

PART 11—DESCRIBING AGENCY NEEDS

Sec.

- 11.000 Scope of part.
- 11.001 Definitions.
- 11.002 Policy.

Subpart 11.1—Selecting and Developing Requirements Documents

- 11.101 Order of precedence for requirements documents.
- 11.102 Standardization program.
- 11.103 Market acceptance.
- 11.104 Use of brand name or equal purchase descriptions.
- 11.105 Items peculiar to one manufacturer.
- 11.106 Purchase descriptions for service contracts.
- 11.107 Solicitation provision.

Subpart 11.2—Using and Maintaining Requirements Documents

- 11.201 Identification and availability of specifications.
- 11.202 Maintenance of standardization documents.
- 11.203 Customer satisfaction.
- 11.204 Solicitation provisions and contract clauses.

Subpart 11.3—Acceptable Material

- 11.301 Policy.
- 11.302 Contract clause.

Subpart 11.4—Delivery or Performance Schedules

- 11.401 General.
- 11.402 Factors to consider in establishing schedules.
- 11.403 Supplies or services.
- 11.404 Contract clauses.

Subpart 11.5—Liquidated Damages

- 11.501 General.
- 11.502 Policy.
- 11.503 Procedures.
- 11.504 Contract clauses.

Subpart 11.6—Priorities and Allocations

- 11.600 Scope of subpart.
- 11.601 Definitions.
- 11.602 General.
- 11.603 Procedures.
- 11.604 Solicitation provision and contract clause.

Subpart 11.7—Variation in Quantity

- 11.701 Supply contracts.
- 11.702 Construction contracts.
- 11.703 Contract clauses.

Subpart 11.8—Testing

- 11.801 Preaward in-use evaluation.

11.000 Scope of part.

This part prescribes policies and procedures for describing agency needs.

11.001 Definitions.

As used in this part—

“Reconditioned” means restored to the original normal operating condition by readjustments and material replacement.

“Recovered material” has the meaning provided such term in 23.402.

“Remanufactured” means factory rebuilt to original specifications.

“Virgin material” means previously unused raw material, including previously unused copper, aluminum, lead, zinc, iron, other metal or metal ore, or any undeveloped resource that is, or with new technology will become, a source of raw materials.

11.002 Policy.

(a) In fulfilling requirements of 10 U.S.C. 2305(a)(1), 10 U.S.C. 2377, 41 U.S.C. 253a(a), and 41 U.S.C. 264b, agencies shall—

(1) Specify needs using market research in a manner designed to—

(i) Promote full and open competition (see Part 6), or maximum practicable competition when using simplified acquisition procedures, with due regard to the nature of the supplies or services to be acquired; and

(ii) Only include restrictive provisions or conditions to the extent necessary to satisfy the needs of the agency or as authorized by law.

(2) To the maximum extent practicable, ensure that acquisition officials—

(i) State requirements with respect to an acquisition of supplies or services in terms of—

(A) Functions to be performed;

(B) Performance required; or

(C) Essential physical characteristics;

(ii) Define requirements in terms that enable and encourage offerors to supply commercial items, or, to the extent that commercial items suitable to meet the agency's needs are not available, nondevelopmental items, in response to the agency solicitations;

(iii) Provide offerors of commercial items and nondevelopmental items an opportunity to compete in any acquisition to fill such requirements;

(iv) Require prime contractors and subcontractors at all tiers under the agency contracts to incorporate commercial items or nondevelopmental items as components of items supplied to the agency; and

(v) Modify requirements in appropriate cases to ensure that the requirements can be met by commercial

items or, to the extent that commercial items suitable to meet the agency's needs are not available, nondevelopmental items.

(b) The Metric Conversion Act of 1975, as amended by the Omnibus Trade and Competitiveness Act of 1988 (15 U.S.C. 205a, *et seq.*), designates the metric system of measurement as the preferred system of weights and measures for United States trade and commerce, and it requires that each agency use the metric system of measurement in its acquisitions, except to the extent that such use is impracticable or is likely to cause significant inefficiencies or loss of markets to United States firms. Requiring activities are responsible for establishing guidance implementing this policy in formulating their requirements for acquisitions.

