

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 5, 8, 16, 18, and 38**

[FAC 2005–50; FAR Case 2007–012; Item II; Docket 2011–0081, Sequence 01]

RIN 9000–AL93

**Federal Acquisition Regulation;
Requirements for Acquisitions
Pursuant to Multiple-Award Contracts**

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule.

SUMMARY: DoD, GSA, and NASA are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement section 863 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009. Section 863, entitled “Requirements for Purchase of Property and Services Pursuant to Multiple-Award Contracts,” mandates enhanced competition for orders placed under multiple-award contracts, including GSA’s Federal Supply Schedules (FSS). If an individual order over the simplified acquisition threshold does not follow the section 863 competitive procedures, section 863 requires that a notice of, and the determination to waive competition for, the order be published in FedBizOpps within 14 days after award. These FAR changes support the Administration’s commitment to strengthened competition and increased transparency.

DATES: *Effective Date:* May 16, 2011.

Applicability Date: (1) The changes in this rule apply to solicitations issued and contracts awarded on or after May 16, 2011 (*see* FAR 1.108(d)(1)). (2) The changes also apply to orders issued on or after the effective date of this regulation, without regard to whether the underlying contracts were awarded before May 16, 2011. (3) The changes apply to Blanket Purchase Agreements (BPAs) established under FSS contracts on or after May 16, 2011. (4) The ordering procedures for BPAs in FAR 8.405–3(c) are mandatory for BPAs established under FSS contracts on or after May 16, 2011 and discretionary for BPAs established under FSS contracts prior to the effective date.

Comment Date: Interested parties should submit written comments to the

Regulatory Secretariat on or before May 16, 2011 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–50, FAR Case 2007–012, by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2007–012” under the heading “Enter Keyword or ID” and selecting “Search.” Select the link “Submit a Comment” that corresponds with “FAR Case 2007–012.” Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company name (if any), and “FAR Case 2007–012” on your attached document.

- *Fax:* (202) 501–4067.

- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1275 First Street, NE., 7th Floor, Washington, DC 20417.

Instructions: Please submit comments only and cite FAC 2005–50, FAR Case 2007–012, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. William Clark, Procurement Analyst, at (202) 219–1813, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–50, FAR Case 2007–012.

SUPPLEMENTARY INFORMATION:**I. Background***A. Overview*

This interim rule amends the FAR to implement section 863 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417) enacted on October 14, 2008.

Section 863 mandated the development and publication of regulations in the FAR to enhance competition for the award of orders placed under multiple-award contracts. Section 863 specified enhancements that include—

- Strengthening competition rules for placing orders under FSS and other multiple-award contracts to ensure both the provision of fair notice to contract holders and the opportunity for contract holders to respond (similar to the procedures implemented for section 803 of the National Defense Authorization Act for Fiscal Year 2002 (Pub. L. 107–107)); and

- Providing notice in FedBizOpps of certain orders placed under multiple-award contracts, including FSS.

- The legislation builds on recommendations offered by the Acquisition Advisory Panel, which was established by section 1423 of the Services Acquisition Reform Act of 2003, (Pub. L. 108–136). The final report of the Acquisition Advisory Panel, issued in January 2007, can be accessed at <http://acquisition.gov/comp/aap/index.html>.

For each individual purchase of property or services in excess of the simplified acquisition threshold (SAT) that is made under a multiple-award contract, section 863 requires the provision of fair notice of intent to make a purchase (including a description of the work to be performed and the basis on which the selection will be made) to all contractors offering such property or services under the multiple-award contract. In addition, the statute requires that all contractors responding to the notice be afforded a fair opportunity to make an offer and have that offer fairly considered by the purchasing official. A notice may be provided to fewer than all contractors offering such property or services under a multiple-award contract if the notice is provided to as many contractors as practicable. When notice is provided to fewer than all the contractors, a purchase cannot be made unless—

- Offers were received from at least three qualified contractors; or
- A contracting officer determines in writing that no additional qualified contractors were able to be identified despite reasonable efforts to do so.

These requirements may be waived on the basis of a justification, including a written determination identifying the statutory basis for an exception to fair opportunity, that is prepared and approved at the levels specified in the FAR.

In considering regulatory changes to strengthen the use of competition in task- and delivery-order contracts, the Defense Acquisition Regulations Council and Civilian Agency Acquisition Council (Councils) sought to develop amendments that take increased and more effective advantage of competition, consistent with the general competition principles addressed in the President’s March 4, 2009, Memorandum on Government Contracting (available at http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government), while still preserving the efficiencies of these contract vehicles. For this reason, the

rule addresses several issues that are not expressly addressed in section 863, such as competition for the establishment and placement of orders under FSS BPAs. The changes, however, are not applicable to BPAs awarded pursuant to FAR part 13 or to orders awarded under FAR procedures other than those in FAR subparts 8.4 and 16.5.

In particular, this interim rule—

- Revises the “fair opportunity” competition requirements in FAR 16.505(b) (applicable to multiple-award task- and delivery-order contracts, other than FSS contracts) to require that, for orders exceeding the SAT, agencies (i) provide fair notice of intent to make the purchase to all contract holders, (ii) afford all contract holders a fair opportunity to submit offers and have those offers fairly considered, and (iii) justify an exception to fair opportunity with appropriate documentation and approval;

- Amends the procedures for ordering supplies and services under FSS contracts at FAR 8.405–1 and 8.405–2, when the order is above the SAT, to require that ordering activities—

- Receive at least three quotes, as a general matter, that can fulfill the requirement and fairly consider all quotes received; and

- Document the file to explain efforts made to obtain quotes from at least three FSS contractors that can fulfill the requirements if fewer than three quotes were received and e-Buy, an electronic FSS requirements posting tool, was not used;

- Establishes new competition procedures at FAR 8.405–3 for creating BPAs under FSS contracts and placing orders under the BPAs that—

- Create a preference for multiple-award BPAs, rather than single-award BPAs, generally modeled after the preference for multiple-award task- and delivery-order contracts in FAR 16.505;

- Allow single-award BPAs if (i) the agency considered multiple awards and the decision to make a single award is explained and documented in the acquisition plan and contract file, (ii) the estimated value of the BPA does not exceed \$100 million (including any options), with limited exception, and (iii) the ordering activity prepares a written determination before exercising an option and secures the approval of its competition advocate;

- Establish competition requirements for placing orders under multiple-award BPAs that require the ordering activity to (i) provide a Request for Quotation (RFQ) to all BPA holders

offering the required supplies or services under the BPA for orders over the SAT that includes a description of the supplies to be delivered or the services to be performed and the basis upon which the selection will be made, (ii) afford all BPA holders an opportunity to submit a quote, (iii) fairly consider all responses received, and (iv) make award in accordance with the selection procedures; and

- Restrict the circumstances when a BPA may be established based on a limited-source justification (*see also* FAR 8.405–6(a)(1)(i));

- Amends the contract award synopsis provisions at FAR 5.301 (with conforming changes at FAR 5.406, 8.405–6(a)(2), and 16.505(b)(2)(ii)(D)) to require publication and posting of actions supported by exceptions to fair opportunity at FAR 16.505(b)(2) for non-FSS task- and delivery-order contracts and limited-sources justifications at FAR 8.405–6 for FSS contracts, except when disclosure would compromise national security or create other security risks;

- Clarifies that ordering activities may seek a price reduction under FSS contracts at any time and that they shall seek a price reduction when placing an order or establishing a BPA that exceeds the SAT (*see* FAR 8.405–4); and

- Adds language explaining that the protest procedures found at FAR subpart 33.1 are applicable to the issuance of an order or the establishment of a BPA against an FSS contract.

Additional background on changes to strengthen competition rules under GSA’s FSS is provided in the following section B.

B. Strengthening Competition Rules Under FSS

1. FAR 8.405–1, Ordering procedures for supplies, and services not requiring a statement of work.

Current language at FAR 8.405–1 provides competition guidance and ordering procedures for three categories of purchases:

- Orders at or below the micro-purchase threshold.
- Orders exceeding the micro-purchase threshold but not exceeding the maximum-order threshold identified in the schedule contract.
- Orders exceeding the maximum-order threshold.

