SEC. 816. EXCEPTION TO REQUIREMENT TO INCLUDE COST OR PRICE TO THE GOVERNMENT AS A FACTOR IN THE EVALUATION OF PROPOSALS FOR CERTAIN TASK OR DELIVERY ORDER CONTRACTS.

(a) CONTRACTING UNDER TITLE 41, UNITED STATES CODE.—Section 3306(c) of title 41, United States Code, is amended—

(1) in paragraph (1), by inserting "except as provided in paragraph (3)," in subparagraphs (B) and (C) after the subparagraph designation; and

(2) by adding at the end the following new paragraphs:

"(3) EXCEPTIONS FOR CERTAIN INDEFINITE DELIVERY, INDEFINITE QUANTITY CONTRACTS.—If the head of an agency issues a solicitation for multiple task or delivery order contracts under section 4103(d) of this title for the same or similar services and intends to make a contract award to each qualifying offeror—

"(A) cost or price to the Federal Government need not, at the Government's discretion, be considered under subparagraph (B) of paragraph (1) as an evaluation factor for the contract award; and

"(B) if, pursuant to subparagraph (A), cost or price to the Federal Government is not considered as an evaluation factor for the contract award—

"(i) the disclosure requirement of subparagraph (C) of paragraph (1) shall not apply; and

"(ii) cost or price to the Federal Government shall be considered in conjunction with the issuance pursuant to section 4106(c) of this title of a task or delivery order under any contract resulting from the solicitation.

"(4) QUALIFYING OFFEROR DEFINED.—In paragraph (3), the term 'qualifying offeror' means an offeror that—

"(A) is determined to be a responsible source;

"(B) submits a proposal that conforms to the requirements of the solicitation; and

(C) the contracting officer has no reason to believe would likely offer other than fair and reasonable pricing.".

(b) CONTRACTING UNDER TITLE 10, UNITED STATES CODE.—Section 2305(a)(3) of title 10, United States Code, is amended—

(1) in subparagraph (A), by inserting "(except as provided in subparagraph (C))" in clauses (ii) and (iii) after "shall"; and

(2) by adding at the end the following new subparagraphs:

"(C) If the head of an agency issues a solicitation for multiple task or delivery order contracts under section 2304a(d)(1)(B) of this title for the same or similar services and intends to make a contract award to each qualifying offeror—

"(i) cost or price to the Federal Government need not, at the Government's discretion, be considered under clause (ii) of subparagraph (A) as an evaluation factor for the contract award; and

"(ii) if, pursuant to clause (i), cost or price to the Federal Government is not considered as an evaluation factor for the contract award—

"(I) the disclosure requirement of clause (iii) of subparagraph (A) shall not apply; and

"(II) cost or price to the Federal Government shall be considered in

conjunction with the issuance pursuant to section 2304c(b) of this title of a task or delivery order under any contract resulting from the solicitation.

"(D) In subparagraph (C), the term 'qualifying offeror' means an offeror that—

"(i) is determined to be a responsible source;

"(ii) submits a proposal that conforms to the requirements of the solicitation; and

"(iii) the contracting officer has no reason to believe would likely offer other than fair and reasonable pricing.".

Section-by-Section Analysis

This proposal would amend title 41, United States Code, with respect to civilian contracting, and title 10, United States Code, with respect to defense contracting, to provide an exception to the existing statutory requirement to include cost or price to the Federal Government as an evaluation factor that must be considered in the evaluation of proposals for all contracts. The exception would only apply, if the Government elects at its discretion to invoke for a given solicitation, to multiple award task or delivery order contracts to acquire services. Furthermore, the exception would only apply in those instances where the Government intends to make a contract award to each qualifying offeror, thus affording maximum opportunity for effective competition at the task order level. An offeror would be qualified only if it is a responsible source, submits a proposal that conforms to the requirements of the solicitation, and is a source that the contracting officer has no reason to believe would likely submit other than fair and reasonable pricing for orders ~~(e.g., there is not information available to the contracting officer to suggest that the contractor has less than a satisfactory record of forecasting and controlling costs)~~.

The Competition in Contracting Act (CICA) requires agencies to include cost or price to the Federal Government as an evaluation factor that must be considered in the evaluation of proposals. According to Government Accountability Office (GAO) case law, "agencies have considerable discretion in determining the appropriate method for taking cost into account, but the method used must provide for a reasonable assessment of the cost of performance of the competing proposals." With respect to multiple award task or delivery contracts, the Court of Federal Claims has agreed with the GAO in concluding that "there is no exception to the requirement set forth in CICA that cost or price to the government be considered in selecting proposals for award because the selected awardees will be provided the opportunity to compete for task orders under the awarded contracts" (SERCO INC. v. United States, 81 Fed. Cl. 463, 492 (COFC) (March 2008) citing MIL Corp., 2004 WL 3190217, at 7.).