(c) To the extent practicable and consistent with Subpart 9.5, potential offerors should be given an opportunity to comment on agency requirements or to recommend application and tailoring of requirements documents and alternative approaches. Requiring agencies should apply specifications, standards, and related documents initially for guidance only, making final decisions on the application and tailoring of these documents as a product of the design and development process. Requiring agencies should not dictate detailed design solutions prematurely (see 7.101 and 7.105(a)(8)).

(d) The Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6901, *et seq.*), as amended, Executive Order 12873, dated October 20, 1993, and Executive Order 12902, dated March 8, 1994, establish requirements for the procurement of products containing recovered materials, and environmentally preferable and energy-efficient products and services. Requiring activities shall prepare plans, drawings, specifications, standards (including voluntary standards), and purchase descriptions that consider the requirements set forth in Part 23. Environmental objectives, such as pollution prevention (*e.g.*, promoting waste reduction, source reduction, energy efficiency and maximum practicable recovered material content) (see Part 23) shall be considered when describing Government requirements for supplies and services, and when developing source selection factors for competitive negotiated acquisitions (see 15.304), when appropriate.

(e) Some or all of the performance levels or performance specifications in a solicitation may be identified as targets rather than as fixed or minimum requirements.

Subpart 11.1—Selecting and Developing Requirements Documents

11.101 Order of precedence for requirements documents.

(a) Agencies may select from existing requirements documents, modify or combine existing requirements

documents, or create new requirements documents to meet agency needs, consistent with the following order of precedence:

- (1) Documents mandated for use by law.
- (2) Performance-oriented documents.
- (3) Detailed design-oriented documents.
- (4) Standards, specifications and related publications issued by the Government outside the Defense or Federal series for the non-repetitive acquisition of items.

(b) Agencies should prepare product descriptions to achieve maximum practicable use of recovered material, other materials that are environmentally preferable, and products that are energy-efficient (see Subparts 23.4 and 23.7).

11.102 Standardization program.

Agencies shall select existing requirements documents or develop new requirements documents that meet the needs of the agency in accordance with the guidance contained in the Federal Standardization Manual, FSPM-0001, and, for DoD components, DoD 4120.3-M, Defense Standardization Program Policies and Procedures. The Federal Standardization Manual may be obtained from the General Services Administration (see address in 11.201(d)(1)). DoD 4120.3-M may be obtained from DoD (see address in 11.201(d)(2)).

11.103 Market acceptance.

(a) Section 8002(c) of Pub. L. 103-355 provides that, in accordance with agency procedures, the head of an agency may, under appropriate circumstances, require offerors to demonstrate that the items offered—

- (1) Have either—
 - (i) Achieved commercial market acceptance; or
 - (ii) Been satisfactorily supplied to an agency under current or recent contracts for the same or similar requirements; and
- (2) Otherwise meet the item description, specifications, or other criteria prescribed in the public notice and solicitation.

(b) Appropriate circumstances may, for example, include situations where the agency's minimum need is for an item that has a demonstrated reliability, performance or product support record in a specified environment. Use of market acceptance is inappropriate when new or evolving items may meet the agency's needs.

(c) In developing criteria for demonstrating that an item has achieved commercial market acceptance, the contracting officer shall ensure the criteria in the solicitation—

- (1) Reflect the minimum need of the agency and are reasonably related to the demonstration of an item's acceptability to meet the agency's minimum need;

(2) Relate to an item's performance and intended use, not an offeror's capability;

(3) Are supported by market research;

(4) Include consideration of items supplied satisfactorily under recent or current Government contracts, for the same or similar items; and

(5) Consider the entire relevant commercial market, including small business concerns.

(d) Commercial market acceptance shall not be used as a sole criterion to evaluate whether an item meets the Government's requirements.

(e) When commercial market acceptance is used, the contracting officer shall document the file to—

(1) Describe the circumstances justifying the use of commercial market acceptance criteria; and

(2) Support the specific criteria being used.

11.104 Use of brand name or equal purchase descriptions.

(a) While the use of performance specifications is preferred to encourage offerors to propose innovative solutions, the use of brand name or equal purchase descriptions may be advantageous under certain circumstances.

