

(3) *Discharges occurring on or after October 1, 2003, and before October 1, 2006.* For discharges occurring on or after October 1, 2003, and before October 1, 2006, short-stay outlier payments are subject to the provisions of § 412.84(i)(2) for adjustments to cost-to-charge ratios.

(4) *Discharges occurring on or after October 1, 2006.* For discharges occurring on or after October 1, 2006, short-stay outlier payments are subject to the following provisions:

(i) CMS may specify an alternative to the cost-to-charge ratio otherwise applicable under paragraph (f)(4)(ii) of this section. A hospital may also request that its fiscal intermediary use a different (higher or lower) cost-to-charge ratio based on substantial evidence presented by the hospital. This request must be approved by the appropriate CMS Regional Office.

(ii) The cost-to-charge ratio applied at the time a claim is processed is based on either the most recent settled cost report or the most recent tentatively settled cost report, whichever is from the latest cost reporting period.

(iii) The fiscal intermediary may use a statewide average cost-to-charge ratio, which CMS establishes annually, if it is unable to determine an accurate cost-to-charge ratio for a hospital in one of the following circumstances:

(A) A new hospital that has not yet submitted its first Medicare cost report. (For this purpose, a new hospital is defined as an entity that has not accepted assignment of an existing hospital's provider agreement in accordance with § 489.18 of this chapter.)

(B) A hospital whose cost-to-charge ratio is in excess of 3 standard deviations above the corresponding national geometric mean. CMS establishes and publishes this mean annually.

(C) Any other hospital for which data to calculate a cost-to-charge ratio are not available.

(iv) Any reconciliation of outlier payments is based on the cost-to-charge ratio calculated based on a ratio of costs to charges computed from the relevant cost report and charge data determined at the time the cost report coinciding with the discharge is settled.

(v) At the time of any reconciliation under paragraph (f)(4)(iv) of this section, outlier payments may be adjusted to account for the time value of any underpayments or overpayments. Any adjustment is based upon a widely available index to be established in advance by the Secretary, and is applied from the midpoint of the cost reporting period to the date of reconciliation.

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: April 4, 2008.

Kerry Weems,

Acting Administrator, Centers for Medicare & Medicaid Services.

Approved: April 30, 2008.

Michael O. Leavitt,

Secretary.

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DEPARTMENT OF HOMELAND SECURITY

48 CFR Part 3036

[Docket No. DHS–2007–0024]

RIN 1601–AA44

Department of Homeland Security Acquisition Regulation; One-Step Turnkey Design-Build Contracts for United States Coast Guard (HSAR Case 2007–002)

AGENCY: Department of Homeland Security.

ACTION: Final rule.

SUMMARY: The Department of Homeland Security (DHS or Department) is amending the Homeland Security Acquisition Regulation (HSAR) to incorporate delegation of one-step turnkey design-build authority from the Secretary of Homeland Security to the United States Coast Guard (USCG or Coast Guard). This rule implements changes that result from the USCG Authorization Act for Fiscal Year 2006.

DATES: Effective May 6, 2008.

FOR FURTHER INFORMATION CONTACT: Kathy Strouss, Department of Homeland Security, Office of the Chief Procurement Officer, Acquisition Policy and Legislation, (202) 447–5300.

SUPPLEMENTARY INFORMATION:

I. Background

II. Discussion of Public Comments

III. Regulatory Analyses

A. Executive Order 12866 Assessment

B. Regulatory Flexibility Act

I. Background

Under the United States Coast Guard (USCG) Authorization Act for Fiscal Year 2006, the Secretary of Homeland Security was authorized to use one-step turnkey design-build procedures when entering into construction contracts. *See* Public Law 109–241, sec. 205. On July 13, 2007, DHS published a proposed rule, which would amend the

Department of Homeland Security Acquisition Regulation (HSAR) to incorporate the delegation of turnkey design-build authority from the Secretary of Homeland Security to the United States Coast Guard. *See* 72 FR 38548. DHS adopts the proposed rule as a final rule without change.

