

6.303-1 Requirements.

* * * * *

(b) The contracting officer shall not award a sole-source contract under the 8(a) authority (15 U.S.C. 637(a)) for an amount exceeding \$20 million unless—

(1) The contracting officer justifies the use of a sole-source contract in writing in accordance with 6.303-2;

(2) The justification is approved by the appropriate official designated at 6.304; and

(3) The justification and related information are made public after award in accordance with 6.305.

* * * * *

■ 5. Amend section 6.303-2 by—

■ a. Redesignating paragraphs (a) and (b) as paragraphs (b) and (c), respectively;

■ b. Adding a new paragraph (a);

■ c. Revising newly redesignated paragraph (b) introductory text; and

■ d. Adding a new paragraph (d).

The added and revised text reads as follows:

6.303-2 Content.

(a) Each justification shall contain sufficient facts and rationale to justify the use of the specific authority cited.

(b) As a minimum, each justification, except those for sole-source 8(a) contracts over \$20 million (*see* paragraph (d) of this section), shall include the following information:

* * * * *

(d) As a minimum, each justification for a sole-source 8(a) contract over \$20 million shall include the following information:

(1) A description of the needs of the agency concerned for the matters covered by the contract.

(2) A specification of the statutory provision providing the exception from the requirement to use competitive procedures in entering into the contract (*see* 19.805-1).

(3) A determination that the use of a sole-source contract is in the best interest of the agency concerned.

(4) A determination that the anticipated cost of the contract will be fair and reasonable.

(5) Such other matters as the head of the agency concerned shall specify for purposes of this section.

6.304 [Amended]

■ 6. Amend section 6.304 by removing from paragraph (a)(1) “6.303-2(a)(12)” and adding “6.303-2(b)(12)” in its place.

PART 15—CONTRACTING BY NEGOTIATION

15.607 [Amended]

■ 7. Amend section 15.607 by removing from paragraph (b)(2) “6.303-2(b)” and adding “6.303-2(c)” in its place.

PART 19—SMALL BUSINESS PROGRAMS

■ 8. Amend section 19.808-1 by redesignating paragraphs (a) and (b) as paragraphs (b) and (c), respectively; and adding a new paragraph (a) to read as follows:

19.808-1 Sole source.

(a) The SBA may not accept for negotiation a sole-source 8(a) contract that exceeds \$20 million unless the requesting agency has completed a justification in accordance with the requirements of 6.303.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 10, 16, 44, and 52

[FAC 2005-50; FAR Case 2008-007; Item IV; Docket 2010-0086, Sequence 1]

RIN 9000-AL50

Federal Acquisition Regulation; Additional Requirements for Market Research

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA have adopted as final, with changes, the interim rule amending the Federal Acquisition Regulation (FAR) to implement section 826, Market Research, of the National Defense Authorization Act for Fiscal Year 2008. Section 826 requires the head of an agency to take appropriate steps to ensure that any prime contractor of a contract (or task order or delivery order) in an amount in excess of \$5 million for the procurement of items other than commercial items engages in market research as necessary before making purchases.

DATES: *Effective Date:* April 15, 2011.

FOR FURTHER INFORMATION CONTACT: Ms. Lori Sakalos, Procurement Analyst, at (202) 208-0498, 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 2008-007.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 75 FR 34277 on June 16, 2010, to implement section 826, Market Research, of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181). Section 826 establishes additional requirements in subsection (c) of 10 U.S.C. 2377. As a matter of policy, these requirements are extended to all executive agencies. Specifically, the head of the agency must conduct market research before issuing an indefinite-delivery indefinite-quantity task or delivery order for a noncommercial item in excess of the simplified acquisition threshold. In addition, a prime contractor with a contract in excess of \$5 million for the procurement of items other than commercial items is required to conduct market research before making purchases that exceed the simplified acquisition threshold for or on behalf of the Government. Three respondents submitted 16 comments on the interim rule.

