



MAY THE CLAUSE BE WITH YOUSM

Competition Requirements

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COMPETITION REQUIREMENTS

- Competition is one of the hallmarks of doing business with the U.S. Government
- The key statute promoting competition is the Competition in Contracting Act (“CICA”) of 1984, which supplemented what was already on the books
- CICA is implemented by FAR Part 6, “Competition Requirements”
- FAR Part 6 is unusual because it has no implementing clauses in FAR Part 52

Competition Requirements

- The statutes and FAR Part 6 also recognize that there are certain situations where full and open competition is not practical
- The goal is to maximize competition, while still carrying out other Congressional priorities like aiding small businesses and minority-owned businesses
- When full competition is undertaken, the GAO takes the position that anything that reduces competition violates CICA

FULL AND OPEN COMPETITION

- FAR 6.101, “Policy,” states:
 - (a) 10 U.S.C. 3201 and 41 U.S.C. 3301 require, with certain limited exceptions, (see Subparts 6.2 and 6.3), that contracting officers shall promote and provide for full and open competition in soliciting offers and awarding Government contracts.
 - (b) Contracting officers shall provide for full and open competition through use of the competitive procedures contained in this subpart that are best suited to the circumstances of the contract action and consistent with the need to fulfill the Government’s requirements efficiently (10 U.S.C. 3201 and 41 U.S.C. 3301)

FULL AND OPEN COMPETITION AFTER EXCLUSION OF SOURCES

- As a sovereign, the Government has different interests than we do as individuals or corporations
- For example, the Government has a strong interest in keeping its industrial base “warm” in case of an emergency (e.g., Desert Storm, post-9-11, Ukraine)
- The Government also has a strong interest in using its economic leverage to improve the status of certain sectors of industry, particularly small businesses

USING OTHER THAN FULL COMPETITION

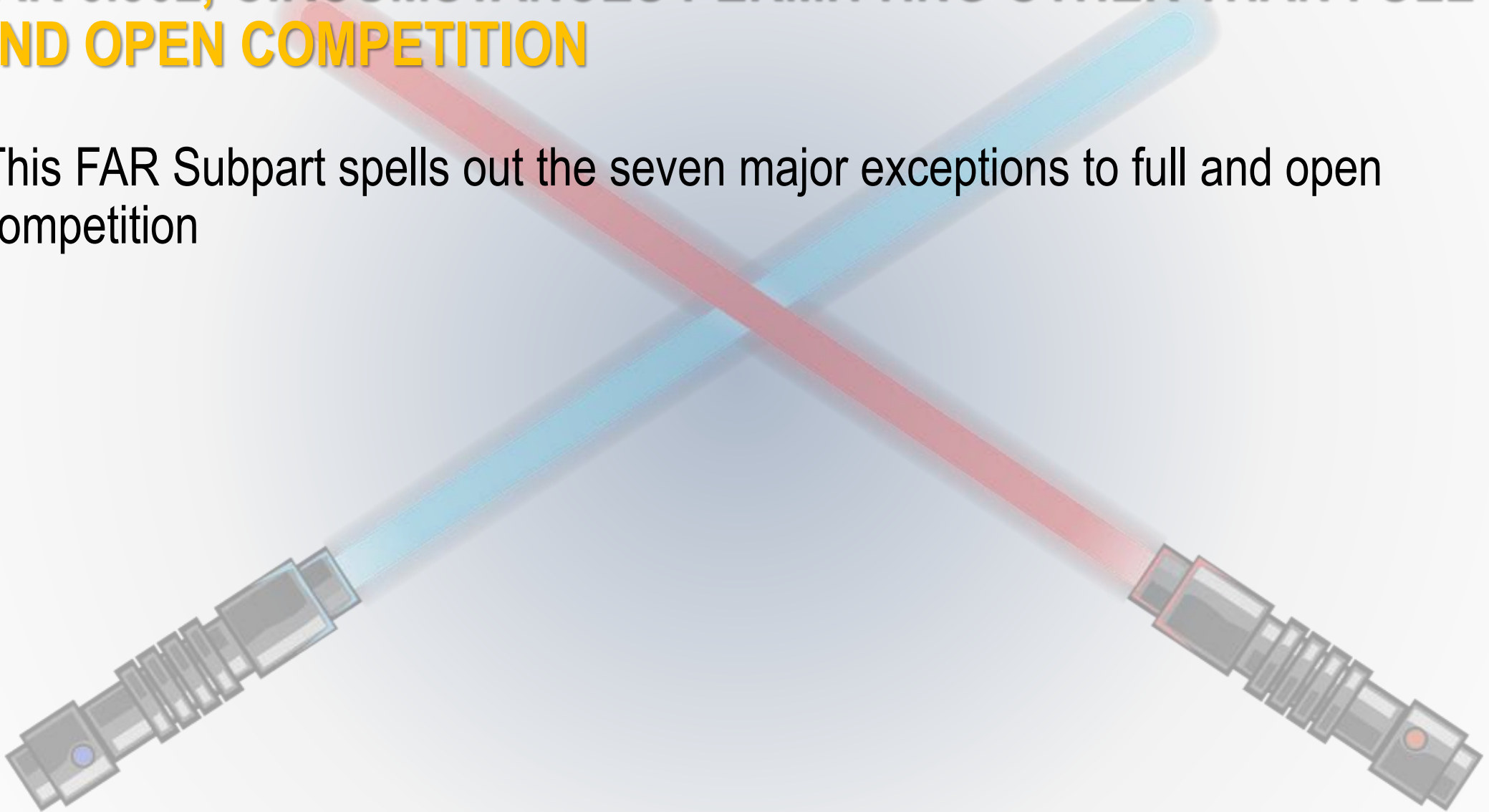
- FAR Subpart 6.2 provides the authority for C.O.s to use other than full and open competition when the Government wants to:
 - Establish or maintain alternate sources
 - Limit competition to small businesses, Hubzone businesses, service-disabled veteran-owned businesses, economically disadvantaged women-owned small businesses, or set-asides for local firms during a major disaster or emergency (e.g., hurricanes, fires, tornadoes)
 - The phrase “other than full and open competition” is not defined anywhere in the FAR

