Federal Register

Monday,
January 27, 2003

Part VI

Department of Defense
General Services Adminstration
National Aeronautics and Space Administration

48 CFR Parts 2, 10, et al.
Federal Acquisition Regulations; Interim and Final Rules

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 10, 12, 13, 19, and 25

[FAC 2001–12; FAR Case 2002–026]

RIN 9000–AJ54

Federal Acquisition Regulation; Procurements for Defense Against or Recovery From Terrorism or Nuclear, Biological, Chemical or Radiological Attack

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

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement Sections 852 through 856 and Section 858 of the Homeland Security Act (Pub. L. 107–296). Those sections increase the amount of the micro-purchase threshold and, in certain situations, the simplified acquisition threshold and provide streamlined procedures for procurements of supplies or services by or for an executive agency that are to be used to facilitate defense against or recovery from terrorism or nuclear, biological, chemical, or radiological attack. The Act text covers solicitations issued during the one-year period starting on the date of enactment (November 25, 2002), but the Act does not become effective until 60 days after enactment (January 24, 2003).

DATES: *Effective Date:* January 24, 2003.

Comment Date: Interested parties should submit comments to the FAR Secretariat at the address shown below on or before March 28, 2003, to be considered in the formulation of a final rule.

ADDRESSES: Submit written comments to—General Services Administration, FAR Secretariat (MVA), 1800 F Street, NW., Room 4035, Attn: Ms. Laurie Duarte, Washington, DC 20405.

Submit electronic comments via the Internet to—*farcase.2002–026@gsa.gov.*

Please submit comments only and cite FAC 2001–12, FAR case 2002–026, in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Victoria Moss, Procurement Analyst, at (202) 501–4764. Please cite FAC 2001–12, FAR case 2002–026.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule implements Sections 852 through 856 and Section 858 of the Homeland Security Act (Pub. L. 107–296)). These provisions, which are set forth in Title VIII, Subtitle F of the Act, provide Federal emergency procurement flexibilities.

Section 852 specifies that the authorities granted in the subtitle apply to acquisitions of supplies or services by or for an executive agency that, as determined by the head of the executive agency, are to be used to facilitate defense against or recovery from terrorism or nuclear, biological, chemical, or radiological attack, but only if a solicitation of offers for the procurement is issued before November 25, 2003.

Section 853 increases the simplified acquisition threshold to $200,000 ($300,000 for contracts awarded and performed outside the United States) for acquisitions referred to in section 852 that are carried out in support of a humanitarian or peacekeeping operation or a contingency operation. The definition of simplified acquisition threshold in FAR 2.101 has been revised to reflect this change. As further required by section 853, FAR 19.502–2(a) has been amended to increase the small business reservation to mirror these increased thresholds.

Section 854 increases the micro-purchase threshold to $7,500 for acquisitions referred to in section 852. To implement this change, the rule modifies (1) the definition of micro-purchase threshold at FAR 2.101, (2) guidance on the use of micro-purchase authority at FAR 13.201, and (3) coverage at FAR 19.502–1 addressing the applicability of set-aside requirements.

Section 855 allows agencies to treat acquisitions referred to in section 852 as commercial items and removes the $5,000,000 limitation for the Test Program for Certain Commercial Items for these acquisitions. FAR 12.102(f), addressing the applicability of commercial item policies, and FAR Subpart 13.5 on the use of the commercial items test authority, have been revised accordingly.

Section 856 provides for the use of streamlined acquisition authorities and procedures authorized by law for a procurement referred to in section 852 and waives the dollar limitations on sole source 8(a) acquisitions and HUBZone Sole Source awards for these acquisitions. Changes have been made at FAR 19.805–1 and 19.1306.

Section 858 calls for market research on an ongoing basis to identify effectively the capabilities, including the capabilities of small businesses and new entrants into Federal contracting, that are available in the marketplace for meeting the requirements of the executive agency in furtherance of defense against or recovery from terrorism or nuclear, biological, chemical, or radiological attack. This requirement is reflected in FAR 10.001.

This is not a significant regulatory action and, therefore, was not 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.

