Part 5115 - Contracting by Negotiation

The official AFARS regulation resides on the Army's Knowledge Management Portal PAM. If you do not have CAC access to PAM, please visit the Army Contracting Enterprise's public facing website "Army Connect" at https://www.army.mil/armycontracting#org-afars. The AFARS will return to Acquisition.gov upon completion of the RFO.

(Revised 01 October 2024)

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5115.000 Scope of part.

(1) The Army Source Selection Supplement (AS3) at Appendix AA contains detailed guidance pertaining to the source selection process. The AS3 is used in conjunction with this part and supplements the mandatory DoD Source Selection Procedures. It contains information on source selection processes and techniques that the Army uses for competitive, negotiated acquisitions using either formal or informal source selection procedures. See DoD Source Selection Procedures at 1.3, page 2 for exceptions.

(2) The AS3 is a comprehensive source selection resource which recites best practices that promote source selection flexibility and consistency within a given framework in Army source selections. Army personnel shall use the AS3 resource when conducting competitive source selections. The extent to which personnel will use the processes and techniques described in this supplement will depend upon the complexity and dollar value of each acquisition and the available resources. When using the AS3, apply prudent business sense to tailor the processes to fit the circumstances.

5115.001 Definitions.

“Formal source selection,” as used in this part, means the source selection process in which someone other than the Contracting officer is the source selection authority, normally for high dollar value or complex acquisitions.

Subpart 5115.2 - Solicitation and Receipt of Proposals and

Information

5115.201 Exchanges with industry before receipt of proposals.

(c) Early involvement is essential for maximizing industry's contribution to the planning, requirements definition, and acquisition processes. Communications with industry should start prior to drafting any solicitation. Measures will be taken to protect any intellectual property (IP) discussed during the planning/pre-solicitation phase, to include non-disclosure agreements as applicable (see Appendices of the Implementation Guidance for Army Directive 2018-26).

(6) When a written acquisition plan is required per DFARS 207.103(d) and a draft request for proposal is not used, Contracting officers must include the rationale for not using a draft request for proposal in the plan.

(f) All non-public contractor-owned IP discussed will be considered proprietary information and will not be disclosed publicly. This includes IP the Government is privy to as a result of discussions, documentation, or demonstrations.

5115.204 Contract format.

(e) The Assistant Secretary of the Army (Acquisition, Logistics and Technology) may exempt individual contracts from the use of the uniform contract format. See Appendix GG for further delegation. The Deputy Assistant Secretary of the Army (Procurement), without power to further delegate, may exempt classes of contracts. The exempting authority will consult with affected contract administration and payment offices prior to granting the exemption.

Subpart 5115.3 - Source Selection

5115.300 Scope of subpart.

Contracting officers will conduct source selections for architect-engineering services in accordance with FAR part 36.601.

5115.300-90 Waiver approvals.

The senior procurement executive may approve, in accordance with Paragraph 1.2.4 of the Department of Defense Source Selection Procedures, waivers for solicitations valued below $1 billion. See Appendix GG for further delegation.

5115.303 Responsibilities.

TABLE 5115-1, Source Selection Authority (SSA) Appointments for FAR-Based Acquisitions

SSA Designations	Appoint ing Authority
Acquisitions for systems and services, acquired through the Defense Acquisition System, for which milestone decision authority (or other decision authority) is at the Army Acquisition Executive (AAE) or Office of the Secretary of Defense level IAW the applicable Adaptive Acquisition Framework DoDI.	AAE, or as delegated
Other service acquisitions with a total planned dollar value of $500 million or more, or service acquisitions identified by the ASA(ALT) as a special interest. See DoDI 5000.74 and AR 70-13.	DASA(P) or Senior Services Manager
All other acquisitions for which formal source selection procedures are used.	HCA delegable to the SCO (Note 1)

Notes:
1. The HCA or SCO must coordinate with the responsible Program Executive Officer prior to nominating or, as applicable, appointing an SSA for a source selection in support of an Army acquisition program.
2. Appointment of selection officials for Other Transactions Agreements shall follow the Army's Other Transaction policy.

(b)(2) Army SSAs shall utilize Appendix AA, Army Source Selection Supplement (AS3), when conducting competitive, negotiated source selections. A source selection plan is required for all competitive, negotiated acquisitions where the basis of award includes factors in addition to cost or price. Army SSAs must use the standard rating tables as detailed in the DoD Source Selection Procedures, to include the colors and adjectives.

