(3) The Government has validated all mandatory data fields and has marked the records ''Active.''

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DEPARTMENT OF DEFENSE

48 CFR Parts 208, 210, 219, and 252

[DFARS Case 2002–D003]

Defense Federal Acquisition Regulation Supplement; Competition Requirements for Purchases From a Required Source

AGENCY: Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 811 of the National Defense Authorization Act for Fiscal Year 2002 and section 819 of the National Defense Authorization Act for Fiscal Year 2003. Sections 811 and 819 address requirements for conducting market research before purchasing a product listed in the Federal Prison Industries (FPI) catalog, and for use of competitive procedures if an FPI product is found to be noncomparable to products available from the private sector. Section 819 also addresses limitations on an inmate worker's access to information and on use of FPI as a subcontractor.

EFFECTIVE DATE: December 15, 2003.

FOR FURTHER INFORMATION CONTACT: Ms. Michele Peterson, Defense Acquisition Regulations Council, OUSD(AT&L)DPAP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062. Telephone (703) 602–0311; facsimile (703) 602–0350. Please cite DFARS Case 2002–D003.

SUPPLEMENTARY INFORMATION:

A. Background

Section 811 of the National Defense Authorization Act for Fiscal Year 2002 (Pub. L. 107–107) added 10 U.S.C. 2410n, providing that (1) before purchasing a product listed in the FPI catalog, DoD must conduct market research to determine whether the FPI product is comparable in price, quality, and time of delivery to products available from the private sector; (2) if the FPI product is not comparable in price, quality, and time of delivery, DoD must use competitive procedures to acquire the product; and (3) in conducting such a competition, DoD must consider a timely offer from FPI for award in accordance with the specifications and evaluation factors in the solicitation.

DoD published an interim rule at 67 FR 20687 on April 26, 2002, to implement section 811 of Public Law 107–107. On December 2, 2002, section 819 of the National Defense Authorization Act for Fiscal Year 2003 (Pub. L. 107–314) amended 10 U.S.C. 2410n to (1) clarify requirements for conducting market research before purchasing a product listed in the FPI catalog; (2) specify requirements for use of competitive procedures or for making a purchase under a multiple award contract if an FPI product is found to be noncomparable to products available from the private sector; (3) specify that a contracting officer's determination, regarding the comparability of an FPI product to products available from the private sector, is not subject to the arbitration provisions of 18 U.S.C. 4124(b); (4) specify that a DoD contractor may not be required to use FPI as a subcontractor; and (5) prohibit the award of a contract to FPI that would allow an inmate worker access to classified or sensitive information.

DoD published a proposed rule at 68 FR 26265 on May 15, 2003, to further implement the requirements of section 811 of Public Law 107–107, to implement section 819 of Public Law 107–314, and to address public comments received in response to the interim rule published on April 26, 2002. A discussion of the comments received in response to the proposed rule published on May 15, 2003, is provided below. DoD has adopted the proposed rule as a final rule without change.

1. *Comment:* FPI is not a small business concern and should not be permitted to participate in small business set-asides.

DoD Response: Concur that FPI is not a small business concern. The small business set-aside procedures in the rule apply only when an FPI product is found to be noncomparable to private sector products. In these situations, competitive procedures *must* be used and FPI *must* be given an opportunity to compete. Because the definition of competitive procedures in 10 U.S.C. 2410n includes procurements conducted in furtherance of the Small Business Act, the DFARS rule permits restriction of the competition to FPI and small business concerns.

2. *Comment:* The rule should prohibit a Federal contractor from being required to specify FPI products in the designs, specifications, or standards it develops for DoD.

DoD Response: Concur. Section 208.670 of the rule prohibits such an action.

3. *Comment:* The rule should clarify that DoD contracts, particularly architect-engineer contracts, should specify that FPI goods must be used to supply DoD unless excepted by 208.602. For example, DoD would not be permitted by law to procure office furniture as part of a consolidated or prime contract for the construction or renovation of a building if such a contracting method is used to preclude the necessity for a comparability determination or competitive procedures under sections 811 and 819.