II. Discussion of Public Comments

DHS received public comments from 6 sources on the proposed rule. The public comments received and the responses are summarized below:

Comment: Several comments were opposed to this HSAR revision, which would incorporate the delegation of one-step turnkey design-build procedures authority from the Secretary of Homeland Security to the United States Coast Guard. Most commenters fully understood that DHS issued the proposed rule to implement changes enacted by Congress in section 205 of Public Law 109–241; however, the commenters still urged DHS not to adopt the proposed regulation, believing instead that the Department should continue to follow the two-phase design-build procedures laid out in the Federal Acquisition Reform Act (FARA) of 1996.

Response: DHS disagrees. The Coast Guard has studied the one-step turnkey design-build process and is fully convinced that it is in the best interest of both the Coast Guard and the government to adopt this streamlined acquisition method. The Coast Guard delegation of one-step turnkey design-build authority is consistent with section 205 of Public Law 109–241. Each construction acquisition is unique, and one-step turnkey design-build methods will be used where it is reasonable, prudent, and offers the best contracting strategy for the Coast Guard.

Comment: Other comments fully supported the adoption of a universal design-build methodology for all federal design-build projects. The commenters wrote, however, that the adoption of a turnkey design-build (one-step) method would unnecessarily confuse the private sector with conflicting procurement methodologies.

Response: DHS disagrees. The private sector is very familiar with one-step turnkey design-build and has been using the process for years. The private sector has gained experience with one-step design-build use at other federal agencies, such as the Department of Defense (DoD) and the Department of Transportation.

Comment: One commenter reminded DHS that the Federal Acquisition Regulation (FAR) Part 36 governs the use of two-phase design-build

procedures for construction contracting and is the only design-build method that is currently allowed under the FAR. This commenter believes that any deviation from the current guidance in FAR part 36 is not authorized by Congress. The commenter requests that the USCG comply with the current laws and intent of Congress in this regard. Another commenter had concerns about the implications of the proposed rule. The commenter highlighted the fact that "Unless the less complex facilities are truly less complex and do not require extensive designs, the costs to the small business of a one stage procedure could and would be more expensive and may limit competition from small business." The commenter also indicated that this proposed rule did not provide enough specificity as to provide adequate notice to the public regarding changes proposed. The commenter urged the Department to reissue a proposed rule with greater specificity (rather than issue a final rule) and to extend the comment period.

Response: DHS does not believe one-step turnkey design-build will place an undue burden on small business. Since one purpose of the rule is to provide the Coast Guard with cost and time efficiencies for small construction projects, the rule should also afford small construction companies with an opportunity to successfully compete for such projects. DHS did not extend the comment period for this proposed rule, because DHS does not believe that any additional time is necessary. DHS believes that the comment period provided was sufficient.

Comment: DHS received several comments regarding the type of projects to be completed under turnkey. Specifically, commenters wanted to know what constituted a "complex facility" versus a "simple design" and wanted DHS to elaborate further on the types and size of facilities to be included under the proposed turnkey acquisition methodology.

Response: The Coast Guard will consider all types of facilities and projects under turnkey acquisition procedures. The final acquisition method for each project is not finalized until all acquisition planning is complete. The DHS advanced acquisition planning database (located at <http://www.fido.gov>) contains a complete listing of Coast Guard construction projects scheduled for each fiscal year. In addition, the Coast Guard will be developing internal guidelines to ensure that all of its construction offices follow standards in executing one-step turnkey design-build authority.