However, in practice, the evaluation of price as a source selection factor in determining which offerors will receive initial contracts awards for service contracts is problematic at best

and is, in many cases for all intents and purposes meaningless. A legislative change is necessary to address this area of procurement law, particularly in light of the fact that over XX percent of the dollars obligated in support of the Federal Agencies acquisitions for services are executed under these types of contracts.

For multiple award task and delivery order contracts to acquire services, there are two primary techniques that the GAO has recognized as legitimate methods to evaluate cost and price. Each technique has to account for the "indefinite" nature of an indefinite delivery/indefinite quantity (IDIQ) arrangement. By definition, the agency does not know specifically at the time the award is made to what extent the contract vehicle will be used to place orders. One technique is for the agency to structure the Request for Proposals (RFP) to instruct offerors to fill in a table in their proposal listing their labor rates for services. Another method is to instruct offerors to respond to a hypothetical ("sample") task.

When using the rate table technique, agencies must develop estimates of the quantity and mix of various labor hours based on historical experience of similar services acquired in the past. These estimates reflect what the agency expects to experience over the life of the new contract. For evaluation purposes, the agency multiplies its estimated hours against the offerors' proposed rates to arrive at the evaluated price.

Although the rate table method has been accepted by the GAO as a valid means to evaluate price in multiple award IDIQ contracts, the technique is flawed because it presumes that a given set of fully loaded labor rates can be meaningfully evaluated by comparing one offeror's set to another's. The flaw lies in the fact that each prospective offeror has its own unique array of labor categories and its own unique disclosure statement that governs how work will be proposed and executed. Despite an agency's best attempt to develop and normalize a common set of labor rate categories from which each offeror will be required to propose, this set will invariably not correlate to the company's actual labor structure. As a result, there is an artificial basis for comparison. Furthermore, the rate table technique runs counter to the statutory preference for performance-based service contracting. It should not matter how a particular offeror's proposed fully burdened labor rates compare another's if the awardees are required to propose bottom line firm fixed prices to perform task orders under performance-based terms. Since the rate table technique simply multiplies the offerors' rates by the Government's estimated hours, the evaluated price does not reflect any consideration for the fact that one offeror might ultimately bid an innovative or efficient means to accomplish the work under a particular task order.

An alternative to the rate table method is the use of sample tasks. When an agency lacks historical data from which to establish an estimate of the mix and quantity of labor hours to be expended over the life of the IDIQ contract, it may employ the sample task technique as a means to evaluate cost or price (as well as technical factors). The GAO found this approach may provide a reasonable basis to evaluate cost, even if it results in substantial variations in offeror responses (see Matter of High-Point Schaer, B-242616, May 28, 1991).

However, in another case, the GAO sustained the protestor's contention that the agency's price evaluation to acquire travel services under a multiple award IDIQ arrangement was flawed

because the agency's request for proposals did not require offerors to propose binding prices for which they would be required to honor in future task order proposals (see In Matter of CW Government Travel Inc.—Reconsideration, B-295530, July 25, 2005 at 10). The GAO held that "[b]ecause the sample task pricing is not binding, a price realism and reasonableness analysis based on that pricing provides no meaningful assessment of the likely cost to the government of an offeror's proposal." When offerors are held bound under the resultant IDIQ contract to the rates proposed in their sample task order, agencies are able to assert that they fulfilled the current statutory requirement to evaluate cost or price to the Government. As a technique, agencies typically incorporate sample task rates as ceiling rates in the resultant contract, which enables awardees to bid lower rates (if they desire) in individual task order proposals. However, agencies often structure IDIQ service contracts to afford flexibility to award task orders under the full range of contract types and when cost reimbursable orders are used, it is not appropriate to cap the order rates at the "ceiling" rates bid in the sample task. Notably, in the aforementioned case, the GAO decision stated, "We acknowledge that the evaluation of price or cost in the award of an ID/IQ 'umbrella' contract can be challenging, particularly in the procurement of services, because the more meaningful price competition may take place at the time individual task or delivery orders are to be issued."

Relieving the requirement to account for cost or price when evaluating proposals for the initial award of multiple award IDIQ service contracts will enable procurement officials to focus their energy on establishing and evaluating the non-price factors that will result in more meaningful distinctions among offerors. Source selection officials typically spend (collectively) hundreds of hours evaluating cost and price as a factor in awarding any given multiple award IDIQ contract to acquire services. This is non-value added effort since the meaningful evaluation of cost and price takes place at the point in time when subsequent task or delivery order proposals are evaluated.

Budget Implications: The proposal only addresses procurement processes and not amounts appropriated for the procurement of items or services.

