

Competition Requirements



[Reference: FAR 6 and DEAR 906]

Overview

This section discusses competition requirements and provides a model Justification for Other than Full and Open Competition (JOFOC).

Background

The Competition in Contracting Act (CICA) of 1984 requires that all acquisitions be made using full and open competition. Seven exceptions to using full and open competition are specifically identified in Federal Acquisition Regulation (FAR) Subpart 6.3. Documentation justifying the use of any of these exceptions is required. The exception, with supporting documentation, must be certified and approved at certain levels that vary according to the dollar value of the acquisition. The information that must be included in each justification is identified in FAR Sections 6.303-1 and 6.303-2.

Authority

The Secretary of Energy has designated and delegated certain authorities and responsibilities to the Senior Procurement Executive(s) (SPE) pertaining to implementing and executing statutory and regulatory competition requirements. For DOE contracting activities, the SPE is the Director, Office of Procurement and Assistance Management. For National Nuclear Security Administration (NNSA) contracting activities, it is the Director, Office of Acquisition and Supply Management.

In addition to the authorities in FAR Part 6, DOE has two other authorities that provide for other than full and open competition. These authorities are:

- The Federal Property and Administrative Services Act (40 U.S.C. 474(13)), which provides that nothing in this Act shall impair or affect any authority or programs authorized under the Atomic Energy Act of 1954, as amended.

- The Atomic Energy Act of 1954, as amended, which provides that the President may exempt any specific action of DOE in a particular matter carried out under the authority of this Act from the provisions of law relating to contracts whenever it is determined that such action is essential in the interest of common defense and security.

Competition Advocates

To implement FAR 6.501, the Secretary of Energy has delegated the authority for appointment of agency and contracting activity competition advocates to the SPEs, DOE and NNSA. The SPEs have delegated to their respective Head of Contracting Activities (HCA) the authority to appoint contracting activity competition advocates. In addition, the HCA's approval for JOFOCs is in accordance with the HCA Delegation of Authority/Designation memorandum.

Justification

Contracting officers certify that the JOFOC is complete and accurate and also require the acquisition initiator to furnish and certify that the supporting data (e.g., verification of the government's minimum needs and schedule requirements, efforts to find additional sources, rationale for limiting sources, or other information that forms the basis for other than full and open competition) is complete, current, and accurate.

A complete JOFOC must include the results of market research and, if applicable, the sources sought synopsis (see Chapter 5.2) as part of the main body of the justification and not as an addendum. An attachment may be used to provide detailed reviews of responses to the synopsis and companies reviewed during the market research, but the results of market research and a summary of responses received must be included in the main body of the JOFOC.

Contracting officers must obtain legal review from the contracting activity legal counsel office in a JOFOC with an estimated amount of more than \$1 million or such lower threshold as the contracting activity legal counsel office may establish.

Each contracting activity should issue local implementing procedures that define the appropriate processing of JOFOCs at their locale. These procedures should specifically address the responsibilities of the program manager and contracting activity legal counsel.

Dollar thresholds for JOFOC approvals are subject to change. See the applicable HCA Delegation of Authority/Designation and FAR 6.304(a) for the current dollar thresholds. For actions less than \$650,000, the Contracting Officer should include the Competition Advocate in the review of the JOFOC before signing it.

Use of the attached model JOFOC, in conjunction with FAR 6.303-2, Content, will ensure consistency with FAR requirements.

Use of “Unusual and Compelling Urgency” Exception (FAR 6.302-2)

All requirements citing urgency as the exception should receive careful scrutiny to assure that the reason for the urgency is valid. The urgency exception contained in FAR Part 6 is not acceptable if there is evidence of poor planning and if the action cannot pass the test of a valid noncompetitive action. The Government Accountability Office and other reviewing organizations have held that the lack of planning or the delaying of a requirement to use the urgency exception is viewed as an attempt to circumvent CICA requirements.

Section 862 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417) amended the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(d)) to include a limit on the period of performance of contracts awarded noncompetitively under unusual and compelling urgency circumstances. This requirement is prescribed at FAR 6.302-2.

The total period of performance may not exceed the time necessary to meet the unusual and compelling requirements of the work to be performed under the contract and award of another contract for the required goods or services through the use of competitive procedures. The period of performance may not exceed one year unless the head of the agency determines that exceptional circumstances apply. The Secretary has delegated to the SPEs the authority to make this determination.

