

DEPARTMENT OF DEFENSE**Defense Acquisition Regulations System****48 CFR Parts 212, 213, 219, 237, and 252**

[Docket DARS–2016–0034]

RIN 0750–AJ06

Defense Federal Acquisition Regulation Supplement: Competition for Religious-Related Services Contracts (DFARS Case 2016–D015)**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).**ACTION:** Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2016, clarifying the competition requirements for the acquisition of religious-related services contracts on a United States military installation.

DATES: Effective April 13, 2018.**FOR FURTHER INFORMATION CONTACT:** Ms. Carrie Moore, telephone 571–372–6093.**SUPPLEMENTARY INFORMATION:****I. Background**

DoD published a proposed rule in the *Federal Register* at 81 FR 93875 on December 22, 2016, recommending revisions to the DFARS to implement section 898 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2016 (Pub. L. 114–92). Section 898 requires that DoD not preclude a nonprofit organization from competing for a contract for religious-related services on a United States military installation. The proposed revisions set forth policy and procedures that allow nonprofit organizations to participate in small business set-asides and directed contracting officers not to use the sole source authorities at FAR 6.302–5(b)(4) through (7) when acquiring religious-related services on a United States military installation. The proposed rule also contained a new provision to ensure that potential offerors are aware that a nonprofit organization will not be precluded from competing for a contract for religious-related services under a small business set-aside, notwithstanding that it is not one of the small business types identified in FAR 19.000(a)(3).

The comment period for the proposed rule closed on February 21, 2017. There

were no public comments submitted in response to the proposed rule.

II. Discussion and Analysis

There are no changes made in the final rule from the proposed rule.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule applies the requirements of section 898 of the NDAA for FY 2016 to contracts at or below the simplified acquisition threshold (SAT), and to contracts for the acquisition of commercial items. The rule is not applicable to the contracts for the acquisition of commercially available off-the-shelf (COTS) items. Accordingly, the Director, DPAP, has signed a determination and finding to apply this rule to contracts or subcontracts in amounts not greater than the SAT and the acquisition of commercial items, excluding COTS items, for DFARS clause 252.219–7012, Competition for Religious-Related Services.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This rule is not subject to E.O. 13771 (82 FR 9339, February 3, 2017), because this rule is not a significant regulatory action.

VI. Regulatory Flexibility Act

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

The objective of this final is to implement section 898 of the National Defense Authorization Act for Fiscal Year 2016. The rule does so by amending the DFARS to establish the

policy and procedures necessary to ensure nonprofit entities, such as religious organizations, are not precluded from participating in acquisitions for religious related services on U.S. military installations. There were no public comments received in response to the initial regulatory flexibility analysis.

This rule may have a significant economic impact on a substantial number of small businesses that typically compete for contracts for the covered services, since most of the contracts awarded for religious-related services fall within the dollar range reserved exclusively for small business participation (over the micro-purchase threshold, but no more than the simplified acquisition threshold (SAT)). The rule may also have a significant economic impact on nonprofit organizations, since these entities are normally precluded from competing for such acquisitions that are reserved for small business concerns. However, the impact is also bounded as this is a small sector in terms of the numbers of purchase orders DoD awards in a year for these requirements, and the dollar value of these orders is relatively low.

According to data obtained from the Federal Procurement Data System (FPDS) for FY 2015, DoD awarded 290 contracts to 232 unique businesses for religious-related services under the product services code for Chaplain Services (G002), the majority of which (95 percent) are valued below the SAT. Of those 290 contracts, approximately 160 contracts were awarded to 130 unique small business concerns (56 percent). The FPDS data further indicates that of the 160 contracts awarded to small business, 137 of the contracts were awarded on the basis of a total small business set-aside, including one total set-aside to women-owned small business concerns. In addition, in order to carry out the Congressional mandate of section 898, this rule restricts the use of the sole source authorities at FAR 6.302–5(b)(4) through (7) when contracting for religious-related services on U.S. military installations; as a result, such solicitations would have to be competed in a manner that allows nonprofit organizations to participate. Analysis of FPDS data for FY 2015 reveals that four contracts were awarded to a HUBZone small business concern on a sole source basis.