Changes to Existing Law: The proposal would amend section 3306 of title 41, United States Code, and section 2305 of title 10, United States Code, as follows:

TITLE 41, UNITED STATES CODE

§3306. Planning and solicitation requirements

(a) PLANNING AND SPECIFICATIONS.-

(1) PREPARING FOR PROCUREMENT.-In preparing for the procurement of property or services, an executive agency shall-

(A) specify its needs and solicit bids or proposals in a manner designed to achieve full and open competition for the procurement;

(B) use advance procurement planning and market research; and

(C) develop specifications in the manner necessary to obtain full and open competition with due regard to the nature of the property or services to be acquired.

(2) REQUIREMENTS OF SPECIFICATIONS.-Each solicitation under this division shall include specifications that-

(A) consistent with this division, permit full and open competition; and

(B) include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the executive agency or as authorized by law.

(3) TYPES OF SPECIFICATIONS.-For the purposes of paragraphs (1) and (2), the type of specification included in a solicitation shall depend on the nature of the needs of the executive agency and the market available to satisfy those needs. Subject to those needs, specifications may be stated in terms of-

(A) function, so that a variety of products or services may qualify;

(B) performance, including specifications of the range of acceptable characteristics or of the minimum acceptable standards; or

(C) design requirements.

(b) CONTENTS OF SOLICITATION.-In addition to the specifications described in subsection (a), each solicitation for sealed bids or competitive proposals (other than for a procurement for commercial items using special simplified procedures or a purchase for an amount not greater than the simplified acquisition threshold) shall at a minimum include-

(1) a statement of-

(A) all significant factors and significant subfactors that the executive agency reasonably expects to consider in evaluating sealed bids (including price) or competitive proposals (including cost or price, cost-related or price-related factors and subfactors, and noncost-related or nonprice-related factors and subfactors); and

(B) the relative importance assigned to each of those factors and subfactors; and

(2)(A) in the case of sealed bids-

(i) a statement that sealed bids will be evaluated without discussions with the bidders; and

(ii) the time and place for the opening of the sealed bids; or

(B) in the case of competitive proposals-

(i) either a statement that the proposals are intended to be evaluated with, and the award made after, discussions with the offerors, or a statement that the proposals are intended to be evaluated, and the award made, without discussions with the offerors (other than discussions conducted for the purpose of minor clarification) unless discussions are determined to be necessary; and

(ii) the time and place for submission of proposals.

(c) EVALUATION FACTORS.-

(1) IN GENERAL.-In prescribing the evaluation factors to be included in each solicitation for competitive proposals, an executive agency shall-

(A) establish clearly the relative importance assigned to the evaluation factors and subfactors, including the quality of the product or services to be provided (including technical capability, management capability, prior experience, and past performance of the offeror);

(B) except as provided in paragraph (3), include cost or price to the Federal Government as an evaluation factor that must be considered in the evaluation of proposals; and

(C) except as provided in paragraph (3), disclose to offerors whether all evaluation factors other than cost or price, when combined, are-

(i) significantly more important than cost or price;

(ii) approximately equal in importance to cost or price; or

(iii) significantly less important than cost or price.

(2) RESTRICTION ON IMPLEMENTING REGULATIONS.-Regulations implementing paragraph (1)(C) may not define the terms "significantly more important" and "significantly less important" as specific numeric weights that would be applied uniformly to all solicitations or a class of solicitations.

(3) EXCEPTIONS FOR CERTAIN INDEFINITE DELIVERY, INDEFINITE QUANTITY CONTRACTS.—If the head of an agency issues a solicitation for multiple task or delivery order contracts under section 4103(d) of this title for the same or similar services and intends to make a contract award to each qualifying offeror—

(A) cost or price to the Federal Government need not, at the Government's discretion, be considered under subparagraph (B) of paragraph (1) as an evaluation factor for the contract award; and

(B) if, pursuant to subparagraph (A), cost or price to the Federal Government is not considered as an evaluation factor for the contract award—

(i) the disclosure requirement of subparagraph (C) of paragraph (1) shall not apply; and

(ii) cost or price to the Federal Government shall be considered in conjunction with the issuance pursuant to section 4106(c) of this title of a task or delivery order under any contract resulting from the solicitation.

(4) QUALIFYING OFFEROR DEFINED.—In paragraph (3), the term 'qualifying offeror' means an offeror that—

(A) is determined to be a responsible source;

(B) submits a proposal that conforms to the requirements of the solicitation; and

(C) the contracting officer has no reason to believe would likely offer other than fair and reasonable pricing.

(d) ADDITIONAL INFORMATION IN SOLICITATION.-This section does not prohibit an executive agency from-

(1) providing additional information in a solicitation, including numeric weights for all evaluation factors and subfactors on a case-by-case basis; or

(2) stating in a solicitation that award will be made to the offeror that meets the solicitation's mandatory requirements at the lowest cost or price.