(b) Brand name or equal purchase descriptions must include, in addition to the brand name, a general description of those salient physical, functional, or performance characteristics of the brand name item that an "equal" item must meet to be acceptable for award. Use brand name or equal descriptions when the salient characteristics are firm requirements.

11.105 Items peculiar to one manufacturer.

Agency requirements shall not be written so as to require a particular brand name, product, or a feature of a product, peculiar to one manufacturer, thereby precluding consideration of a product manufactured by another company, unless—

(a) The particular brand name, product, or feature is essential to the Government's requirements, and market research indicates other companies' similar products, or products lacking the particular feature, do not meet, or cannot be modified to meet, the agency's needs;

(b) The authority to contract without providing for full and open competition is supported by the required justifications and approvals (see 6.302-1); and

(c) The basis for not providing for maximum practicable competition is documented in the file when the acquisition is awarded using simplified acquisition procedures.

11.106 Purchase descriptions for service contracts.

In drafting purchase descriptions for service contracts, agency requiring activities shall ensure that inherently gov-

ernmental functions (see Subpart 7.5) are not assigned to a contractor. These purchase descriptions shall—

(a) Reserve final determination for Government officials;

(b) Require proper identification of contractor personnel who attend meetings, answer Government telephones, or work in situations where their actions could be construed as acts of Government officials unless, in the judgment of the agency, no harm can come from failing to identify themselves; and

(c) Require suitable marking of all documents or reports produced by contractors.

11.107 Solicitation provision.

The contracting officer must insert the provision at 52.211-6, Brand Name or Equal, when brand name or equal purchase descriptions are included in a solicitation.

Subpart 11.2—Using and Maintaining Requirements Documents

11.201 Identification and availability of specifications.

(a) Solicitations citing requirements documents listed in the General Services Administration (GSA) Index of Federal Specifications, Standards and Commercial Item Descriptions, the DoD Index of Specifications and Standards (DoDISS), or other agency index shall identify each document's approval date and the dates of any applicable amendments and revisions. Do not use general identification references, such as "the issue in effect on the date of the solicitation." Contracting offices will not normally furnish these cited documents with the solicitation, except when—

(1) The requirements document must be furnished with the solicitation to enable prospective contractors to make a competent evaluation of the solicitation;

(2) In the judgment of the contracting officer, it would be impracticable for prospective contractors to obtain the documents in reasonable time to respond to the solicitation; or

(3) A prospective contractor requests a copy of a Government promulgated requirements document.

(b) Contracting offices shall clearly identify in the solicitation any pertinent documents not listed in the GSA Index of Federal Specifications, Standards and Commercial Item Descriptions or DoDISS. Such documents shall be furnished with the solicitation or specific instructions shall be furnished for obtaining or examining such documents.

(c) When documents refer to other documents, such references shall—

(1) Be restricted to documents, or appropriate portions of documents, that apply in the acquisition;

(2) Cite the extent of their applicability;

(3) Not conflict with other documents and provisions of the solicitation; and

(4) Identify all applicable first tier references.

(d)(1) The GSA Index of Federal Specifications, Standards and Commercial Item Descriptions, FPMR Part 101-29, may be purchased from the—

General Services Administration
Federal Supply Service
Specifications Section
Suite 8100
470 East L'Enfant Plaza, SW
Washington, DC 20407
Telephone (202) 619-8925.

(2) The DoDISS may be purchased from the—

Department of Defense Single Stock Point (DoDSSP)
Building 4, Section D
700 Robbins Avenue
Philadelphia, PA 19111-5094
Telephone (215) 697-2667/2179.

(e) Agencies may generally obtain from the GSA Specifications Section or DoDSSP those nongovernment (voluntary) standards adopted for use by Federal or Defense activities. Standards not available from these sources may be obtained from Government libraries, activities subscribing to document handling services or the organization responsible for the preparation, publication or maintenance of the standard.

11.202 Maintenance of standardization documents.

(a) Recommendations for changes to standardization documents listed in the GSA Index of Federal Specifications, Standards and Commercial Item Descriptions should be submitted to the—

General Services Administration
Federal Supply Service
Office of Acquisition
Washington, DC 20406.

Agencies shall submit recommendations for changes to standardization documents listed in the DoDISS to the cognizant preparing activity.

