or before April 7, 2003 to be considered in the formulation of a final rule".

I hereby am submitting my comments. We would like clarification for the **Past Performance information** discussed in stated in Paragraph (f) (11) (ii). Will the amount of "points" received for the Past Performance be disclosed as it relates to that specific solicitation. If not, I would like to propose that it be disclosed. Also, will the source of any "additional" Past Performance" information be disclosed, i.e. in addition to what the Contractor / Vendor provides to the

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Government in their proposal response. If that is not the intention **of the Debriefing reform, I would like to suggest it as a clause that could be very beneficial to a Contractor in determining an Agencies performance rating.**

Thank you for your reply.

Rosemary Ficalora, Sr. Contracts Administrator

301-908-7934

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2002-014-

DEFENSE LOGISTICS AGENCY
HEADQUARTERS
8725 JOHN J. KINGMAN ROAD, SUITE 2533
FORT BELVOIR, VIRGINIA 22060-6221

J-33

APR - 7 2003

General Services Administration
FAR Secretariat (MVA)
1800 F Street, N.W., Room 4035
Washington, DC 20405

Attn: Ms. Laurie Duarte

Re: FAR Case 2002-014, Debriefing—Competitive Acquisition (Proposed Rule)

Dear Ms. Duarte:

The Defense Logistics Agency submits these comments in response to the proposed rule amending the FAR implementation of requirements for debriefings to unsuccessful offerors under competitive proposals, in accordance with Sections 1014 and 1064 of the Federal Acquisition Streamlining Act of 1994. The proposed rule adds new paragraphs to the FAR provisions at 52.212-1 Instructions to Offerors – Commercial Items, and FAR 52.215-1 Instructions to Offerors – Competitive Acquisition, to address debriefing requirements. This implements the statutory requirement for competitive solicitations to include a statement that prescribes the minimal information that shall be disclosed in postaward debriefings. The current FAR implementation includes the following among the information that must be disclosed: "any stated unit prices of each award" (15.503(b)(1)(iv)) and "overall evaluated cost or price (including unit prices)" (15.506(d)(2)). However, the FAR case states that references to "unit prices" were intentionally left out of both proposed paragraphs, due to the flux of recent case law. While it hints that a revision to FAR 15.503(b)(1)(iv) may be coming, the current FAR requirements to include unit prices in postaward notices and debriefings still stand.

As discussed more fully below, while DLA supports giving notice to all contractors regarding information that will be released in postaward notices and debriefings, the notice ought to identify that unit prices are subject to being released and clarify the definition of unit price. Once clarified, the possibility that a unit price would be considered commercial confidential information diminishes. As written, the rule puts the contracting officer in a precarious position, because it makes no changes to the requirements to release unit prices at FAR 15.503(b)(1)(iv) and 15.506(d)(2), yet it does not inform prospective offerors that their unit prices are subject to being released. We urge the FAR Council to address the requirement to release unit prices clearly and consistently within its regulations.

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DLA Supports Amending FAR Provisions at 52.212-1 and 52.215-1 to Add Paragraphs Addressing Debriefings.

To the extent that the proposed amendments implement the statutory requirement for competitive solicitations to give prospective offerors notice of what information is subject to disclosure in a debriefing, DLA supports the FAR case, but contends that the proposed rule does not go far enough and thereby creates additional confusion.

Currently, FAR 15.506(d)(2) and FAR 15.503(b)(1)(iv) require contracting officers to release to the unsuccessful offerors the stated unit prices of each award. The FAR requires release of "unit prices" in notices to unsuccessful offerors and in post-award debriefings. With specific regard to postaward notices, FAR 15.503(b) directs that –

> (1) Within 3 days after the date of contract award, the contracting officer shall provide written notification to each offeror whose proposal was in the competitive range but was not selected for award (10 U.S.C. §2305(b)(1) and 41 U.S.C. §253(b)(c)) or had not been previously notified under paragraph (a) of this section. This notice shall include –
>
> * * * * *
>
> (iv) The items, quantities, and any stated unit prices of each award.

Similarly, with regard to debriefing unsuccessful offerors, FAR 15.506 directs that –

> (d) At a minimum, the debriefing information shall include –
>
> * * * * *
>
> (2) The overall evaluated cost or price (including unit prices) and technical rating, if applicable, of the successful offeror . . . .

This regulatory coverage mandates release of the total contract price and any unit prices, based upon an implicit conclusion that this type of data is not confidential business information. FAR 15.503(b)(1) clearly distinguishes between confidential cost elements and releasable contract-pricing information by cautioning –

> (v) In no event shall an offeror's cost breakdown, profit, overhead rates, trade secrets, manufacturing processes and techniques, or other confidential business information be disclosed to any other offeror.

