

## **6 FAH-2 H-220 COMPETITION IN CONTRACTING**

*(TL:CORH-2; 11-19-2003)*  
*(Office of Origin: A/OPE)*

### **6 FAH-2 H-221 GENERAL**

*(TL:CORH-2; 11-19-2003)*

a. The Competition in Contracting Act of 1984 (CICA), Public Law 98-369, requires, with limited exceptions, that contracting officers promote and provide for full and open competition in soliciting offers and awarding U.S. Government contracts over the simplified acquisition threshold. Maximum competition is desirable from a public perspective because, if properly administered, it results in timely delivery to the U.S. Government of quality products and services at reasonable cost.

b. There are three levels of competition in contracting:

- (1) Full and open competition;
- (2) Full and open competition after exclusion of sources; and
- (3) Other than full and open competition.

### **6 FAH-2 H-222 FULL AND OPEN COMPETITION**

*(TL:CORH-2; 11-19-2003)*

a. "Full and open competition" means that all responsible sources are permitted to compete. It is the preferred form of contracting and includes contracting by sealed bids, negotiation, and other procedures.

b. When sealed bids or competitive proposals are selected under full and open competition, there is potentially a large universe of prospective bidders or offerors. The more bids or proposals, the greater likelihood that the U.S. Government will obtain a good "buy."

## **6 FAH-2 H-223 FULL AND OPEN COMPETITION AFTER EXCLUSION OF SOURCES**

*(TL:CORH-2; 11-19-2003)*

Full and open competition after exclusion of sources is used when the U.S. Government excludes certain potential sources from consideration for a contract in order to establish or maintain alternative sources. The most common use occurs when an acquisition is set aside for small businesses or for small, disadvantaged businesses through the Small Business Administration's 8(a) program.

## **6 FAH-2 H-224 OTHER THAN FULL AND OPEN COMPETITION**

*(TL:CORH-2; 11-19-2003)*

Other than full and open competition is the least competitive, and therefore the least desirable, method of acquiring supplies and services. Under this method, a bid or proposal is solicited from one, or very few, sources. Detailed justification and approvals at high levels in the Department are required to document the choice of other than full and open competition as a means of acquisition.

## **6 FAH-2 H-225 CIRCUMSTANCES PERMITTING OTHER THAN FULL AND OPEN COMPETITION**

*(TL:CORH-2; 11-19-2003)*

a. Contracting without providing for full and open competition is a violation of statute unless permitted by and fully justified under one of the following statutory authorities. Examples of the appropriate application of these authorities are also provided below. The requirements for a Justification for Other than Full and Open Competition (JOFOC) to support use of these authorities are in FAR 6.303 and 6.304 and DOSAR 606.303 and 606.304. Samples of JOFOC for domestic contracting activities and JOFOC for contracting activities abroad are available from A/OPE.

b. The seven exceptions listed below are the only statutory authorities available to restrict competition. Congress has deliberately made it difficult to limit competition. To invoke any of the following exceptions, the COR prepares the documentation in accordance with the requirements of the sample JOFOC. The contracting officer will either concur with the JOFOC

and forward it to any other required individuals for approvals or will not concur with the JOFOC. If the contracting officer does not agree with the JOFOC, he or she will discuss his or her reasons with the COR. All JOFOCs must be prepared and submitted with the procurement request package with the exception of those involving "unusual and compelling urgency" which may be prepared after the fact.

## **6 FAH-2 H-225.1 Only One Responsible Source**

*(TL:CORH-2; 11-19-2003)*

a. Citations: 41 U.S.C. 253(c)(1) and FAR 6.302-1 apply when the required supplies or services are available from only one source. Examples:

(1) Items or services not available from other sources or no alternate sources were found following market survey (a caution: the most effective proof of a lack of other sources is documented evidence of a widely advertised solicitation that drew only a single response);

(2) Unique and significant industrial accomplishments by a specific firm;

(3) Utility services (electric power or energy, gas, water);

(4) Existence of limited rights in data, patent rights, copyrights, or secret processes make the supplies/services available from only one source (however, the FAR provides that the mere existence of these rights does not, in and of itself, justify use of the authority);

(5) Use of a "brand name" or other type of purchase description to specify a particular brand name, product or product feature, peculiar to one manufacturer regardless of the number of sources solicited.

**NOTE:** A "brand name" purchase description differs from a "brand name or equal" description. A "brand name or equal" description permits competition from other manufacturers' products. Because competition by other manufacturers' products is permitted, a "brand name or equal" description is considered to provide for full and open competition.

b. It is inappropriate to assume that only a single source exists. Boards and courts have determined that a U.S. Government contracting officer is obligated to show evidence of recent advertising (advertising in FedBizOpps is required domestically unless a waiver is prepared; a waiver is not prepared for acquisitions abroad as a blanket waiver has been provided by the Assistant Secretary for Administration). When the FedBizOpps notice is not used, local advertisements and market surveys must be conducted to establish that there are no alternative sources. This

authority should be used, if appropriate, in preference to the authority in FAR 6.302-7 (public interest), but should not be used if any of the other authorities apply. For contracts using this authority, the notices required by FAR 5.201 shall have been published (unless an appropriate waiver is prepared) and responses, including any bids and proposals, must be considered.