(b) When an agency cites an existing standardization document but modifies it to meet its needs, the agency shall follow the guidance in Federal Standardization Manual and, for Defense components, DoD 4120.3-M, Defense Standardization Program Policies and Procedures.

11.203 Customer satisfaction.

Acquisition organizations shall communicate with customers to determine how well the requirements document reflects the customer's needs and to obtain suggestions for

corrective actions. Whenever practicable, the agency may provide affected industry an opportunity to comment on the requirements documents.

11.204 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert the provision at 52.211-1, Availability of Specifications Listed in the GSA Index of Federal Specifications, Standards and Commercial Item Descriptions, FPMR Part 101-29, in solicitations that cite specifications listed in the Index that are not furnished with the solicitation.

(b) The contracting officer shall insert the provision at 52.211-2, Availability of Specifications Listed in the DoD Index of Specifications and Standards (DoDISS) and Descriptions Listed in the Acquisition Management Systems and Data Requirements Control List, DoD 5010.12-L, in solicitations that cite specifications listed in the DoDISS or DoD 5010.12-L that are not furnished with the solicitation.

(c) The contracting officer shall insert a provision substantially the same as the provision at 52.211-3, Availability of Specifications Not Listed in the GSA Index of Federal Specifications, Standards and Commercial Item Descriptions, in solicitations that cite specifications that are not listed in the Index and are not furnished with the solicitation, but may be obtained from a designated source.

(d) The contracting officer shall insert a provision substantially the same as the provision at 52.211-4, Availability for Examination of Specifications Not Listed in the GSA Index of Federal Specifications, Standards and Commercial Item Descriptions, in solicitations that cite specifications that are not listed in the Index and are available for examination at a specified location.

Subpart 11.3—Acceptable Material

11.301 Policy.

(a) Agencies shall not require virgin material or supplies composed of or manufactured using virgin material unless compelled by law or regulation or unless virgin material is vital for safety or meeting performance requirements of the contract.

(b) Except when acquiring commercial items, agencies shall require offerors to identify used, reconditioned, or remanufactured supplies, or unused former Government surplus property, proposed for use under the contract. Such supplies or property may not be used in contract performance unless authorized by the contracting officer.

(c) When acquiring commercial items, the contracting officer shall consider the customary practices in the industry for the item being acquired. The contracting officer may require offerors to provide information on used, reconditioned, or remanufactured supplies, or unused former

Government surplus property, proposed for use under the contract. The request for such information shall be included in the solicitation and shall, to the maximum practicable extent, be limited to information provided pursuant to normal commercial practices.

11.302 Contract clause.

Except when acquiring commercial items, the contracting officer shall insert the clause at 52.211-5, Material Requirements, in solicitations and contracts for supplies.

Subpart 11.4—Delivery or Performance Schedules

11.401 General.

(a) The time of delivery or performance is an essential contract element and shall be clearly stated in solicitations. Contracting officers shall ensure that delivery or performance schedules are realistic and meet the requirements of the acquisition. Schedules that are unnecessarily short or difficult to attain—

(1) Tend to restrict competition,
(2) Are inconsistent with small business policies, and

(3) May result in higher contract prices.

(b) Solicitations shall, except when clearly unnecessary, inform bidders or offerors of the basis on which their bids

[The next page is 11-5.]

BLANK PAGE

proposals will be evaluated with respect to time of delivery or performance.

(c) If timely delivery or performance is unusually important to the Government, liquidated damages clauses may be used (see Subpart 11.5).

11.402 Factors to consider in establishing schedules.

(a) *Supplies or services.* When establishing a contract delivery or performance schedule, consideration shall be given to applicable factors such as the—

- (1) Urgency of need;
- (2) Industry practices;
- (3) Market conditions;
- (4) Transportation time;
- (5) Production time;
- (6) Capabilities of small business concerns;
- (7) Administrative time for obtaining and evaluating offers and for awarding contracts;
- (8) Time for contractors to comply with any conditions precedent to contract performance; and
- (9) Time for the Government to perform its obligations under the contract; *e.g.*, furnishing Government property.