II. Discussion/Analysis

Public Comments: A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Purpose

1. *Comment:* One respondent stated that the guidance does not appear to explain the end purpose of the market research. Another respondent, however, concluded that the FAR states the purpose of the market research twice, in FAR 44.402(b) and 10.001(a)(3). The second respondent stated that the purpose for conducting market research is “clearly described in Part 10 and there is no reason to repeat that same language elsewhere in the FAR.”

Response: The Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council (the Councils) agree with the second respondent. FAR part 10 “prescribes policies and procedures for conducting market research to arrive at the most suitable approach to acquiring, distributing, and supporting supplies and services” (FAR 10.000). FAR 10.001(a)(3) lists the ways in which the

results of the market research may be used. We believe that the end purpose of market research is exhaustively covered in FAR part 10. We also agree that there is no need to repeat this material in FAR subpart 44.4, and the final rule removes the redundant material.

2. *Comment:* A respondent noted that competitively awarded indefinite-delivery indefinite-quantity contracts are priced as a result of market forces. Conducting market research prior to the award of individual task orders “will only be looking at the scope of Task Order* * * (and) is redundant to the market research already required by FAR for the (indefinite-delivery indefinite-quantity) contract.” It is unlikely to result in more competition or better pricing, according to the respondent.

Response: The Councils note that the purpose of market research is to effectively identify, on an on-going basis, the capabilities of small businesses and new entrants into Federal contracting that are available in the marketplace for meeting the requirements of the agency. The Councils disagree with the respondent’s contention that more competition or better pricing are unlikely to result. (Also see responses at II.F., Burden.)

B. Location in FAR

1. *Comment:* A respondent noted that, while FAR part 10 contains scant detail on market research, there are existing market research techniques and information embedded in chapter 2 of the DoD Commercial Item (CI) Handbook at <http://www.acq.osd.mil/dpap/Docs/cihandbook.pdf>. The respondent stated that the Handbook might be instructive for executive agencies to use as part of any training requirements.

Response: This comment is outside the scope of the FAR case. However, it has been forwarded to both the Defense Acquisition University and the Federal Acquisition Institute for their consideration. The current Commercial Item Handbook (version 1.0) was published November 2001 and is currently in revision.

2. *Comment:* A respondent stated its conclusion that the section 826 requirement for contractors with contracts exceeding \$5 million to perform market research for “other than commercial items” is misplaced because the title of FAR subpart 44.4 is “Subcontracts for Commercial Items and Commercial Components.” The respondent suggested that a better location for the statutory requirement would be at FAR 44.303.

Response: The Councils agree that the requirement was misplaced in FAR subpart 44.4 and have relocated the clause prescription to FAR part 10, Market Research (rather than FAR subpart 44.3, as suggested by the respondent). The statute and policy require contractors to conduct market research in certain circumstances (when the contract is over \$5 million for the procurement of items other than commercial items); whether the subcontract is for commercial or other than commercial items is immaterial to the contractor’s requirement to conduct market research. The statute encourages contractors and subcontractors to use commercial items. The FAR is amended to delete the subject of market research from subpart 44.4, and the “Scope of subpart” section, FAR 44.400, is being revised accordingly. The Councils believe that the coverage is better located in FAR part 10 rather than FAR subpart 44.3, as the respondent suggested, because the latter subpart is exclusive to Contractors’ Purchasing Systems Reviews.

3. *Comment:* A respondent stated that FAR 52.244–6 is intended to limit the clauses that a FAR part 15 prime contractor is required to flow down to a subcontractor selling commercial items. The respondent stated its belief that the new Alternate I to the clause is unnecessary. The respondent also concluded that the existing FAR part 10 market research language should not be restated there. Last, the respondent questioned the need for the added language about “procuring commercial items,” when the focus of section 826 is on procurement of “other than commercial items.”

