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DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No. 2002-C-001]

Patent and Trademark Office

Acquisition Guidelines (PTAG)

AGENCY: Patent and Trademark Office, Commerce.

ACTION: Notice of promulgation of guidelines.

SUMMARY: The United States Patent and Trademark Office (USPTO) is publishing guidelines which will apply to its acquisitions.

EFFECTIVE DATE: The guidelines will be adopted on March 10, 2003.

FOR FURTHER INFORMATION CONTACT: Ms. Susan Messina, Procurement Analyst, USPTO, Office of Procurement, at 703-305-8014.

SUPPLEMENTARY INFORMATION:

Background

The USPTO published the proposed guidelines and requested comments on October 23, 2002 (67 FR 65092). No comments were received in response to this notice and request for comments.

Nature of Guidelines

Neither the **Federal** Acquisition Regulation (FAR) nor the procedures set forth in this notice will be binding on USPTO contracting officers or other USPTO employees involved in the procurement process. However, USPTO employees may assume that following either the FAR procedures or, to the extent applicable, the alternate procedures set forth in this notice will ensure compliance with applicable legal requirements and result in fair and appropriate decisions. USPTO employees may use procedures other than those set forth in the FAR and this notice so long as these procedures comply with all applicable statutes, Executive Orders and regulations, will further the legitimate interests of the USPTO and are calculated to result in fair decisions.

Neither the FAR nor the alternate guidance provided in this notice is binding on USPTO vendors or any other member of the public, except to the extent provisions therefrom are incorporated in legally enforceable contracts. Instructions set forth in solicitations or other procurement documents are also binding in that they may establish conditions on an offeror's continued participation in the procurement process.

The alternate procedures set forth in this notice are intended to incorporate brevity of content, streamlined procedures, innovation in process, flexibility, and discretion to the acquisition process while ensuring objectivity and maximum reasonable competition. The

following are *highlights of the benefits the USPTO hopes to achieve* through this alternate guidance:

- Increase the competitive threshold from \$2500 to \$5000 to decrease processing time and costs.
- Use “maximum reasonable competition” instead of “full and open competition” for a more efficient procurement process.
- Reflect the USPTO’s increased flexibility in procuring printing services.
- Increase the threshold for the use of simplified acquisition procedures for commercial items from \$5 million to \$10 million to reduce the lead time for processing requirements and decrease acquisition costs.
- Provide guidance on the use of an Alternative Streamlined Contracting Approach. This process involves the early identification of highly qualified vendors, which will reduce the investment of vendor time and resources, provide greater flexibility, and establish better partnerships with the vendor community. The use of a pre-set number of firms for the competitive range also reduces unreasonable contractor expectations.
- Permit limited discussions after the establishment of the competitive range in lieu of making an award without discussions. USPTO hopes to reduce processing time and administrative burdens associated with proposal revisions.
- Permit use of contract types not included in the FAR (*i.e.*, contract types that combine elements of the various contract types listed in the FAR (Labor Hour Award Fee, for one example). This provides greater flexibility to improve mission accomplishment and improved partnering relationships with vendors.

Guidelines

Expanded Use of Electronic Commerce

Recognizing that the Internet provides a valuable means of disseminating information, USPTO intends to continue and expand its use of electronic commerce to facilitate streamlining of the acquisition process. While the USPTO will continue to synopsise proposed actions and contract awards, **the objective is to use the USPTO Office of Procurement web site as the foremost method of publicizing requirements, business opportunities, and providing procurement information to the business community.**

Competition

The USPTO will endeavor to acquire products and services to the maximum extent possible in all acquisitions on a competitive basis; however, it is exempt from the requirement to meet the test of “full and open competition” as defined in FAR part 6. The USPTO will use competition as a principal tool in achieving results and intends to adopt means of affording competition that it determines will effectually serve the performance goals established for particular acquisitions.