(b) *Construction.* When scheduling the time for completion of a construction contract, the contracting officer shall consider applicable factors such as the—

- (1) Nature and complexity of the project;
- (2) Construction seasons involved;
- (3) Required completion date;
- (4) Availability of materials and equipment;
- (5) Capacity of the contractor to perform; and
- (6) Use of multiple completion dates. (In any given contract, separate completion dates may be established for separable items of work. When multiple completion dates are used, requests for extension of time must be evaluated with respect to each item, and the affected completion dates modified when appropriate.)

11.403 Supplies or services.

(a) The contracting officer may express contract delivery or performance schedules in terms of—

- (1) Specific calendar dates;
- (2) Specific periods from the date of the contract; *i.e.*, from the date of award or acceptance by the Government, or from the date shown as the effective date of the contract;
- (3) Specific periods from the date of receipt by the contractor of the notice of award or acceptance by the Government (including notice by receipt of contract document executed by the Government); or
- (4) Specific time for delivery after receipt by the contractor of each individual order issued under the contract, as in indefinite delivery type contracts and GSA schedules.

(b) The time specified for contract performance should not be curtailed to the prejudice of the contractor because of delay by the Government in giving notice of award.

(c) If the delivery schedule is based on the date of the contract, the contracting officer shall mail or otherwise furnish to the contractor the contract, notice of award, acceptance of proposal, or other contract document not later than the date of the contract.

(d) If the delivery schedule is based on the date the contractor receives the notice of award, or if the delivery schedule is expressed in terms of specific calendar dates on the assumption that the notice of award will be received by a specified date, the contracting officer shall send the contract, notice of award, acceptance of proposal, or other contract document by certified mail, return receipt requested, or by any other method that will provide evidence of the date of receipt.

(e) In invitations for bids, if the delivery schedule is based on the date of the contract, and a bid offers delivery based on the date the contractor receives the contract or notice of award, the contracting officer shall evaluate the bid by adding 5 calendar days (as representing the normal time for arrival through ordinary mail). If the contract or notice of award will be transmitted electronically, (1) the solicitation shall so state; and (2) the contracting officer shall evaluate delivery schedule based on the date of contract receipt or notice of award, by adding one working day. (The term "working day" excludes weekends and U.S. Federal holidays.) If the offered delivery date computed with mailing or transmittal time is later than the delivery date required by the invitation for bids, the bid shall be considered nonresponsive and rejected. If award is made, the delivery date will be the number of days offered in the bid after the contractor actually receives the notice of award.

11.404 Contract clauses.

(a) *Supplies or services.* (1) The contracting officer may use a time of delivery clause to set forth a required delivery schedule and to allow an offeror to propose an alternative delivery schedule. The clauses and their alternates may be used in solicitations and contracts for other than construction and architect-engineering substantially as shown, or they may be changed or new clauses written.

(2) The contracting officer may insert in solicitations and contracts other than those for construction and architect-engineering, a clause substantially the same as the clause at 52.211-8, Time of Delivery, if the Government requires delivery by a particular time and the delivery schedule is to be based on the date of the contract. If the delivery schedule is expressed in terms of specific calendar dates or specific periods and is based on an assumed date of award, the contracting officer may use the clause with its Alternate I. If the delivery schedule is expressed in terms of

11.501

specific calendar dates or specific periods and is based on an assumed date the contractor will receive notice of award, the contracting officer may use the clause with its Alternate II. If the delivery schedule is to be based on the actual date the contractor receives a written notice of award, the contracting officer may use the clause with its Alternate III.

(3) The contracting officer may insert in solicitations and contracts other than those for construction and architect-engineering, a clause substantially the same as the clause at 52.211-9, Desired and Required Time of Delivery, if the Government desires delivery by a certain time but requires delivery by a specified later time, and the delivery schedule is to be based on the date of the contract. If the delivery schedule is expressed in terms of specific calendar dates or specific periods and is based on an assumed date of award, the contracting officer may use the clause with its Alternate I. If the delivery schedule is expressed in terms of specific calendar dates or specific periods and is based on an assumed date the contractor will receive notice of award, the contracting officer may use the clause with its Alternate II. If the delivery schedule is to be based on the actual date the contractor receives a written notice of award, the contracting officer may use the clause with its Alternate III.