FAR Subpart 6.3, OTHER THAN FULL AND OPEN COMPETITION

- Under certain conditions, spelled out in FAR 6.302, the Government may proceed to procure goods or services without full and open competition, but the Government cannot do so if the reason is that the activity did not do adequate advance planning or there are concerns relating to the amount of funds available (e.g., funds are about to expire) (FAR 6.301)
- And when not using full and open competition, the C.O. “shall solicit offers from as many potential sources as is practicable under the circumstances”

FAR 6.302, CIRCUMSTANCES PERMITTING OTHER THAN FULL AND OPEN COMPETITION

- This FAR Subpart spells out the seven major exceptions to full and open competition



FAR 6.302-1, Only one responsible source, and no other supplies or services will satisfy agency requirements

- This clause makes it clear that slightly different rules apply to DOD, NASA and the Coast Guard, but, in general, it can be applied (a) to unsolicited proposals if they meet certain criteria; (b) and to follow-on contracts if they meet certain criteria such as duplicative costs or unacceptable delays
- The clause gives examples of the circumstances that could give rise to using this exception, again differentiating between DOD, NASA and the Coast Guard on the one hand and other agencies on the other
- The clause also provides authority for brand name or equal procurements
- The GAO will examine such cases with close scrutiny
- When a responsible source expresses interest in competing, the agency must make reasonable efforts to allow that source to compete

FAR 6.302-1, cont.

- At the GAO, agencies must prove their position “convincingly”
- It is considered improper for an agency to rely on the putative awardee for technical advice and expertise
- Written justification is required as is public notice pursuant to FAR 5.201

FAR 6.302-2, UNUSUAL OR COMPELLING URGENCY

- Can be used when the agency's need for the supplies or services is of such an unusual and compelling urgency that the Government would be seriously injured (financially or otherwise) unless it is permitted to limit the number of sources
- Written justification is required, but may be done after-the-fact to avoid delays
- The period of performance is to be limited and, in any event, should not exceed one year—but it can be extended if separate written justification is provided
- This exception is narrowly construed because the acquisition planning process is designed to overcome all but the most compelling emergency situation
- Urgency has generally been found where the agency could show that it had made reasonable efforts to obtain competition but was unable to meet this goal because of insufficient time to fulfill critical agency requirements