This interim rule retains three categories of purchases but no longer employs the maximum-order threshold limitation as a point of reference to define the boundaries of the categories. Instead, the second and third categories

are bounded by the SAT. This change is required to ensure rules comply with the section 863 competition requirements. With respect to the competition requirements, existing requirements are retained in some instances and changed in others, as follows:

a. *Orders at or below the micro-purchase threshold.* Because the competition standards under section 863 begin at the SAT, the Councils agreed that no changes were needed to the procedures for orders at or below the micro-purchase threshold, *i.e.*, orders may be placed with any FSS contractor that can meet the agency’s needs.

b. *Orders exceeding the micro-purchase threshold but not exceeding the SAT.* In this category, an ordering activity may place an order with the FSS contractor that represents the best value after surveying at least three FSS contractors through GSA Advantage! by reviewing the catalogs or price lists of at least three FSS contractors, or by requesting quotations from at least three schedule contractors.

c. *Orders exceeding the SAT.* This interim rule changes competition requirements in this category to conform to the section 863 competition standards. The ordering activity must provide the RFQ to as many FSS contractors as practicable, consistent with market research appropriate to the circumstances, to reasonably ensure that quotes will be received from at least three contractors that can fulfill the requirement and further ensure that all quotes received are fairly considered and award is made in accordance with the basis for selection in the RFQ. The terminology set forth in the statute is tailored to conform with the process under which the FSS Program operates. For example, section 863 uses language such as “each individual purchase of property or services,” whereas this rule uses the term “orders.” The ordering procedures at FAR 8.405–1(d) for orders exceeding the maximum-order threshold have been deleted because the section 863 competition standard supersedes those procedures. In addition, when an order exceeds the SAT, an ordering activity is now required to document the best-value determination with evidence of compliance with the ordering procedures. For example, there should be documentation to show whether at least three quotes were received. If fewer than three quotes were received, and e-Buy was not used (*see* discussion on e-Buy at paragraph 4. of this section), then the contracting officer must clearly explain, in the file documentation, the efforts made to obtain quotes from at

least three FSS contractors that can fulfill the requirement.

2. *FAR 8.405-2, Ordering procedures for services requiring a statement of work.*

a. *Orders at or below the micro-purchase threshold.* The rules for orders at or below the micro-purchase threshold remain unchanged.

b. *Orders exceeding the micro-purchase threshold but not exceeding the SAT.* Consistent with current FAR requirements for orders of this size, the ordering activity must provide the RFQ (including the statement of work and evaluation criteria) to at least three FSS contractors that offer services that will meet the agency's needs. Otherwise, the ordering activity contracting officer must document the circumstances for restricting consideration of fewer than three schedule contractors that can fulfill the requirement, based on one of the reasons at FAR 8.405-6(a) and select the corresponding reason in FPDS.

c. *Orders exceeding the SAT.* This interim rule adds the new competition standards in accordance with section 863 for orders over the SAT that do not require statements of work. Here, the ordering activity must include the statement of work and evaluation criteria (e.g., experience and past performance) when providing the RFQ to FSS contractors that offer services that will meet the agency's needs or posting the RFQ on e-Buy.

3. *FAR 8.405-3, Blanket Purchase Agreements (BPAs).* This interim rule consolidates FSS BPA procedures into one subsection, FAR 8.405-3, and makes a number of changes to improve competition in the establishment of FSS BPAs and the placement of orders under such BPAs. (The Councils note that the rule addresses only FSS BPAs. This interim rule is not applicable to BPAs established under FAR part 13.) Although section 863 does not specifically address the treatment of BPAs established under FSS contracts, the Councils, after careful deliberation, decided to apply the basic competition procedures of section 863 to the establishment of BPAs under FSS contracts. Accordingly, if the anticipated value of the BPA is over the SAT, the ordering activity either must seek quotes from as many schedule contractors as practicable to reasonably ensure that quotes will be received from at least three contractors that can fulfill the requirements or post the RFQ on e-Buy, unless these requirements are waived on the basis of a limited-sources justification that is prepared and approved in accordance with FAR 8.405-6.

a. *Single-award BPAs.* To encourage and facilitate competition when placing orders under BPAs, this interim rule establishes a preference for multiple-award BPAs rather than single-award BPAs. The ordering activity must consider several factors, including the benefits of on-going competition, when deciding how many BPAs are appropriate and document the decision in the acquisition plan or BPA file. A single-award BPA may be established only under certain circumstances. To further encourage the use of multiple-award BPAs, the Councils added a limitation that no single-award BPA with an estimated value exceeding \$100 million (including any options) may be awarded unless, under certain circumstances, the head of the agency makes a determination in writing, and the Councils limited the duration of single-award BPAs to one year. While a single-award BPA may include up to four one-year options, the exercise of each option will now require a written determination approved by the ordering activity competition advocate. This determination, which is required for all BPAs at least once a year, must address whether (1) the FSS contract upon which the BPA was established is still in effect; (2) the BPA still represents the best value; and (3) the estimated quantities/amounts have been exceeded and additional price reductions can be obtained.

b. *Orders under multiple-award BPAs.* This interim rule structures the ordering procedures for multiple-award BPAs according to dollar thresholds, i.e., orders under the micro-purchase threshold, orders over the micro-purchase threshold but under the SAT, and orders over the SAT. Orders at or below the micro-purchase threshold may be placed with any BPA holder that can meet the agency needs.

When an order is over the micro-purchase threshold but less than the SAT, the ordering activity must provide each multiple-award BPA holder a fair opportunity to be considered unless one of the exceptions at FAR 8.405-6(a)(1)(i) applies. The ordering activity contracting officer must document the circumstances when limiting consideration to less than all the multiple-award BPA holders.

For an order exceeding the SAT placed under a multiple-award BPA, the ordering activity shall provide an RFQ to all BPA holders offering the required supplies or services under the multiple-award BPA. The RFQ must include a description of the supplies to be delivered or the services to be performed and the basis upon which the selection will be made. The ordering

activity shall: (1) Afford all BPA holders an opportunity to submit a quote; (2) fairly consider all responses received; and (3) make award in accordance with the selection procedures. The ordering activity must place orders using these procedures unless the requirement is waived on the basis of a justification that is prepared and approved in accordance with FAR 8.405-6.

The Councils note that the new competition standard for multiple-award BPAs is not applicable to orders placed under BPAs that were established on or before the effective date of this interim rule.

4. *E-Buy.* The Councils considered various methods for providing fair notice to all FSS contractors. FAR 8.402 currently requires the use of e-Buy, an electronic FSS requirements-posting tool, only when an order contains brand-name specifications. The Councils agreed that the use of e-Buy provides contracting officers with an efficient method of posting requirements to reach the widest audience of offerors that can fulfill the requirements, as well as a swift and easy means for contractors to submit responsive and responsible quotes. Therefore, this interim rule amends FAR 8.402(d) to identify e-Buy as one medium for providing fair notice while also providing offerors with a voluntary quoting system. The Councils agreed that posting the RFQ on e-Buy allows all FSS holders with the referenced FSS Special Item Number (SIN) to view the posting, thus satisfying the requirements for fair notice when placing an order or establishing a BPA under FAR subpart 8.4.

As explained previously in this section, the procedures for ordering supplies and services under FSS contracts (FAR 8.405-1 and 8.405-2) when the order is above the SAT, have been revised to require the receipt of at least three quotes that can fulfill the requirement and also require that all quotes received must be fairly considered. However, if e-Buy is used and fewer than three quotes are received, section 863 competition requirements are considered to have been met and the contracting officer may proceed with award. If e-Buy is not used and fewer than three quotes are received from schedule contractors that can fulfill the requirements, the contracting officer must document a determination that no additional contractors capable of fulfilling the requirements could be identified despite reasonable efforts to do so.