(b) *Construction.* The contracting officer shall insert the clause at 52.211-10, Commencement, Prosecution, and Completion of Work, in solicitations and contracts when a fixed-price construction contract is contemplated. The clause may be changed to accommodate the issuance of orders under indefinite-delivery contracts. If the completion date is expressed as a specific calendar date, computed on the basis of the contractor receiving the notice to proceed by a certain day, the contracting officer may use the clause with its Alternate I.

Subpart 11.5—Liquidated Damages

11.501 General.

This subpart provides policies and procedures for the use of liquidated damages clauses in solicitations and contracts for supplies, services, and construction, except for the Liquidated Damages—Subcontracting Plan clause at 52.219-16, which may be applied pursuant to 19.705-7.

11.502 Policy.

(a) Liquidated damages clauses should be used only when both (1) the time of delivery or performance is such an important factor in the award of the contract that the Government may reasonably expect to suffer damage if the delivery or performance is delinquent, and (2) the extent or amount of such damage would be difficult or impossible to ascertain or prove. In deciding whether to include a liquidated damage clause in a contract, the contracting officer should consider the probable effect on such matters as pricing,

competition, and the costs and difficulties of contract administration.

(b) The rate of liquidated damages used must be reasonable and considered on a case-by-case basis since liquidated damages fixed without any reference to probable actual damages may be held to be a penalty, and therefore unenforceable. The contract may also include an overall maximum dollar amount or period of time, or both, during which liquidated damages may be assessed, to ensure that the result is not an unreasonable assessment of liquidated damages.

(c) The contracting officer shall take all reasonable steps to mitigate liquidated damages. If a liquidated damages clause is included in a contract and a basis for termination for default exists, the contracting officer should take appropriate action expeditiously to obtain performance by the contractor or to terminate the contract (see Subpart 49.4). If delivery or performance is desired after termination for default, efforts must be made to obtain the delivery or performance elsewhere within a reasonable time. Efficient administration of contracts containing a liquidated damages clause is imperative to prevent undue loss to defaulting contractors and to protect the interests of the Government.

(d) If a contract provides for liquidated damages for delay, the Comptroller General, on the recommendation of the head of the agency concerned, is authorized and empowered by law to make a remission, that in the discretion of the Comptroller General is just and equitable, of the whole or any part of such damages.

11.503 Procedures.

(a) If a liquidated damages clause is to be used in a contract, the applicable clause and appropriate rate(s) of liquidated damages shall be included in the solicitation.

(b) If a liquidated damages clause is used in a construction contract, the rate(s) of liquidated damages to be assessed against the contractor should be for each day of delay and the rate(s) should as a minimum cover the estimated cost of inspection and superintendence for each day of delay in completion. Whenever the Government will suffer other specific losses due to the failure of the contractor to complete the work on time, the rate(s) should also include an amount for these items. Examples of specific losses are—

- (1) The cost of substitute facilities;
- (2) The rental of buildings and/or equipment; or
- (3) The continued payment of quarters allowances.

(c) If appropriate to reflect the probable damages, considering that the Government can terminate for default or take other appropriate action, the rate of assessment of liquidated damages may be in two or more increments which provide a declining rate of assessment as the delinquency continues. The contract may also include an overall maxi-

imum dollar amount or period of time, or both, during which liquidated damages may be assessed, to ensure that the result is not an unreasonable assessment of liquidated damages.

11.504 Contract clauses.

(a) The contracting officer may insert the clause at 52.211-11, Liquidated Damages—Supplies, Services, or Research and Development, in solicitations and contracts when a fixed-price contract is contemplated for supplies, services, or research and development (see 11.502).

(b) The contracting officer may insert the clause at 52.211-12, Liquidated Damages—Construction, in solicitations and contracts for construction, except construction contracts on a cost-plus-fixed-fee basis (see 11.502). If different completion dates are specified in the contract for separate parts or stages of the work, the contracting officer shall use the clause with its Alternate I.

(c) The contracting officer shall insert the clause at 52.211-13, Time Extensions, in solicitations and contracts for construction in which the clause at 52.211-12, Liquidated Damages—Construction, is used with its Alternate I.

Subpart 11.6—Priorities and Allocations

11.600 Scope of subpart.

This subpart implements the Defense Priorities and Allocations System (DPAS), a Department of Commerce (DOC) regulation in support of authorized national defense programs (see 15 CFR 700).