Response: The Councils agree that Alternate I to FAR 52.244–6 is unnecessary and not relevant to subcontracts for commercial items. By removing discussion of market research from FAR subpart 44.4, there will no longer be a redundant discussion of FAR part 10 material in FAR subpart 44.4. The Councils agree with the respondent that the focus of section 826 is on the procurement of other than commercial items. Relocating the requirement for contractors to conduct market research to FAR part 10 better aligns the FAR coverage with the statute. The Councils have retained the requirement, at section 826(a) (10 U.S.C. 2377(c)(4)), for a contractor with a contract over \$5 million for the procurement of other than commercial items to conduct market research. However, the Councils have added the requirement as a new FAR clause, 52.210–1, Market Research, prescribed at FAR 10.003, Contract clause. Because

the statute requires the conduct of market research by a contractor awarded task orders or delivery orders over \$5 million for items other than commercial items, we have added a cross-reference to the requirement to FAR subpart 16.5.

C. Clarification of FAR Language

1. *Comment:* A respondent concluded that the interim rule confuses the prime contractor’s role in procuring supplies and services to support its deliverable to the Government, *i.e.*, subcontracting, with the unique and completely distinct role of a prime contractor holding a contract to operate a Government facility and act in the place of the Government in procuring supplies and services solely to support the activities at the Government facility, *i.e.*, acting as an agent of the Government.

Response: The Councils eliminated the “purchasing agent” language by deleting the Alternate I to FAR 52.244–6. The Councils also created a new FAR clause 52.210–1, Market Research.

2. *Comment:* A respondent noted that there is a significant difference between the section 826 requirement to conduct market research “as may be necessary” and the FAR 44.402(b) requirement to conduct market research “to the maximum extent practicable.” The respondent requested that the language from section 826 be used so that contractors will have the ability to tailor their market research as necessary to reflect their knowledge and experience of the supplies and services being procured.

Response: The Councils do not agree with the respondent. The Government has interpreted “as may be necessary” to mean “to the maximum extent practicable.” In any case, the term “to the maximum extent practicable” has been removed from the case, as the coverage for FAR 44.402(b) has been deleted from the rule.

D. Application

1. *Comment:* According to the respondent, mixing the discussion of a contractor’s possible roles of subcontracting and acting as the Government’s agent has created a lower standard for “agents.” As written, the respondent stated, the language requires contractors to perform the necessary market research whenever procuring other than commercial items, but purchasing agents are only required to perform market research when procuring other-than-commercial items with a value over the simplified acquisition threshold. The respondent questioned the need for this distinction.

Response: The Councils agree that there need not be any distinction

between the contractor acting as a subcontractor and the contractor "acting as a purchasing agent." The language has been removed from FAR subpart 44.4.

2. *Comment:* A respondent recommended requiring the conduct of market research prior to the award of each task order issued under an indefinite-delivery indefinite-quantity contract that was awarded on a sole-source basis.

Response: The Councils disagree with the respondent because the clear language of the statute, section 826(c), establishes a requirement for the conduct of market research appropriate to the circumstances prior to awarding a task order or delivery order in excess of the simplified acquisition threshold for the procurement of items other than commercial items. The statute does not limit the market research requirements to task orders or delivery orders awarded against sole-source indefinite-delivery contracts. Although this is mandatory for DoD and not for civilian agencies, the language was applied to civilian agencies for uniformity across the Government. *See also* the response to the second comment at II.A., Purpose, and the responses at II.E., Exceptions.

E. Exceptions

1. *Comment:* One respondent stated that the addition of a new paragraph (d) at FAR 10.001, Policy, only applies to "(A) contingency operation or defense against or recovery from nuclear, biological, chemical, or radiological attack; and (B) disaster relief * * *". For that reason, the respondent believes that the same applicability should be added to FAR 44.402, as paragraph (d) outlines. The respondent noted that, without this change, there would be a negative impact on indefinite-delivery indefinite-quantity contracts.

Response: The respondent's assumptions about the applicability are not correct. The requirement for agencies to conduct market research for disaster relief and contingency operations already existed at FAR 10.001(a)(2).

2. *Comment:* A respondent claimed that indefinite-quantity contracts set aside for Small Business Administration (SBA) categories, such as the 8(a) program and small disadvantaged business, should be exempt from market research requirements because the intent is to facilitate the SBA in supporting these "specialty market segments." The respondent notes that this market segment historically is very committed and can be relied upon to self-police.