Additional FPDS data was obtained for FY 2016, which showed DoD awarded 256 contracts to 212 unique businesses for religious-related services under product service code G002, of which the majority (91 percent) were

valued below the SAT. Of those 256 contracts, 158 contracts (62 percent) were awarded to 130 unique small business concerns (63 percent). 116 contracts were solicited using a total small business set-aside. Again, as a result of this rule, such solicitations could not preclude a nonprofit organization from submitting an offer and being considered for award. Six contracts were awarded on a sole source basis under the Small Business Act 8(a) Business Development Program (8(a) Program); however, this rule restricts DoD contracting officers from using the sole source authority at FAR 6.302–5(b)(4) for the 8(a) Program to procure religious-related services to be performed on a U.S. military installation. In order to comply with section 898, any requirements currently in the 8(a) program would be required, upon renewal, to be solicited in a manner that does not preclude a nonprofit organization from the competition.

There are no reporting, recordkeeping, or compliance requirements associated with this rule.

There are no significant alternative approaches to the rule that would minimize the impact on small entities and meet the stated objectives of the statute.

VII. Paperwork Reduction Act

The 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 212, 213, 219, 237, and 252

Government procurement.

Jennifer Lee Hawes,
Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212, 213, 219, 237, and 252 are amended as follows:

■ 1. The authority citation for parts 212, 213, 219, 237, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

■ 2. Amend section 212.301 by adding new paragraph (f)(vii)(D) to read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(f) * * *

(vii) * * *

(D) Use the provision at 252.219–7012, Competition for Religious-Related Services, as prescribed in 219.270–3.

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PART 213—SIMPLIFIED ACQUISITION PROCEDURES

- 3. Amend section 213.7001 by—
- a. Redesignating paragraphs (a)(1) and (2) as paragraphs (a)(1)(i) and (ii), respectively;
- b. Redesignating the introductory text as paragraph (a)(1);
- c. Redesignating paragraph (b) as paragraph (a)(2); and
- d. Adding a new paragraph (b).

The addition reads as follows:

213.7001 Procedures.

* * * * *

(b) To comply with section 898 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114–92), contracting officers shall not use the sole source authority at FAR 6.302–5(b)(4) to purchase religious-related services to be performed on a U.S. military installation. For competitive purchases under the 8(a) program, contracting officers shall not exclude a nonprofit organization from the competition. See 219.270 for additional procedures.

PART 219—SMALL BUSINESS PROGRAMS

- 4. Add sections 219.270, 219.270–1, 219.270–2, and 219.270–3 to subpart 219.2 to read as follows:

219.270 Religious-related services— inclusion of nonprofit organizations.

219.270–1 Definition.

As used in this section—
Nonprofit organization means any organization that is—

- (1) Described in section 501(c) of the Internal Revenue Code of 1986; and
- (2) Exempt from tax under section 501(a) of that Code.

219.270–2 Procedures.

(a) To comply with section 898 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114–92), when acquiring religious-related services to be performed on a U.S. military installation—

- (1) Do not preclude a nonprofit organization from competing, even when the acquisition is set aside for small businesses as identified in FAR 19.000(a)(3); and
- (2) Do not use any of the sole source exceptions at FAR 6.302–5(b)(4) through (7) for such acquisitions.

(b) If the apparently successful offeror has not represented in its quotation or offer that it is one of the small business concerns identified in FAR 19.000(a)(3), the contracting officer shall verify that the offeror is registered in the System for Award Management database as a nonprofit organization.

219.270–3 Solicitation provision.

Use the provision 252.219–7012, Competition for Religious-Related Services, in solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial items, for the acquisition of religious-related services to be performed on U.S. military installations, when the acquisition is set aside for any of the small business concerns identified in FAR 19.000(a)(3).

PART 237—SERVICE CONTRACTING

- 5. Add new subpart 237.77 to read as follows:

Subpart 237.77—Competition for Religious-Related Services

Sec.

