

contract action for the same requirement would not be considered consolidation.

*DoD Response:* If two or more items were previously acquired under a single contract, and the follow-on acquisition is for the same requirement, the follow-on acquisition would not meet the definition of consolidation, unless it is further combined with other requirements.

25. *Comment:* One respondent asked whether a contract for support services at a dining facility that includes mess attendant services and full food (cooking) is covered by the DFARS rule.

*DoD Response:* Whether this situation is covered depends upon how the requirements were previously performed. The DFARS rule applies when the required supplies or services previously were acquired under two or more separate contracts, but now will be acquired under one.

26. *Comment:* Two respondents recommended that coverage be included in the DoD 5000 series publications as to what an acquisition strategy must include before contracts with a total value exceeding \$5,000,000 can be consolidated.

*DoD Response:* DoD considers the comment to be outside the scope of this DFARS rule. However, this recommendation has been forwarded to the Defense Acquisition Policy Working Group for consideration.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

## B. Regulatory Flexibility Act

DoD has prepared a final regulatory flexibility analysis consistent with 5 U.S.C. 604. A copy of the analysis may be obtained from the point of contact specified herein. The analysis is summarized as follows:

This final rule amends the DFARS to implement Section 801 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108-136). Section 801 added 10 U.S.C. 2382, which places restrictions on the consolidation of two or more requirements of a DoD department, agency, or activity into a single solicitation and contract, when the total value of the requirements exceeds \$5,000,000. The objective of the rule is to ensure that decisions regarding consolidation of contract requirements are made with a view toward providing small business concerns with appropriate opportunities to participate in DoD procurements as prime contractors and subcontractors. DoD received no public comments in response to the initial regulatory flexibility analysis. As a result of public

comments received on the interim rule, the final rule contains changes that clarify the applicability of the rule and the requirements for market research. The rule will apply to small entities that are interested in providing supplies or services under DoD contracts or subcontracts. There are no known alternatives that would accomplish the objectives of 10 U.S.C. 2382. The impact on small entities is expected to be positive.

## C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply, because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, et seq.

### List of Subjects in 48 CFR Parts 207, 210, and 219

Government procurement.

**Michele P. Peterson,**

*Editor, Defense Acquisition Regulations System.*

■ Accordingly, the interim rule amending 48 CFR parts 207 and 219, which was published at 69 FR 55986 on September 17, 2004, is adopted as a final rule with the following changes:

■ 1. The authority citation for 48 CFR parts 207 and 219 continues to read as follows:

**Authority:** 41 U.S.C. 421 and 48 CFR Chapter 1.

### PART 207—ACQUISITION PLANNING

■ 2. Section 207.170-2 is revised to read as follows:

#### 207.170-2 Definitions.

As used in this section—

*Consolidation of contract requirements* means the use of a solicitation to obtain offers for a single contract or a multiple award contract to satisfy two or more requirements of a department, agency, or activity for supplies or services that previously have been provided to, or performed for, that department, agency, or activity under two or more separate contracts.

*Multiple award contract* means—

(1) Orders placed using a multiple award schedule issued by the General Services Administration as described in FAR Subpart 8.4;

(2) A multiple award task order or delivery order contract issued in accordance with FAR Subpart 16.5; or

(3) Any other indefinite-delivery, indefinite-quantity contract that an agency enters into with two or more sources for the same line item under the same solicitation.

■ 3. Section 207.170-3 is amended by revising paragraph (a) introductory text and paragraph (a)(3)(i) introductory text to read as follows:

#### 207.170-3 Policy and procedures.

(a) Agencies shall not consolidate contract requirements with an estimated total value exceeding \$5,000,000 unless the acquisition strategy includes—

\* \* \* \* \*

(3) \* \* \*

(i) Market research may indicate that consolidation of contract requirements is necessary and justified if the benefits of the acquisition strategy substantially exceed the benefits of each of the possible alternative contracting approaches. Benefits may include costs and, regardless of whether quantifiable in dollar amounts—

\* \* \* \* \*

■ 4. Part 210 is added to read as follows:

## PART 210—MARKET RESEARCH

**Authority:** 41 U.S.C. 421 and 48 CFR Chapter 1.

### 210.001 Policy.

(a) In addition to the requirements of FAR 10.001(a), agencies shall—

(i) Conduct market research appropriate to the circumstances before soliciting offers for acquisitions that could lead to a consolidation of contract requirements as defined in 207.170-2; and

(ii) Use the results of market research to determine whether consolidation of contract requirements is necessary and justified in accordance with 207.170-3.

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## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

#### 48 CFR Parts 208 and 216

[DFARS Case 2004-D009]

### Defense Federal Acquisition Regulation Supplement; Competition Requirements for Federal Supply Schedules and Multiple Award Contracts

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** DoD has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to update and clarify

requirements for competition in the placement of orders under Federal Supply Schedules and multiple award contracts.