DoD Response: Concur that consolidation of requirements merely to avoid a comparability determination or competitive procedures would be improper, as would any other action taken to circumvent statutory or regulatory requirements. However, consolidation where appropriate appears to be consistent with 10 U.S.C. 2410(e), which addresses the issue of subcontracting and specifically prohibits DoD from requiring a contractor to use FPI as a subcontractor or supplier. The provisions of 10 U.S.C. 2410(e) are reflected in the rule at 208.670.

4. *Comment:* A paragraph should be added to 208.670 to state that nothing in that section prohibits FPI from voluntarily entering into a subcontract with, or from being accepted as a subcontractor by, any prime contractor doing business with a DoD component.

DoD Response: Nothing in the rule precludes FPI from acting as a subcontractor. Specific mention of this subject in the rule is unnecessary.

5. *Comment:* The rule should clarify that use of multiple award schedule contracts is a legitimate competitive procedure.

DoD Response: This point is clear from the definition of ''competitive procedures'' at 208.601–70, which permits use of the procedures in FAR 6.102, to include the use of multiple award schedule contracts.

6. *Comment:* The first sentence of 208.602(a)(i) should make it clear that it is mandatory for contracting officers to conduct market research before purchasing a product listed in the FPI Schedule.

DoD Response: The first sentence of 208.602(a)(i) is an imperative statement and is clearly mandatory.

7. *Comment:* The way the rule is written, if FPI's product is found to be noncomparable in price, quality, and delivery time, FPI is given a second chance to meet these criteria through the competition phase. The rule should

be revised to eliminate the second redundant step.

DoD Response: Do not concur. The two-step process is consistent with 10 U.S.C. 2410n(b), which clearly establishes an ''if-then'' situation, *i.e.*, if DoD makes a noncomparability determination, then competitive procedures must be used.

8. *Comment:* The rule should emphasize the two-step nature of the procedures, add a definition of ''comparable'' to 208.601–70, and clarify that DoD purchasers may request waiver if an FPI product has been determined to be comparable.

DoD Response: The rule is clear with regard to the two-step nature of the procedures. A definition of ''comparable'' is unnecessary, as this term is already used throughout the FAR and DFARS with its common dictionary meaning. If an FPI product is determined to be comparable to a private sector product, the rule requires use of the procedures in FAR subpart 8.6, which addresses clearance/waiver provisions. It is unnecessary to repeat these provisions in the DFARS.

9. *Comment:* The requirement for a written comparability determination takes discretion away from the contracting officer and should be eliminated.

DoD Response: Do not concur. It is common business practice to document the decision-making process.

10. *Comment:* The ''unilateral decision'' language at 208.602(a) should be removed. It does not provide any guidance to contracting officers in exercising their discretion.

DoD Response: Do not concur. This language clarifies the contracting officer's role in the determination process and is consistent with the provisions of 10 U.S.C. 2410n(d).

11. *Comment:* The rule should include language requiring FPI to adhere to its contractual obligations to the same extent as any other DoD contractor.

DoD Response: Concur that FPI should be held accountable for its performance. In accordance with FAR 8.607, the Government may collect past performance information for use in supporting a clearance request for future purchases. However, it is unnecessary to address this issue in this DFARS rule.

12. *Comment:* The rule overlooks the statutory requirement to give NIB second priority, behind FPI, for sales of products to the Government. The language at 208.602(a)(iv) should be revised to state that in the event that FPI is found to be non-comparable, JWOD products would be given first priority; if the product is not on the JWOD Procurement List, then competitive procedures may be used.

DoD Response: Do not concur. In accordance with 41 U.S.C. 48, NIB is given priority only if the required supplies or services are not available from FPI. If FPI can fulfill the requirement, even though it is determined to be noncomparable, 10 U.S.C. 2410n requires use of competitive procedures that include FPI.

13. *Comment:* The requirement in 208.602(a)(iv)(C)(1), to ''Establish and communicate to FPI the requirements and evaluation factors that will be used as the basis for selecting a source, so that an offer from FPI can be evaluated on the same basis as the schedule holder'' is too solicitous of FPI, exceeds the requirements of the law, and should be removed.