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Again, in FAR 15.506, the contracting officer is admonished that –

(e) Moreover, the debriefing shall not reveal any information prohibited from disclosure by 24.202 or exempt from release under the Freedom of Information Act (5 U.S.C. 552) including –

* * * * *

(2) Commercial and financial information that is privileged or confidential, including cost breakdowns, profit, indirect costs rates, and similar information; . . .

There needs to be a definition of unit price. In addition, the implicit presumption in FAR 15.506 and 15.503 (i.e., that unit prices are generally not confidential business information) should be made explicit.

Confusion is caused by lack of unit price definition in FAR.

Because the FAR does not define "unit price," contracting officers have been confused about what to release and what to protect. This confusion has led to improper release of non-unit price information and, as a result, created adverse case law. The past distinction between unit prices, which are releasable, and non-unit prices, which may not be, has been clouded by recent case law. *Mc Donnell Douglas Corp v. National Aeronautics & Space Administration*, 180 F.3d 303 (D.C. Cir. 1999); *Mallinckrodt Inc., v. West, (140 F. Supp. 2d 1) (D.D.C. 2000)*; *MCI Worldcom, Inc. v. General Services Administration*, 163 F.Supp.2d 28 (D.D.C. 2001). Although the *MCI* case addressed non-unit price data, the court noted that even release of unit prices requires a FOIA-type analysis of competitive harm. This treatment of all unit prices as potentially confidential is a reversal of long-standing policies and interests. Lack of clarity in the FAR coverage helped lead the court to this conclusion.

The FAR should contain a definition of "unit price" and a statement authorizing disclosure. This would clarify what pricing information to protect and what to disclose.

For decades, the settled rule was that the prices paid by the Government in unclassified contracts were releasable. Strong policy arguments supported this rule: disclosure encouraged fair competition, avoided unnecessary protests, encouraged accountability for expenditure of public funds, and offered protection against fraud by promoting transparent transactions. Furthermore, disclosure for negotiated procurements paralleled disclosure in sealed bid procurements, which is statutorily required (10 U.S.C. § 2305(b)(3)).

Confusion began in 1999, when the U.S. Court of Appeals for the District of Columbia Circuit reversed a district court decision that upheld the agency's decision to release contract unit

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prices. (*McDonnell Douglas Corp v. National Aeronautics & Space Administration*, 180 F.3d 303 (D.C. Cir. 1999). The Court found that the release of line-item prices would cause substantial competitive harm to the contractor, because the disclosure would permit its competitors to underbid it and allow commercial customers to "ratchet down" by better bargaining their prices. Prior case law had suggested a much stricter test – that the release would somehow reveal specific details of companies' competitive strategies. The facts of this case, however, predated the FAR Part 15 implementation of the debriefing statute that required disclosure of the overall evaluated cost (10 U.S.C. §2305(b)(5)(B)). Many considered the release authority reflected in the FAR debriefing regulations to have limited the significance of this decision.

The issue surfaced again in 2000, when the same court held that the Department of Veteran's Affairs was prohibited from disclosing the rebates and incentives offered by Mallinckrodt, Inc. because the information was exempt from disclosure under FOIA Exemption 4. (*Mallinckrodt Inc., v. West*, 140 F. Supp. 2d 1 (D.D.C. 2000)). This case involved blanket purchase agreements (BPAs) that supplemented existing Federal Supply Schedule (FSS) contracts between the supplier and the Government and that allowed the Government to negotiate and receive additional discounts (trade discounts). The Court overturned the VA's decision to disclose Mallinckrodt's rebate and incentive data on the basis that the rebate and incentive data were protected from disclosure because they were submitted to the Government "voluntarily." *Critical Mass v. Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1992). The Court also held that the rebate and incentive information was not "unit pricing data," because the information revealed little, if anything, about the actual cost of the product to the Government. However, the Court did clearly state that unit prices were required to be submitted and would be subject to disclosure. "While it is beyond dispute that unit pricing data is required to be submitted in order to compete for a government contract and would therefore be disclosable, it does not follow that information relating to rebates and incentives constitutes unit pricing data. On the contrary, the unit price is the amount of public funds the government must pay for goods and services." 140 F. Supp.2d, 1, 11. Although this case may have narrowed the definition of what constituted unit prices, it clearly authorized their release, and did not significantly change the long-settled rule.

The issue arose again in 2001, this time with significant consequences. The same Court found the agency mischaracterized complex pricing breakdowns contained in spreadsheet tables in a telecommunications contract as unit prices when they were not. *MCI Worldcom, Inc. v. General Services Administration*, 163 F.Supp.2d 28 (D.D.C. 2001). The Court found that the complex pricing tables did not contain "unit prices" but instead more closely resemble[d] 'cost breakdowns,' which are specifically prohibited from disclosure by the FAR. 163 F. Supp. 2d at 33. Noting the absence of a definition of 'unit price' in the FAR or case law, the Court found that because the pricing elements and components of the tables were "not separately purchased,

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ordered, or billed to the government", they did not constitute "price" for a "good or service" and thus were not unit prices. Id. at 32-33.