5. *Other FSS ordering issues.* This interim rule retains current FAR

limitations that restrict the use of brand-name specifications to situations where a 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. This interim rule also retains the list of factors to be considered when determining best value, such as past performance, special features required for effective program performance, delivery terms, and environmental and energy efficiency considerations, but adds a cross reference to FAR 8.405-4 to emphasize that ordering activities should seek price reductions when considering price.

C. Strengthening Competition Requirements for Task and Delivery Orders in FAR Subpart 16.5, Indefinite-Delivery Contracts

The changes made by this interim rule to FAR subpart 16.5 are fully addressed in section I.1. Overview, of this **Federal Register** document.

II. Executive Order 12866

This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

III. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this interim rule to 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 this rule does not revise or change existing regulations pertaining specifically to small business concerns seeking Government contracts. DoD, GSA, and NASA believe the rule will benefit small entities by encouraging and enhancing competition.

Therefore, an Initial Regulatory Flexibility Analysis has not been performed. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAC 2005-50, FAR Case 2007-012), in correspondence.

IV. Paperwork Reduction Act

The interim rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

V. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417) was enacted on October 14, 2008. Section 863 required the FAR to be revised no later than one year after enactment, or October 14, 2009. Absent implementation of this interim rule, section 863 will not be implemented in the FAR and agencies will not be compliant with this provision. However, pursuant to 41 U.S.C. 1707 and FAR 1.501-3(b), DoD, GSA, and NASA will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 5, 8, 16, 18, and 38

Government procurement.

Dated: March 4, 2011.

Millisa Gary,

Acting Director, Office of Governmentwide Acquisition Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 5, 8, 16, 18, and 38 as set forth below:

■ 1. The authority citation for 48 CFR parts 5, 8, 16, 18, and 38 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 5—PUBLICIZING CONTRACT ACTIONS

■ 2. Revise section 5.301 to read as follows:

5.301 General.

(a) Except for contract actions described in paragraph (b) of this section and as provided in 5.003, contracting officers must synopsize through the GPE the following:

(1) Contract awards exceeding \$25,000 that are—

(i) Covered by the World Trade Organization Government Procurement

Agreement or a Free Trade Agreement (*see* subpart 25.4); or

(ii) Likely to result in the award of any subcontracts. However, the dollar threshold is not a prohibition against publicizing an award of a smaller amount when publicizing would be advantageous to industry or to the Government.

(2) Certain contract actions greater than the simplified acquisition threshold as follows—

(i) Federal Supply Schedule (FSS) orders or Blanket Purchase Agreements supported by a limited-source justification (excluding brand name) in accordance with 8.405-6; or

(ii) Task or delivery orders awarded without providing fair opportunity in accordance with 16.505(b)(2).

(3) A notice is not required under this section if the notice would disclose the executive agency's needs and the disclosure of such needs would compromise the national security.

(b) A notice is not required under paragraph (a)(1) of this section if—

(1) The award results from acceptance of an unsolicited research proposal that demonstrates a unique and innovative research concept and publication of any notice would disclose the originality of thought or innovativeness of the proposed research or would disclose proprietary information associated with the proposal;

(2) The award results from a proposal submitted under the Small Business Innovation Development Act of 1982 (Pub. L. 97-219);

(3) The contract action is an order placed under subpart 16.5 or 8.4, except *see* paragraph (a)(2) of this section;

(4) The award is made for perishable subsistence supplies;

(5) The award is for utility services, other than telecommunications services, and only one source is available;

(6) The contract action—

(i) Is for an amount not greater than the simplified acquisition threshold;

(ii) Was made through a means where access to the notice of proposed contract action was provided through the GPE; and

(iii) Permitted the public to respond to the solicitation electronically; or

(7) The award is for the services of an expert to support the Federal Government in any current or anticipated litigation or dispute pursuant to the exception to full and open competition authorized at 6.302-3.

(c) With respect to acquisitions covered by the World Trade Organization Government Procurement Agreement or a Free Trade Agreement, contracting officers must submit synopses in sufficient time to permit

their publication in the GPE not later than 60 days after award.

(d) Posting is required of the justifications for—

(1) Contracts awarded using other than full and open competition in accordance with 6.305;

(2) FSS orders or Blanket Purchase Agreements with an estimated value greater than the simplified acquisition threshold and supported by a limited-sources justification (see 8.405–6(a)); or

(3) Task or delivery orders greater than the simplified acquisition threshold and awarded without providing for fair opportunity in accordance with 16.505(b)(2)(ii)(B) and (D).

■ 3. Revise section 5.406 to read as follows:

5.406 Public disclosure of justification documents for certain contract actions.

(a) Justifications and approvals for other than full and open competition must be posted in accordance with 6.305.

(b) Limited-source justifications (excluding brand name) for FSS orders or blanket purchase agreements with an estimated value greater than the simplified acquisition threshold must be posted in accordance with 8.405–6(a)(2).

(c) Justifications for task or delivery orders greater than the simplified acquisition threshold and awarded without providing for fair opportunity must be posted in accordance with 16.505(b)(2)(ii)(D).

5.705 [Amended]

■ 4. Amend section 5.705 by removing from the introductory paragraph “5.301(b)(3) through (8)” and adding “5.301(b)(2) through (7)” in its place.

PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

■ 5. Amend section 8.402 by revising paragraph (d) to read as follows:

8.402 General.

* * * * *

(d)(1) *e-Buy*, GSA’s electronic Request for Quotation (RFQ) system, is a part of a suite of on-line tools which complement GSA Advantage!. E-Buy allows ordering activities to post requirements, obtain quotes, and issue orders electronically. Posting an RFQ on e-Buy—

(i) Is one medium for providing fair notice to all schedule contractors offering such supplies and services as required by 8.405–1, 8.405–2, and 8.405–3; and

(ii) Is required when an order contains brand-name specifications (see 8.405–6).

(2) Ordering activities may access e-Buy at <http://www.ebuy.gsa.gov>. For more information or assistance on either GSA Advantage! or e-Buy, contact GSA at Internet e-mail address gsa.advantage@gsa.gov.

* * * * *

■ 6. Amend section 8.404 by—

■ a. Revising the last sentence in paragraph (a);

■ b. Redesignating paragraph (e) as paragraph (g);

■ c. Adding new paragraphs (e) and (f); and

■ d. Revising the newly redesignated paragraph (g).

The revised and added text reads as follows:

8.404 Use of Federal Supply Schedules.

(a) * * * Therefore, when establishing a BPA (as authorized by 13.303–2(c)(3)), or placing orders under Federal Supply Schedule contracts using the procedures of 8.405, ordering activities shall not seek competition outside of the Federal Supply Schedules or synopsize the requirement; but see paragraph (g) of this section.

* * * * *

(e) The procedures under subpart 33.1 are applicable to the issuance of an order or the establishment of a BPA against a schedule contract.

(f) If the ordering activity issues an RFQ, the ordering activity shall provide the RFQ to any schedule contractor that requests a copy of it.

(g)(1) Ordering activities shall publicize contract actions funded in whole or in part by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5):

(i) Notices of proposed MAS orders (including orders issued under BPAs) that are for “informational purposes only” exceeding \$25,000 shall follow the procedures in 5.704 for posting orders.

(ii) Award notices for MAS orders (including orders issued under BPAs) shall follow the procedures in 5.705.

(2) When an order is awarded or a Blanket Purchase Agreement is established with an estimated value greater than the simplified acquisition threshold and supported by a limited-source justification at 8.405–6(a), the ordering activity contracting officer must—

(i) Publicize the action (see 5.301); and

(ii) Post the justification in accordance with 8.405–6(a)(2).

■ 7. Amend section 8.405 by adding a sentence to the end of the paragraph.

8.405 Ordering procedures for Federal Supply Schedules.

* * * For establishing BPAs and for orders under BPAs see 8.405–3.

■ 8. Amend section 8.405–1 by—

■ a. Adding to the end of paragraph (a) “For establishing BPAs and for orders under BPAs see 8.405–3.”