DoD Response: Do not concur. Since a formal solicitation will not be issued for purchases made using multiple award schedules, there must be a means of communicating this information to enable FPI to compete in accordance with 10 U.S.C. 2410n.

14. *Comment:* The language at 208.602(a)(iv) should specify how FPI will be notified of a solicitation.

DoD Response: Do not concur. This level of detail is more appropriately left to the discretion of the contracting officer.

15. *Comment:* The FPI Board of Directors adopted a resolution that directs FPI to grant waivers in all cases where the private sector provides a lower price for a comparable product that FPI does not meet. The rule should clarify that, because of sections 811 and 819, DoD contracting officers are exempt from this resolution and are therefore not required to obtain a waiver from FPI.

DoD Response: Section 208.606 of the rule provides a blanket exception from FPI clearance requirements, to apply when a contracting officer determines that an FPI product is not comparable to private sector products and the procedures at 208.602(a)(iv) are used. A specific exemption from the Board of Directors resolution is unnecessary.

16. *Comment:* The initial regulatory flexibility analysis concluded that the rule could benefit small business concerns that offer products comparable to FPI. The analysis should also consider and include the impact on FPI and the small business concerns that support FPI.

DoD Response: Concur. The final regulatory flexibility analysis addresses FPI and the small business concerns that provide supplies and services to FPI.

This rule was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

This rule 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.*, because the rule will permit small entities to compete with FPI for DoD contract awards under certain conditions. A final regulatory flexibility analysis has been prepared and is summarized as follows:

This rule amends DoD policy pertaining to the acquisition of products from FPI. The rule implements 10 U.S.C. 2410n. The net effect of the rule is unknown at this time. The rule is expected to benefit small business concerns that offer products comparable to those listed in the FPI catalog, by permitting those concerns to compete for DoD contract awards. The rule could also have a negative impact on small business concerns that provide supplies or services to FPI in support of its products. There are no known significant alternatives to the rule that would meet the requirements of 10 U.S.C. 2410n.

A copy of the analysis may be obtained from the point of contact specified herein.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 208, 210, 219, and 252

Government procurement.

Michele P. Peterson,

Executive Editor, Defense Acquisition Regulations Council.

■ Accordingly, the interim rule amending 48 CFR parts 208 and 210 which was published at 67 FR 20687 on April 26, 2002, is adopted as a final rule with the following changes:

■ 1. The authority citation for 48 CFR parts 208, 210, 219, and 252 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR chapter 1.

PART 208—REQUIRED SOURCES OF SUPPLIES AND SERVICES

■ 2. Section 208.601–70 is added to read as follows:

208.601–70 Definitions.

As used in this subpart—

Competitive procedures includes the procedures in FAR 6.102, the set-aside procedures in FAR subpart 19.5, and competition conducted in accordance with FAR part 13.

Market research means obtaining specific information about the price, quality, and time of delivery of products available in the private sector and may include techniques described in FAR 10.002(b)(2).

■ 3. Sections 208.602 and 208.606 are revised to read as follows:

208.602 Policy.

(a)(i) Before purchasing a product listed in the FPI Schedule, conduct market research to determine whether the FPI product is comparable to products available from the private sector that best meet the Government's needs in terms of price, quality, and time of delivery (10 U.S.C. 2410n). This is a unilateral determination made at the discretion of the contracting officer. The procedures of FAR 8.605 do not apply.

(ii) Prepare a written determination that includes supporting rationale explaining the assessment of price, quality, and time of delivery, based on the results of market research comparing FPI products to those available from the private sector.

(iii) If the FPI product is comparable, follow the policy at FAR 8.602(a).

