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Subject: FAR Case 2015-038, Reverse Auction Guidance

Curtis,

The Coalition for Government Procurement (“the Coalition”) sincerely appreciates the opportunity to comment on the Reverse Auction Guidance proposed rule (FAR Case 2015-038).

The Coalition is a non-profit association of firms selling commercial services, products, and solutions to the Federal Government. Our members collectively account for tens of billions of dollars of the sales generated through the GSA Multiple Award Schedules (MAS) program including healthcare product sales offered through the VA Federal Supply Schedules. Coalition members include small, medium, and large businesses that account for more than \$145 billion in Federal Government contracts. Coalition members account for more than \$24 billion in Federal IT spending and \$25 billion in Federal healthcare spending. The Coalition is proud to have worked with Government officials for over 40 years towards the mutual goal of common-sense acquisition.

The Reverse Auction Guidance proposed rule implements recommendations made by the Government Accountability Office (GAO) based on its analysis of reverse auction rates of competition, cost savings, and fees in 2013 and 2018. The rulemaking also covers guidance from the Office of Federal Procurement Policy’s (OFPP) on the Effective Use of Reverse Auctions from 2015. The rule proposes to add a new FAR subpart 17.8., that would among other things:

- Provide Governmentwide policy on when the use of reverse auctions may be appropriate, and when reverse auctions should not be used;
- Determine how reverse auction fees should be evaluated;
- Establish how agency acquisitions for reverse auction services should be competed, and require that the resulting contract or agreement be documented and made available to agency contracting officers for future reference and verification;
- Clarify requirements for contracting officers when using reverse auction services; and
- Require the contracting officers contact information be made available to offerors.

The Coalition supports the implementation of the recommendations made by the GAO and the OFPP into the FAR in order to clarify for the acquisition workforce the effective use of reverse auctions. The following comments on the proposed rule reflect the diverse views of a subset of our members.

Appropriate Use of Reverse Auctions

Under the right circumstances, reverse auctions are an appropriate tool in the procurement toolbox that Federal purchasers can use to obtain competitive pricing for products (and services) that meet their requirements. The Coalition also agrees that reverse auctions are most effective for relatively simple commercial items, including commercial off-the-shelf items, that typically result in fixed price arrangements.

Exclusion for “Medical/Surgical Supplies and Equipment” to Protect Patient Safety

The Coalition supports the proposed rule’s exclusion of personal protective equipment (PPE) from reverse auctions consistent with Section 814 of the FY2017 National Defense Authorization Act (NDAA). We agree that in cases in which the quality or failure of an item can result in casualties, a low price technically acceptable approach and the use of reverse auction, are inappropriate. A best value approach should be used for these procurements. The accompanying Senate Report¹ to the FY2017 NDAA addresses Congress’ intent behind the prohibition,

“The committee is concerned that an overarching bias towards reducing prices paid by the Department of Defense (DOD) to the exclusion of other factors could result in DOD buying low cost products that have the potential to negatively impact the safety of U.S. troops. This could be a particular problem with the quality of personal protective equipment such as helmets, body armor, eye protection, and other similar individual equipment issued to U.S. military personnel. While LPTA and reverse auction contracting techniques are appropriate for some type of purchases, the committee believes that lowest price is not always the best strategy when quality and innovation are needed. In these cases, the committee believes a best value acquisition approach is more appropriate.”

We believe that the same rationale applies to personal protective equipment (PPE) used by healthcare workers and “medical/surgical supplies and equipment” used in VA and DoD healthcare facilities. The health and safety of Federal healthcare workers, and the patients that they serve who are veterans, active duty military, and military families, should not be compromised in order to achieve the lowest price.