11.601 Definitions.

“Authorized program,” as used in this subpart, means a program approved by the Federal Emergency Management Agency (FEMA) for priorities and allocations support under the Defense Production Act of 1950, as amended (50 U.S.C. app. 2061, *et seq.*), to promote the national defense. Schedule I of the DPAS lists currently authorized programs.

“Controlled materials,” as used in this subpart, means the various shapes and forms of steel, copper, aluminum, and nickel alloys specified in Schedule II, and defined in Schedule III, of the DPAS.

“Delegate Agency,” as used in this subpart, means an agency of the U.S. Government authorized by delegation from DOC to place priority ratings on contracts that support authorized programs. Schedule I of the DPAS lists the Delegate Agencies.

“Rated order” means a prime contract for any product, service, or material (including controlled materials) placed by a Delegate Agency under the provisions of the DPAS in support of an authorized program and which require prefer-

ential treatment, and includes subcontracts and purchase orders resulting under such contracts.

11.602 General.

(a) Under Title I of the Defense Production Act of 1950, as amended (50 U.S.C. app. 2061, *et seq.*), the President is authorized—

(1) To require that contracts in support of the national defense be accepted and performed on a preferential or priority basis over all other contracts, and

(2) To allocate materials and facilities in such a manner as to promote the national defense.

(b) The Office of Industrial Resource Administration (OIRA), DOC, is responsible for administering and enforcing a system of priorities and allocations to carry out Title I of the Defense Production Act for industrial items. The DPAS has been established to promote the timely availability of the necessary industrial resources to meet current national defense requirements and to provide a framework to facilitate rapid industrial mobilization in case of national emergency.

(c) The Delegate Agencies (see Schedule I of the DPAS) have been given authority by DOC to place rated orders in support of authorized programs. Other government agencies, Canada, and other friendly foreign nations may apply for special rating authority in support of authorized programs (see 15 CFR 700.55).

(d) Rated orders shall be placed in accordance with the procedures in the DPAS. Contracting officers responsible for acquisitions in support of authorized programs shall be familiar with the DPAS and should provide guidance on the DPAS to contractors and suppliers receiving rated orders. Agency heads shall ensure compliance with the DPAS by contracting activities within their agencies.

(e) Under the Defense Production Act, any willful violation of the Act, the DPAS, or any official action taken by DOC under the DPAS, is a crime punishable by a maximum fine of \$10,000, one year in prison, or both (see 15 CFR 700.70 and 15 CFR 700.74).

11.603 Procedures.

(a) There are two levels of priority for rated orders established by the DPAS, identified by the rating symbols “DO” and “DX.” All DO rated orders have equal priority with each other and take preference over unrated orders. All DX rated orders have equal priority with each other and take preference over DO rated and unrated orders. DX ratings are used for special defense programs designated by the President to be of the highest national priority.

(b) DOC may issue a Directive to compel a contractor or supplier to accept a rated order, to rearrange production or delivery schedules, or to improve shipments against partic-

ular rated orders. Directives issued by DOC take precedence over all rated and unrated orders as stated in the Directive.

(c) In addition to any other contractual requirements, a valid rated order must contain (see 15 CFR 700.12) the following:

(1) A priority rating consisting of the appropriate DO or DX rating symbol and a program or identification symbol to indicate the authorized program (see Schedule I of the DPAS).

(2) A required delivery date or delivery dates.

(3) The signature of an individual authorized by the agency to sign rated orders.

(d) The DPAS has the following three basic elements which are essential to the operation of the system:

(1) Mandatory acceptance of rated orders. A rated order shall be accepted by a contractor or supplier unless rejected for the reasons provided for mandatory rejection in 15 CFR 700.13(b), or for optional rejection in 15 CFR 700.13(c).

(2) Mandatory extension of priority ratings throughout the acquisition chain. Contractors and suppliers receiving rated orders shall extend priority ratings to subcontractors or vendors when acquiring items to fill the rated orders (see 15 CFR 700.15).

(3) Priority scheduling of production and delivery. Contractors and suppliers receiving rated orders shall give the rated orders priority over other contracts as needed to meet delivery requirements (see 15 CFR 700.14).