(iv) If the FPI product is not comparable in one or more of the areas of price, quality, and time of delivery—

(A) Acquire the product using—

(1) Competitive procedures; or

(2) The fair opportunity procedures in FAR 16.505, if placing an order under a multiple award task or delivery order contract;

(B) Include FPI in the solicitation process and consider a timely offer from FPI for award in accordance with the requirements and evaluation factors in the solicitation, including solicitations issued using small business set-aside procedures; and

(C) When using a multiple award schedule issued under the procedures of FAR subpart 8.4—

(1) Establish and communicate to FPI the requirements and evaluation factors that will be used as the basis for selecting a source, so that an offer from FPI can be evaluated on the same basis as the schedule holder; and

(2) Consider a timely offer from FPI.

208.606 Exceptions.

For DoD, FPI clearances also are not required when—

(1) The contracting officer makes a determination that the FPI product is not comparable to products available from the private sector that best meet the Government's needs in terms of price, quality, and time of delivery; and

(2) The procedures at 208.602(a)(iv) are used.

■ 4. Sections 208.670 and 208.671 are added to read as follows:

208.670 Performance as a subcontractor.

Do not require a contractor, or subcontractor at any tier, to use FPI as a subcontractor for performance of a contract by any means, including means such as—

(a) A solicitation provision requiring a potential contractor to offer to make use of FPI products or services;

(b) A contract specification requiring the contractor to use specific products or services (or classes of products or services) offered by FPI; or

(c) Any contract modification directing the use of FPI products or services.

208.671 Protection of classified and sensitive information.

Do not enter into any contract with FPI that allows an inmate worker access to any—

(a) Classified data;

(b) Geographic data regarding the location of—

(1) Surface and subsurface infrastructure providing communications or water or electrical power distribution;

(2) Pipelines for the distribution of natural gas, bulk petroleum products, or other commodities; or

(3) Other utilities; or

(c) Personal or financial information about any individual private citizen, including information relating to such person's real property however described, without the prior consent of the individual.

PART 219—SMALL BUSINESS PROGRAMS

■ 5. Section 219.502–70 is added to read as follows:

219.502–70 Inclusion of Federal Prison Industries, Inc.

When using competitive procedures in accordance with 208.602(a)(iv), include Federal Prison Industries, Inc. (FPI), in the solicitation process and consider a timely offer from FPI.

■ 6. Section 219.508 is added to read as follows:

219.508 Solicitation provisions and contract clauses.

(c) Use the clause at FAR 52.219–6, Notice of Total Small Business Set-Aside, with 252.219–7005, Alternate A, when the procedures of 208.602(a)(iv) apply to the acquisition.

(d) Use the clause at FAR 52.219–7, Notice of Partial Small Business Set-Aside, with 252.219–7006, Alternate A, when the procedures of 208.602(a)(iv) apply to the acquisition.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 7. Sections 252.219–7005 and 252.219–7006 are added to read as follows:

252.219–7005 Alternate A.

Alternate A (Dec 2003)

As prescribed in 219.508(c), substitute the following paragraph (b) for paragraph (b) of the clause at FAR 52.219–6:

(b) *General.* (1) Offers are solicited only from small business concerns and Federal Prison Industries, Inc. (FPI). Offers received from concerns that are not small business concerns or FPI shall be considered nonresponsive and will be rejected.

(2) Any award resulting from this solicitation will be made to either a small business concern or FPI.

252.219–7006 Alternate A.

Alternate A (Dec 2003)

As prescribed in 219.508(d), add the following paragraph (d) to the clause at FAR 52.219–7:

(d) Notwithstanding paragraph (b) of this clause, offers will be solicited and considered from Federal Prison Industries, Inc., for both the set-aside and non-set-aside portion of this requirement.

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DEPARTMENT OF DEFENSE

48 CFR Part 216

[DFARS Case 2001–D013]

Defense Federal Acquisition Regulation Supplement; Provisional Award Fee Payments

AGENCY: Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to address the use of provisional award fee payments under cost-plus-award-fee contracts. The rule provides for successfully performing contractors to receive a portion of award fees within an evaluation period prior to a final evaluation for that period.

DATES: *Effective date:* January 13, 2004.

Applicability date: The DFARS changes in this rule apply to solicitations issued on or after January