B. Regulatory Flexibility Act

The changes may 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.* The Councils prepared an Initial Regulatory Flexibility Analysis (IRFA), and it is summarized as follows:

The increased thresholds are limited to apply to acquisitions of supplies or services by or for an executive agency that are to be used to facilitate defense against or recovery from terrorism or nuclear, biological, chemical, or radiological attack. There are no data available on the number of procurements that will be eligible. We expect the increased thresholds to this limited class of procurements will apply to a very small number of small entities.

This interim rule does not impose any data collection requirements on small business concerns. The rule does not duplicate, overlap, or conflict with other relevant Federal rules. There are no significant alternatives to the interim rule that would accomplish the stated beneficial objective.

The FAR Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. Interested parties may obtain a copy from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR subparts in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 601, *et seq.* (FAC 2001–12, FAR Case 2002–026), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the

FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

D. 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 FAR coverage implements Sections 852 through 856 and Section 858 of the Homeland Security Act (Pub. L. 107–296), signed on November 25, 2002, which provides for urgently needed authorities to be used in the fight against, and recovery from terrorism.

However, pursuant to Public Law 98–577 and FAR 1.501, the Councils 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 2, 10, 12, 13, 19, and 25

Government procurement.

Dated: January 16, 2003.

Al Matera,

Director, Acquisition Policy Division.

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 2001–12 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Adminstration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2001–12 are effective January 24, 2003.

Dated: January 16, 2003.

Deidre A. Lee,

Director, Defense Procurement and Acquisition Policy.

Dated: January 16, 2003.

David A. Drabkin,

Deputy Associate Administrator, Office of Acquisition Policy, General Services Administration.

Dated: January 16, 2003.

Tom Luedtke,

Assistant Administrator for Procurement, National Aeronautics and Space Adminstration.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 10, 12, 13, 19, and 25 as set forth below:

1. The authority citation for 48 CFR parts 2, 10, 12, 13, 19, and 25 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

2. Amend section 2.101 by adding, in alphabetical order, the definitions "Contingency operation" and "Humanitarian or peacekeeping operation"; and revising the definitions "Micro-purchase threshold" and "Simplified acquisition threshold" to read as follows:

2.101 Definitions.

* * * * *

Contingency operation (10 U.S.C. 101(a)(13)) means a military operation that—

(1) Is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(2) Results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of 10 U.S.C., chapter 15 of 10 U.S.C, or any other provision of law during a war or during a national emergency declared by the President or Congress.

* * * * *

Humanitarian or peacekeeping operation means a military operation in support of the provision of humanitarian or foreign disaster assistance or in support of a peacekeeping operation under chapter VI or VII of the Charter of the United Nations. The term does not include routine training, force rotation, or stationing (10 U.S.C. 2302(8) and 41 U.S.C. 259(d)).

* * * * *

Micro-purchase threshold means $2,500, except it means__

(1) $2,000 for construction subject to the Davis Bacon Act; and

(2) $7,500 for acquisitions of supplies or services that, as determined by the head of the agency, are to be used to facilitate defense against or recovery from terrorism (defined at Public Law 107–296, Sec. 2) or nuclear, biological, chemical, or radiological attack, as described in 13.201(g)(1)(i), except for construction subject to the Davis Bacon Act (Public Law 107–296, Sec. 854). The threshold is $15,000 for acquisitions by or for the Department of Defense as described in 13.201(g)(1)(ii) (Public Law 107–107, Sec. 836(a)(1)(A)).

* * * * *

Simplified acquisition threshold means $100,000, except that__

(1) In the case of any contract to be awarded and performed, or purchase to be made outside the United States in support of a contingency operation or a humanitarian or peacekeeping operation, the term means $200,000; or

(2) For acquisitions of supplies or services that, as determined by the head of the agency are to be used to facilitate defense against or recovery from terrorism (defined at Public Law 107–296, Sec. 2) or nuclear, biological, chemical, or radiological attack—

(i) For any agency, in support of a humanitarian or peacekeeping or a contingency operation if initiated by a solicitation issued from January 24, 2003, to November 24, 2003 (Public Law 107–296, Sec. 853(a)), the term means—

(A) $200,000 for any contract to be awarded and performed, or purchase to be made, inside the United States; and

(B) $300,000 for any contract to be awarded and performed, or purchase to be made, outside the United States.