(S-90) The appointment of an individual to serve as the SSA shall be commensurate with the complexity and dollar value of the acquisition. For acquisitions with a total estimated value of $100 million or more, the SSA shall be an individual other than the Contracting officer. For all other acquisitions, the Contracting officer may serve as the SSA in accordance with FAR 15.303 unless the agency head appoints another individual.

(S-91) The Source Selection Evaluation Board chairperson is responsible for tailoring the reporting and documentary requirements in accordance with the AS3, and overseeing the source selection training for their source selection team.

(S-92) Contracting officers will assist program executive officers (PEOs), program managers (PMs), or other program or functional proponents to –

(1) Develop and implement the acquisition strategy;

(2) Prepare and obtain approval of the source selection plan before issuing the solicitation; and

(3) Recommend an official as the SSA, when the AAE has delegated authority to appoint the SSA.

(S-93) PEOs, PMs, or other program or functional proponents provide the necessary funds for

salaries, overtime, temporary duty travel, and other expenses for the source selection. In addition, PEOs, PMs, or other proponents may also provide office space, administrative equipment, clerical support, and other necessary administrative support to personnel involved in the source selection.

5115.303-1 Appointments.

(a) Contracting activities shall submit nominations for SSA appointment to the AAE, DASA(P) or Senior Services Manager as indicated in Table 5115-1 of this section. Each nomination must include the following:

(1) A memorandum from the HCA or SCO to the DASA(P) requesting the appointment of the nominee as SSA.

(2) A biography of the SSA nominee detailing the training, knowledge, and experience that qualifies them for this appointment.

(3) A memorandum for the record signed by the supporting legal office, ethics counselor, detailing the ethics briefing conducted with the nominee for this source selection, and verification the nominee's final disclosure report has been reviewed and not potential conflicts of interest were identified.

(4) Request for Source Selection Appointment documents for DASA(P) or AAE signature should be sent encrypted email to: usarmy.pentagon.hqda-asa-alt.list.saal-ps-staff@army.mil.

5115.304 Evaluation factors and significant subfactors.

(b)(2)(A) Only the absolute minimum number of factors necessary for evaluation of proposals shall be established. When appropriate, the SSA may subdivide source selection factors into subfactors. On rare occasions, the SSA may further subdivide a subfactor into elements, if needed.

(B) As stated in the AS3, evaluation factors and subfactors must be definable in readily understood qualitative terms (i.e., adjectival, colors, or other indicators, but not numbers) and represent the key areas of importance for consideration. Numerical weighting (i.e., assigning points or percentages to evaluation factors and subfactors) is not an authorized method of expressing the relative importance of the factors and subfactors.

(d) When the Government intends to evaluate the cost of future production or performance beyond the instant contract, and to include these costs as part of the basis of selection and award, clearly specify the evaluation procedures for such costs in the solicitation. Additionally, Contracting officers must specify in the solicitation the Government's procedures and methodologies for developing any estimates before using any of the associated cost estimates for evaluating future or life cycle costs.

5115.305 Proposal evaluation.

(a) If the request for proposal identifies a threshold and objective performance for any of the requirements, the Contracting officer must inform the offerors how the source selection team will evaluate the objective performance requirements and credit the performance above the threshold requirement.

(1) *Cost or price evaluation.* Do not score price or cost or combine it with other non-price or cost related aspects of the proposal evaluation.

(2) *Past performance evaluation.* The Contractor Performance Assessment Rating System is available via the Internet at https://www.cpars.gov .

(3) *Technical evaluation*. When divergent evaluations exist, and none of the evaluators have misinterpreted or misunderstood any aspects of the proposals, consider providing the SSA with written majority and minority opinions.

5115.306 Exchanges with offerors after receipt of proposals.

All exchanges with offerors after receipt of proposals must clearly identify the types of exchanges, i.e., clarifications, communications or discussions.

(c) Competitive Range. The SSA must approve the competitive range determination.

5115.308 Source selection decision.

The SSA shall prepare a source selection decision document for all source selections conducted using this part. The source selection decision document must reflect the SSA's integrated assessment and decision. The document must be the single summary document supporting selection of the best value proposal consistent with the stated evaluation criteria. It must clearly explain the decision and document the reasoning the SSA used to reach a decision. The document should be releasable to the Government Accountability Office and others authorized to receive proprietary and source selection information.

5115.371 Only one offer.

5115.371-5 Waiver.

