



POLICY FLASH
2006-28

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DATE: May 15, 2006

TO: Procurement Directors

FROM: Office of Procurement and Assistance Policy, MA-61
Office of Procurement and Assistance Management

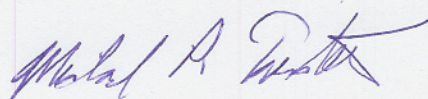
SUBJECT: **Federal Acquisition Circular (FAC) 2005-09 and Office of Federal Procurement Policy (OFPP) Information Memorandum**

SUMMARY: This Policy Flash forwards two (2) items for your information.

(1) FAC 2005-09 was issued on April 19, 2006 (71 FR 20294) into the Federal Acquisition Regulation. A summary of items covered is attached.

(2) An OFPP memorandum to all Chief Acquisition Officers and Senior Procurement Executives, dated April 17, 2006, entitled "Publication of Brand Name Justifications," is attached, requiring that notice to the public include a justification, should it be necessary to limit a solicitation to a brand name specification. Please note that OFPP's concern is not the use of a brand name "or equal" purchase description, as allowed by FAR 11.104, but rather the use of a brand name specific to one vendor, as discussed at FAR 11.105.

Questions may be referred to Richard Langston (202) 287-1339 or email Richard.Langston@hq.doe.gov.



Michael P. Fischetti, Acting Director
Office of Procurement and Assistance Policy
Office of Procurement and Assistance Management

Attachments

Item	Subject	FAR case	FAR Analyst
I.	Federal Technical Data Solution (FedTeDS)	2004-007	Zaffos.
II.	Definition of Information Technology	2004-030	Davis.
III.	OMB Circular A-76	2004-021	Zaffos.
IV.	Combating Trafficking in Persons	2005-012	Clark.
V.	Confirmation of HUBZone Certification	2005-009	Cundiff.
VI.	Expiration of the Price Evaluation Adjustment	2005-002	Cundiff.
VII.	Removal of Sanctions Against Certain European Union Member States (Interim).	2005-045	Clark.
VIII.	Free Trade Agreements Morocco (Interim)	2006-001	Clark.
IX.	Fast Payment Procedures	2004-031	Olson.
X.	Technical Amendment		

Item I--Federal Technical Data Solution (FedTeDS) (FAR Case 2004-007)

This final rule amends the FAR to require contracting officers to make solicitation-related information that requires limited availability or distribution available to offerors electronically via the Federal Technical Data Solution (FedTeDS), unless certain exceptions apply. FedTeDS provides secure, user identification and password protected access to solicitation-related data that should not be made available to the public on the Government-wide Point of Entry (GPE) Web site.

Item II--Definition of Information Technology (FAR Case 2004-030)

This final rule adopts without change the interim rule which amended FAR 2.101(b) by revising the definition for "information technology" to reflect changes to the definition resulting from the enactment of Public Law 108-199, Consolidated Appropriations Act, 2004. Section 535(b) of Division F of Public Law 108-199 permanently revises the term "information technology," which is defined at 40 U.S.C. 11101, to add "analysis" and "evaluation" and to clarify the term "ancillary equipment."

Item III--OMB Circular A-76 (FAR Case 2004-021)

This final rule amends FAR Subpart 7.3 to provide language that is consistent with OMB Circular A-76 (Revised), Performance of Commercial Activities, dated May 29, 2003. In addition, it provides two new provisions that inform potential offerors of the procedures the Government will follow for streamlined and standard competitions, as they are defined in the Circular.

Item IV--Combating Trafficking in Persons (FAR Case 2005-012)

This interim rule amends FAR Parts 12, 22 and 52 to implement the Trafficking Victims Protection Reauthorization Act of 2003, as amended by the Trafficking Victims Protection Reauthorization Act of 2005. The statute (22 U.S.C. 7104(g)) requires that the contract contain a clause allowing the agency to terminate the contract without penalty if the contractor or

subcontractor engage in severe forms of trafficking in persons or has procured a commercial sex act, or used forced labor in the performance of the contract. The interim rule applies to contractors awarded service contracts (other than commercial service contracts under Part 12). Such contractors must develop policies to combat trafficking in persons and notify the contracting officer immediately of any information it received from any source that alleges a contract employee has engaged in conduct that violates this policy, and any actions taken against the employee pursuant to the clause.