■ b. Revising paragraphs (c) and (d);

■ c. Redesignating paragraph (e) as paragraph (g);

■ d. Adding new paragraphs (e) and (f); and

■ e. Revising newly redesignated paragraph (g).

The added and revised text reads as follows:

8.405–1 Ordering procedures for supplies, and services not requiring a statement of work.

* * * * *

(c) *Orders exceeding the micro-purchase threshold but not exceeding the simplified acquisition threshold.* Ordering activities shall place orders with the schedule contractor that can provide the supply or service that represents the best value. Before placing an order, an ordering activity shall:

(1) Consider reasonably available information about the supply or service offered under MAS contracts by surveying at least three schedule contractors through the GSA Advantage! on-line shopping service, by reviewing the catalogs or pricelists of at least three schedule contractors, or by requesting quotations from at least three schedule contractors (see 8.405–5); or

(2) Document the circumstances for restricting consideration to fewer than three schedule contractors based on one of the reasons at 8.405–6(a).

(d) *For proposed orders exceeding the simplified acquisition threshold.* (1)

Each order shall be placed on a competitive basis in accordance with (d)(2) and (3) of this section, unless this requirement is waived on the basis of a justification that is prepared and approved in accordance with 8.405–6.

(2) The ordering activity contracting officer shall provide an RFQ that includes a description of the supplies to be delivered or the services to be performed and the basis upon which the selection will be made (see 8.405–1(f)).

(3) The ordering activity contracting officer shall—

(i) Post the RFQ on e-Buy to afford all schedule contractors offering the required supplies or services under the appropriate multiple award schedule(s) an opportunity to submit a quote; or

(ii) Provide the RFQ to as many schedule contractors as practicable, consistent with market research appropriate to the circumstances, to

reasonably ensure that quotes will be received from at least three contractors that can fulfill the requirements. When fewer than three quotes are received from schedule contractors that can fulfill the requirement, the contracting officer shall prepare a written determination explaining that no additional contractors capable of fulfilling the requirement could be identified despite reasonable efforts to do so. The determination must clearly explain efforts made to obtain quotes from at least three schedule contractors.

(4) The ordering activity contracting officer shall ensure that all quotes received are fairly considered and award is made in accordance with the basis for selection in the RFQ.

(e) When an order contains brand-name specifications, the contracting officer shall post the RFQ on e-Buy along with the justification or documentation as required by 8.405-6.

(f) In addition to price (see 8.404(d) and 8.405-4), when determining best value, the ordering activity may consider, among other factors, the following:

- (1) Past performance.
 - (2) Special features of the supply or service required for effective program performance.
 - (3) Trade-in considerations.
 - (4) Probable life of the item selected as compared with that of a comparable item.
 - (5) Warranty considerations.
 - (6) Maintenance availability.
 - (7) Environmental and energy efficiency considerations.
 - (8) Delivery terms.
- (g) *Minimum documentation.* The ordering activity shall document—
- (1) The schedule contracts considered, noting the contractor from which the supply or service was purchased;
 - (2) A description of the supply or service purchased;
 - (3) The amount paid;
 - (4) When an order exceeds the simplified acquisition threshold, evidence of compliance with the ordering procedures at 8.405-1(d); and
 - (5) The basis for the award decision.

■ 9. Amend section 8.405-2 by—

- a. Adding a sentence to the end of paragraph (a);
- b. Removing from the first sentence in paragraph (b) “include the work” and adding “include a description of work” in its place;
- c. Revising the heading to paragraph (c)(2), and paragraphs (c)(2)(ii), (c)(2)(iii) and (c)(3);
- d. Revising the third sentence of paragraph (d);

- e. Removing from the end of paragraph (e)(6) the word “and”;
- f. Removing from the end of paragraph (e)(7)(ii) “order.” and adding “order; and” in its place; and
- g. Adding paragraph (e)(8).

The revised and added text reads as follows:

8.405-2 Ordering procedures for services requiring a statement of work.

(a) * * * “For establishing BPAs and for orders under BPAs see 8.405-3.”

* * * * *

(c) * * *

(2) For orders exceeding the micro-purchase threshold, but not exceeding the simplified acquisition threshold.

* * * * *

(ii) The ordering activity shall provide the RFQ (including the statement of work and evaluation criteria) to at least three schedule contractors that offer services that will meet the agency’s needs or document the circumstances for restricting consideration to fewer than three schedule contractors based on one of the reasons at 8.405-6(a).

(iii) The ordering activity shall specify the type of order (*i.e.*, firm-fixed-price, labor-hour) for the services identified in the statement of work. The contracting officer should establish firm-fixed-prices, as appropriate.

(3) *For proposed orders exceeding the simplified acquisition threshold.* In addition to meeting the requirements of 8.405-2(c)(2)(i) and (iii), the following procedures apply:

(i) Each order shall be placed on a competitive basis in accordance with (c)(3)(ii) and (iii) of this section, unless this requirement is waived on the basis of a justification that is prepared and approved in accordance with 8.405-6.

(ii) The ordering activity contracting officer shall provide an RFQ that includes a statement of work and the evaluation criteria.

(iii) The ordering activity contracting officer shall—

(A) Post the RFQ on e-Buy to afford all schedule contractors offering the required services under the appropriate multiple-award schedule(s) an opportunity to submit a quote; or

(B) Provide the RFQ to as many schedule contractors as practicable, consistent with market research appropriate to the circumstances, to reasonably ensure that quotes will be received from at least three contractors that can fulfill the requirements. When fewer than three quotes are received from schedule contractors that can fulfill the requirements, the contracting officer shall prepare a written determination to explain that no additional contractors capable of

fulfilling the requirements could be identified despite reasonable efforts to do so. The determination must clearly explain efforts made to obtain quotes from at least three schedule contractors.

(C) Ensure all quotes received are fairly considered and award is made in accordance with the evaluation criteria in the RFQ.

(d) * * * Place the order with the schedule contractor that represents the best value (see 8.404(d) and 8.405-4).

* * *

(e) * * *

(8) When an order exceeds the simplified acquisition threshold, evidence of compliance with the ordering procedures at 8.405-2(c).

■ 10. Revise section 8.405-3 to read as follows:

8.405-3 Blanket purchase agreements (BPAs).

(a) *Establishment.* (1) Ordering activities may establish BPAs under any schedule contract to fill repetitive needs for supplies or services. Ordering activities shall establish the BPA with the schedule contractor(s) that can provide the supply or service that represents the best value.

(2) In addition to price (see 8.404(d) and 8.405-4), when determining best value, the ordering activity may consider, among other factors, the following:

- (i) Past performance.
- (ii) Special features of the supply or service required for effective program performance.
- (iii) Trade-in considerations.
- (iv) Probable life of the item selected as compared with that of a comparable item.
- (v) Warranty considerations.
- (vi) Maintenance availability.
- (vii) Environmental and energy efficiency considerations.
- (viii) Delivery terms.

(3)(i) The ordering activity contracting officer shall, to the maximum extent practicable, give preference to establishing multiple-award BPAs, rather than establishing a single-award BPA.

(ii) No single-award BPA with an estimated value exceeding \$103 million (including any options), may be awarded unless the head of the agency determines in writing that—

(A) The orders expected under the BPA are so integrally related that only a single source can reasonably perform the work;

(B) The BPA provides only for firm-fixed priced orders for—

(1) Products with unit prices established in the BPA; or

(2) Services with prices established in the BPA for specific tasks to be performed;

(C) Only one source is qualified and capable of performing the work at a reasonable price to the Government; or

(D) It is necessary in the public interest to award the BPA to a single source for exceptional circumstances.

(iii) The requirement for a determination for a single-award BPA greater than \$103 million is in addition to any applicable requirement for a limited-source justification at 8.405-6. However, the two documents may be combined into one document.