FAR 6.302-3, INDUSTRIAL MOBILIZATION; ENGINEERING, DEVELOPMENTAL, OR RESEARCH CAPABILITY; OR EXPERT SERVICES

- Full and open competition need not be used when it is necessary to award to a particular source or sources in order to:
 - Maintain a facility, producer, manufacturer or other supplier in case of an emergency or to achieve industrial mobilization
 - To establish or maintain an essential engineering, research or development capability to be provided by an educational or other nonprofit institution or a federally-funded R&D center
 - Or to acquire the services of an expert or neutral person for any current or anticipated litigation or dispute
 - The clause provides examples
 - All such actions must be approved in writing

FAR 6.302-4, International Agreement

- Full and open competition need not be used where precluded by the terms of an international agreement or treaty between the U.S. and a foreign government or international organization, or the written direction of a foreign government reimbursing the U.S. Government agency for the cost of the acquisition of the supplies or services
- Written justification and approvals are required for agencies other than the DOD, NASA and the Coast Guard

FAR 6.302-5, AUTHORIZED OR REQUIRED BY STATUTE

- Full and open competition need not be required when (a) a statute expressly authorizes or requires that the acquisition be made through another agency or from a specified source or (b) the agency's need is for a brand name commercial product for authorized resale
- The clause gives examples of such statutes: Federal Prison Industries, Government Printing and Binding, sole-source awards under the Section 8(a) program, and others
- There are other limitations, but written authorization is required

FAR 6.302-6, NATIONAL SECURITY

- Full and open competition is not needed when the disclosures of the agency's needs would compromise the national security unless the agency is permitted to limit the number of sources from which it is seeking bids or proposals
- This authority should not be used merely because the acquisition is classified or merely because access to classified material will be necessary to submit a proposal or to perform a contract
- Written justification is required

FAR 6.302-7, PUBLIC INTEREST

- Full and open competition need not be used when the agency head determines that it is not in the public interest in the particular acquisition concerned
- Written authorization is required
- Congress must be notified no less than 30 days before the award of the contract
- Example: In the early 2000s, the Navy issued a sole-source contract for Russian helicopters because the Navy thought that the Afghans would have an easier time flying them, this aiding the war effort. A Sikorsky protest challenging this decision was denied.

FAR 6.303, Justifications

- This provision spells out the requirements that a C.O. must satisfy in order to proceed with a sole-source procurement, a contract resulting from an unsolicited proposal, or award any other contract without providing for full and open competition
- In such cases, the C.O. must justify, if required by FAR 6.302, the use of such action in writing, must certify the accuracy and completeness of the justification, and obtain the approval required by FAR 6.304
- This provision contains other requirements and it should be a routine practice of a C.O. to review this language carefully before proceeding

FAR 6.303-2, Contents

- This provision spells out the information that should be included in any such justification
- At a minimum, the justification should contain sufficient facts and rationale to justify the specific authority used
- Once again, a C.O. would be wise to thoroughly review this provision to understand what is required

FAR 6.304

- This provision sets forth the different approvals that a C.O. must obtain depending on the action in question

FAR 6.305, Availability of the Justification

- This provision directs the C.O. to make publicly available the justification required by FAR 6.303-1
- There are certain deadlines for publishing this information on www.sam.gov

FAR Subpart 6.5, Advocates for Competition

- The head of each executive agency shall designate an advocate for competition for the agency and for each procuring activity of the agency
- The advocate shall be someone other than the agency's senior procurement executive and shall not be assigned any duties or responsibilities that are inconsistent with FAR 6.502
- The duties of the Competition Advocate are spelled out in FAR 6.502, and they include promoting commercial product and service acquisitions, promoting full and open competition, challenging requirements that are not stated in terms of functions to be performed, performance required, or essential physical characteristics

Advocates for Competition

- FAR 6.502 lists several other responsibilities of the Competition Advocate, but suffice it to say that anything that would suggest less than full and open competition would come under serious review

QUESTIONS?