Up to this point, the case did not significantly alter the existing rule; however, the Court continued in dicta to find that even if the tables were unit prices, the same FAR language the agency relied on for release actually prohibited its release. The Court said that the FAR requirement to release unit prices must be read in combination with the qualifying language at FAR 15.506(e), which provides that any information exempted from disclosure by the Freedom of Information Act (FOIA) shall not be revealed in a debriefing. Although it is dicta, it is unclear when a unit price is to be considered proprietary, since *MCI* involved non-unit prices. Ever since the *MCI* case, agencies are at a loss as to what to release, because the FAR – which implements statute – requires release of certain information, while the *MCI* court states otherwise.

As currently written, the proposed amendments to FAR provisions 52.212-1 and 52.215-1 would only make this situation worse. The FAR would continue to mandate release of unit prices, yet the solicitation provisions would not inform prospective offerors that their unit prices are subject to being released. Contracting officers are caught between trying to comply with the FAR mandate to release unit prices, and the reading in of FOIA submitter notice requirements prior to release of unit prices. Defining "unit prices" in the FAR would eliminate or greatly reduce this confusion.

A proposed definition of "unit price" is offered.

The proposed definition for "unit price" is the total purchase price charged to the Government for an item of supply or service, divided by the purchase quantity. This should be added to the FAR definitions in 2.101. This definition explicitly tells the contracting officer, and prospective offerors, what the Government considers to be a unit price. FAR 15.503(b)(v) and FAR 15.506(e)(3) explicitly protect that which is less than a unit price – cost breakdowns, profit, indirect cost rates and similar information. However, the unit prices that the Government agrees to pay become a term of the negotiated contract, and these unit prices would be released to unsuccessful offerors and during debriefings. We think this is what was intended in FAR 15.5 and is not a substantive change of the FAR or the procurement process. The definition is consistent with that offered in *Mallinckrodt*.

FAR should clarify its intent to release unit prices to all contractors.

Clearly the FAR's mandate to release unit prices was premised on the implicit acknowledgement that unit prices as defined above are not confidential commercial business information. The confusion caused by the dicta in the *MCI* case should be addressed by defining unit prices and reiterating that they will be released. To that end, a statement should be added to

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FAR 15.506(e): "Generally, unit prices paid by the government are not considered confidential commercial information." Since the statute 10 U.S.C. §2305(b)(5)(B)(ii) itself requires release of the total contract price, and given that solicitations stating the quantity solicited are publicly available, it seems ludicrous that one could argue that the dividend in the equation could be confidential information. As with any contract-related submission, in the rare instance where a unit price could reveal confidential commercial information, an offeror could protect its unit prices by marking them proprietary in accordance with FAR 3.104 and 52.215-1(e). Of course, the contractor must show that the release of its unit prices would disclose confidential business information. However, we believe this would be the exception not the rule. The rule would be that unit prices are released, unless the contractor has marked them proprietary and substantiated the marking with supporting rationale.

In summary, we believe the FAR Council should take this opportunity to clarify the definition of unit price in the FAR, and reiterate the policy of transparency of public contracts by addressing the releasabilty of unit prices in the proposed provision amendments. Accordingly, we have attached our proposed changes. We appreciate the opportunity to offer these comments. My point of contact is Mrs. Anne Burleigh, who can be reached at (703) 767-1358, or by e-mail at anne.burleigh@dla.mil.

CLAUDIA S. KNOTT
Senior Procurement Executive

Attachment

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014-2

FAR Case 2002-014
Debriefing – Competitive Acquisition (Proposed Rule)
DLA Comments

2.101 Definitions

* * * * *

[***Unit price*** **means the total purchase price charged to the Government for an item of supply or service, divided by the purchase quantity.]**

* * * * *

15.503 Notifications to unsuccessful offerors.

* * * * *

(b) *Postaward notices* -

(1) Within 3 days after the date of the contract award, the contracting officer shall provide written notification to each offeror whose proposal was in the competitive range but was not selected for award (10 U.S.C. 2305(b)(5) and 41 U.S.C. 253b(c)) or had not been previously notified under paragraph (a) of this section. The notice shall include –

* * * * *

(iv) The items, quantities, and any stated unit prices [**as defined by 2.101**] of each award. If the number of items or other factors makes listing any stated unit prices impracticable at that time, only the total contract price need be furnished in the notice. However, the items, quantities, and any stated unit prices of each award shall be made publicly available, upon request; and

* * * * *

15.506 Postaward debriefing of offerors.

* * * * *

(e) The debriefing shall not include point-by-point comparisons of the debriefed offeror's proposal with those of other offerors. Moreover, the debriefing shall not reveal any information prohibited from disclosure by 24.202 or exempt from release under Freedom of Information Act (5 U.S.C. 552) including –

* * * * *

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(3) Commercial and financial information that is privileged or confidential, including cost breakdowns, profit, indirect cost rates, and similar information. **[Generally, unit prices as defined in FAR 2.101 are not confidential commercial or financial information.]**

* * * * *

52.212-1 Instructions to Offerors – Commercial Items.