It is the policy of the USPTO to promote competition to the maximum extent possible. Competition reduces the risk of having to rely on only one source for critical goods or services and reduces costs. USPTO intends to balance these considerations with the

program benefits that can be gained from developing a reduced supplier base and building strategic alliances with its suppliers. The degree of competition sought will be influenced by knowledge of the marketplace and successful past performance records, with competition in most cases limited to a reasonable number of capable sources. Under the USPTO process, all firms will be apprised of opportunities, but

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only those judged to be the most viable will commit the resources to fully participate. USPTO intends to have an open interchange with industry about USPTO potential requirements and contractor capabilities long before any formal solicitation is issued. It is the policy of the USPTO to inform all firms of opportunities and seek to ensure only the most viable will need to commit resources to fully participate. Where justifications for limiting competition are prepared, they will be approved at the following levels:

- a. Justifications of procurements \$1,000,000 or less will be approved by the Contracting Officer.
- b. Justifications over \$1,000,000 and less than \$10,000,000 will be approved by the Director, Office of Procurement.
- c. Justifications greater than \$10,000,000 will be approved by the Agency Competition Advocate.

Simplified Acquisition Procedures

Competitive quotations need not be sought for purchases under \$5,000 provided that the Contracting Officer can readily determine the price to be fair and reasonable. Written solicitations should only be utilized when appropriate given the complexity of the requirement.

The USPTO contracting officer may use procedures similar to those set forth at subpart 13.5 of the FAR for acquisitions of commercial items not in excess of \$10 million.

Alternative Streamlined Contracting Approach

The Contracting Officer may utilize the streamlined process described below to solicit offers. The characteristics of this process include:

- a. Early identification of the most highly qualified contractors;
- b. Establishing a pre-set number of firms for the competitive range to limit the investment of contractor time and resources and to reduce the administrative burden of the procurement process; and
- c. Conducting negotiations only where it is practical and efficient to do so and without the requirement for a common cut-off date for concluding negotiations.

The USPTO intends to use a project team to conduct acquisitions under the alternative streamlined contracting approach. The project team will be a multi-disciplinary team that consists of a warranted contracting officer, representatives from the program office whose requirement is the subject of the procurement, the Office of Corporate Planning, and the Office of the General Counsel. The project team will possess the necessary authority needed to conduct all aspects of the acquisition. No further approvals will be required to conduct the acquisition.

The Alternative Streamlined Contracting Process is conducted as follows:

- a. A project team conducts all aspects of the acquisition.
- b. The team employs strategies and methods that best fulfill the needs of the acquisition.
- c. When using the streamlined Alternative Streamlined Contracting Approach, USPTO may employ announcements of opportunities rather than announcement of individual actions over \$25,000.
- d. Initially, a high-level solicitation document is used. It should solicit basic and essential information such as offeror qualifications, broad-based product data, proposed technical concept, past performance, and pricing. The solicitation document will typically consist of:
 1. Information on goals and objectives of the requirement,
 2. Specific procedures related to conducting the acquisition,
 3. Instructions to offerors on preparing a response,
 4. Information on how responses will be evaluated,
 5. Budget information on the value of the acquisition, where appropriate, and
 6. Project and acquisition timeframes and schedules.
- e. A competitive range will be established after initial evaluation of responses. Respondents judged as not being among the most highly rated will be eliminated from further consideration.
- f. After establishment of the competitive range, a detailed Statement of Need is issued to solicit additional information and obtain a more complete offer from all firms. The Statement of Need will incorporate the principles of performance-based contracting to permit offerors the opportunity to propose the best solution to meet the USPTO's needs.
- g. Oral presentations may be used. The Contracting Officer should maintain an adequate record of oral presentations.

Based on responses to the Statement of Need, the Contracting Officer may negotiate or conduct discussions only with the highest ranked offeror based on the evaluation factors set forth in the solicitation. If the USPTO Contracting Officer is unable to reach agreement with this offeror, negotiations will be initiated with the next highest-ranked firm. This process will continue until those firms remaining in the competitive range have been considered. If agreement cannot be reached, negotiations may be reopened with all firms in the competitive range or the solicitation may be canceled.