(e) LIMITATION ON EVALUATION OF PURCHASE OPTIONS.-An executive agency, in issuing a solicitation for a contract to be awarded using sealed bid procedures, may not include in the solicitation a clause providing for the evaluation of prices for options to purchase additional

property or services under the contract unless the executive agency has determined that there is a reasonable likelihood that the options will be exercised.

(f) ***

TITLE 10, UNITED STATES CODE

§2305. Contracts: planning, solicitation, evaluation, and award procedures

(a)(1)(A) In preparing for the procurement of property or services, the head of an agency shall—

(i) specify the agency's needs and solicit bids or proposals in a manner designed to achieve full and open competition for the procurement;

(ii) use advance procurement planning and market research; and

(iii) develop specifications in such manner as is necessary to obtain full and open competition with due regard to the nature of the property or services to be acquired.

(B) Each solicitation under this chapter shall include specifications which—

(i) consistent with the provisions of this chapter, permit full and open competition; and

(ii) include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the agency or as authorized by law.

(C) For the purposes of subparagraphs (A) and (B), the type of specification included in a solicitation shall depend on the nature of the needs of the agency and the market available to satisfy such needs. Subject to such needs, specifications may be stated in terms of—

(i) function, so that a variety of products or services may qualify;

(ii) performance, including specifications of the range of acceptable characteristics or of the minimum acceptable standards; or

(iii) design requirements.

(2) In addition to the specifications described in paragraph (1), a solicitation for sealed bids or competitive proposals (other than for a procurement for commercial items using special simplified procedures or a purchase for an amount not greater than the simplified acquisition threshold) shall at a minimum include—

(A) a statement of—

(i) all significant factors and significant subfactors which the head of the agency reasonably expects to consider in evaluating sealed bids (including price) or competitive proposals (including cost or price, cost-related or price-related factors and subfactors, and noncost-related or nonprice-related factors and subfactors); and

(ii) the relative importance assigned to each of those factors and subfactors; and

(B)(i) in the case of sealed bids—

(I) a statement that sealed bids will be evaluated without discussions with the bidders; and

(II) the time and place for the opening of the sealed bids; or

(ii) in the case of competitive proposals-

(I) either a statement that the proposals are intended to be evaluated with, and award made after, discussions with the offerors, or a statement that the proposals are intended to be evaluated, and award made, without discussions with the offerors (other than discussions conducted for the purpose of minor clarification) unless discussions are determined to be necessary; and

(II) the time and place for submission of proposals.

(3)(A) In prescribing the evaluation factors to be included in each solicitation for competitive proposals, the head of an agency—

(i) shall clearly establish the relative importance assigned to the evaluation factors and subfactors, including the quality of the product or services to be provided (including technical capability, management capability, prior experience, and past performance of the offeror);

(ii) shall (except as provided in subparagraph (C)) include cost or price to the Federal Government as an evaluation factor that must be considered in the evaluation of proposals); and

(iii) shall (except as provided in subparagraph (C)) disclose to offerors whether all evaluation factors other than cost or price, when combined, are—

(I) significantly more important than cost or price;

(II) approximately equal in importance to cost or price; or

(III) significantly less important than cost or price.

(B) The regulations implementing clause (iii) of subparagraph (A) may not define the terms "significantly more important" and "significantly less important" as specific numeric weights that would be applied uniformly to all solicitations or a class of solicitations.

(C) If the head of an agency issues a solicitation for multiple task or delivery order contracts under section 2304a(d)(1)(B) of this title for the same or similar services and intends to make a contract award to each qualifying offeror—

(i) cost or price to the Federal Government need not, at the Government's discretion, be considered under clause (ii) of subparagraph (A) as an evaluation factor for the contract award; and

(ii) if, pursuant to clause (i), cost or price to the Federal Government is not considered as an evaluation factor for the contract award—

(I) the disclosure requirement of clause (iii) of subparagraph (A) shall not apply; and

(II) cost or price to the Federal Government shall be considered in conjunction with the issuance pursuant to section 2304c(b) of this title of a task or delivery order under any contract resulting from the solicitation.

(D) In subparagraph (C), the term "qualifying offeror" means an offeror that—

(i) is determined to be a responsible source;

(ii) submits a proposal that conforms to the requirements of the solicitation; and

(iii) the contracting officer has no reason to believe would likely offer other than fair and reasonable pricing.

(4) Nothing in this subsection prohibits an agency from—

(A) providing additional information in a solicitation, including numeric weights for all evaluation factors and subfactors on a case-by-case basis; or

(B) stating in a solicitation that award will be made to the offeror that meets the solicitation's mandatory requirements at the lowest cost or price.

(5) The head of an agency, in issuing a solicitation for a contract to be awarded using sealed bid procedures, may not include in such solicitation a clause providing for the evaluation of prices for options to purchase additional property or services under the contract unless the head of the agency has determined that there is a reasonable likelihood that the options will be exercised.

(b) ***

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