

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-215135

DATE: October 23, 1984

MATTER OF: Monarch Enterprises, Inc.

DIGEST:

GAO has no basis to question agency's issuance of solicitation using clauses specified by Defense Acquisition Regulation (DAR) when solicitation is issued after the effective date of the Federal Acquisition Regulation (FAR), but where agency implementing regulations and agency internal guidance provides that solicitations already in process of preparation prior to the effective date of FAR may be issued using DAR clauses when inclusion of FAR clauses would cause an undue delay in solicitation. By issuing solicitation under DAR, the contracting officer implicitly determined that substitution of FAR provisions would unduly delay the solicitation process, which is a judgment for the agency to make.

Monarch Enterprises, Inc. protests the issuance of invitation for bids (IFB) No. DACW17-84-B-0023 using clauses and provisions specified in the Defense Acquisition Regulation (DAR), § 1-100 et seq., reprinted in 32 C.F.R. pts. 1-39 (1983) instead of using those in the Federal Acquisition Regulation (FAR), § 1.000 et seq., 48 Fed. Reg. 42,102 (1983) (to be codified at 48 C.F.R. § 1.000). The Army Corps of Engineers issued the solicitation on April 10, 1984 for maintenance services for certain recreational areas along the Okeechobee Waterway in Lee, Glades and Martin Counties, Florida. The protester contends that the issuance of the solicitation including the DAR clauses was improper because the solicitation was issued after the effective date of the FAR and requests resolicitation of the invitation using the FAR clauses.

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We deny the protest.

The FAR was issued jointly by the Secretary of Defense, the Administrator of General Services and the Administrator, National Aeronautics and Space Administration as a single regulation for use by all executive agencies in their acquisition of supplies and services with appropriated funds. The forward included in the initial publication of the FAR in the Federal Register stated that the FAR was to be effective April 1, 1984 "in accordance with procedures to be established" by the issuing parties. 48 Fed. Reg. 42,102. Further, FAR § 1.301(a) and (b) provides that an agency head may issue implementing regulations or internal agency guidance. 48 C.F.R. 42,105. Finally, the Army FAR Supplement (AFARS) provides that the heads of the contracting activities may issue instructions implementing the FAR and its supplements. AFARS, § 1.304-90(b) (1984 ed.).

In accordance with this guidance, the Department of Defense and the Army issued regulations and the Corps has issued internal guidance concerning the implementation of the FAR. The forwards of the Department of Defense (DOD) FAR Supplement, 48 Fed. Reg. 11,302 and the AFARS provides that the new clauses need not be included in solicitations already in process of preparation on April 1 when their inclusion would cause an undue delay in the solicitation. The Corps instructed its district offices by letter of March 16, that "[a]ll procurements that were not started by issuance of a synopsis, advance notice, IFB/RFP, etc. prior to [the effective date of the FAR], must be processed under the FAR." The agency also reports that the Office of the Chief of Engineers instructed the procuring activities by a later message that if the request for the procurement was received prior to April 1, although the solicitation was to be issued after that date, the contracting officer had the option of using either FAR or DAR clauses in the solicitation. If, however, the procurement request was received after April 1, the procuring activity was instructed that the FAR clauses and provisions were mandatory.

Here, although the solicitation was issued on April 10, the agency reports that the Jacksonville District Office received the procurement request on March 12. Additionally, the procurement was synopsisized

in the Commerce Business Daily on March 20. Thus, since the procurement was begun prior to April 1, the solicitation was issued in accordance with the Corps' instructions, which in our view were consistent with the FAR and its implementing regulations.

Nevertheless, the protester argues that the use of the FAR clauses in this solicitation would not have resulted in undue delay, the condition specified by the forewards of the DOD FAR Supplement and the AFARS for use of DAR clauses in solicitations in the process of preparation on April 1. By issuing the solicitation using the DAR clauses, the contracting officer implicitly determined that the substitution of the FAR provisions would unduly delay the solicitation process. Although the protester disagrees, we think this is a judgment which must be made by the agency.

We deny the protest.

A handwritten signature in black ink, reading "Milton J. Fowler". The signature is written in a cursive style with a large initial "M".

Acting Comptroller General
of the United States