Selecting Contract Types

Where appropriate, the USPTO may use any contract type (*e.g.*, fixed price or labor hour) provided for in the FAR without regard to any limitations specified therein, and in addition may use hybrid or other contract types not provided for in the FAR.

Indefinite-Delivery Contracts

Because it is exempt from the *Federal Property and Administrative Services Act (FPAS)*, the USPTO is not required to make multiple awards for indefinite-quantity contracts under any circumstances, or, where multiple awards are made, to use any specific procedures for placing task or delivery orders. Contracting Officers are encouraged, however, to consider the use of multiple awards where doing so would result in benefits to the USPTO. A solicitation contemplating multiple awards should address the procedures the USPTO will use for selecting between contractors when awarding task or delivery orders. Where a specific procurement includes procedures for seeking task or delivery order proposals from multiple contractors, applying these procedures to individual requirements below \$5,000 normally will not be in the best interest of the USPTO.

Options

Because of the USPTO's exemption from FPAS, it may make award on the basis of unpriced options contained in an existing contract without seeking further competition. The USPTO intends to consider the use of this technique in connection with performance-based contracting under the following circumstances:

- a. The award of additional option periods to the incumbent contractor without competition is used as an incentive and reward for good contract performance;
- b. The solicitation notifies offerors that unpriced options will be used as a performance incentive; and
- c. The contract includes provisions for measuring contract performance and the pricing, negotiation, and exercise of additional option periods.

Acquisition Plans

Acquisition planning serves two important purposes: it establishes how an agency will meet programmatic requirements within the agency's

budgetary goals and it serves as a guideline for the acquisition.

Annual Acquisition Plans—As a means of funds control, prioritization, and workload scheduling, USPTO intends to continue to utilize yearly acquisition plans that are tied to the budget process. The plans should be updated as priorities and funding changes

occur to ensure accuracy and currency. Plans will be concise. All planned acquisitions for a given fiscal year should be included on the yearly acquisition plan.

Separate Project Agreements—The USPTO may use a separate project agreement for individual or multiple actions that utilize the Alternative Streamlined Contracting Approach. Project Agreement documents tailored to the size and complexity of the various acquisitions will be developed.

Individual Acquisition Plans—The content of the individual acquisition plan shall be left to the discretion of the Contracting Officer. At a minimum, acquisitions plans should contain the following:

- a. Statement of need.
- b. Applicable conditions.
- c. Cost.
- d. Risks.
- e. Plan of action.
- f. Milestones.

Printing Requirements

The Patent and Trademark Efficiency Act, 35 U.S.C. 2(b)(4)(B), exempts the USPTO from requirements for printing by the Government Printing Office. Accordingly the USPTO intends to acquire printing by the most economic and efficient means available, which may in particular acquisitions include the Government Printing Office.

Market Research

The purpose of USPTO's approach to market research is to identify and determine the availability of products or services that will satisfy its requirements. The USPTO will use such research, as appropriate, to help it ascertain the most efficient acquisition strategy—with consideration of the range of potential sources, availability of commercial items, and identification of standard commercial practices. Accordingly, the USPTO intends to conduct market research that, to the extent possible, is based upon clear statements of an acquisition's intended outcome and does not foreclose, before research is conducted, the consideration of any reasonable solution or technology for accomplishing its goal. The best result of market research will be achieved when there is a clear statement of the acquisition's intended outcome.

Market research is the responsibility of the entire acquisition team. USPTO Contracting Officers should work closely with technical/program staff to ensure that appropriate market research is conducted. The extent and results of market research efforts should be documented in acquisition planning documents and/or project agreements when the Alternative Streamlined Contracting Approach is utilized.

Bid Protests

The USPTO continues to be subject to the bid protest jurisdiction of the General Accounting Office and of the Court of **Federal** Claims. The USPTO is also subject to Executive Order 12979 concerning protests to the agency. Its procedures for considering such protests are available at:

<http://www.uspto.gov/web/offices/ac/comp/proc/protest.htm>.

Dated: January 31, 2003.

James E. Rogan,

*Under Secretary of Commerce for Intellectual
Property and Director of the United States
Patent and Trademark Office.*

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