When the contracting activity believes that exceptional circumstances may exist for a contract period to be longer than one year, the contracting activity must prepare a “Determination of Exceptional Circumstances” (DEC) for approval by the appropriate SPE. The DEC, along with a copy of the draft JOFOC, shall be submitted to either of the following: for DOE procurements to the Office of Contract Management (MA-62) or for NNSA procurements to the Director, Office of Acquisition and Supply Management, in accordance with Acquisition Chapter 71.1 and local review procedures. Ensure that you have provided a notice/coordination to these offices that this action will be coming for review and approval.

- When the contract will be awarded after the approval of the DEC, the contract may be for a period greater than one year.
 - The DEC and the JOFOC must justify the period of performance.
- When the contract must be awarded prior to the approval of the DEC, the contract may only be awarded for a period of up to one year.
 - If the item(s) being acquired requires a period of performance of greater than one year, the DEC and JOFOC should justify this need and the contract may be modified to include the additional time after the DEC and JOFOC are approved.

Use the attached DEC determination and findings (D&F) template. See STRIPES library.

Public Interest (FAR 6.302-7)

A particular acquisition may state that there is an exception to public interest for other than full and open competition. This acquisition should receive careful scrutiny to assure that there is reason to support that it is not in the public interest to compete. This exception requires a determination by either the Secretary of Energy or the Administrator, National Nuclear Security Administration that it is not in the public interest in the particular acquisition concerned to seek full and open competition. This authority may not be delegated. The use of this exception is extremely rare and may only be used when no other authorities in FAR 6.302 apply. The Public Interest exception will be documented in a Public Interest Determinations and Findings (D&F). No class Public Interest D&Fs are permitted. This authority is prescribed at FAR 6.302-7.

Regardless of dollar value, the contracting activity must prepare two documents: the “Public Interest Determinations and Findings” and the Congressional notification letter. The Public Interest D&F will be approved by either the Secretary of Energy or the Administrator, National Nuclear Security Administration. The Congressional notification letter will be signed by either the Secretary or the Administrator.

The contracting activity shall submit the D&F and the Congressional notification letter to either one of the following: for DOE procurements to the Office of Contract Management (MA-62) or for NNSA procurements to the Director, Office of Acquisition Management, in accordance with Acquisition Chapter 71.1 and local review procedures.

Once the Secretary of Energy or the Administrator, National Nuclear Security Administration has approved the Public Interest D&F and signed the Congressional notification, be certain to place these documents in the contract file. Do not award the contract until at least 30 days after the Congressional notification was sent.

Use the attached model Public Interest Determinations and Findings, in conjunction with FAR 1.7, Determinations and Findings, and FAR 6.302-7.

Use the attached model Congressional notification letter. See STRIPES library.

Work Direction

Under no circumstance shall Department of Energy personnel direct work to a particular source through, or accept work for (e.g. from other Federal agencies via an interagency agreement) any of the Department’s contractors or their subcontractors for the purpose of avoiding the requirements of the Competition in Contracting Act, or as a means of satisfying a requirement that should be contracted for by the Department.

Work assignments to any contractor in which the Department requires performance by a specific subcontractor(s) must be supported by a JOFOC, in accordance with FAR Part 6, as if the work were being contracted directly by the Department. In addition to satisfying the requirements of FAR 6.303, the justification shall include a determination that such work is consistent with the

scope of the prime contractor's assigned program responsibilities and that the directed subcontractor has the technical capability to perform the work assigned. Consideration should be given to preparing the justification to contract directly with the subcontractor as the prime contractor.

DOE employees shall not initiate an interagency agreement under the Economy Act to another Federal agency to circumvent Federal or DOE regulations, or in the belief that an outside agency will permit a lesser standard of adherence to Federal and Departmental procurement regulations or policies than that expected of DOE contracting officers.

Public Availability of the Justification for Other than Full and Open Competition (JOFOC) documents

FAR 6.305 requires agencies to make JOFOC documents available for public inspection within 14 days after contract award on the agency website and at the Governmentwide Point of Entry Federal Business Opportunities at www.fedbizopps.gov. FAR 6.305(f) provides exceptions to posting the JOFOC. In the case of a contract award authorized pursuant to FAR 6.302-2, the rule requires that the JOFOC be posted within 30 days after contract award. For FAR 6.302-7 Public Interest exceptions, the approved D&F does not get posted or otherwise made publically available. The DOE link to www.fedbizopps.gov is at http://management.energy.gov/business_DOE.htm.