Response: The SBA's current socioeconomic programs offering eligible program participants contractual opportunities are the section 8(a) program, HUBZone program, and the service-disabled veteran-owned small business concern program. The SBA has finalized the regulations that will provide guidance for the women-owned small business Federal contract program. The rule was published in the **Federal Register** on October 7, 2010 (75 FR 66258). The SBA does not have a small and disadvantaged business (SDB) program offering SDB set-asides. However, the SBA's 8(a) firms may represent themselves as SDBs for Federal contracts and subcontracts to include task- and delivery-orders under indefinite-delivery contracts.

Performing market research for task- and delivery-orders will not diminish opportunities for agencies to establish set-asides for small-business concerns or, when appropriate, award sole-source contracts for indefinite-delivery contracts. Market research performed by prime contractors will also enhance subcontracting opportunities for small-business concerns. Careful attention to market-research strategies is an effective method for creating contract opportunities for small-business concerns. It provides them with an awareness of forthcoming procurements. In turn, the market research provides a vehicle for the small-business concern to market its capabilities to the Government and its contractors. FAR part 10 currently supports market research for small business concerns and requires agencies to take advantage of commercially available market research methods in order to effectively identify the capabilities of small businesses. The final rule will not limit an entity's ability to utilize the SBA's small business programs.

F. Burden

1. *Comment:* A respondent noted that at least one agency uses multiple-award contracts for construction. Each task order is competed, which the respondent stated ensures that "the full force of the marketplace is apparent in the pricing of competitiveness of each award." In addition, each prime contractor is continually reviewing the performance and prices of all its subcontractors. The respondent stated that having the Government perform additional market research in this market segment is a waste of time and money.

Response: The Councils do not agree with the respondent. Given the continuously changing circumstances and entry of new businesses, on-going

market research is not a waste of manpower and taxpayers' money. Further, the respondent addresses the Government's performance of additional market research, but the statute also places the on-going market research requirement on the prime contractor in these circumstances. There is no reason why a multiple-award construction contract should be treated any differently than any multiple-award contract.

2. *Comment:* A respondent expressed concern about the negative impact caused by the time and effort required for each market survey. Fiscal year-end solicitations and awards may be slowed to the point of making awards impossible.

Response: The Councils cannot waive statutory requirements simply because compliance will take time. In an effort to enhance uniformity and consistency, the DoD statutory mandate was intentionally extended to all executive agencies, consistent with Governmentwide applications being sought in other competition matters by the Office of Federal Procurement Policy. The Councils also point the respondent to FAR 10.002(b)(1), which notes that the "extent of market research will vary, depending on such factors as urgency, estimated dollar value, complexity, and past experience." Further, the Councils note that FAR 10.002(b)(1) clearly states that the market research effort for a new task order or delivery order need not be *de novo* in every case; the "contracting officer may use market research conducted within 18 months before the award of any task or delivery order if the information is still current, accurate, and relevant" (emphasis added).

3. *Comment:* The respondent stated that the requirement for market research will greatly impede the award of task orders, slowing fiscal year-end awards to the point of impossibility and negatively impacting Base Operating Support/Service (BOS) contracts. The respondent noted that BOS contracts have performance-based elements that ensure the contractor has incentives for efficiencies that will result in substantive savings in cost and schedule. Time has proven that having a single contractor responsible for the full scope of a contract effort enables tradeoffs by the contractor that result in better overall performance and savings, according to the respondent, than would intermittent market research.

Response: Whatever the respondent's experience with BOS contracts containing performance-based elements, the Councils note that the statute requires the conduct of market research

for both single-award and multiple-award indefinite-delivery contracts. The point of having contractors conduct market research, as stated in the law, is to identify commercial or nondevelopmental items that may be available to meet the agency's needs, not to identify efficiency trade-offs within the contractor's operations. Both efforts can proceed in tandem.