**DATES:** *Effective Date:* March 21, 2006.

**FOR FURTHER INFORMATION CONTACT:** Ms. Robin Schulze, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062. Telephone (703) 602-0326; facsimile (703) 602-0350. Please cite DFARS Case 2004-D009.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

This final rule revises procedures for use of Federal Supply Schedules and multiple award contracts to promote competition in the placement of orders for supplies or services. The final rule—

- Revises approval requirements for placement of noncompetitive orders exceeding \$100,000 under Federal Supply Schedules for consistency with those at FAR 8.405-6, and extends those requirements to orders under multiple award contracts;

- Applies the same ordering procedures to both supplies and services; and

- Makes additional changes to DFARS Subpart 208.4 for consistency with the policy in FAR Subpart 8.4.

DoD published a proposed rule at 70 FR 32280 on June 2, 2005. Four sources submitted comments on the proposed rule. A discussion of the comments is provided below.

1. *Comment:* Recommend relocating the last sentence of 208.405-70(c)(2), which references the General Services Administration's electronic quote system "e-Buy", to DoD's Procedures, Guidance, and Information (PGI) resource, to be consistent with DFARS Transformation.

*DoD Response:* DoD agrees and has relocated the referenced text to PGI, at <http://www.acq.osd.mil/dpap/dars/pgi>.

2. *Comment:* Recommend removing the requirement to obtain three proposals when ordering supplies under GSA's Federal Supply Schedule program, because the requirement is unduly burdensome and administratively wasteful.

*DoD Response:* Do not agree. DoD has adopted this policy to place the appropriate emphasis on competition and to ensure that DoD can continue to use Federal Supply Schedules to meet future requirements.

3. *Comment:* The requirement at FAR 8.405-6 for the senior procurement executive to approve proposed orders exceeding \$50,000,000 for DoD, NASA, and the Coast Guard is different from

the policy at FAR 6.304(a)(4) for non-schedule buys, which only requires senior procurement executive approval for orders exceeding \$75,000,000.

*DoD Response:* Federal Acquisition Circular 2005-05 dated July 27, 2005 (70 FR 43576), amended the FAR to make the thresholds at 8.405-6 consistent with those at 6.304(a)(4).

4. *Comment:* Recommend clarifying the justification approval level for waivers of competition when establishing blanket purchase agreements (BPAs), because BPAs may have no estimated value, and the existing requirements are based on estimated dollar value.

*DoD Response:* An estimated value should be established for a BPA as part of acquisition planning, and the approval level for the BPA should be based on that estimated value.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

**B. Regulatory Flexibility Act**

DoD certifies that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule strengthens and clarifies existing requirements for competition in the placement of orders under Federal Supply Schedules and multiple award contracts.

**C. Paperwork Reduction Act**

The Paperwork Reduction Act does not apply, because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

**List of Subjects in 48 CFR Parts 208 and 216**

Government procurement.

**Michele P. Peterson,**

*Editor, Defense Acquisition Regulations System.*

■ Therefore, 48 CFR parts 208 and 216 are amended as follows:

■ 1. The authority citation for 48 CFR parts 208 and 216 continues to read as follows:

**Authority:** 41 U.S.C. 421 and 48 CFR Chapter 1.

**PART 208—REQUIRED SOURCES OF SUPPLIES AND SERVICES**

**208.404 [Amended]**

■ 2. Section 208.404 is amended by removing paragraphs (b) and (S-70).

**208.404-1 through 208.405-2 [Removed]**

■ 3. Sections 208.404-1, 208.404-2, 208.404-70, 208.405, and 208.405-2 are removed.

■ 4. Sections 208.405-70, 208.406, and 208.406-1 are added to read as follows:

**208.405-70 Additional ordering procedures.**

(a) This subsection—

(1) Implements Section 803 of the National Defense Authorization Act for Fiscal Year 2002 (Pub. L. 107-107) for the acquisition of services, and establishes similar policy for the acquisition of supplies;

(2) Applies to orders for supplies or services under Federal Supply Schedules, including orders under blanket purchase agreements established under Federal Supply Schedules; and

(3) Also applies to orders placed by non-DoD agencies on behalf of DoD.

(b) Each order exceeding \$100,000 shall be placed on a competitive basis in accordance with paragraph (c) of this subsection, unless this requirement is waived on the basis of a justification that is prepared and approved in accordance with FAR 8.405-6 and includes a written determination that—

(1) A statute expressly authorizes or requires that the purchase be made from a specified source; or

(2) One of the circumstances described at FAR 16.505(b)(2)(i) through (iii) applies to the order. Follow the procedures at PGI 216.505-70 if FAR 16.505(b)(2)(ii) or (iii) is deemed to apply.

(c) An order exceeding \$100,000 is placed on a competitive basis only if the contracting officer provides a fair notice of the intent to make the purchase, including a description of the supplies to be delivered and the basis upon which the contracting officer will make the selection, to—

(1) As many schedule contractors as practicable, consistent with market research appropriate to the circumstances, to reasonably ensure that offers will be received from at least three contractors that can fulfill the requirements, and the contracting officer—

(i)(A) Receives offers from at least three contractors that can fulfill the requirements; or

(B) Determines in writing that no additional contractors that can fulfill the requirements could be identified despite reasonable efforts to do so (documentation should clearly explain efforts made to obtain offers from at least three contractors); and

(ii) Ensures all offers received are fairly considered; or

(2) All contractors offering the required supplies or services under the applicable multiple award schedule, and affords all contractors responding to the notice a fair opportunity to submit an offer and have that offer fairly considered.