In order to post a JOFOC on the www.fedbizopps.gov website, this website has a notice type called "Justification & Approval (J&A)" at the Opportunities section. Within DOE only the designated contracting activity personnel are allowed to post to the www.fedbizopps.gov website the standalone J&A Notices (JOFOC Notices), as well as associate a JOFOC Notice to existing notices, such as an award, if applicable. Note: The designated DOE personnel are not allowed to delete/modify a posted JOFOC Notice type. The Information Management Systems Division, MA-623, should be contacted for assistance.

The HCA shall ensure that each JOFOC document is redacted, as appropriate, and posted to the website at www.fedbizopps.gov. The contracting officer shall carefully screen a JOFOC for all contractor proprietary and other sensitive data and remove it if such data exists, including such references and citations as are necessary to protect the proprietary data, before making the justifications available for public inspection. Also, the contracting officer shall be guided by the exemptions to disclosure of information contained in the Freedom of Information Act (5 U.S.C. 552) and the prohibitions against disclosure in FAR 24.202 in determining whether other data should be removed. Before posting the JOFOC, the contracting officer shall coordinate the redacted JOFOC as needed with the local Counsel's Office and the local FOIA officer.

Best Practices

When unsolicited proposals are considered, the unique or innovative method, approach, or idea contained in the proposal must be described in the JOFOC. Any unique, innovative, or

proprietary features that might be compromised if publicly disclosed in FedBizOpps must also be identified in the JOFOC.

For a JOFOC advocating limited competition, the circumstances surrounding the limitation, including how the number of firms in the competition was determined, must be described.

Negotiations of a sole source contract should not begin before the JOFOC has been approved.

Justification for Other than Full and Open Competition
Contracting Activity Processing the Requirement
Name of Organization Originating the Requirement
Identification Number (purchase request/solicitation number)

1. Identification of the agency and the contracting activity, and specific identification of the document as a “Justification for Other than Full and Open Competition”.
2. The nature and/or description of the action being approved, i.e. sole source, limited competition, establishment of a new source, etc.
3. A description of the supplies or services required to meet the agency’s needs.
4. The statutory authority permitting other than full and open competition.
5. A statement demonstrating the unique qualifications of the proposed contractor or the nature of the action requiring the use of the authority.
6. A description of efforts to ensure that offers were solicited from as many potential sources as is practicable. Include whether or not a FedBizOpps announcement was made and what response, if any, was received, and include the exception under FAR 5.202 when not synopsising. Describe whether any additional or similar requirements are anticipated in the future. (This may not be included as an addendum. It must be in the body of the JOFOC.)
7. Cite the anticipated dollar value of the proposed acquisition including options if applicable and a determination by the Contracting Officer that the anticipated cost to the Government will be fair and reasonable. When exceptional circumstances exist that require the period of performance to exceed one year, the JOFOC shall state priced option period(s) will be included and that a determination and findings is being prepared for the Senior Procurement Executive’s approval.
8. A description of the market research conducted and the results or a statement of the reason market research was not conducted. Do not simply refer to the sources sought synopsis.
9. Any other facts supporting the use of other than full and open competition, such as:
 - a. Explanation of why technical data packages, specifications, engineering descriptions, statements of work or purchase descriptions suitable for full and open competition have not been developed or are not available.
 - b. When FAR Subpart 6.302-2 is cited for follow-on acquisition as described in FAR 6.302-1(a)(2)(ii), an estimate of cost to the Government that would be duplicated and how the estimate was derived.

c. When FAR 6.302-2 is cited, data, estimated cost, or other rationale as to the extent and nature of the harm to the Government.

10. A listing of the sources, if any, that expressed a written interest in the acquisition.

11. A statement of actions the agency may take to remove or overcome any barriers to competition if subsequent acquisitions are anticipated.

Certification

The information contained in this Justification for Other than Full and Open Competition is certified accurate and complete to the best of my knowledge and belief.

Acquisition Initiator _____ Contracting Officer _____
Signature Date Signature Date

(See FAR 6.2, 6.3, and 6.5, and DEAR 906.202, 906.304 and 906.501 for review and approval requirements under specific circumstances.)