## **6 FAH-2 H-225.2 Unusual and Compelling Urgency**

*(TL:CORH-2; 11-19-2003)*

a. Citations: 41 U.S.C. 253(c)(2) and FAR 6.302-2 apply when the need for the supplies or services is of such an unusual and compelling urgency that the U.S. Government would be seriously injured, financially or otherwise, unless the Department is permitted to limit the number of sources from which it solicits bids or proposals.

b. The JOFOC must clearly demonstrate how the Department will be severely damaged unless it limits the number of sources. This authority cannot be used if the actual reason for the urgency is either a lack of advance planning by the requirements office or because of the possible expiration of fiscal year funds.

c. This authority requires that agencies request offers from as many potential sources as is practicable. **It does not justify request of an offer from only a single source (sole source).** Also, ample precedent provides that the U.S. Government shall obtain only its minimum needs under contracts awarded under this authority. For example, no option quantities or years may be procured under this authority. The U.S. Government may contract only for the minimum quantity necessary to fulfill its needs for the time required to resolicit under full and open competition for the longer-term requirement. Examples:

(1) Acquisitions to support disaster relief;

(2) Acquisitions to obtain supplies or services vital to the U.S. Government's interests such as if the guard contractor suffers business failure in mid-contract (i.e., the protection of U.S. Government personnel and resources).

## **6 FAH-2 H-225.3 Industrial Mobilization or Experimental, Developmental, or Research Work**

*(TL:CORH-2; 11-19-2003)*

Citations: 41 U.S.C. 253(c)(3) and FAR 6.302-3 apply when it is necessary to award the contract to a particular source or sources in order to:

(1) Maintain suppliers for national emergencies or industrial mobilization; or

(2) Establish or maintain an essential engineering, research, or developmental capability by an educational or other nonprofit institution or a Federally funded research and development center (FFRDC). Examples:

(a) To maintain vital facilities for national emergency;

(b) Requirements approved for the Department of Defense Industrial Preparedness Program;

(c) To create or maintain critical domestic capability for manufacture in the United States or Canada;

(d) To train a selected supplier, prevent loss of capability, or maintain active R&D work.

## **6 FAH-2 H-225.4 International Agreement**

*(TL:CORH-2; 11-19-2003)*

Citations: 41 U.S.C. 253(c)(4) and FAR 6.302-4 apply when full and open competition is precluded by the terms of an international agreement or by the written directions of a foreign government reimbursing the Department for the cost of the acquisition. Example: An international agreement includes terms requiring that services to be performed or supplies to be used be from a particular firm, or authorizing the other government party to specify the source of products.

## **6 FAH-2 H-225.5 Authorized or Required by Statute**

*(TL:CORH-2; 11-19-2003)*

Citations: 41 U.S.C. 253(c)(5) and FAR 6.302-5: Full and open competition need not be provided when:

(1) A statute expressly authorizes or requires that the acquisition be made through another agency or from a specified source; or

(2) The agency's need is for a brand name commercial item for authorized resale. Examples (required sources such as):

(a) 8(a) procurements through the Small Business Administration (no JOFOC or approvals are required);

(b) Federal Prison Industries;

(c) Blind or severely handicapped (no JOFOC or approvals are required); or

(d) U.S. Government printing and binding.

## **6 FAH-2 H-225.6 National Security**

*(TL:CORH-2; 11-19-2003)*

a. Citations: 41 U.S.C. 253(c)(6) and FAR 6.302-6 apply when disclosure of the Department's needs would compromise the national security if the sources from which bids or proposals are solicited were not limited. The Department must request offers from as many potential sources as is practicable under the circumstances.

b. This authority must not be used merely because the acquisition is classified or because access to classified matter will be necessary to submit a proposal or to perform the contract.

c. The contracting officer is required to synopsise such a proposed acquisition in FedBizOpps unless he or she determines that the synopsis cannot be worded to preclude disclosure of the Department's needs and that such disclosure would compromise the national security.

## **6 FAH-2 H-225.7 Public Interest**

*(TL:CORH-2; 11-19-2003)*

a. Citations: 41 U.S.C. 253(c)(7) and FAR 6.302-7 apply when the head of an Executive Branch agency determines that full and open competition is not in the public interest in the particular acquisition concerned.

b. Limitations for public interest exception:

(1) Justification: A written Determination and Finding (D&F) to use this authority must be made in accordance with FAR Subpart 1.7 by the agency head. The D&F may not be made on a class basis, and may not be delegated. Congress must be notified in writing of such a determination not less than 30 days before award of the contract; and

(2) Approval: Any justification for a contract awarded under the authority of FAR 6.302-7, regardless of dollar amount, shall be considered approved when the D&F required above is made. Note that the Secretary of State must sign the D&F, and signature authority is not delegable.

## **6 FAH-2 H-226 JUSTIFICATIONS, APPROVALS, AND NOTICE REQUIREMENTS FOR OTHER THAN FULL AND OPEN COMPETITION**

*(TL:CORH-2; 11-19-2003)*

a. FAR 6.303 and 6.304 and DOSAR 606.303 and 606.304 describe how to write appropriate JOFOCs. The following are instructions and formats for the collection of necessary information, recommendations, certifications, and approvals.

b. Justifications:

(1) A contracting officer may not commence negotiations for a sole-source contract, a contract resulting from an unsolicited proposal, or award any other contract without providing for full and open competition unless he or she justifies such actions in writing, certifies the accuracy and completeness of the justification, and obtains the necessary approvals;

(2) The COR is responsible for providing and certifying as accurate and complete data necessary to support his or her recommendation for other than full and open competition. The contracting officer will reject any JOFOC which lacks the required information or certification. Inadequate documentation will be returned to the COR for revision prior to initiation of the acquisition action. Refer to the sample of JOFOC for domestic contracting activities or the sample of JOFOC for contracting activities abroad for a description of the required information.

c. Approvals: Refer to the sample of JOFOC for domestic contracting activities or the sample of JOFOC for contracting activities abroad for information on approval levels; these levels vary slightly. The estimated dollar value of all options shall be included in the dollar threshold to determine the approval level of a JOFOC.

## **6 FAH-2 H-227 THROUGH H-229 UNASSIGNED**