(iv) In determining how many multiple-award BPAs to establish or that a single-award BPA is appropriate, the contracting officer should consider the following factors and document the decision in the acquisition plan or BPA file:

(A) The scope and complexity of the requirement(s);

(B) The benefits of on-going competition and the need to periodically compare multiple technical approaches or prices;

(C) The administrative costs of BPAs; and

(D) The technical qualifications of the schedule contractor(s).

(4) BPAs shall address the frequency of ordering, invoicing, discounts, requirements (e.g., estimated quantities, work to be performed), delivery locations, and time.

(5) When establishing multiple-award BPAs, the ordering activity shall specify the procedures for placing orders under the BPAs in accordance with 8.405-3(c)(2).

(6) Establishment of a multi-agency BPA against a Federal Supply Schedule contract is permitted if the multi-agency BPA identifies the participating agencies and their estimated requirements at the time the BPA is established.

(7) *Minimum documentation.* The ordering activity contracting officer shall include in the BPA file documentation the—

(i) Schedule contracts considered, noting the contractor to which the BPA was awarded;

(ii) Description of the supply or service purchased;

(iii) Price;

(iv) Required justification for a limited-source BPA (see 8.405-6), if applicable;

(v) Determination for a single-award BPA exceeding \$100 million, if applicable (see (a)(3)(ii));

(vi) Documentation supporting the decision to establish multiple-award BPAs or a single-award BPA (see (a)(3)(iv));

(vii) Evidence of compliance with paragraph (b) of this section, for competitively awarded BPAs, if applicable; and

(viii) *Basis for the award decision.* This should include the evaluation methodology used in selecting the contractor, the rationale for any tradeoffs in making the selection, and a price reasonableness determination for services requiring a statement of work.

(b) *Competitive procedures for establishing a BPA.* This paragraph applies to the establishment of a BPA, in addition to applicable instructions in paragraph (a).

(1) *For supplies, and for services not requiring a statement of work.* The procedures of this paragraph apply when establishing a BPA for supplies and services that are listed in the schedule contract at a fixed price for the performance of a specific task, where a statement of work is not required (e.g., installation, maintenance, and repair).

(i) *If the estimated value of the BPA does not exceed the simplified acquisition threshold.* (A) The ordering activity shall:

(1) Consider reasonably available information about the supply or service offered under MAS contracts by surveying at least three schedule contractors through the GSA Advantage! on-line shopping service, by reviewing the catalogs or pricelists of at least three schedule contractors, or by requesting quotations from at least three schedule contractors (see 8.405-5); or

(2) Document the circumstances for restricting consideration to fewer than three schedule contractors based on one of the reasons at 8.405-6(a).

(B) The ordering activity shall establish the BPA with the schedule contractor(s) that can provide the best value.

(ii) *If the estimated value of the BPA exceeds the simplified acquisition threshold.* The ordering activity contracting officer:

(A) Shall provide an RFQ that includes a description of the supplies to be delivered or the services to be performed and the basis upon which the selection will be made.

(B)(1) Shall post the RFQ on e-Buy to afford all schedule contractors offering the required supplies or services under the appropriate multiple award schedule(s) an opportunity to submit a quote; or

(2) Shall provide the RFQ to as many schedule contractors as practicable, consistent with market research appropriate to the circumstances, to reasonably ensure that quotes will be received from at least three contractors that can fulfill the requirements. When

fewer than three quotes are received from schedule contractors that can fulfill the requirements, the contracting officer shall prepare a written determination explaining that no additional contractors capable of fulfilling the requirements could be identified despite reasonable efforts to do so. The determination must clearly explain efforts made to obtain quotes from at least three schedule contractors.

(C) Shall ensure all quotes received are fairly considered and award is made in accordance with the basis for selection in the RFQ. After seeking price reductions (see 8.405-4), establish the BPA with the schedule contractor(s) that provides the best value.

(D) The BPA must be established in accordance with paragraphs (b)(1)(ii)(B) and (C) of this section, unless the requirement is waived on the basis of a justification that is prepared and approved in accordance with 8.405-6.

(2) *For services requiring a statement of work.* This applies when establishing a BPA that requires services priced at hourly rates, as provided by the schedule contract. The applicable services will be identified in the Federal Supply Schedule publications and the contractor's pricelists.

(i) *Statements of Work (SOWs).* The ordering activity shall develop a statement of work. All Statements of Work shall include a description of work to be performed; location of work; period of performance; deliverable schedule; applicable performance standards; and any special requirements (e.g., security clearances, travel, and special knowledge). To the maximum extent practicable, agency requirements shall be performance-based statements (see subpart 37.6).

(ii) *Type-of-order preference.* The ordering activity shall specify the order type (i.e., firm-fixed price, labor-hour) for the services identified in the statement of work. The contracting officer should establish firm-fixed prices, as appropriate.

(iii) *Request for Quotation procedures.* The ordering activity must provide a RFQ, which includes the statement of work and evaluation criteria (e.g., experience and past performance), to schedule contractors that offer services that will meet the agency's needs. The RFQ may be posted to GSA's electronic RFQ system, e-Buy (see 8.402(d)).

(iv) *If the estimated value of the BPA does not exceed the simplified acquisition threshold.* The ordering activity shall provide the RFQ (including the statement of work and evaluation criteria) to at least three

schedule contractors that offer services that will meet the agency's needs.

(v) *If estimated value of the BPA exceeds the simplified acquisition threshold.* The ordering activity contracting officer—

(A) Shall post the RFQ on e-Buy to afford all schedule contractors offering the required supplies or services under the appropriate multiple-award schedule an opportunity to submit a quote; or

(B) Shall provide the RFQ, which includes the statement of work and evaluation criteria, to as many schedule contractors as practicable, consistent with market research appropriate to the circumstances, to reasonably ensure that quotes will be received from at least three contractors that can fulfill the requirements. When fewer than three quotes are received from schedule contractors that can fulfill the requirements, the contracting officer shall document the file. The contracting officer shall prepare a written determination explaining that no additional contractors capable of fulfilling the requirements could be identified despite reasonable efforts to do so. The determination must clearly explain efforts made to obtain quotes from at least three schedule contractors.

(vi) The ordering activity contracting officer shall ensure all quotes received are fairly considered and award is made in accordance with the basis for selection in the RFQ. The ordering activity is responsible for considering the level of effort and the mix of labor proposed to perform, and for determining that the proposed price is reasonable.

(vii) The BPA must be established in accordance with paragraph (b)(2)(iv) or (v), and with paragraph (b)(2)(vi) of this section, unless the requirement is waived on the basis of a justification that is prepared and approved in accordance with 8.405–6.

(viii) The ordering activity contracting officer shall establish the BPA with the schedule contractor(s) that represents the best value (*see* 8.404(d) and 8.405–4).

(3) After award, ordering activities should provide timely notification to unsuccessful offerors. If an unsuccessful offeror requests information on an award that was based on factors other than price alone, a brief explanation of the basis for the award decision shall be provided.

(c) *Ordering from BPAs.* The procedures in this paragraph (c) are not required for BPAs established on or before May 16, 2011. However, ordering activities are encouraged to use the procedures for such BPAs.

(1) *Single-award BPA.* If the ordering activity establishes a single-award BPA, authorized users may place the order directly under the established BPA when the need for the supply or service arises.

(2) *Multiple-award BPAs.* (i) *Orders at or below the micro-purchase threshold.* The ordering activity may place orders at or below the micro-purchase threshold with any BPA holder that can meet the agency needs. The ordering activity should attempt to distribute any such orders among the BPA holders.

(ii) *Orders exceeding the micro-purchase threshold but not exceeding the simplified acquisition threshold.* (A) The ordering activity must provide each multiple-award BPA holder a fair opportunity to be considered for each order exceeding the micro-purchase threshold, but not exceeding the simplified acquisition threshold unless one of the exceptions at 8.405–6(a)(1)(i) applies.

(B) The ordering activity need not contact each of the multiple-award BPA holders before placing an order if information is available to ensure that each BPA holder is provided a fair opportunity to be considered for each order.

(C) The ordering activity contracting officer shall document the circumstances when restricting consideration to less than all multiple-award BPA holders offering the required supplies and services.