Reviews

Program Senior Official (or designee)	_____	_____	Contracting Activity Legal Counsel (if > \$1 million)	_____	_____
	Signature	Date		Signature	Date

Approvals

Contracting Activity
Competition Advocate _____
(if > \$650,000* & **) Signature Date

Head of the Contracting
Activity _____
(if > \$12.5 million*⁺) Signature Date

Senior Procurement
Executive _____
(if > \$50 million⁺) Signature Date

*Dollar thresholds are subject to change; see FAR 6.304(a) for the current dollar thresholds.

**For actions less than \$650,000, the Contracting Officer should include the Competition Advocate in the review of the JOFOC before signing it.

⁺ Dollar threshold is in accordance with the HCA Delegation of Authority/Designation.

Determination of Exceptional Circumstances

Determination and Findings: To exceed period of performance beyond one year for unusual and compelling urgency exception for other than full and open competition

Based upon the following determination and findings, the proposed procurement described below may extend beyond one year.

Findings

1. The *(contracting activity processing the requirement)* proposes to acquire under solicitation or contract *(number)*, *(title and description of service)*. The estimated value is \$ *(amount)* for a XX month.
2. *The documentation shall explain why there is a need to exceed one year. Discuss items such as the severability of services, why the requirement can not be competitively competed within one year, etc. Enclose a copy of the Justification for Other than Full and Open Competition (JOFOC) reviewed and signed by the appropriate officials except for the approving official signature on the JOFOC.*
3. *A statement ensuring that any follow-on requirements will be solicited as a full and open competition procurement.*

Determination

Based upon the above findings and as authorized by Federal Acquisition Regulation 6.302-2(d)(2), I have determined that the exceptional circumstance to exceed the period of performance beyond one year for *(title of service)* is appropriate and is in the Government's best interest. I approve the exceptional circumstances.

Senior Procurement Executive Signature

Date

(This is a D&F template. – Tailor the D&F to the specific action. See STRIPES library. .)

Determination for Public Interest Exception for *(title of procurement)*

Determination and Findings: To procure the requirement under Public Interest exception for other than full and open competition

Based upon the following determination and findings, the proposed procurement described below is not in the public interest to use full and open competition.

Findings

1. The *(contracting activity processing the requirement)* proposes to acquire under solicitation or contract *(number)*, *(title and description of service)*. The estimated value is \$ *(amount)* for a *XX* month *(include any options both in dollar value and/or state what are the periods of performance.)*
2. *The documentation shall explain why it is not in the public interest to use full and open competition. Discuss, at a minimum, why none of the other exceptions to full and open competition apply and the rationale to support this exception.*
3. Authority for this exception is 41 U.S.C. 253(c)(7) as implemented at Federal Acquisition Regulation 6.302-7.

Determination

Based upon the above findings and as authorized by 41 U.S.C. 253(c)(7), I have determined that it is not in the public interest to use full and open competition for *(title of procurement)*. I approve this Public Interest exception to full and open competition. Expiration of this Determination and Findings is up completion of contract *(number)*.

Secretary of Energy	Signature	Date

Administrator National Nuclear Security Administration	Signature	Date

*(Select the appropriate approving official and delete the other signature block.)
(This is a D&F template. – Tailor the D&F to the specific action. See STRIPES library.)*

Reviews for Determination for Public Interest Exception for *(title of procurement)*

Acquisition Initiator _____ Contracting Officer _____
Signature Date Signature Date

Program Senior Official Contracting Activity
(or designee) _____ Legal Counsel
Signature Date Signature Date

Contracting Activity
Competition Advocate _____
Signature Date

Head of the Contracting
Activity _____
Signature Date

Senior Procurement
Executive _____
Signature Date

**SAMPLE CONGRESSIONAL NOTIFICATION LETTER
FOR PUBLIC INTERST EXCEPTION**

The President of the Senate
U.S. Senate
Washington, DC 20510

The Speaker of the House
U.S. House of Representatives
Washington, DC 20515

Subject: Public Interest Exception Notification of Pending Contract Action

Dear President and Speaker:

No earlier than thirty days from the date of this notification, the Department of Energy (*National Nuclear Security Administration*) intends to award an action for (*title of procurement*) pursuant to 41 U.S.C. 253(c)(7). I have determined that it is not in the public interest to use full and open competition

If you have any questions, please contact (*insert the program office name and phone number.*)

Sincerely,

Name of Secretary or Administrator
Title