Subpart 5106.3 - Other Than Full and Open Competition

Parent topic: Part 5106 - Competition Requirements

5106.302 Circumstances permitting other than full and open competition.

5106.302-1 Only one responsible source and no other supplies or services will satisfy agency requirements.

(a)(2)(i)(1) The HCA shall make the determination at DFARS 206.302-1(a)(2)(i)(1). See Appendix GG for further delegation.

(d) The HCA may waive the requirements as stated in DFARS and DFARS PGI 206.302-1(d). See Appendix GG for further delegation.

5106.302-2 Unusual and compelling urgency.

(d)(1)(ii) The Assistant Secretary of the Army (Acquisition, Logistics and Technology) shall make the determination that exceptional circumstances apply as described in FAR 6.302-2(d)(1)(ii). See Appendix GG for further delegation.

(2)(ii) The Assistant Secretary of the Army (Acquisition, Logistics and Technology) shall make the determination for any subsequent modification as set forth in FAR 6.302-2(d)(2)(ii). See Appendix GG for further delegation.

5106.302-3 Industrial mobilization; engineering, developmental, or research capability; or expert services.

(c) *Limitations.* When citing the authority at 10 U.S.C. 3204(a)(3) as implemented in FAR 6.302-3(a)(2)(ii), the Contracting officer must ensure the certifications required by FAR 6.303-1(c) and FAR 6.303-2(c) contain a statement that the technical and requirements personnel reviewed the proposed effort to ensure that it falls within the charter or special capabilities of the proposed institution. In addition, the statement will explain how the proposed effort establishes or maintains (as appropriate) an essential engineering, research, or development capability to be provided by an educational or other non-profit institution or a federally funded research and development center (FFRDC). When proposing to contract directly with an FFRDC not sponsored by the contracting activity, the Contracting officer must ensure that the procurement request includes a written confirmation from the sponsoring agency that the proposed effort falls within the mission and general scope of effort or special competency of the FFRDC.

5106.302-4 International agreement.

(c) *Limitations.* When citing the authority at 10 U.S.C. 3204(a)(4) as implemented in FAR 6.302-4 and DFARS 206.302-4(c), the Contracting officer must ensure the document referred to in DFARS 206.302-4(c) is titled "International Agreement Competitive Restrictions" (IACR). The IACR describes the terms of an international agreement or treaty, or the written directions of a foreign government reimbursing the cost of the procurement, that have the effect of requiring other than competitive procedures for the procurement. The IACR may be used even when the terms of the agreement or treaty, or the written directions, do not specifically name a required source, provided the agreement or treaty, or the written directions, contain sufficient information to explain why the use of other than competitive procedures is required. The HCA may delegate authority to prepare an IACR to a level no lower than the chief of the contracting office. The Contracting officer must include in the contract file the IACR and a copy of the associated Letter of Offer and Acceptance, or other international agreement, treaty, or written directions of the reimbursing foreign government.

5106.302-5 Authorized or required by statute.

(b) Application. Agencies may use this authority to—

(4) See AFARS 5106.303-1(b) for requirements for justification and approval of sole source 8(a) awards exceeding $100 million.

5106.302-7 Public Interest.

(b) Application. This authority may be used when —

(1) See Section B of DPCAP Class Deviation 2024-O0005 Temporary Authorizations for Covered Contracts Related to Ukraine, Taiwan, and Israel for instructions on use of other than competitive procedures under FAR 6.302-7 for “covered contracts” defined as those awarded to

(A) build or replenish the stocks of critical munitions and other defense articles of DoD;

(B) provide materiel and related services to foreign allies and partners that have provided support to Ukraine, Taiwan, or Israel; or

(C) provide materiel and related services to Ukraine, Taiwan, or Israel.

(2) Authority to make the head of the agency determination specified at FAR 6.302-7(a)(2) is delegated to the head of the contracting activity, who meets the eligibility criteria stated in the class deviation, regardless of the dollar value of the procurement action. See Appendix GG for further delegations.

(3) In lieu of the requirement at FAR 6.302-7(c)(2), not later than 7 days before awarding a covered contract using the authority in paragraph (b)(1), the Army must submit written notification of use of this authority to the congressional defense committees. Contracting officers shall submit congressional notification for HQDA review, coordination, and/or approval via the Enterprise Task Management Software Solution (ETMS2) to the ODASA(P) directorate listed at AFARS 5101.290(b)(1)(ii)(B).

(See AFARS 5153.206-92 and AFARS 5153.303-11 for determination and findings for other than full and open competition for covered contracts applicable under this subpart. See AFARS 5153.303-12 for sample congressional notification.)

5106.303 Justifications.

5106.303-1 Requirements.

(a) Contracting officers shall not release any solicitation for other than full and open competition prior to approval of the justification, except when citing the authority at 10 U.S.C. 3204(a)(2) as implemented at FAR 6.302-2.

(b) Contracting officers shall not release any solicitation for a sole-source contract prior to approval of the justification, except when citing the 8(a) authority (15 U.S.C. 637(a)) for an amount exceeding $100 million unless—

(2) The head of the procuring activity has approved the justification. See Appendix GG for further delegation.

(c) Only United States Government employees formally representing the appropriate functional activity may sign technical and requirements certifications under this provision.