(iii) *Orders exceeding the simplified acquisition threshold.* (A) The ordering activity shall place an order in accordance with paragraphs (c)(2)(iii)(A)(1), (2) and (3) of this paragraph, unless the requirement is waived on the basis of a justification that is prepared and approved in accordance with 8.405–6. The ordering activity shall—

(1) Provide an RFQ to all BPA holders offering the required supplies or services under the multiple-award BPAs, to include a description of the supplies to be delivered or the services to be performed and the basis upon which the selection will be made;

(2) Afford all BPA holders responding to the RFQ an opportunity to submit a quote; and

(3) Fairly consider all responses received and make award in accordance with the selection procedures.

(B) The ordering activity shall document evidence of compliance with these procedures and the basis for the award decision.

(3) *BPAs for hourly-rate services.* If the BPA is for hourly-rate services, the ordering activity shall develop a statement of work for each order

covered by the BPA. Ordering activities should place these orders on a firm-fixed price basis to the maximum extent practicable. All orders under the BPA shall specify a price for the performance of the tasks identified in the statement of work.

(d) *Duration of BPAs.* (1) Multiple-award BPAs generally should not exceed five years in length, but may do so to meet program requirements.

(2) A single-award BPA shall not exceed one year. It may have up to four one-year options. *See* paragraph (e) of this section for requirements associated with option exercise.

(3) Contractors may be awarded BPAs that extend beyond the current term of their GSA Schedule contract, so long as there are option periods in their GSA Schedule contract that, if exercised, will cover the BPA's period of performance.

(e) *Review of BPAs.* (1) The ordering activity contracting officer shall review the BPA and determine in writing, at least once a year (*e.g.*, at option exercise), whether—

(i) The schedule contract, upon which the BPA was established, is still in effect;

(ii) The BPA still represents the best value (*see* 8.404(d)); and

(iii) Estimated quantities/amounts have been exceeded and additional price reductions can be obtained.

(2) The determination shall be included in the BPA file documentation.

(3) If a single-award BPA is established, the ordering activity contracting officer's annual determination must be approved by the ordering activity's competition advocate prior to the exercise of an option to extend the term of the BPA.

■ 11. Revise section 8.405–4 to read as follows:

8.405–4 Price reductions.

Ordering activities may request a price reduction at any time before placing an order, establishing a BPA, or in conjunction with the annual BPA review. However, the ordering activity shall seek a price reduction when the order or BPA exceeds the simplified acquisition threshold. Schedule contractors are not required to pass on to all schedule users a price reduction extended only to an individual ordering activity for a specific order or BPA.

■ 12. Revise section 8.405–6 to read as follows:

8.405–6 Limiting sources.

Orders placed or BPAs established under Federal Supply Schedules are exempt from the requirements in part 6. However, an ordering activity must justify its action when restricting

consideration in accordance with paragraphs (a) or (b) of this section—

(a) *Orders or BPAs exceeding the micro-purchase threshold based on a limited sources justification.* (1) *Circumstances justifying limiting the source.* (i) For a proposed order or BPA with an estimated value exceeding the micro-purchase threshold not placed or established in accordance with the procedures in 8.405–1, 8.405–2, or 8.405–3, the only circumstances that may justify the action are—

(A) An urgent and compelling need exists, and following the procedures would result in unacceptable delays;

(B) Only one source is capable of providing the supplies or services required at the level of quality required because the supplies or services are unique or highly specialized; or

(C) In the interest of economy and efficiency, the new work is a logical follow-on to an original Federal Supply Schedule order provided that the original order was placed in accordance with the applicable Federal Supply Schedule ordering procedures. The original order or BPA must not have been previously issued under sole-source or limited-sources procedures.

(ii) See 8.405–6(c) for the content of the justification for an order or BPA exceeding the simplified acquisition threshold.

(2) *Posting.* (i) Within 14 days after placing an order or establishing a BPA exceeding the simplified acquisition threshold that is supported by a limited-sources justification permitted under any of the circumstances under paragraph (a)(1) of this section, the ordering activity shall—

(A) Publish a notice in accordance with 5.301; and

(B) Post the justification—

(1) At the GPE <http://www.fedbizopps.gov>;

(2) On the Web site of the ordering activity agency, which may provide access to the justification by linking to the GPE; and

(3) For a minimum of 30 days.

(ii) In the case of an order or BPA permitted under paragraph (a)(1)(i)(A) of this section, the justification shall be posted within 30 days after award.

(iii) Contracting officers shall carefully screen all justifications for contractor proprietary data and remove all such data, and such references and citations as are necessary to protect the proprietary data, before making the justifications available for public inspection. Contracting officers shall also be guided by the exemptions to disclosure of information contained in the Freedom of Information Act (5 U.S.C. 552) and the prohibitions

against disclosure in 24.202 in determining whether other data should be removed. Although the submitter notice process set out in Executive Order 12600 “Predisclosure Notification Procedures for Confidential Commercial Information” does not apply, if the justification appears to contain proprietary data, the contracting officer should provide the contractor that submitted the information an opportunity to review the justification for proprietary data before making the justification available for public inspection, redacted as necessary. This process must not prevent or delay the posting of the justification in accordance with the timeframes required in paragraphs (a)(2)(i) and (ii) of this section.

(iv) This posting requirement does not apply when disclosure would compromise the national security (e.g., would result in disclosure of classified information) or create other security risks.

(b) *Items peculiar to one manufacturer.* An item peculiar to one manufacturer can be a particular brand name, product, or a feature of a product, peculiar to one manufacturer. A brand name item, whether available on one or more schedule contracts, is an item peculiar to one manufacturer.

(1) Brand name specifications shall not be used unless 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.

(2) *Documentation.* (i) For proposed orders or BPAs with an estimated value exceeding the micro-purchase threshold, but not exceeding the simplified acquisition threshold, the ordering activity contracting officer shall document the basis for restricting consideration to an item peculiar to one manufacturer.

(ii) For proposed orders or BPAs with an estimated value exceeding the simplified acquisition threshold see paragraph (c) of this section.

(3) *Posting.* (i) The ordering activity shall post the following information along with the Request for Quotation (RFQ) to e-Buy (<http://www.ebuy.gsa.gov>):

(A) For proposed orders or BPAs with an estimated value exceeding \$25,000, but not exceeding the simplified acquisition threshold, the documentation required by paragraph (b)(2)(i) of this section.

(B) For proposed orders or BPAs with an estimated value exceeding the

simplified acquisition threshold, the justification required by paragraph (c) of this section.

(ii) The posting requirement of paragraph (b)(3)(i) of this section does not apply when—

(A) Disclosure would compromise the national security (e.g., would result in disclosure of classified information) or create other security risks. The fact that access to classified matter may be necessary to submit a proposal or perform the contract does not, in itself, justify use of this exception;

(B) The nature of the file (e.g., size, format) does not make it cost-effective or practicable for contracting officers to provide access through e-Buy; or

(C) The agency’s senior procurement executive makes a written determination that access through e-Buy is not in the Government’s interest.

(c) *An order or BPA with an estimated value exceeding the simplified acquisition threshold.* (1) For a proposed order or BPA exceeding the simplified acquisition threshold, the requiring activity shall assist the ordering activity contracting officer in the preparation of the justification. The justification shall cite that the acquisition is conducted under the authority of the Multiple-Award Schedule Program (see 8.401).

(2) At a minimum, each justification shall include the following information:

(i) Identification of the agency and the contracting activity, and specific identification of the document as a “Limited-Sources Justification.”

(ii) Nature and/or description of the action being approved.

(iii) A description of the supplies or services required to meet the agency’s needs (including the estimated value).

(iv) The authority and supporting rationale (see 8.405–6(a)(1)(i) and (b)(1)) and, if applicable, a demonstration of the proposed contractor’s unique qualifications to provide the required supply or service.

(v) A determination by the ordering activity contracting officer that the order represents the best value consistent with 8.404(d).