Item V--Confirmation of HUBZone Certification (FAR Case 2005-009)

The interim rule published at 70 FR 43581, July 27, 2005 is converted to a final rule without change. The interim rule amended FAR 19.703 and the clause at 52.219-9 to clarify that prime contractors must confirm that a subcontractor representing itself as a Historically Underutilized Business Zone (HUBZone) small business concern is certified, consistent with the requirements of 15 U.S.C. 632 et seq., as amended. This change is expected to increase subcontracting opportunities for certified HUBZone small business concerns and ensure accurate reporting of subcontract awards to HUBZone small business concerns under Government contracts.

Item VI--Expiration of the Price Evaluation Adjustment (FAR Case 2005-002)

This final rule adopts, without change, an interim rule that amended the FAR to cancel the authority for civilian agencies, other than NASA and the U.S. Coast Guard, to apply the price evaluation adjustment to certain small disadvantaged business concerns in competitive acquisitions. The change was required because the statutory authority for the adjustments had expired. As a result, certain small disadvantaged business concerns will no longer benefit from the adjustments. DoD, NASA, and the U.S. Coast Guard are authorized to continue applying the price evaluation adjustment.

Item VII--Removal of Sanctions Against Certain European Union Member States (FAR Case 2005-045)

This interim rule removes the sanctions in FAR Part 25 against Austria, Belgium, Denmark, Finland, France, Ireland, Italy, Luxembourg, the Netherlands, Sweden, and the United Kingdom on acquisitions not covered by the World Trade Organization Government Procurement Agreement (WTO GPA). These sanctions did not apply to small business set-asides, to acquisitions below the simplified acquisition threshold using simplified acquisition procedures, or to acquisitions by the Department of Defense. Contracting officers may now consider offers of end products, services, and construction that were previously prohibited by the sanctions.

Item VIII--Free Trade Agreements - Morocco (FAR Case 2006-001)

This interim rule allows contracting officers to purchase the products of Morocco without application of the Buy American Act if the acquisition is subject to the Morocco Free Trade Agreement. The U.S. Trade Representative negotiated a Free Trade Agreement with Morocco, which went into effect January 1, 2006. This agreement joins the North American Free Trade Agreement (NAFTA) and the Australia, Chile, and Singapore Free Trade Agreements which are already in the FAR. The threshold for applicability of the Morocco Free Trade Agreement is \$193,000 for supplies and services, \$7,407,000 for construction.

Item IX--Fast Payment Procedures (FAR Case 2004-031)

This amendment permits, but does not require, fast payment when invoices and/or outer shipping containers are not marked "Fast Pay", provided the contract includes the "Fast Payment Procedure" clause. If the Fast Payment clause is in the contract, such unmarked invoices will no longer be rejected. Instead, they will be paid using either fast payment or normal payment procedures. In addition, the revision deletes the requirement for marking invoices "No Receiving Report Prepared."

Item X--Technical Amendment

An editorial change is made at FAR 19.1005(a) in Item 3 of the NAICS Description by removing from the end of NAICS code entry "541310" the word "or".



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT POLICY

April 17, 2006

MEMORANDUM FOR CHIEF ACQUISITION OFFICERS
SENIOR PROCUREMENT EXECUTIVES

FROM:

Robert A. Burton

Associate Administrator

SUBJECT:

Publication of Brand Name Justifications

The purpose of this memorandum is to provide additional guidance to agencies when publicizing a brand name justification. As you know, Federal Acquisition Regulation (FAR) 11.105 requires all agencies to prepare justifications when brand name specifications are used in the solicitation. In April 2005, we requested agencies to publicize the justification with the solicitation. Since the requirement to post the brand name justification or documentation is new and impacts the federal acquisition process, this change will be incorporated into the FAR. FAR Case 2005-037, Brand Name Specifications, was opened to address this subject.

While the FAR is being updated to reflect the new publication requirement, agencies are required to post the brand name justification or documentation to:

- 1) the Governmentwide Point of Entry (GPE) system at www.fedbizopps.gov with the solicitation; or
- 2) the e-Buy system at <http://www.ebuy.gsa.gov> with the request for quotation (RFQ) when using the General Services Administration (GSA) Federal Supply Schedules (FSS).

The posting requirement applies to acquisitions exceeding \$25,000 that use brand name specifications, including simplified acquisitions and sole source procurements. If publication of the justification or documentation with the solicitation or the RFQ is inappropriate because one of the exceptions in FAR 5.102(a)(4) applies, agencies should keep a copy of the justification or documentation in the contract file.

Agencies should encourage their acquisition professionals to limit the use of brand name specifications and maximize competition. Questions regarding this memorandum may be directed to Julia Wise on (202) 395-7561 or jwise@omb.eop.gov.