Comment: DHS received a few comments regarding specific implementation policy of two-phase design-build process. Several commenters wrote that price should not enter into the evaluation until after the qualifications of the applicants have been fully evaluated and a shortlist of between three and five fully qualified firms are identified. They wrote that under the proposed rule's one-step selection procedure, price would be mingled with the qualifications. The commenters also believed that a one-step selection process carries numerous disadvantages for both the agency and for the contractors when compared with the existing two-step process. The commenters wrote that under a one-phase process, proposal costs would be escalated, because all of the applicants would have to go through the complete cost proposal process, unlike in two-step design-build process, where only the short-listed firms have to prepare a cost proposal. The commenters wrote that since cost proposals often require a significant pre-contract design effort, there would be a need for the Coast Guard (like some federal agencies) to provide a stipend to the short-listed firms which would increase costs for the agency. In addition, the commenters thought that a one-phase design-build process would deny the Coast Guard the innovation and creativity that is fostered by the two-step selection process as competitors compete to provide the most "value added" to their proposals. The commenters indicated that with an unlimited number of competitors, relatively few firms will want to invest the effort to be innovative and creative—especially smaller firms with emerging talent.

Response: A historical perspective of past Coast Guard construction projects shows that the majority of construction projects have gone to small businesses. The Coast Guard believes that, under one-step turnkey design-build authority, construction projects will continue to go to small businesses. Contract opportunities would still be available for companies that meet their socio-economic status as specified in federal statutes. This includes companies located in Historically Underutilized Business Zones (HUBZone), companies eligible to receive federal contracts under the Small Business Administration's 8(a) Business Development Program, companies eligible as Service-Disabled Veteran Owned Small Business (SDVOSB) concerns, and other certified Small Business (SB) concerns eligible for contract opportunities. The Coast Guard

anticipates that many of its one-step design build projects will involve modest design efforts that will not substantially add to the cost of a contractor's bid or proposal. The Coast Guard does not intend to pay stipends related to costs for one-step turnkey design-build proposal development.

Comment: DHS received several comments regarding contractor selection and qualifications. Commenters wrote that if the Coast Guard moves forward in implementing regulations on a one-phase design-build process, then DHS should modify source selection procedures.

Response: If DHS were to follow the recommendation of these commenters, DHS would render the one-step turnkey design-build program into a two-step design-build program, thereby defeating the intent of Congress in granting DHS the option of delegating one-step turnkey design-build authority to the Coast Guard. The Coast Guard will base all contract awards under one-step turnkey design-build authority on Best Value Continuum Selection methods. In addition, the Coast Guard is in the process of developing internal guidelines to ensure that all its construction offices follow identical standards in executing one-step turnkey design-build contracts. The guidelines will allow for program standardization among all Coast Guard civil engineering units.

Comment: Two commenters recommended that DHS should add a provision to the final rule to limit the use of the one-step design-build process to projects that are "less complex projects requiring little or adaptive design with a maximum construction value of no more than \$6 million."

Response: The Coast Guard intends to utilize one-step turnkey design-build authority on a case-by-case basis. Detailed acquisition planning will determine the best procurement method to use for each project undertaken by various Coast Guard civil engineering units. The Coast Guard does not intend to limit one-step turnkey design-build procedures to procurements falling within predetermined dollar ranges. The Coast Guard will consider all projects regardless of dollar value.

Comment: A few commenters remarked that the FAR provision implemented in "Subpart 36.3—Two-Phase Design-Build Selection Procedures" should be the only governing provision. They remarked that Congress has never authorized a waiver of or deviation from qualifications based selection (QBS) for architecture, engineering and related services and that Congress has

consistently endorsed and required use of this process (40 U.S.C. 1101 *et seq.* and FAR part 36.6).

Response: DHS disagrees. The USCG Authorization Act for Fiscal Year 2006 specifically authorizes the Secretary to use one-step turnkey design-build procedures when entering into construction contracts. See Public Law 109-241 section 205. In addition, in the past, the one-step turn-key design-build procedures were authorized by Congress pursuant to 10 U.S.C. 2862. This law allows DoD service secretaries (the Secretary of the Army, the Secretary of the Air Force and the Secretary of the Navy) to use the one-step turnkey procedures for military construction contracts. The purpose of this rule is to delegate authority of the Secretary of Homeland Security under section 205 of Public Law 109-241 (14 U.S.C. 677) to the Coast Guard.