(vi) A description of the market research conducted among schedule holders and the results or a statement of the reason market research was not conducted.

(vii) Any other facts supporting the justification.

(viii) A statement of the actions, if any, the agency may take to remove or overcome any barriers that led to the restricted consideration before any subsequent acquisition for the supplies or services is made.

(ix) The ordering activity contracting officer's certification that the justification is accurate and complete to the best of the contracting officer's knowledge and belief.

(x) Evidence that any supporting data that is the responsibility of technical or requirements personnel (e.g., verifying the Government's minimum needs or requirements or other rationale for limited sources) and which form a basis for the justification have been certified as complete and accurate by the technical or requirements personnel.

(xi) For justifications under 8.405-6(a)(1), a written determination by the approving official identifying the circumstance that applies.

(d) *Justification approvals.* (1) For a proposed order or BPA with an estimated value exceeding the simplified acquisition threshold, but not exceeding \$650,000, the ordering activity contracting officer's certification that the justification is accurate and complete to the best of the ordering activity contracting officer's knowledge and belief will serve as approval, unless a higher approval level is established in accordance with agency procedures.

(2) For a proposed order or BPA with an estimated value exceeding \$650,000, but not exceeding \$12.5 million, the justification must be approved by the competition advocate of the activity placing the order, or by an official named in paragraph (d)(3) or (d)(4) of this section. This authority is not delegable.

(3) For a proposed order or BPA with an estimated value exceeding \$12.5 million, but not exceeding \$62.5 million (or, for DoD, NASA, and the Coast Guard, not exceeding \$85.5 million), the justification must be approved by—

(i) The head of the procuring activity placing the order;

(ii) A designee who—

(A) If a member of the armed forces, is a general or flag officer;

(B) If a civilian, is serving in a position in a grade above GS-15 under the General Schedule (or in a comparable or higher position under another schedule); or

(iii) An official named in paragraph (d)(4) of this section.

(4) For a proposed order or BPA with an estimated value exceeding \$62.5 million (or, for DoD, NASA, and the Coast Guard, over \$85.5 million), the justification must be approved by the senior procurement executive of the agency placing the order. This authority is not delegable, except in the case of the Under Secretary of Defense for Acquisition, Technology, and Logistics, acting as the senior procurement executive for the Department of Defense.

■ 13. Revise section 8.406-1 to read as follows:

8.406-1 Order placement.

(a) Ordering activities may place orders orally, except for—

(1) Supplies and services not requiring a statement of work exceeding the simplified acquisition threshold;

(2) Services requiring a statement of work (SOW); and

(3) Orders containing brand-name specifications that exceed \$25,000.

(b) Ordering activities may use Optional Form 347, an agency-prescribed form, or an established electronic communications format to order supplies or services from schedule contracts.

(c) The ordering activity shall place an order directly with the contractor in accordance with the terms and conditions of the pricelists (see 8.402(b)). Prior to placement of the order, the ordering activity shall ensure that the regulatory and statutory requirements of the requiring agency have been applied.

(d) Orders shall include the following information in addition to any information required by the schedule contract:

(1) Complete shipping and billing addresses.

(2) Contract number and date.

(3) Agency order number.

(4) F.o.b. delivery point; i.e., origin or destination.

(5) Discount terms.

(6) Delivery time or period of performance.

(7) Special item number or national stock number.

(8) A statement of work for services, when required, or a brief, complete description of each item (when ordering by model number, features and options such as color, finish, and electrical characteristics, if available, must be specified).

(9) Quantity and any variation in quantity.

(10) Number of units.

(11) Unit price.

(12) Total price of order.

(13) Points of inspection and acceptance.

(14) Other pertinent data; e.g., delivery instructions or receiving hours and size-of-truck limitation.

(15) Marking requirements.

(16) Level of preservation, packaging, and packing.

PART 16—TYPES OF CONTRACTS

■ 14. Amend section 16.505 by—

■ a. Revising paragraph (a)(1) and the fourth sentence of paragraph (b)(1)(ii);

■ b. Redesignating paragraphs (b)(1)(iii) and (b)(1)(iv) as paragraphs (b)(1)(iv) and (b)(1)(v), respectively;

■ c. Adding a new paragraph (b)(1)(iii); and

■ d. Revising paragraphs (b)(2) and (b)(5).

The revised and added text reads as follows:

16.505 Ordering.

(a) *General.* (1) In general, the contracting officer does not synopsise orders under indefinite-delivery contracts; except see 16.505(a)(10) and 16.505(b)(2)(ii)(D).

* * * * *

(b) * * *

(1) * * *

(ii) * * * If the order does not exceed the simplified acquisition threshold, the contracting officer need not contact each of the multiple awardees under the contract before selecting an order awardee if the contracting officer has information available to ensure that each awardee is provided a fair opportunity to be considered for each order. * * *

(iii) *Orders exceeding the simplified acquisition threshold.* (A) Each order exceeding the simplified acquisition threshold shall be placed on a competitive basis in accordance with paragraph (b)(1)(iii)(B) of this section, unless supported by a written determination that one of the circumstances described at 16.505(b)(2)(i) applies to the order and the requirement is waived on the basis of a justification that is prepared in accordance with 16.505(b)(2)(ii)(B);

(B) The contracting officer shall—

(1) Provide a fair notice of the intent to make a purchase, including a clear description of the supplies to be delivered or the services to be performed and the basis upon which the selection will be made to all contractors offering the required supplies or services under the multiple-award contract; and

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

* * * * *

(2) *Exceptions to the fair opportunity process.* (i) The contracting officer shall give every awardee a fair opportunity to be considered for a delivery-order or task-order exceeding \$3,000 unless one of the following statutory exceptions applies:

(A) The agency need for the supplies or services is so urgent that providing a fair opportunity would result in unacceptable delays.

(B) Only one awardee is capable of providing the supplies or services required at the level of quality required because the supplies or services ordered are unique or highly specialized.

(C) The order must be issued on a sole-source basis in the interest of economy and efficiency because it is a logical follow-on to an order already issued under the contract, provided that all awardees were given a fair opportunity to be considered for the original order.

(D) It is necessary to place an order to satisfy a minimum guarantee.

(E) For orders exceeding the simplified acquisition threshold, a statute expressly authorizes or requires that the purchase be made from a specified source.

(ii) The justification for an exception to fair opportunity shall be in writing as specified in paragraphs (b)(2)(ii)(A) or (B) of this section.

(A) *Orders exceeding \$3,000, but not exceeding the simplified acquisition threshold.* The contracting officer shall document the basis for using an exception to the fair opportunity process. If the contracting officer uses the logical follow-on exception, the rationale shall describe why the relationship between the initial order and the follow-on is logical (*e.g.*, in terms of scope, period of performance, or value).

(B) *Orders exceeding the simplified acquisition threshold.* As a minimum, each justification shall include the following information and be approved in accordance with paragraph (b)(2)(ii)(C) of this section:

(1) Identification of the agency and the contracting activity, and specific identification of the document as a "Justification for an Exception to Fair Opportunity."

(2) Nature and/or description of the action being approved.

(3) A description of the supplies or services required to meet the agency's needs (including the estimated value).

(4) Identification of the exception to fair opportunity (*see* 16.505(b)(2)) and the supporting rationale, including a demonstration that the proposed contractor's unique qualifications or the nature of the acquisition requires use of the exception cited. If the contracting officer uses the logical follow-on exception, the rationale shall describe why the relationship between the initial order and the follow-on is logical (*e.g.*, in terms of scope, period of performance, or value).

(5) A determination by the contracting officer that the anticipated cost to the Government will be fair and reasonable.

(6) Any other facts supporting the justification.

(7) A statement of the actions, if any, the agency may take to remove or overcome any barriers that led to the exception to fair opportunity before any subsequent acquisition for the supplies or services is made.

(8) The contracting officer's certification that the justification is accurate and complete to the best of the contracting officer's knowledge and belief.