(a) The HCA is authorized to perform the functions at DFARS 215.371-5. See Appendix GG for further delegation.

Subpart 5115.4 - Contract Pricing

5115.403 Obtaining certified cost or pricing data.

5115.403-1 Prohibition on obtaining certified cost or pricing data (10 U.S.C. 2306a and 41 U.S.C. 35).

(c)(4) Waivers. Follow DFARS 215.403-1(c)(4)(A) to determine when an exceptional case waiver of the requirement to submit certified cost or pricing data is appropriate.

Army Contracting officers shall follow the procedures at AFARS PGI 5115.403-1, for tracking and reporting the required information when submitting exceptional case waivers.

(A)(2) Coordinate proposed exceptional case waivers that exceed $100 million in writing with the Deputy Assistant Secretary of the Army (Procurement) (DASA(P)) prior to submission to the head of contracting activity (HCA) for approval. Submit the proposed waiver to the addressee listed at 5101.290(b)(2)(ii)(E).

(5) The head of contracting activity is the approval authority for waivers Section (E) of Defense Pricing and Contracting Class Deviation 2024- O0005 Temporary Authorizations for Covered Contracts Related to Ukraine, Taiwan, and Israel. See AFARS 5153.206-93 Instructions for Congressional Notification Requirement When Utilizing the Authorities Conferred by paragraphs (B) – (G) of DPCAP Class Deviation 2024- O0005—Temporary Authorizations for Covered Contracts Related to Ukraine, Taiwan, and Israel; Workload Forecasting Instructions and AFARS 5153.303-13 for instructions and sample format for reporting covered contracts applicable under this subpart to congressional defense committees.

5115.403-3 Requiring data other than certified cost or pricing data.

(a)(4) The head of contracting activity makes the determination as specified in FAR 15.403-3(a)(4). See Appendix GG for further delegation.

5115.403-3-90 Process and Reporting Requirements Pertaining to Contractor Denials of Contracting officer Requests for Data Other Than Certified Cost or Pricing Data.

In accordance with (DPCAP) memorandum , dated 22 March 2019, subject: Process and Reporting Requirements Pertaining to Contractor Denials of Contracting officer Requests for Data Other Than Certified Cost or Pricing Data, in the event of an exigent situation when the HCA approves award without obtaining requested cost data from exclusive distributors and/or dealers, Army contracting activities shall notify the Office of the DASA(P) at the address listed at AFARS 5101.290(b)(2)(ii)(E).

The Office of the DASA(P) will then notify the Office of the Under Secretary of Defense (Acquisition and Sustainment). Each notification will include the following information:

(a) Contractor name and DUNS number (Exclusive Distributor/Dealer).

(b) Subcontractor name and DUNS number (e.g., OEM/actual manufacturer).

(c) Contract number, modification or order number, if applicable.

(d) Date and amount of the contract action.

(e) Steps taken to attempt price analysis without requiring cost data.

(f) Contractor’s rationale for refusing to provide the data.

(g) Actions taken by the contracting activity to obtain the data.

(h) Data used to determine price reasonableness and resulting determination.

(i) Actions planned to avoid this situation in the future.

5115.404 Proposal analysis.

5115.404-1 Proposal analysis techniques.

(a) General.

(i)(A)(iv) The HCA shall make the decision as stated in DFARS PGI 215.404-1(a)(i)(A)(iv) and in accordance with AFARS 5115.403-3-90 Process and Reporting Requirements Pertaining to Contractor Denials of Contracting officer Requests for Data Other Than Certified Cost or Pricing Data.. See Appendix GG for further delegation.

5115.404-4 Profit.

(c) Contracting officer responsibilities.

(2)(C)(2) The HCA approves use of the alternate approach discussed in DFARS 215.404-4(c)(2)(C)(2). See Appendix GG for further delegation.

5115.406 Documentation.

5115.406-1 Prenegotiation objectives.

(1) The Contracting officers will prepare, review, and obtain approval of prenegotiation memoranda in accordance with the activity's business clearance procedures. In accordance with AFARS 5115.406-3, the Contracting officer may consolidate the prenegotiation memorandum and price negotiation memorandum (POM/PNM) for competitive or non-competitive acquisitions. When intending to use a consolidated POM/PNM, the Contracting officer must still comply with FAR 15.406-1 and DFARS PGI 215.406-1 and obtain written approval of the prenegotiation objectives before negotiation of any pricing action.