Finally, this final rule makes several conforming changes and technical corrections as a result of public comments received:

1. The language added to FAR 52.244-6 (Alternate I) is relocated to a new FAR clause 52.210-1, Market Research;

2. A prescription for the new clause is added at FAR 10.003, Contract clause; and

3. A cross-reference for the clause is added at FAR 16.506(h) when the contract is over \$5 million for the procurement of items other than commercial items.

III. 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.

IV. Regulatory Flexibility Act

DoD, GSA, and NASA certify that this final rule will not 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 of the high dollar threshold, non-applicability to contracts for commercial items (including commercial items that are services), and non-applicability to subcontracts for commercial items (including commercial items that are services). DoD, GSA, and NASA anticipate that the required market research is likely to increase the number of small businesses identified as able to provide commercial or nondevelopmental items as subcontractors. Any impact to small businesses is positive because their commercial and nondevelopmental items are more likely to be discovered as a result of these market research requirements. No comments were received from small entities in response to the invitation to do so included in the interim rule.

V. Paperwork Reduction Act

The final 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).

List of Subjects in 48 CFR Parts 10, 16, 44, and 52

Government procurement.

Dated: March 4, 2011.

Millisa Gary,

Acting Director, Office of Governmentwide Acquisition Policy.

Interim Rule Adopted as Final With Changes

Accordingly, the interim rule amending 48 CFR parts 10, 16, 44, and 52, which was published in the **Federal Register** at 75 FR 34277, June 16, 2010, is adopted as final with the following changes:

■ 1. The authority citation for 48 CFR parts 10, 16, 44, 52 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 10—MARKET RESEARCH

■ 1. Amend section 10.001 by revising paragraph (d) to read as follows:

10.001 Policy.

* * * * *

(d) *See* 10.003 for the requirement for a prime contractor to perform market research in contracts in excess of \$5 million for the procurement of items other than commercial items in accordance with section 826 of Public Law 110-181.

■ 2. Add section 10.003 to read as follows:

10.003 Contract clause.

The contracting officer shall insert the clause at 52.210-1, Market Research, in solicitations and contracts over \$5 million for the procurement of items other than commercial items.

PART 16—TYPES OF CONTRACTS

■ 3. Amend section 16.506 by adding paragraph (h) to read as follows:

16.506 Solicitation provisions and contract clauses.

* * * * *

(h) *See* 10.001(d) for insertion of the clause at 52.210-1, Market Research, when the contract is over \$5 million for the procurement of items other than commercial items.

PART 44—SUBCONTRACTING POLICIES AND PROCEDURES

■ 4. Revise section 44.400 to read as follows:

44.400 Scope of subpart.

This subpart prescribes the policies limiting the contract clauses a contractor may be required to apply to any subcontractors that are furnishing commercial items or commercial components in accordance with section 8002(b)(2) of Public Law 103-355.

44.402 [Amended]

■ 5. Amend section 44.402 by removing paragraph (b) and redesignating paragraphs (c) and (d) as paragraphs (b) and (c), respectively.

■ 6. Revise section 44.403 to read as follows:

44.403 Contract clause.

The contracting officer shall insert the clause at 52.244-6, Subcontracts for Commercial Items, in solicitations and contracts other than those for commercial items.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 7. Add section 52.210-1 to read as follows:

52.210-1 Market Research.

As prescribed in 10.003, insert the following clause:

Market Research (APR 2011)

(a) *Definition.* As used in this clause—
Commercial item and *nondevelopmental item* have the meaning contained in Federal Acquisition Regulation 2.101.

(b) Before awarding subcontracts over the simplified acquisition threshold for items other than commercial items, the Contractor shall conduct market research to—

(1) Determine if commercial items or, to the extent commercial items suitable to meet the agency's needs are not available, nondevelopmental items are available that—

(i) Meet the agency's requirements;

(ii) Could be modified to meet the agency's requirements; or

(iii) Could meet the agency's requirements if those requirements were modified to a reasonable extent; and

(2) Determine the extent to which commercial items or nondevelopmental items could be incorporated at the component level.

(End of clause)

52.244-6 [Amended]

■ 8. Amend section 52.244-6 by removing from the introductory text "44.403(a)," and adding "44.403," in its place; and removing Alternate I.

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