(d) A justification approved on a class basis authorizes the award of two or more contract actions using other than full and open competition. Provided that it complies with the requirements below, the justification may encompass identified contract actions for the same or integrally related supplies or services or other contract actions that require essentially identical justification. A justification made on a class basis—

(i) Is not limited to a single contractor;

(ii) May cover contracts for non-permanent requirements to be awarded in successive fiscal years, provided that the requirements and quantities are included in the Future Years Defense Program (FYDP), and their costs have been specifically identified;

(iii) Must address every contract included in the scope of the class justification in each paragraph, in detail (e.g., specific quantity and dollar amounts for each contract; detailed documentation of the circumstances supporting the use of other than full and open competitive procedures for each contracting action); and

(iv) Must include only those supply or service components that are, and will clearly remain, sole or limited source for the period covered by the justification.

(e) If a Contracting officer awards a contract exceeding the dollar threshold identified at FAR 6.304(a)(4) prior to approval of the required justification using the authority cited in FAR 6.302-2, the contracting activity must submit the justification for approval to the address in AFARS 5101.290(b)(2)(ii)(B) no later than seven calendar days after contract award.

5106.303-1-90 Requirements for amended justifications.

(a) The Contracting officer shall amend a justification and obtain the required approvals when any of the following occur prior to award of the contract action:

(1) The dollar value of the prospective contract action increases beyond the authority of the previous approving official.

(2) A change in the competitive strategy further reduces competition.

(3) A change in requirements affects the basis for the justification.

(b) The senior procurement executive (SPE) approves all amendments to justifications previously approved at the SPE level, except when the basis for the amended justification supports a lower approval level per FAR 6.304.

(c) Prepare all amended justifications as required in AFARS 5106.303-2-90(c)(3).

5106.303-2 Content.

(d)(5) The Assistant Secretary of the Army (Acquisition, Logistics and Technology) shall specify other matters as described in FAR 6.303-2(d)(5). See Appendix GG for further delegation.

5106.303-2-90 Format and submission of the justification review and justification and approval documents.

(a) *General.* The justification and approval (J&A) format at AFARS 5153.303-5 is mandatory for all justifications in support of other than full and open competition. Contracting officers will tailor the J&A's format to accommodate other type justifications in accordance with the FAR approval thresholds and required content.

(b) Reserved.

(c) *Instructions.*

(1) *Justification review document (JRD) .* The JRD serves as the cover page(s) to the J&A document and may be tailored to reflect the approval thresholds and relevant functions for the instant contract action.

(2) *Justification and approval document.*

(i) Begin page numbering on the first page of the JRD, and number each subsequent page of the document sequentially.

(ii) Enter the control number in the upper right corner of each page, including the JRD and approval pages.

(iii) If a paragraph prescribed in the format does not apply to the contract action, indicate "Not applicable" and explain why.

(iv) Certifying officials must approve any material changes to the original J&A contents.

(v) Paragraph 7, “Actions to Increase Competition,” must be specific and comprehensive.

(vi) Only United States Government employees formally representing the appropriate functional activity may validate and certify the JRD and J&A (see AFARS 5153.303-4 and AFARS 5153.303-5). Other government officials shall not perform this certification.

(3) *Amended justifications.*

(i) When AFARS 5106.303-1-90 requires an amended justification, the Contracting officer must prepare a document entitled “Amendment to Justification for Other Than Full and Open Competition,” using the same paragraph designations used in the original justification. Attach a copy of the original JRD and J&A documents. In addition—

(A) Number amendments sequentially;

(B) Include J&A paragraphs 1, 2 and 3 in full, revised if required;

(C) Include new certifications by the Contracting officer (paragraphs 13 and 14). Include new technical and requirements certifications (paragraphs 11 and 12) only when changes in those areas of responsibility prompted the amendment;

(D) Use paragraph 10 to explain the reason for the amendment and to give any additional information that would help the reader understand the changes; and

(E) Address all remaining paragraphs of the J&A by stating “No change” following the paragraph number or by inserting an entirely revised paragraph. When there are minor changes, mark through deleted items and underline additions to the original paragraph to indicate changes to the original document. For major revisions, including the addition of paragraphs that previously did not apply, instead of marking through and underlining, use paragraph 10 to identify the paragraph number and summarize the changes. Include this information following the entry required by (D).

(ii) Determine the approval level for an amended J&A by using the cumulative dollar value of the amended justification, e.g., original J&A value plus the amount of the change.

(d) *Submission.*

(1) For contracting actions exceeding the dollar threshold identified at FAR 6.304(a)(4), the contracting activity must submit the justification in sufficient time for approval, approximately 40 working days, to the address at AFARS 5101.290(b)(2)(ii)(B). Electronic transmission is preferred. For electronic submission, indicate the lead point of contact and the alternate (name, phone number, email address).

(2) Include with the justification the transmittal memorandum signed by the appropriate official, the current acquisition plan, and any other key documents related to the instant action. The approval authority or his/her office may request a copy of the acquisition strategy, usually for large services or major weapons system contracts; business case analysis for performance based logistics and select Acquisition Category programs; or requirements validation separately.

(e) *Revisions.* The ODASA(P) action officer will return J&As submitted for SPE approval when directed revisions cannot be accomplished within five business days. The contracting activity may re-submit the J&A after making the requested revisions. Once received, the ODASA(P) action officer

will start anew processing the action for approval.

5106.304 Approval of the justification.

(a)(3) The HCA shall approve justifications as described at FAR 6.304(a)(3). See Appendix GG for further delegation.

(i) See AFARS 5106.303-1-90 for approval of amended justifications.

(ii) Requirements shall not be split to avoid submission of a justification to a higher-level approval authority.

(c) Approval procedures and thresholds for justifications based on a class of contracts are the same as for individual justifications; see FAR 6.304.