



April 8, 2020

Class Deviation CD-2020-06

MEMORANDUM FOR GSA CONTRACTING ACTIVITIES

FROM: JEFFREY A. KOSES
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SENIOR PROCUREMENT EXECUTIVE
OFFICE OF ACQUISITION POLICY (MV)

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JEFFREY KOSES
Date: 2020.04.08
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SUBJECT: FAR and GSAR Class Deviation - Congressional Notification of Noncompetitive Procurement Determination in Response to a Public Health Emergency

1. Purpose.

This memorandum approves a class deviation from the Federal Acquisition Regulation (FAR) and General Services Acquisition Regulation (GSAR) to implement Section 15003 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (P.L. 116-136) changing the requirement for notification to Congress for public interest exceptions to competition in response to a public health emergency.

2. Background.

Section 15003 of the CARES Act changes the Congressional notification requirement specifically for public interest determinations by the GSA Administrator in response to a public health emergency. The FAR and General Services Administration Acquisition Regulation (GSAR) do not address this specific scenario.

This deviation implements a statutory change that allows GSA to notify Congress of a determination by the Administrator regarding an acquisition much closer to the time of contract award than under the current regulations, in specific circumstances. It sets a different timeline for GSA to notify Congress of not less than 3 days before a contract award, rather than the general time frame of not less than 30 days before a contract award.

This class deviation is in response to a public health emergency where full and open competition of an acquisition is not in the public interest. The areas of the FAR and GSAR that are being amended by this class deviation are: FAR 6.302-7 and GSAM 506.302.

3. Authority.

This class deviation is issued under the authority of FAR 1.404 and General Services Administration Acquisition Manual (GSAM) 501.404.

This deviation is issued following consultation with the Chair of the Civilian Agency Acquisition Council (CAAC) in accordance with FAR 1.404(a) and GSAM 501.404(a).

4. Deviation.

See Attachment A for the changes in the FAR text as revised by this deviation. See Attachment B for the changes in the GSAR text as revised by this deviation.

5. Effective Date.

This deviation is effective immediately and remains in effect until rescinded or incorporated into the FAR and GSAR.

6. Point of Contact.

Any questions regarding this deviation may be directed to GSARPolicy@gsa.gov.

Attachments

Attachment A – Line-In/Line-Out: FAR Text
Attachment B – Line-In/Line-Out: GSAR Text
Attachment C – Business Case

**APPENDIX A
FAR DEVIATION LINE-IN/LINE-OUT TEXT
FOR CLASS DEVIATION CD-2020-06**

FAR Baseline: FAC 2020-05 effective 03/30/2020

- Additions to baseline made by deviation are indicated by **[bold text in brackets]**
- Deletions to baseline made by deviation are indicated by ~~strikethroughs~~
- Five asterisks (*****) indicate that there are no revisions between the preceding and following parts or sections
- Three asterisks (***) indicate that there are no revisions between the material shown within a section and subsection or subsection

Part 6 - Competition Requirements

Subpart 6.3 - Other Than Full and Open Competition

6.302 Circumstances permitting other than full and open competition.

6.302-7 Public interest.

(a) Authority. (1) Citations: 10 U.S.C.2304(c)(7) or 41 U.S.C.3304(a)(7).

(2) Full and open competition need not be provided for when the agency head determines that it is not in the public interest in the particular acquisition concerned.

(b) *Application*. This authority may be used when none of the other authorities in 6.302 apply.

(c) Limitations. (1) A written determination to use this authority shall be made in accordance with subpart 1.7, by-

(i) The Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, the Secretary of Homeland Security for the Coast Guard, or the Administrator of the National Aeronautics and Space Administration; or

(ii) The head of any other executive agency. ~~This authority may not be delegated.~~

[This authority may not be delegated.]

(2)[i] The Congress shall be notified in writing of such determination not less than 30 days before award of the contract.

[(ii) However, if the Administrator of the General Services Administration makes such a determination in response to a public health emergency declaration by the Secretary of Health and Human Services under section 319 of the Public Health Service Act (42 U.S.C. 247(d)), the Congress shall be notified in writing of such determination not less than 3 days before award of the contract (see section 15003 of Publ. L. 116-136).]

(3) If required by the head of the agency, the contracting officer shall prepare a justification to support the determination under paragraph (c)(1) of this subsection.

(4) This Determination and Finding (D&F) shall not be made on a class basis.

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**APPENDIX B
GSAR DEVIATION LINE-IN/LINE-OUT TEXT
FOR CLASS DEVIATION CD-2020-06**

GSAM Baseline: Change 106 effective 02/19/2020

- Additions to baseline made by deviation are indicated by **[bold text in brackets]**
- Deletions to baseline made by deviation are indicated by ~~strikethroughs~~
- Five asterisks (* * * * *) indicate that there are no revisions between the preceding and following sections
- Three asterisks (* * *) indicate that there are no revisions between the material shown within a subsection

Part 506 - Competition Requirements

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Subpart 506.3 - Other than Full and Open Competition

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[506.302 Circumstances permitting other than full and open competition.]

[506.302-7 Public interest.

(a) Authority. (1) Citations: 41 U.S.C.3304(a)(7) and (P.L. 116-136 SEC. 15003).

(2) Full and open competition need not be provided for when the Administrator determines that it is not in the public interest in the particular acquisition concerned.

(b) Application. This authority may be used when none of the other authorities in FAR 6.302 apply.