(d) See PGI 208.405–70 for additional information regarding fair notice to contractors and requirements relating to the establishment of blanket purchase agreements under Federal Supply Schedules.

#### **§ 208.406 Ordering activity responsibilities.**

##### **§ 208.406–1 Order placement.**

Follow the procedures at PGI 208.406–1 when ordering from schedules.

### **PART 216—TYPES OF CONTRACTS**

■ 5. Section 216.505–70 is revised to read as follows:

#### **§ 216.505–70 Orders under multiple award contracts.**

(a) This subsection—

(1) Implements Section 803 of the National Defense Authorization Act for Fiscal Year 2002 (Pub. L. 107–107) for the acquisition of services, and establishes similar policy for the acquisition of supplies;

(2) Applies to orders for supplies or services exceeding \$100,000 placed under multiple award contracts;

(3) Also applies to orders placed by non-DoD agencies on behalf of DoD; and

(4) Does not apply to orders for architect-engineer services, which shall be placed in accordance with the procedures in FAR Subpart 36.6.

(b) Each order exceeding \$100,000 shall be placed on a competitive basis in accordance with paragraph (c) of this subsection, unless this requirement is waived on the basis of a justification that is prepared and approved in accordance with FAR 8.405–6 and includes a written determination that—

(1) A statute expressly authorizes or requires that the purchase be made from a specified source; or

(2) One of the circumstances described at FAR 16.505(b)(2)(i) through (iv) applies to the order. Follow the procedures at PGI 216.505–70 if FAR 16.505(b)(2)(ii) or (iii) is deemed to apply.

(c) An order exceeding \$100,000 is placed on a competitive basis only if the contracting officer—

(1) Provides a fair notice of the intent to make the purchase, including a

description of the supplies to be delivered or the services to be performed and the basis upon which the contracting officer will make the selection, to all contractors offering the required supplies or services under the multiple award contract; and

(2) Affords all contractors responding to the notice a fair opportunity to submit an offer and have that offer fairly considered.

(d) When using the procedures in this subsection—

(1) The contracting officer should keep contractor submission requirements to a minimum;

(2) The contracting officer may use streamlined procedures, including oral presentations;

(3) The competition requirements in FAR part 6 and the policies in FAR Subpart 15.3 do not apply to the ordering process, but the contracting officer shall consider price or cost under each order as one of the factors in the selection decision; and

(4) The contracting officer should consider past performance on earlier orders under the contract, including quality, timeliness, and cost control.

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### **DEPARTMENT OF DEFENSE**

#### **Defense Acquisition Regulations System**

##### **48 CFR Parts 215 and 216**

[DFARS Case 2005–D003]

#### **Defense Federal Acquisition Regulation Supplement; Incentive Program for Purchase of Capital Assets Manufactured in the United States**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** DoD has adopted as final, with changes, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 822 of the National Defense Authorization Act for Fiscal Year 2004. Section 822 requires the Secretary of Defense to establish an incentive program for contractors to purchase capital assets manufactured in the United States, and to provide consideration for offerors with eligible capital assets in source selections for major defense acquisition programs.

**DATES:** Effective March 21, 2006.

**FOR FURTHER INFORMATION CONTACT:** Ms. Amy Williams, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062. Telephone (703) 602–0328; facsimile (703) 602–0350. Please cite DFARS Case 2005–D003.

#### **SUPPLEMENTARY INFORMATION:**

##### **A. Background**

DoD published an interim rule at 70 FR 29643 on May 24, 2005, to implement Section 822 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136). Section 822 added 10 U.S.C. 2436, which requires the Secretary of Defense to (1) establish an incentive program for contractors to purchase capital assets manufactured in the United States under contracts for major defense acquisition programs; and (2) provide consideration for offerors with eligible capital assets in source selections for major defense acquisition programs.

Six respondents submitted comments on the interim rule. A discussion of the comments is provided below.

1. *Comment:* Some respondents expressed concern about the future of the U.S. machine tool industry and its ability to help in the defense of the United States. They discussed the severe pressure from foreign competition and asserted that the machine tool industry in particular is essential to the military industrial and critical infrastructure base of the United States.

*DoD Response:* DoD recognizes these concerns and considers that the incentive program in this DFARS rule provides sufficient motivation for vendors to consider the purchase of U.S. machine tools for major defense acquisition programs as well as for other defense requirements.

2. *Comment:* One respondent stated that the use of U.S. machine tools for fulfilling defense contracts should be mandatory.

*DoD Response:* The mandatory use of U.S. machine tools would severely affect DoD's ability to manage its contracts in terms of cost, schedule, and performance and would negatively impact DoD's ability to meet warfighter needs. Such an approach could deny DoD the ability to select the contractor that is most likely to provide the most effective solution to DoD needs, simply because that contractor did not possess all U.S. machine tools. Further, if defense contractors were forced to acquire U.S. machine tools in order to be responsive to DoD's needs, the expense of acquiring those tools (estimated to be in the billions) would