(ii) By or for the Department of Defense in support of a contingency operation if award is made and funds are obligated on or before September 30, 2003 (Public Law 107–107, Sec. 836(a)(1)(B)), the term means—

(A) $250,000 for any contract to be awarded and performed, or purchase to be made, inside the United States; and

(B) $500,000 for any contract to be awarded and performed, or purchase to be made, outside the United States.

* * * * *

PART 10—MARKET RESEARCH

3. Amend section 10.001 by removing the word "and" at the end of paragraph (a)(2)(iii); and adding paragraph (a)(2)(v) to read as follows:

10.001 Policy.

(a) * * *

(2) * * *

(v) Agencies shall conduct market research on an ongoing basis, and take advantage to the maximum extent practicable of commercially available market research methods, to identify effectively the capabilities, including the capabilities of small businesses and new entrants into Federal contracting, that are available in the marketplace for meeting the requirements of the agency in furtherance of defense against or recovery from terrorism or nuclear, biological, chemical or radiological attack (Public Law 107–296, Sec. 858); and

* * * * *

PART 12—ACQUISITION OF COMMERCIAL ITEMS

4. Amend section 12.102 by revising paragraph (f) to read as follows:

12.102 Applicability.

* * * * *

(f)(1) Contracting officers may treat any acquisition of supplies or services that, as determined by the head of the agency, are to be used to facilitate defense against or recovery from terrorism or nuclear, biological, chemical, or radiological attack, as an acquisition of commercial items. This paragraph applies to solicitations issued by any agency from January 24, 2003, through November 24, 2003 (Public Law 107–296, Sec. 856).

(2) Acquisition of biotechnology supplies or services, for use to facilitate the defense against terrorism or biological attack against the United States, by or for the Department of Defense shall be considered as an acquisition of commercial items when award is made and funds are obligated on or before September 30, 2003 (Public Law 107–107, Sec. 836(a)(2)). The authority of this paragraph is in addition to and does not limit the authority of paragraph (f)(1) of this section. Nothing in this paragraph shall preclude a contracting officer from treating an acquisition described in this paragraph as one for a non-commercial item if a determination is made by the contracting officer that the purchase cannot be made at a fair and reasonable price using the policies of this part.

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

5. Amend section 13.003 by revising paragraph (b)(1) to read as follows:

13.003 Policy.

* * * * *

(b)(1) Each acquisition of supplies or services that has an anticipated dollar value exceeding $2,500 ($7,500 for acquisitions as described in 13.201(g)(1)(i) and $15,000 for acquisitions as described in 13.201(g)(1)(ii)) and not exceeding $100,000 ($200,000 for acquisitions described in paragraph (2)(i) of the Simplified Acquisition Threshold definition at 2.101) is reserved exclusively for small business concerns and shall be set aside (*see* 19.000 and subpart 19.5). *See* 19.502–2 for exceptions.

* * * * *

6. Amend section 13.105 by revising the first sentence of paragraph (b) to read as follows:

13.105 Synopsis and posting requirements.

* * * * *

(b) When acquiring commercial items or supplies or services procured in accordance with 12.102(f)(1) and (f)(2), the contracting officer may use a combined synopsis and solicitation.

* * *

7. Amend section 13.201 by revising paragraph (g) to read as follows:

13.201 General.

* * * * *

(g)(1) For acquisitions of supplies or services that, as determined by the head of the agency, are to be used to facilitate defense against or recovery from terrorism or nuclear, biological, chemical, or radiological attack, the temporary micro-purchase thresholds are

(i) $7,500 for acquisitions by or for any agency if the award is made from January 24, 2003, through November 24, 2003; and

(ii) $15,000 for acquisitions by or for the Department of Defense if award is made and funds are obligated on or before September 30, 2003.

(2) Purchases using this authority must have a clear and direct relationship to defense against or recovery from terrorism or nuclear, biological, chemical, or radiological attack.

