

in amounts exceeding the simplified acquisition threshold.

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PART 217—SPECIAL CONTRACTING METHODS

■ 4. Section 217.7802 is amended by revising paragraph (e) to read as follows:

217.7802 Policy.

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(e) Collecting and reporting data on the use of assisted acquisition for analysis. Follow the reporting requirements at PGI 217.7802.

PART 237—SERVICE CONTRACTING

■ 5. Section 237.170–2 is amended by revising paragraph (b) to read as follows:

237.170–2 Approval requirements.

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(b) *Acquisition of services through use of a contract or task order issued by a non-DoD agency.* Comply with the review, approval, and reporting requirements established in accordance with Subpart 217.78 when acquiring services through use of a contract or task order issued by a non-DoD agency.

[FR Doc. 06–2644 Filed 3–20–06; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 207, 210, and 219

[DFARS Case 2003–D109]

Defense Federal Acquisition Regulation Supplement; Consolidation of Contract Requirements

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 801 of the National Defense Authorization Act for Fiscal Year 2004. Section 801 places restrictions on the consolidation of two or more requirements of a DoD department, agency, or activity into a single solicitation and contract with a total value exceeding \$5,000,000.

DATES: Effective March 21, 2006.

FOR FURTHER INFORMATION CONTACT: Ms. Deborah Tronic, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), IMD 3C132, 3062

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SUPPLEMENTARY INFORMATION:

A. Background

DoD published an interim rule at 69 FR 55986 on September 17, 2004, to implement 10 U.S.C. 2382, as added by Section 801 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136). 10 U.S.C. 2382 places restrictions on the consolidation of two or more requirements of a DoD department, agency, or activity into a single solicitation and contract with a total value exceeding \$5,000,000. Twenty-two respondents submitted comments on the interim rule. A discussion of the comments is provided below.

1. *Comment:* Four respondents indicated that the difference between consolidation of contract requirements and contract bundling is unclear.

DoD Response: The definitions of the two terms are similar, because all bundles are consolidations. However, not all consolidations are bundles. The definition of “bundle” requires that previous contracts for the item were either performed by small business concerns or were suitable for small business concerns, whereas the definition of “consolidation” does not contain this requirement.

2. *Comment:* One respondent requested clarification regarding the definition of “consolidation.” The respondent interpreted the phrase “two or more separate contracts lower in cost than the total cost of the contract for which the offers are solicited” to mean that, if the cost of one contract for two or more requirements is less than the cost of two or more separate contracts, the acquisition would be outside the definition of consolidation.

DoD Response: Agree that the phrase could lead to multiple interpretations. To ensure that the rule is applied where appropriate, the phrase has been excluded from the final rule.

3. *Comment:* One respondent stated that the rule does not consider varying quantities between the previous buy and the current acquisition; and does not consider when the previous buys were made, i.e., a year ago or five years ago. This could make a big difference in comparing costs.

DoD Response: The definition included in the final rule eliminates the need for cost comparisons.

4. *Comment:* Four respondents stated that the term “consolidation of contract requirements” is not clear with regard to what is meant by “requirements” and

whether or not a different acquisition strategy would be considered a new requirement, such as combining sustaining engineering with system maintenance of the same system.

DoD Response: The DFARS rule follows the legislative definition for consolidation of contract requirements, which addresses a single award covering requirements previously provided under more than one award. DoD believes that the definition is clear, but exercise of judgment may be necessary in some cases to determine whether the requirement has previously been provided.

5. *Comment:* One respondent asked for clarification regarding whether the rule applies to orders.

DoD Response: Under GSA Schedules, DoD activities place orders, but the actual contract (Schedule) is put in place by GSA. A literal reading of the interim rule would be that the DoD senior procurement executive’s determination must be made when the Schedule itself is awarded. The final rule clarifies that the rule applies to orders placed under GSA Schedules.

6. *Comment:* One respondent asked who the senior procurement official is.

DoD Response: The rule uses the term “senior procurement executive.” This term is defined at DFARS 202.101, which specifies the department/agency officials that hold this title.

7. *Comment:* Seven respondents recommended delegation of the senior procurement executive’s authority to determine that contract consolidation is necessary and justified.

DoD Response: The rule does not prohibit delegation of this authority. Therefore, in accordance with FAR 1.108(b), departments and agencies may delegate this authority as deemed appropriate.

8. *Comment:* One respondent stated that the requirement to file the determination in the contract file is unnecessary and should be deleted, because the contracting officer would do this without having it be required.

DoD Response: Due to the specific requirement of 10 U.S.C. 2382 to ensure that decisions regarding consolidation are necessary and justified, DoD believes it is appropriate for this DFARS rule to address the need for supporting documentation.

9. *Comment:* One respondent requested that the requirement for inclusion of the senior procurement executive’s determination in the contract file be satisfied by including the determination in the acquisition plan.

DoD Response: The senior procurement executive may, if desired,

document and sign the acquisition plan to satisfy the requirement for the determination, provided it addresses all the elements in DFARS 207.170-3.

10. *Comment:* One respondent requested additional guidance with respect to permissible contents of the determination. Absent such guidance, the regulation should at least make clear that the scenario identified in 207.170-3(a)(i), i.e., “the benefits of the acquisition strategy substantially exceed the benefits of each of the possible alternative contracting approaches” is simply an example of an adequate determination.