* * * * *

Instructions to Offerors – Commercial Items (Date)

* * * * *

(k) Debriefing. If a postaward debriefing is given to requesting offerors, the Government shall disclose the following information, if applicable:

(1) The agency's evaluation of the significant weak or deficient factors in the debriefed offeror's offer;

(2) The overall evaluated cost or price **[(including unit prices as defined in FAR 2.101)]** and technical rating of the successful and the debriefed offeror and past performance information on the debriefed offeror;

(3) The overall ranking of all offerors, when any ranking was developed by the agency during source selection;

(4) A summary of the rationale for award;

(5) For acquisitions of commercial items, the make and model of the item to be delivered by the successful offeror; and

(6) Reasonable responses to relevant questions posed by the debriefed offeror as to whether source-selection procedures set forth in the solicitation, applicable regulations, and other applicable authorities were followed by the agency.

(End of provision)

* * * * *

52.215-1 Instructions to Offerors – Competitive Acquisition.

* * * * *

Instructions to Offerors – Competitive Acquisition (Date)

* * * * *

(f) * * *

(11) If a postaward debriefing is given to requesting offerors, the Government shall disclose the following information, if applicable:

(i) The agency's evaluation of the significant weak or deficient factors in the debriefed offeror's offer;

(ii) The overall evaluated cost or price **(including unit prices as defined in FAR 2.101)** and technical rating of the successful and the debriefed offeror and past performance information on the debriefed offeror;

(iii) The overall ranking of all offerors, when any ranking was developed by the agency during source selection;

(iv) A summary of the rationale for award;

(v) For acquisitions of commercial items, the make and model of the item to be delivered by the successful offeror; and

(vi) Reasonable responses to relevant questions posed by the debriefed offeror as to whether source-selection procedures set forth in the solicitation, applicable regulations, and other applicable authorities were followed by the agency.

(End of provision)

* * * * *

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APR 18 2002

GSA Office of Governmentwide Policy

MEMORANDUM FOR RONALD POUSSARD
DIRECTOR
DEFENSE ACQUISITION REGULATIONS COUNCIL

FROM: RODNEY P. LANTIER
DIRECTOR
REGULATORY SECRETARIAT

SUBJECT: FAR Case, 2002-014, Debriefing-Competitive Acquisition

Attached is a additional comment received on the subject FAR case published at 68 FR 5778; February 4, 2003. The comment closing date was April 7, 2003.

Response Number	Date Received	Comment Date	Commenter
2002-014-3	04/09/03	04/17/03	Col. Richard Volpe

Attachment

U.S. General Services Administration
1800 F Street, NW
Washington, DC 20405-0002
www.gsa.gov

2002-014-3

"Volpe Richard L Col HQ AFMC/PKP" <Richard.Volpe@wpafb.af.mil>

04/09/2003 03:09 PM

To: "'farcase.2002-014@gsa.gov'" <farcase.2002-014@gsa.gov>
cc: "Telepak AnnMarie Civ HQ AFMC/PKPA" <AnnMarie.Telepak@wpafb.af.mil>
Subject: AFMC/PKP Comments on FAR Case 2002-014 "Debriefing - Competitive Acquisition"

The issue on disclosure of unit price information in debriefings is intentionally not included in subject case but "may cause a future revision to FAR 15.503(b)(1)(iv) to clarify the use of unit prices." When that revision is drafted, please consider the following suggestion from one of our field activities:

If the Government bases the evaluation of offerors' amounts on an aggregate number, such as the "total cost" or "total of all CLINS including options" or even "total of each CLIN," it's logical to require only the release of that aggregate number, and not the breakdown of unit prices. However, if the Government evaluates and bases its decision on the unit prices proposed, then unit price information should be disclosed in a debriefing.

Request FAR language be considered to authorize debriefing price information only to the level upon which the source selection decision was based.

We have no other comments on subject case. If you have any questions please contact my action officer Ms Ann Marie Telepak, AFMC/PKPA, annmarie.telepak@wpafb.af.mil, DSN 986-0378.

v/r

Richard L. Volpe, Col, USAF
Chief, Contracting Policy Division
Directorate of Contracting