The use of reverse auctions and other e-Commerce platforms, where open market items are available, can increase the risk of “gray market” items entering the medical supply chain. Gray market medical supplies have the potential to put patients’ health and safety at risk. Medical/surgical supplies and equipment that are purchased outside of an authorized distributor network on the gray market generate a number of ever-growing Federal government, and especially VA, concerns, such as products that may be counterfeit, stolen, or may have been stored inadequately or otherwise improperly handled, which can pose significant risks to patient safety. Other less obvious concerns, which may pose equal patient safety risks, include invalidation of the product warranties from the OEM and the inability of OEMs to effectively recall products from the field, if necessary.

For these reasons, we urge the FAR Council to exclude medical/surgical supplies and equipment, including healthcare PPE, from reverse auctions. We believe that a best value approach is more appropriate for the procurement of these items, preferably under government contracts that include specific requirements designed to protect patient safety and the medical supply chain.

¹ See <https://www.congress.gov/114/crpt/srpt255/CRPT-114srpt255.pdf> at 215.

Contracting Officer Evaluation of Fees

17.804 in the proposed rule describes the procedures that contracting officers are to follow when considering the use of a reverse auction service provider, such as conducting market research on available sources for reverse auction services, evaluating the fee structure for each reverse auction provider, and documenting the cost effectiveness of the selected service provider.

Once these procedures have been followed at the contract level, it is unnecessary for agency buyers to repeat them for each subsequent reverse auction. As described in the OFPP's guidance on the *Effective Use of Reverse Auctions*, contracting officers should conduct the necessary market research when establishing a contract with a reverse auction provider and negotiate a fee structure that represents a best value to the government at that time. Requiring agency buyers to then repeat these steps after the master contract has been established creates inefficiencies in the reverse auction process, which is intended to allow agencies to buy non-complex items quickly and at a competitive price. Our concern is that the additional steps outlined in 17.804 will lead to longer acquisition times in cases where agencies have already established a negotiated contract with a reverse auction provider.

Importance of Maintaining Reverse Auction Documentation

17.802 (d)(5)(iii) in the proposed rule requires that all documentation received from offerors in response to the reverse auction be removed. The historical data from reverse auction providers, however, has proved invaluable to Federal procurement offices, Offices of Inspectors General, and the GAO. In fact, in its 2013 report, the GAO specifically stated that it relied on the commercial reverse auction provider's data to conduct its analysis on maximizing competition and achieving cost savings, and that the Federal data was less useful for this purpose. Specifically, the GAO stated that,

“Because the federal agencies did not maintain the level of detailed information needed for our review, we obtained reverse auction data from FedBid.”

“[B]y relying on the FedBizOpps data, we also selected the Defense Logistics Agency (DLA) for examination because it had the greatest number of reverse auctions that did not use FedBid. Together, these five agencies represent approximately 70 percent of government-wide reverse auction activity, based on FedBid and FedBizOpps data... .”

“[GAO, however, was] not able to perform detailed analysis of DLA data for fiscal year 2012, because the agency collected only summary level information. Agency officials told us that providing the data for each auction would require them to review all contract files to determine whether a reverse auction had been used. We determined that it would not be a good use of DLA's resources to conduct that review.”

In short, the data provided by reverse auction providers is essential to the Government's ability to perform oversight of these tools, as well as the ability to conduct cost analysis and other basic performance management functions encouraged in the OFPP's reverse auction guidance. Therefore, we recommend that 17.802 be removed from the final rule. If the FAR Council's concerns involve data privacy, we believe that the protections provided in 17.802(d)(4), and other methods, would be more effective in addressing these concerns.

Display of Vendor's Bid Price During Auction

Throughout the proposed rule, there are references to offerors having the ability to view other offeror's price(s) without disclosing the identity of the offeror(s). For example, reverse auction is defined as, "the process for obtaining pricing, usually supported by an electronic tool, where offerors see competing offerors' price(s), without disclosure of the competing offerors' identity, and have the opportunity to submit lower priced offers until the close of the auction." Similar references are in 15.306(3), 3.104-4, and 17.804(b)(1).