(c) Limitations. (1) A written determination to use this authority shall be made in accordance with FAR subpart 1.7, by the Administrator. This authority may not be delegated.

(2)(i) The Congress shall be notified in writing of such determination not less than 30 days before the award of the contract.

(ii) However, if the Administrator makes such a determination in response to a public health emergency declaration by the Secretary of Health and Human Services under section 319 of the Public Health Service Act (42 U.S.C. 247(d)), the Congress shall be notified in writing of such determination not less than 3 days before award of the contract (see section 15003 of Publ. L. 116-136).

(3) If required by the Administrator, the contracting officer shall prepare a justification to support the determination under paragraph (c)(1) of this subsection.

(4) This Determination and Finding (D&F) shall not be made on a class basis.]

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April 8, 2020

MEMORANDUM FOR: JEFFREY A. KOSES
SENIOR PROCUREMENT EXECUTIVE
OFFICE OF ACQUISITION POLICY (MV)

FROM: WILLIAM S. SCHMIDT
DIRECTOR
SUSPENSION & DEBARMENT DIVISION (MVAB)

SUBJECT: Business Case in support of a Class Deviation to implement the (Passed Stimulus Law Sec. 15003) requirement for Congressional notification of noncompetitive procurement determination in response to a public health emergency

1.0 REQUEST

The U.S. General Services Administration (GSA) Suspension and Debarment Division (MVAB) requests a Class Deviation in accordance with Federal Acquisition Regulation (FAR) Subpart 1.404 and General Services Administration Acquisition Manual (GSAM) 501.404(a). The requested Class Deviation seeks to implement the (Passed Stimulus Law Sec. 15003) requirement for GSA to notify Congress of a determination by the GSA Administrator, in response to a public health emergency, that full and open competition in an acquisition is not in the public interest.

1.1 AFFECTED AREAS OF THE FAR AND GSAM

FAR 6.302-7 and GSAM Subpart 506.3.

2.0 RATIONALE SUPPORTING THE NEED

(Passed Stimulus Law Sec. 15003) requires that GSA notify Congress not less than 3 days before contract award if the GSA Administrator made a determination that full-and-open competition is not required in an acquisition because it is not in the public interest, in response to a public health emergency declaration by the Secretary of Health and Human Services under section 319 of the Public Health Service Act. The FAR and General Services Administration Acquisition Regulation (GSAR) do not address this specific requirement. Accordingly, deviations to both, or at least to the GSAR, are required for GSA to implement this statutory rule.

2.1 DESCRIPTION OF THE PROBLEM OR MATTER TO BE ADDRESSED

MVAB requests a Class Deviation to FAR 6.302-7 and GSAM Subpart 506.3, which currently do not include the (Passed Stimulus Law Sec. 15003) requirement for GSA to notify Congress, not less than 3 days before contract award, of a determination by the GSA Administrator, in response to a public health emergency, that full and open competition in an acquisition is not in the public interest.

3.0 BACKGROUND

10 U.S.C. § 2304 and 41 U.S.C. § 3301 require, with certain limited exceptions, that contracting officers promote and provide for full and open competition in soliciting offers and awarding Government contracts. FAR 6.302-7 outlines one of those exceptions. Paragraph (a)(2) explains that “Full and open competition need not be provided for when the agency head determines that it is not in the public interest in the particular acquisition concerned.” Paragraph (c)(2) requires the agency to notify Congress in writing of such a determination “not less than 30 days before award of the contract”. The GSAR does not address FAR 6.302-7. (Passed Stimulus Law Sec. 15003) creates a new Congressional notification requirement that is specific to determinations by the GSA Administrator in response to a public health emergency. It sets a different timeline for GSA to notify Congress: not less than 3 days before contract award; rather than the general timeline of not less than 30 days before contract award. Congress and the President enacted (Passed Stimulus Law) to enable the Government to respond to the COVID-19 viral pandemic. For GSA to quickly implement this statutory rule, a deviation to the FAR and/or GSAR is required.

4.0 DISCUSSION OF THE EFFECT, IF ANY, ON GSA’S INTERNAL OPERATING PROCEDURES

4.1 GSA WORKFORCE

This deviation implements a statutory rule. That rule alters an existing acquisition planning requirement. It allows GSA to notify Congress of a determination by the Administrator regarding an acquisition much closer to the time of contract award than under the current regulations, in specific circumstances. This will shorten the timeline between the Administrator’s determination and contract award in the applicable circumstances.

4.2 AUTOMATED SYSTEMS

There would be no impact to the financial or accounting systems.

5.0 ANALYSIS OF ALTERNATIVES, RISKS, AND RISK MITIGATION

GSA is required by law to implement (Passed Stimulus Law Sec. 15003). Implementing it in the form of publicized deviations to current regulations is a comparably swift option that will also result in broad communication of the implementation to GSA’s acquisition workforce and the public.

6.0 EFFECTS

6.1 Effects on the Agency

This deviation implements a statutory rule allowing GSA to notify Congress of a determination by the Administrator regarding an acquisition much closer to the time of contract award than under the current regulations, in specific circumstances. This will shorten the timeline between the Administrator's determination and contract award in the applicable circumstances.

7.0 RECOMMENDED FAR AND GSAM LANGUAGE:

See Attachment A – Proposed FAR Language

See B Attachment B – Proposed GSAM Language