8. Amend section 13.500 in paragraph (a) by removing the period from the end of the first sentence and adding 1", except as provided in paragraph (e) of this section." in its place; and adding paragraph (e) to read as follows:

13.500 General.

* * * * *

(e) The $5,000,000 limitation provided in this subpart 13.5 does not apply to acquisitions of supplies or services using the authority provided by 12.102(f)(1). Notwithstanding the expiration of the test program specified in paragraph (d) of this section, authority to use simplified procedures under this paragraph applies to an acquisition when the solicitation is issued by any agency from January 24, 2003, through November 24, 2003.

9. Amend section 13.501 by—

a. Removing from paragraph (a)(1)(i) the phrase "paragraphs (a)(2)(i) and (a)(2)(ii)" and adding "paragraph (a)(2)" in its place;

b. Revising paragraph (a)(1)(ii);

c. In paragraph (a)(2)(ii) by adding "but not exceeding $10,000,000," after "$500,000,"; and

d. Adding paragraphs (a)(2)(iii) and (a)(2)(iv). The revised and added text reads as follows:

13.501 Special documentation requirements.

(a) * * *

(1) * * *

(ii) Prepare sole source justifications using the format at 6.303–2, modified to reflect an acquisition under the authority of the test program for commercial items (section 4202 of the Clinger-Cohen Act of 1996) or the authority of the Homeland Security Act (Public Law 107–296, section 856) as implemented at 12.102(f)(1).

(2) * * *

(iii) For a proposed contract exceeding $10,000,000 but not exceeding $50,000,000, the head of the procuring activity or the official described in 6.304(a)(3) or (a)(4) must approve the justification and approval. This authority is not delegable.

(iv) For a proposed contract exceeding $50,000,000 the official described in 6.304(a)(4) must approve the justification and approval. This authority is not delegable except as provided in 6.304(a)(4).

* * * * *

PART 19—SMALL BUSINESS PROGRAMS

10. Amend section 19.502–1 by revising paragraph (b) to read as follows:

19.502–1 Requirements for setting aside acquisitions.

* * * * *

(b) This requirement does not apply to purchases of $2,500 or less ($7,500 or less for acquisitions as described in 13.201(g)(1)(i) or $15,000 or less for acquisitions as described in 13.201(g)(1)(ii)), or purchases from required sources of supply under Part 8 (*e.g.*, Federal Prison Industries, Committee for Purchase From People Who are Blind or Severely Disabled, and Federal Supply Schedule contracts).

11. Amend section 19.502–2 by revising the first sentence of paragraph (a) to read as follows:

19.502–2 Total small business set-asides.

(a) Except for those acquisitions set aside for very small business concerns (*see* subpart 19.9), each acquisition of supplies or services that has an anticipated dollar value exceeding $2,500 ($7,500 for acquisitions as described in 13.201(g)(1)(i) or $15,000 for acquisitions as described in 13.201(g)(1)(ii)), but not over $100,000 ($200,000 for acquisitions described in paragraph (2)(i) of the Simplified Acquisition Threshold definition at 2.101), is automatically reserved exclusively for small business concerns and shall be set aside for small business unless the contracting officer

determines there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery.

* * *

* * * * *

12. Amend section 19.805–1 in paragraph (b)(1) by removing from the end of the sentence "or"; in paragraph (b)(2) by removing the period at the end of the sentence and adding "; or" in its place; and adding paragraph (b)(3) to read as follows:

19.805–1 General.

(b) * * *

(3) The acquisition is conducted under the authority of the Homeland Security Act (Public Law 107–296) and—

(i) The acquisition is for supplies or services that, as determined by the head of the agency, are to be used to facilitate defense against or recovery from terrorism or nuclear, biological, chemical, or radiological attack;

(ii) The solicitation is issued during the period of January 24, 2003, through November 24, 2003; and

(iii) There is either an approved 13.501 justification for sole source acquisition, or an approved 6.303 justification using one of the authorities at 6.302–1, 6.302–2, 6.302–6, or 6.302–7.