(i) *Sole source acquisitions.* For sole source actions, the prenegotiation memoranda document compliance with law, regulations, and policy and become the official record demonstrating the exercise of good business judgment. The prenegotiation memoranda describe the contractor's methodology and how it developed its proposal position to the extent it can be determined from the contractor's proposal and fact-finding efforts, how the price and technical auditors and reviewers developed their recommendations, and what the negotiator did in developing an independent prenegotiation position considering the pricing, audit, and technical analyses and recommendations. An understanding of the development of each of these positions is important when preparing for negotiations. The Defense Acquisition University's Acquisition Community Connection, available via the Internet at https://acc.dau.mil/pricing, contains the DoD Contract Pricing Reference Guides, which discuss in depth the pricing techniques and factors Contracting officers should consider when developing negotiation positions.

(ii) *Competitive negotiated acquisitions.* For competitive negotiated acquisitions using formal source

selection procedures, the Contracting officer should ensure the source selection plan, as well as section M of the solicitation is documented and readily available. This should include the evaluation criteria and the basis for award contained in the solicitation, a summary schedule of offerors' prices, and the technical and cost evaluations. Also, the determination and supporting discussion of offerors determined to be within and outside the competitive range and a summary of the technical and cost evaluation notices the Contracting officer intends to discuss with offerors selected to participate in the discussions should documented and readily available to the Contracting officer.

(2) When a significant disagreement as defined in DFARS PGI 215.406-1(b)(i) exists between the Contracting officer and the Defense Contract Audit Agency (DCAA) auditor, and the auditor requests a higher-level review of the contracting officer's decision, the Contracting officer will advise his/her management and provide the name, title, and telephone number of the higher-level review authority to the DCAA auditor. The initial higher-level review authority is the chief of the contracting office or district/center contracting chief in the United States Army Corps of Engineers. If the significant disagreement still exists after discussions with the chief of the contracting office, the matter is elevated to the SCO for resolution. If s/he is unable to resolve the disagreement, the HCA will attempt to resolve the disagreement. The HCA will notify the DASA(P) if DCAA elevates the significant disagreement to the Director, DPCAP. The Contracting officer shall document the disposition of the higher-level review(s) in a memorandum for the contract file.

5115.406-3 Documenting the negotiation.

(a) Contracting officers must document within the price negotiation memorandum the results of the negotiation in sufficient detail to clearly establish all significant aspects of the contract action. When utilizing a consolidated POM/PNM, the Contracting officer must ensure the POM/PNM contains all required content for both documents, in accordance with FAR 15.406 and DFARS PGI 205.406, and is stated in sufficient detail to reconstruct actions and decisions and to support the reasonableness of the final price.

(b) If the final negotiated price is within a range specifically approved as the prenegotiation objective, and if negotiations did not present information that calls into question the reasonableness of the previously-approved price range, the written approval obtained under AFARS 5115.406-1(1) may also serve as the approval for the consolidated POM/PNM. The approved POM/PNM may be used in determining the negotiated price to be fair and reasonable. Notwithstanding this subsection, the Contracting officer still must obtain all other required pre-award approvals.

For guidance on make-or-buy analysis for Army programs of record see AFARS PGI 5115.407-2.

5115.407-3 Forward pricing rate agreements.

(b)(i) The HCA may waive rates as described in DFARS 215.407-3(b)(i). See Appendix GG for further delegation.

5115.407-4 Should-cost review.

(b) Program should-cost review .

(4) In coordination with the program manager or other customer, the SCO must establish the

requirements and format for the program should-cost team report.

(c) Overhead should-cost review.

(2)(B) The HCA may request an overhead should-cost review as described in DFARS PGI 215.407-4(c)(2)(B). See Appendix GG for further delegation.

Subpart 5115.6 - Unsolicited Proposals

5115.606 Agency procedures.

See Department of the Army Pamphlet 70-3, paragraphs 10-19 and 20, for Army procedures pertaining to unsolicited proposals. Department of the Army Pamphlet 70-3 is located on the Army Publishing Directorate's website at http://www.apd.army.mil/ .

5115.608 Prohibitions.

Government personnel shall not disclose proprietary data included in an unsolicited proposal for any purpose or use except for evaluation purposes (see FAR 15.608). In the event a contract award is made as a result of an unsolicited proposal, the Government shall have the right to duplicate, use, or disclose proprietary data to the extent provided in the contract.