



March 11, 2003

FTS ACQUISITION POLICY LETTER NO. 2003-01

MEMORANDUM FOR ALL FTS ASSOCIATES

FROM: SANDRA N. BATES
COMMISSIONER (T) *Sandra N Bates*

SUBJECT: Implementation of Section 803 of the National Defense Authorization Act for Fiscal Year 2002

The Department of Defense (DOD) has published the final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 803 of the National Defense Authorization Act for fiscal year 2002. (See Federal Register: October 25, 2002 (Volume 67, Number 207). These provisions apply not only to orders placed by DOD for DOD, but also to orders placed by non-DOD agencies on behalf of DOD.

This rule applies to **all orders for services** (including traditional IT, telecommunications and any expansions of services offerings under the FSS/FTS realignment) placed under multiple award contracts on or after October 25, 2002, regardless of whether the multiple award contracts were awarded before, on, or after, that date.

A key point to remember is that these implementing regulations are intended to ensure fairness and to enhance competition.

For multiple award contracts, other than FSS Schedule contracts, "An order for services 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 work the contractor shall perform and the basis upon which the contracting officer will make the selection, to all contractors offering the required 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.”

For orders under Federal Supply Service Schedule Contracts, note the following Section 208.404-70:

“[208.404-70 Additional ordering procedures for services.

(a) This subsection—

(1) Implements Section 803 of the National Defense Authorization Act for Fiscal Year 2002 (Pub. L. 107-107); and

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

(b) Each order for services exceeding \$100,000 shall be placed on a competitive basis in accordance with paragraph (c) of this subsection, unless the contracting officer waives this requirement on the basis of a written determination that—

(1) One of the circumstances described at FAR 16.505(b) (2) (i) through (iii) applies to the order; or

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

(c) An order for services 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 work the contractor shall perform 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 work requirements, and the contracting officer—

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

(B) Determines in writing that no additional contractors that can fulfill the work 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

All contractors offering the required 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. Posting of a request for quotations on the General Services Administration's electronic quote system, "e-Buy" (www.gsaAdvantage.gov), is one medium for providing fair notice to all contractors as required by this paragraph (c)."

Since this regulation applies to all orders for services in excess of \$100,000 awarded on or after October 25, 2002, regardless of when the indefinite quantity contract was issued, one question, that has arisen already, is how to deal with orders under existing BPAs. Until such time as more definitive guidance is provided through a regulatory amendment, the position of FTS is to keep in mind the regulatory intent to ensure fairness and to enhance competition. All FTS personnel, when using FSS Schedule contracts, must follow the competition requirements set forth in 208.404-70 above when establishing orders for services exceeding \$100,000 even if the orders are to be placed under existing BPAs unless the **specific tasks** were identified and priced in the initial BPA competitive award process.

A second question that has arisen already concerns the standard applicable to "as many schedule contractors as practicable." At this time, there is no set number and the focus of the regulation is to enhance competition by obtaining three or more proposals. Realistically, it will very difficult for a contracting officer to determine in writing that "no additional contractors that can fulfill the work requirements could be identified despite reasonable efforts to do so." This documentation will be subject to audit and I am sure a certain amount of hindsight-enabled criticism. While this is somewhat frustrating, again we must recognize that the intent of the legislation is to enhance competition and that is only measured successful by obtaining three or more proposals.

Finally, it should be noted that Section 803 and the implementing DFARS rule is not applicable to orders for services that FTS makes on behalf of other *civilian* agencies. Rather, for orders for agencies other than DOD, there is no change; FTS associates should continue to follow the applicable FAR provisions.