* * * * *

13. Amend section 19.903 by removing from the end of paragraph (b)(2) "or"; redesignating paragraph (b)(3) as (b)(4); adding a new paragraph (b)(3); and by removing from newly designated paragraph (b)(4) "13.201(g)" and adding "13.201(g)(1)(ii)" in its place. The added text reads as follows:

19.903 Applicability.

* * * * *

(b) * * *

(3) Acquisitions of $7,500 or less for acquisitions of supplies or services that, as determined by the head of the agency, are to be used to facilitate defense against or recovery from terrorism or nuclear, biological, chemical, or radiological attack as described in 13.201(g)(1)(i); or

* * * * *

14. Amend section 19.1306 by revising the introductory text of paragraph (a)(2); and adding paragraph (c) to read as follows:

19.1306 HUBZone sole source awards.

(a) * * *

(2) Except as provided in paragraph (c) of this section, the anticipated price of the contract, including options, will not exceed—

* * * * *

(c) The contracting officer may award contracts exceeding the limits in paragraph (a)(2) of this section to HUBZone small business concerns on a sole source basis if the acquisition is conducted under the authority of the Homeland Security Act (Public Law 107–296, Sec. 856(b)) and—

(1) The acquisition is for supplies or services that, as determined by the head of the agency, are to be used to facilitate defense against or recovery from terrorism or nuclear, biological, chemical, or radiological attack;

(2) The solicitation is issued, during the period of January 24, 2003, through November 24, 2003; and

(3) There is either an approved 13.501 justification for sole source acquisition, or an approved 6.303 justification using one of the authorities at 6.302–1, 6.302–2, 6.302–6, or 6.302–7.

PART 25—FOREIGN ACQUISITION

15. Amend section 25.1101 by revising the introductory text of paragraph (a)(1) to read as follows:

25.1101 Acquisition of supplies.

* * * * *

(a)(1) Insert the clause at 52.225–1, Buy American Act—Supplies, in solicitations and contracts with a value exceeding $2,500 ($7,500 for acquisitions as described in 13.201(g)(1)(i) or $15,000 for acquisitions as described in 13.201(g)(1)(ii)) but not exceeding $25,000; and in solicitations and contracts with a value exceeding $25,000, if none of the clauses prescribed in paragraphs (b) and (c) of this section apply, except if—

* * * * *

16. Amend section 25.1103 by revising paragraph (a) to read as follows:

25.1103 Other provisions and clauses.

(a) *Restrictions on certain foreign purchases.* Insert the clause at 52.225–13, Restrictions on Certain Foreign Purchases, in solicitations and contracts with a value exceeding $2,500, $7,500 for acquisitions as described in 13.201(g)(1)(i), or $15,000 for acquisitions as described in 13.201(g)(1)(ii), unless an exception applies (*see* 25.701(a)(2)).

* * * * *

[FR Doc. 03–1687 Filed 1–24–03; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

Federal Acquisition Regulation; Small Entity Compliance Guide

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

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator for the National Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121). It consists of a summary of the rule appearing in Federal Acquisition Circular (FAC) 2001–12 which amends the FAR. An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared in accordance with 5 U.S.C. 604. Interested parties may obtain further information regarding these rules by referring to FAC 2001–12 which precedes this document. These documents are also available via the Internet at *http://www.arnet.gov/far.*

FOR FURTHER INFORMATION CONTACT: Laurie Duarte, FAR Secretariat, (202) 501–4225. For clarification of content, contact Ms. Victoria Moss, Procurement Analyst, General Services Administration, at (202) 501–4764.

Procurements for Defense Against or Recovery From Terrorism or Nuclear, Biological, Chemical or Radiological Attack (FAR Case 2002–026)

This interim rule revises the Federal Acquisition Regulation (FAR) in order to implement Sections 852 through 856 and Section 858 of the Homeland Security Act (Pub. L. 107–296). Those sections increase the amount of the micro-purchase threshold and the simplified acquisition threshold for procurements and provide streamlined procedures for acquisitions of supplies or services by or for an executive agency that, as determined by the head of the executive agency, are to be used to facilitate defense against or recovery from terrorism or nuclear, biological, chemical, or radiological attack. The