Requiring that pricing be shared with other offerors may increase the risk of protest in cases where an agency selects an offer other than the lowest price. It can also increase protest risk by unintentionally disclosing competitive information in smaller/limited markets. For these reasons, some reverse auction services provide alternative means of notifying offerors of whether or not they are currently offering the most competitive price. Therefore, we recommend that the language throughout the rule state that offers "may" see competing offerors' price(s), rather than "shall."

Fee Disclosure

At 17.802(d)(5)(i), the proposed rule states that contracting officers should only use the services of a reverse auction provider that, at the close of each auction, provides the Government with the winning offer, including the offeror's price and the cost of each provider's fee included in the total price.

It is unclear why the provider's fee would need to be disclosed separately at the close of auction if the agency had already negotiated the fee and determined that it was a best value to the government when the contract with the reverse auction service provider was first established. Further, disclosure of the provider's fee is not a standard commercial practice for e-Commerce marketplace providers, and would create an unequal playing field if only applied to reverse auctions. For example, GSA's commercial e-Commerce pilot does not require its e-marketplace providers to list the fees associated with each purchase separately.

The proposed rule already states that the contract for reverse auction services be "made available to agency contracting officers for future reference and verification needs." We believe that access to the original contract should be sufficient in providing agency contracting officers with information about the reverse auction provider's fees negotiated by the agency.

Posting CO Contact Information to Increase Protections Against Gray Market Abuse

Consistent with FAR 5.102(c)(2), the contracting officer's contact information should be posted for each reverse auction. Bidders, and the public, generally, should have access to the CO of the solicitation, in particular, in reverse auctions where offerors may be submitting products to the Government made by OEMs. While offerors are able to self-certify that they are authorized dealers in the reverse auction, increasing transparency through the CO's contact information would provide an additional level of protection by allowing OEMs to advise the Government if an unauthorized offeror has submitted pricing (presumably on its behalf). Gray market items are especially a concern for patient safety in the case of healthcare products, and are a clear cybersecurity risk for IT. We believe that providing the CO's contact information for reverse auctions, consistent with FAR 5.102(c)(2), would help to further deter unauthorized dealers from seeking to enter the Federal supply chain through e-Commerce platforms.

Reducing Cost and Administrative Burdens for Small Business

17.805(b) of the proposed rule requires that CO's "insert the clause at 52.217-YY, Reverse Auction-Orders or Calls, in solicitations and contracts for multiple award indefinite-quantity contracts or BPAs, and a reverse auction may be used to place orders or calls under the basic contract or BPA." Mandatory inclusion of this term in parent vehicles reduces contracting officers' flexibility in determining whether the reverse auction is the best method at the order level.

Small businesses have reported that the reverse auction process can add costs because additional staff may be needed to monitor reverse auctions and continually reconsider pricing during the 10-day process. The Coalition supports the OFPP reverse auction guidance which encourages agencies to cover the costs of vendor participation and avoid fee arrangements where vendors must pay the cost of the reverse auction service in order to better support small business participation. Again, we also recommend that 52.217-YY, Reverse Auction-Orders or Calls, not be mandatory for contracts for multiple award IDIQs or BPAs that offer these services.

Compliance with the Rule of Two

The U.S. Department of Veterans Affairs must follow the "Rule of Two" which requires that when two or more verified and capable service-disabled veteran-owned small businesses (SDVOSBs) are identified, the acquisition must be set-aside for SDVOSBs, provided the contracting officer has a reasonable expectation that two or more verified SDVOSBs will submit offers and that the award can be made at a fair and reasonable price that offers best value to the Government. The Coalition requests that the FAR Council clarify how reverse auctions meet the "Rule of Two" requirement which is intended to support SDVOSBs.

Again, the Coalition sincerely appreciates the opportunity to submit comments in response to the Reverse Auction Guidance proposed rule. If you have any questions, I may be reached at (202) 315-1053 or rwaldron@thecgp.org.

Regards,



Roger Waldron
President