(e) Agencies shall provide contracting activities with specific guidance on the issuance of rated orders in support of agency programs.

(f) Contracting officers shall follow agency procedural instructions concerning the use of rated orders in support of agency programs.

(g) Contracting officers, contractors, or subcontractors at any tier, that experience difficulty placing rated orders, obtaining timely delivery under rated orders, locating a contractor or supplier to fill a rated order, ensuring that rated orders receive preferential treatment by contractors or suppliers, or require rating authority for items not automatically ratable under the DPAS, should promptly seek special priorities assistance in accordance with agency procedures (see 15 CFR 700.50-55).

(h) Contracting officers shall report promptly any violations of the DPAS to DOC in accordance with agency procedures.

11.604 Solicitation provision and contract clause.

(a) Contracting officers shall insert the provision at 52.211-14, Notice of Priority Rating for National Defense Use, in solicitations when the contract to be awarded will be a rated order.

(b) Contracting officers shall insert the clause at 52.211-15, Defense Priority and Allocation Requirements, in contracts that are rated orders.

Subpart 11.7—Variation in Quantity

11.701 Supply contracts.

(a) A fixed-price supply contract may authorize Government acceptance of a variation in the quantity of items called for if the variation is caused by conditions of loading, shipping, or packing, or by allowances in manufacturing processes. Any permissible variation shall be stated as a percentage and it may be an increase, a decrease, or a combination of both; however, contracts for subsistence items may use other applicable terms of variation in quantity.

(b) There should be no standard or usual variation percentage. The overrun or underrun permitted in each contract should be based upon the normal commercial practices of a particular industry for a particular item, and the permitted percentage should be no larger than is necessary to afford a contractor reasonable protection. The permissible variation shall not exceed plus or minus 10 percent unless a different limitation is established in agency regulations. Consideration shall be given to the quantity to which the percentage variation applies. For example, when delivery will be made to multiple destinations and it is desired that the quantity variation apply to the item quantity for each destination, this requirement must be stated in the contract.

(c) Contractors are responsible for delivery of the specified quantity of items in a fixed-price contract, within allowable variations, if any. If a contractor delivers a quantity of items in excess of the contract requirements plus any allowable variation in quantity, particularly small dollar value overshipments, it results in unnecessary administrative costs to the Government in determining disposition of the excess quantity. Accordingly, the contract may include the clause at 52.211-17, Delivery of Excess Quantities, to provide that—

(1) Excess quantities of items totaling up to \$250 in value may be retained without compensating the contractor; and

(2) Excess quantities of items totaling over \$250 in value may, at the Government's option, be either returned at the contractor's expense or retained and paid for at the contract unit price.

11.702 Construction contracts.

Construction contracts may authorize a variation in estimated quantities of unit-priced items. When the variation between the estimated quantity and the actual quantity of a unit-priced item is more than plus or minus 15 percent, an equitable adjustment in the contract price shall be made

upon the demand of either the Government or the contractor. The contractor may request an extension of time if the quantity variation is such as to cause an increase in the time necessary for completion. The contracting officer must receive the request in writing within 10 days from the beginning of the period of delay. However, the contracting officer may extend this time limit before the date of final settlement of the contract. The contracting officer shall ascertain the facts and make any adjustment for extending the completion date that the findings justify.

11.703 Contract clauses.

(a) The contracting officer shall insert the clause at 52.211-16, Variation in Quantity, in solicitations and contracts, if authorizing a variation in quantity in fixed-price contracts for supplies or for services that involve the furnishing of supplies.

(b) The contracting officer may insert the clause at 52.211-17, Delivery of Excess Quantities, in solicitations and contracts when a fixed-price supply contract is contemplated.

(c) The contracting officer shall insert the clause at 52.211-18, Variation in Estimated Quantity, in solicitations and contracts when a fixed-price construction contract is contemplated that authorizes a variation in the estimated quantity of unit-priced items.

Subpart 11.8—Testing

11.801 Preaward in-use evaluation.

Supplies may be evaluated under comparable in-use conditions without a further test plan, provided offerors are so advised in the solicitation. The results of such tests or demonstrations may be used to rate the proposal, to determine technical acceptability, or otherwise to evaluate the proposal (see 15.305).

* * * * *