237.7700 Scope of subpart.
237.7701 Definition.
237.7702 Policy.

Subpart 237.77—Competition for Religious-Related Services

237.7700 Scope of subpart.

This subpart provides policy and guidance for the acquisition of religious-related services to be performed on a U.S. military installation in accordance with section 898 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114–92).

237.7701 Definition.

As used in this subpart—
Nonprofit organization means any organization that is—

- (1) Described in section 501(c) of the Internal Revenue Code of 1986; and
- (2) Exempt from tax under section 501(a) of that Code.

237.7702 Policy.

(a) A nonprofit organization shall not be precluded from competing for a contract for religious-related services to be performed on a U.S. military installation.

(b) See 219.270 when an acquisition for religious-related services to be performed on a U.S. military installation is set aside for any of the small business concerns identified in FAR 19.000(a)(3).

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 6. Add section 252.219–7012 to read as follows:

252.219–7012 Competition for Religious-Related Services.

As prescribed in 219.270–3, use the following provision:

Competition for Religious-Related Services (APR 2018)

(a) *Definition.* As used in this provision—*Nonprofit organization* means any organization that is—

(1) Described in section 501(c) of the Internal Revenue Code of 1986; and

(2) Exempt from tax under section 501(a) of that Code.

(b) A nonprofit organization is not precluded from competing for a contract for religious-related services to be performed on a U.S. military installation notwithstanding that a nonprofit organization is not a small business concern as identified in FAR 19.000(a)(3).

(c) If the apparently successful offeror has not represented in its offer or quotation that it is a small business concern identified in FAR 19.000(a)(3), as appropriate to the solicitation, the Contracting Officer will verify that the offeror is registered in the System for Award Management (SAM) database as a nonprofit organization.

(End of provision)

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 225

[Docket DARS–2018–D007]

RIN 0750–AJ38

Defense Federal Acquisition Regulation Supplement: Safe Access to Projects in Afghanistan (DFARS Case 2017–D032)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2017 that prohibits use of funds for certain programs and projects of the Department of Defense in Afghanistan that cannot be safely accessed by United States Government personnel.

DATES: Effective April 13, 2018.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, telephone 571–372–6106.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is amending the DFARS to implement section 1216 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114–328). Section 1216 requires that funding amounts available to the Department of Defense may not be obligated or expended for a construction or other infrastructure program or project of the Department in Afghanistan if military or civilian personnel of the United States Government, or their representatives with authority to conduct oversight of such program or project, cannot safely access such program or project. The prohibition may be waived with an approved determination.

II. Discussion and Analysis

To implement section 1216, this rule adds a new DFARS section 225.7705, Prohibition on use of funds for contracts of certain programs and projects in Afghanistan that cannot be safely accessed. The procedures provided in this new section are strictly internal to the Government, in that they instruct the contracting officer to not obligate funds on the covered contracts, unless (1) Government personnel can safely access the project, or (2) a determination is approved by the appropriate authority to waive this restriction, as outlined in the statute.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule does not add any new burdens or impact applicability of clauses and provisions at or below the simplified acquisition threshold, or to acquisition of commercial items.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of

E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This rule is not subject to E.O. 13771, Reducing Regulation and Controlling Regulatory Costs, because the rule relates to agency organization, management, or personnel.

VI. Publication of This Final Rule for Public Comment Is Not Required by Statute

The statute that applies to the publication of the Federal Acquisition Regulation is codified at Title 41 of the United States Code (formerly known as the Office of Federal Procurement Policy Act). Specifically, 41 U.S.C. 1707(a)(1) requires that a procurement policy, regulation, procedure or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because it only provides procedures for United States Government personnel to follow for certain programs and projects in Afghanistan that cannot be safely accessed. These requirements affect only the internal operating procedures of the Government.

VII. Regulatory Flexibility Act

Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under 41 U.S.C. 1707(a)(1) (see section VI. of this preamble), the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable. Accordingly, no regulatory flexibility analysis is required and none has been prepared.

VIII. Paperwork Reduction Act

The 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).