Comment: A few comments took exception with the notion that the two-phase design-build selection process required by the FAR (48 CFR 36.6) results in a much longer process. They commented that the two-phase design-build selection process is the most effective way to get the best results using design-build contracting and works well for large and small, simple and complex projects when used correctly. They also felt that the most effective way for an owner to communicate desired project outcomes is through the use of performance-based requirements, which describe the nature of the project in terms of desire performance outcomes and an owner's goals, challenges, and problems, rather than through restrictive design specifications. They felt that this approach maximizes an offeror's flexibility and allows an owner to evaluate design-build teams' innovation and creativity in providing optimum solutions. Moreover, they felt this approach would capture owner requirements more efficiently while dramatically reducing statement of work paperwork by more than 90 percent.

Response: DHS disagrees. The Coast Guard has studied the one-step turnkey design-build process and believes it to be in the best interest of both the Coast Guard and the government to adopt this streamlined acquisition method. The potential spectrum of one-step design-build projects is broad and could involve a performance-based design that complements the efficiencies that a one-step approach can provide in certain situations.

Comment: One commenter wrote that DHS should also encourage the U.S. Coast Guard to include recognition of designated Design-Build Professionals

in the selection procedures in the acquisition process.

Response: DHS agrees. The Coast Guard will include this recommendation in the guidance that it prepares on the one-step turnkey design build guidelines.

III. Regulatory Analyses

A. Executive Order 12866 Assessment

DHS has determined that this final rule is neither a major rule under 5 U.S.C. 804 nor a significant regulatory action under Executive Order 12866, Regulatory Planning and Review. It therefore does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order, and the Office of Management and Budget has not reviewed it.

B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (5 U.S.C. 601-612), the term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. This final rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

List of Subjects in 48 CFR Part 3036

Government procurement.

- Therefore, DHS amends 48 CFR part 3036 as set forth below:

PART 3036—CONSTRUCTION AND ARCHITECT—ENGINEER CONTRACTS

- 1. The authority citation for 48 CFR part 3036 continues to read as follows:

Authority: 41 U.S.C. 418(a) and (b).

- 2. Add subpart 3036.1 to read as follows:

Subpart 3036.1—General

Sec.

3036.104 Policy.

3036.104-90 Authority for one-step turnkey design-build contracting for the United States Coast Guard (USCG).

Subpart 3036.1—General

3036.104 Policy.

3036.104-90 Authority for one-step turnkey design-build contracting for the United States Coast Guard (USCG).

The Head of the Contracting Activity (HCA) of the U.S. Coast Guard may use one-step turn-key selection procedures to enter into fixed-price design-build

contracts in accordance with 14 U.S.C. 677.

Thomas W. Essig,

Chief Procurement Officer, Department of Homeland Security.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 040205043-4043-01]

RIN 0648-XG27

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Closure of the 2008 Deepwater Grouper Commercial Fishery

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; closure.

SUMMARY: NMFS closes the commercial fishery for deepwater grouper (misty grouper, snowy grouper, yellowedge grouper, warsaw grouper, and speckled hind) in the exclusive economic zone (EEZ) of the Gulf of Mexico. NMFS has determined that the deepwater grouper quota for the commercial fishery will have been reached by May 10, 2008. This closure is necessary to protect the deepwater grouper resource.

DATES: Closure is effective 12:01 a.m., local time, May 10, 2008, until 12:01 a.m., local time, on January 1, 2009.

FOR FURTHER INFORMATION CONTACT: Britni Tokotch, telephone 727-824-5305, fax 727-824-5308, e-mail Britni.Tokotch@noaa.gov.

SUPPLEMENTARY INFORMATION: The reef fish fishery of the Gulf of Mexico is managed under the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (FMP). The FMP was prepared by the Gulf of Mexico Fishery Management Council and is implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622. Those regulations set the commercial quota for deepwater grouper in the Gulf of Mexico at 1.02 million lb (463,636 kg) for the current fishing year, January 1 through December 31, 2008.

Under 50 CFR 622.43(a), NMFS is required to close the commercial fishery