(9) Evidence that any supporting data that is the responsibility of technical or requirements personnel (*e.g.*, verifying the Government's minimum needs or requirements or other rationale for an exception to fair opportunity) and which form a basis for the justification have been certified as complete and accurate by the technical or requirements personnel.

(10) A written determination by the approving official that one of the circumstances in (b)(2)(i)(A) through (E) of this section applies to the order.

(C) *Approval.* (1) For proposed orders exceeding the simplified acquisition threshold, but not exceeding \$650,000, the ordering activity contracting officer's certification that the justification is accurate and complete to the best of the ordering activity contracting officer's knowledge and belief will serve as approval, unless a higher approval level is established in accordance with agency procedures.

(2) For a proposed order exceeding \$650,000, but not exceeding \$12.5 million, the justification must be approved by the competition advocate of the activity placing the order, or by an official named in paragraph (b)(2)(ii)(C)(3) or (4) of this section. This authority is not delegable.

(3) For a proposed order exceeding \$12.5 million, but not exceeding \$62.5 million (or, for DoD, NASA, and the Coast Guard, not exceeding \$85.5 million), the justification must be approved by—

(i) The head of the procuring activity placing the order;

(ii) A designee who—

(A) If a member of the armed forces, is a general or flag officer;

(B) If a civilian, is serving in a position in a grade above GS-15 under the General Schedule (or in a comparable or higher position under another schedule); or

(iii) An official named in paragraph (b)(2)(ii)(C)(4) of this section.

(4) For a proposed order exceeding \$62.5 million (or, for DoD, NASA, and the Coast Guard, over \$85.5 million), the justification must be approved by the senior procurement executive of the

agency placing the order. This authority is not delegable, except in the case of the Under Secretary of Defense for Acquisition, Technology, and Logistics, acting as the senior procurement executive for the Department of Defense.

(D) *Posting.* (1) Except as provided in paragraph (b)(2)(ii)(D)(5) of this section, within 14 days after placing an order exceeding the simplified acquisition threshold that does not provide for fair opportunity in accordance with 16.505(b), the contract officer shall—

(i) Publish a notice in accordance with 5.301; and

(ii) Make publicly available the justification required at (b)(2)(ii)(B) of this section.

(2) The justification shall be made publicly available—

(i) At the GPE <http://www.fedbizopps.gov>;

(ii) On the Web site of the agency, which may provide access to the justifications by linking to the GPE; and

(iii) Must remain posted for a minimum of 30 days.

(3) In the case of an order permitted under paragraph (b)(2)(i)(A) of this subsection, the justification shall be posted within 30 days after award of the order.

(4) Contracting officers shall carefully screen all justifications for contractor proprietary data and remove all such data, and such references and citations as are necessary to protect the proprietary data, before making the justifications available for public inspection. Contracting officers shall also be guided by the exemptions to disclosure of information contained in the Freedom of Information Act (5 U.S.C. 552) and the prohibitions against disclosure in 24.202 in determining whether other data should be removed. Although the submitter notice process set out in Executive Order 12600 "Predisclosure Notification Procedures for Confidential Commercial Information" does not apply, if the justification appears to contain proprietary data, the contracting officer should provide the contractor that submitted the information an opportunity to review the justification for proprietary data before making the justification available for public inspection, redacted as necessary. This process must not prevent or delay the posting of the justification in accordance with the timeframes required in paragraphs (1) and (3).

(5) The posting requirement of this section does not apply when disclosure would compromise the national security (*e.g.*, would result in disclosure of

classified information) or create other security risks.

* * * * *

(5) *Decision documentation for orders.* (i) The contracting officer shall document in the contract file the rationale for placement and price of each order, including the basis for award and the rationale for any tradeoffs among cost or price and non-cost considerations in making the award decision. This documentation need not quantify the tradeoffs that led to the decision.

(ii) The contract file shall also identify the basis for using an exception to the fair opportunity process (*see* paragraph (b)(2)).

* * * * *

PART 18—EMERGENCY ACQUISITIONS

18.105 [Amended]

■ 15. Amend section 18.105 by removing “(See 8.405–3(a)(4))” and adding “(see 8.405–3(a)(6))” in its place.

PART 38—FEDERAL SUPPLY SCHEDULE CONTRACTING

■ 16. Amend section 38.101 by revising the second sentence in paragraph (e) to read as follows:

38.101 General.

* * * * *

(e) * * * The requirements of parts 5, 6, and 19 apply at the acquisition planning stage prior to issuing the schedule solicitation and, generally, do not apply to orders and BPAs placed under resulting schedule contracts (except *see* 8.404).

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 6, 15, and 19

[FAC 2005–50; FAR Case 2009–038; Item III; Docket 2010–0095, Sequence 1]

RIN 9000–AL55

Federal Acquisition Regulation; Justification and Approval of Sole-Source 8(a) Contracts

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule.

SUMMARY: DoD, GSA, and NASA are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement section 811 of the National Defense Authorization Act for Fiscal Year 2010. This FAR change encourages agencies to maximize the effective use of competition by making certain that the proper Justification and Approval (J&A) is obtained prior to award of 8(a) sole-source contracts over \$20 million, as required by section 811.

DATES: *Effective Date:* March 16, 2011.

Comment Date: Interested parties should submit written comments to the Regulatory Secretariat on or before May 16, 2011 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–50, FAR Case 2009–038, by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2009–038” under the heading “Enter Keyword or ID” and selecting “Search.” Select the link “Submit a Comment” that corresponds with “FAR Case 2009–038.” Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company name (if any), and “FAR Case 2009–038” on your attached document.

- *Fax:* (202) 501–4067.

- *Mail:* General Services

Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1275 First Street, NE., 7th Floor, Washington, DC 20417.

Instructions: Please submit comments only and cite FAC 2005–50, FAR Case 2009–038, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Anthony Robinson, Procurement Analyst, at (202) 501–2658, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–50, FAR Case 2009–038.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are issuing an interim rule amending the FAR, to implement section 811 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111–84), enacted October 28, 2009. Section 811 requires

a J&A prior to awarding a sole-source contract in an amount over \$20 million under the 8(a) program (15 U.S.C. 637(a)). This written J&A must be approved by an appropriate official and, after award, made public. Authorized by 15 U.S.C. 637(a), the 8(a) program enables contract awards to be made to small business concerns determined eligible for the 8(a) program by the Small Business Administration (SBA).

The requirement for a J&A is not a ceiling or a “cap” on sole-source awards over \$20 million for 8(a) contractors. The statute requires execution of a J&A documenting the reasons for making the award on a sole-source basis rather than competing among the small businesses in the 8(a) program. Prior to the enactment of section 811, a sole-source award of a new contract made using the 8(a) contracting authority did not require a J&A, regardless of the dollar value, and the new statute does not institute any requirement for a J&A for sole-source 8(a) awards that are less than or equal to \$20 million.

II. Discussion and Analysis

Section 811 became effective on the date of enactment, October 28, 2009. Section 811 addresses requirements for the J&A of sole-source contracts over \$20 million under the 8(a) small-business development program.

The Federal Acquisition Regulatory Council (FAR Council) held three Tribal consultation and outreach meetings to discuss rulemaking associated with section 811.

The meetings took place during October 2010 in Washington, DC; Albuquerque, New Mexico; and Fairbanks, Alaska (*see* the meeting notice that was published in the **Federal Register** on August 31, 2010 at 75 FR 53269). Transcripts of the meetings are available at http://www.acq.osd.mil/dpap/dars/section811_docs.html.

After the meetings, DoD, GSA, and NASA weighed the costs and benefits of publishing this rule as proposed or interim. The rule is being published as interim, rather than proposed, because the rule is implementing a statutory mandate, and the statutory date for issuance of regulations has already passed. Because this is an interim rule, the public will have another opportunity to comment. These additional comments could result in further changes in the final rule.

A frequently heard comment at the October meetings was a request that the FAR not use the 12 elements currently required at FAR 6.303–2 for J&As for less than full-and-open competition, but instead limit the elements to be addressed to the five elements listed in