DoD Response: The DFARS language is sufficiently clear. However, a possible source for additional guidance is the DoD Office of the Small and Disadvantaged Business Utilization Benefit Analysis Guidebook—Reference to Assist Department of Defense Acquisition Strategy Teams in Performing a Benefit Analysis before Bundling Contract Requirements. Although this guidebook’s focus is on bundling, there are some similarities to the measurably substantial benefits descriptions that may be helpful. A copy of this guidebook is available at <http://www.acq.osd.mil/sadbu/news/guidebook.htm>. DoD will be revising this guidebook to address consolidation.

11. *Comment:* One respondent recommended that market research requirements for consolidation be added to DFARS 210.001.

DoD Response: The final rule adds a new section at DFARS 210.001 to address market research requirements.

12. *Comment:* Nine respondents recommended a higher dollar threshold for application of the rule.

DoD Response: DoD is unable to increase this threshold, as the \$5 million threshold is specified in 10 U.S.C. 2382(b).

13. *Comment:* Five respondents indicated that the DFARS rule is in conflict with acquisition reform initiatives that include such tools as strategic sourcing, corporate contracts, and commodity councils.

DoD Response: The DFARS rule may make it more administratively burdensome to pursue such strategies; however, the rule does not preclude pursuing acquisition strategies that involve consolidation when it is determined that such consolidation is necessary and justified.

14. *Comment:* One respondent indicated that consolidation limits competitive opportunities and that DoD should not impede competition.

DoD Response: DoD agrees that competition should not be impeded. The rule is intended to ensure that

consolidation decisions are made with a view toward providing small business concerns with appropriate opportunities to participate in DoD procurements at both the prime and subcontract level. It is noted, however, that consolidation will not in all cases result in a less competitive situation than what previously existed. There may be instances where firms that competed for previous separate contracts can still compete for the consolidated contract. In addition, when two contracts that were previously awarded on a sole source basis result in a new contract that is also sole source, competition has not been affected.

15. *Comment:* One respondent stated that the requirements of this rule could result in additional workload to the Government, since it could result in two or three procurements instead of one procurement.

DoD Response: Agree that the rule could increase the number of DoD procurement actions. However, the intent of the rule is to ensure that small business concerns are provided with appropriate opportunities to participate in DoD procurements.

16. *Comment:* One respondent stated that the rule could burden small businesses by requiring them to respond to multiple solicitations instead of just one.

DoD Response: As required by the statute, the application of the rule will preclude the issuance of consolidated acquisitions that cannot be justified, thus protecting the interests of small businesses. The appropriate issuance of multiple solicitations will provide multiple opportunities for small business concerns to compete.

17. *Comment:* Four respondents indicated that there are no exceptions to the rule for small business set-asides, sole source awards, foreign military sales, etc., and suggests there should be exceptions.

DoD Response: 10 U.S.C. 2382 does not provide for any exceptions to the policy stated in the rule.

18. *Comment:* One respondent recommended the removal of the DFARS rule based on the fact that contracting officers are trained in and evaluated on properly applying small business rules to ensure small businesses get appropriate opportunities. In addition, the contracting officer is already required, in some cases, to provide all information relevant to the justification of contract bundling, including the acquisition plan, and to address bundling if applicable.

DoD Response: This DFARS rule is necessary to implement the

requirements of 10 U.S.C. 2382, which are separate from the requirements applicable to bundling at 15 U.S.C. 644(e)(2).

19. *Comment:* One respondent stated that an annual review and assessment of contract consolidations is an undue administrative burden.

DoD Response: In accordance with FAR 19.201(d)(11), the Office of Small and Disadvantaged Business Utilization is already required to conduct annual reviews regarding contract bundling actions. The consolidation review will be a part of this annual review process, and is needed to comply with Section 801(b) of Public Law 108-136, which requires DoD to conduct periodic reviews to determine the extent of consolidation and the impact on small business concerns.

20. *Comment:* One respondent recommended adding a threshold to the review requirement at DFARS 219.201(d)(11), since no documentation requirements exist for contract consolidations valued at less than \$5 million.

DoD Response: DoD does not believe it is necessary to restate the documentation threshold at 219.201(d)(11).

21. *Comment:* One respondent suggested modification of the DD Form 350 to collect information on consolidations.

DoD Response: The DD Form 350 data collection system has been revised to identify procurements involving consolidation of contract requirements.

22. *Comment:* One respondent asked if the rule applies to acquisitions already in process as of the effective date of the rule, September 17, 2004.

DoD Response: In accordance with FAR 1.108(d), the rule applies to solicitations issued on or after September 17, 2004.

23. *Comment:* Two respondents requested clarification as to whether the rule would apply to a procurement that was under the \$5 million threshold initially, but exceeded the threshold after offers were received.

DoD Response: The determination occurs before the solicitation is released, based on the estimated total value of the contract. If the value exceeded \$5 million after offers were received, no further documentation and approval would be necessary at that time. The DFARS rule has been amended at 207.170-3(a) to clarify that application of the rule is based on estimated dollar value.

24. *Comment:* One respondent stated that, if the previous contract contained two or more requirements, the follow-on

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—

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■ 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.

[FR Doc. 06-2646 Filed 3-20-06; 8:45 am]

BILLING CODE 5001-08-P

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