List of Subjects in 48 CFR Part 2

Government procurement.

Dated: July 20, 2005.

Julia B. Wise,

Director, Contract Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 2 as set forth below:

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 1. The authority citation for 48 CFR part 2 is revised to read as follows:

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

■ 2. In section 2.101, amend paragraph (b), in the definition ''Information technology,'' by adding the words ''analysis, evaluation,'' after the word ''storage,'' revising paragraph (2) of the definition; and in paragraph (3)(ii), adding ''analysis, evaluation,'' after the word ''storage,''. The revised text reads as follows:

2.101 Definitions.

* * * * *

(b) * * *

Information technology * * *

(1) * * *

(2) The term ''information technology'' includes computers, ancillary equipment (including imaging peripherals, input, output, and storage devices necessary for security and surveillance), peripheral equipment designed to be controlled by the central processing unit of a computer, software, firmware and similar procedures, services (including support services), and related resources.

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[FR Doc. 05–14666 Filed 7–26–05; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 8

[FAC 2005–05; FAR Case 2005–004; Item II]

RIN 9000–AK23

Federal Acquisition Regulation; Documentation Requirement for Limited Sources Under Federal Supply Schedules

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to make editorial and restructuring changes to clarify the procedures when an ordering activity limits consideration of schedule contractors.

DATES: *Effective Date:* July 27, 2005.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Linda Nelson, Procurement Analyst, at (202) 501–1900. Please cite FAC 2005–05, FAR case 2005–004.

SUPPLEMENTARY INFORMATION:

A. Background

On June 18, 2004, DoD, GSA, and NASA published FAR case 1999–603 (69 FR 34231) amending the FAR to incorporate ordering procedures for orders against Federal Supply Schedules (FSS), including the documentation requirements for justifying sole source orders. The rule inadvertently established these justification and approval requirements for sole source orders instead of when an ordering activity restricts consideration of schedule contractors to less than the required number. This rule corrects that oversight. The final rule also based the content of the documentation requirements on that in FAR 6.303–2. By doing so, the rule established some unintentional and inapplicable content requirements, especially for orders under the simplified acquisition threshold (SAT). This rule corrects those unintended changes by establishing the standard for justifying restricted orders under the SAT and accurately specifying the justification content for restricted orders above the SAT.

The Councils agreed that the changes made did not substantively change the intent of the subpart but are merely a clarification and, therefore, publication for public comment is not required.

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 Regulatory Flexibility Act does not apply to this rule. This final rule does not constitute a significant FAR revision within the meaning of FAR 1.501 and Public Law 98–577, and publication for public comments is not required. However, the Councils will consider comments from small entities concerning the affected FAR Part 8 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 2005–05, FAR case 2005–004), 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.*

List of Subjects in 48 CFR Part 8

Government procurement.

Dated: July 20. 2005.

Julia B. Wise,

Director, Contract Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 8 as set forth below:

PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

■ 1. The authority citation for 48 CFR part 8 is revised to read as follows:

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

■ 2. Amend section 8.401 by revising the definition ''Multiple Award Schedule (MAS'') to read as follows:

8.401 Definitions.

* * * * *

Multiple Award Schedule (MAS) means contracts awarded by GSA or the Department of Veterans Affairs (VA) for similar or comparable supplies, or services, established with more than one supplier, at varying prices. The primary statutory authorities for the MAS program are Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251, *et seq.*) and Title 40 U.S.C. 501, Services for Executive Agencies.

* * * * *

■ 3. Amend section 8.405–1 in the second sentence of the introductory text of paragraph (c) by adding ''at least three schedule contractors through'' after the word ''surveying''; and adding paragraph (e) to read as follows:

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

* * * * *

(e) *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; and

(3) The amount paid.

■ 4. Amend section 8.405–2 by adding paragraph (e) to read as follows:

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

* * * * *

(e) *Minimum documentation.* The ordering activity shall document—

(1) The schedule contracts considered, noting the contractor from which the service was purchased;

(2) A description of the service purchased;

(3) The amount paid;

(4) The evaluation methodology used in selecting the contractor to receive the order;

(5) The rationale for any tradeoffs in making the selection;

(6) The price reasonableness determination required by paragraph (d) of this subsection; and

(7) The rationale for using other than—

(i) A firm-fixed price order; or

(ii) A performance-based order.

8.405–3 [Amended]

■ 5. Amend section 8.405–3 in paragraph (b)(2)(i) by removing the word ''additional''.

■ 6. Revise the section heading and text of section 8.405–6 to read as follows:

8.405–6 Limited sources justification and approval.

(a) Orders placed under Federal Supply Schedules are exempt from the requirements in Part 6. However, an ordering activity must justify its action when restricting consideration of schedule contractors to fewer than required in 8.405–1 or 8.405–2.

(b) Circumstances that may justify restriction include—

(1) Only one source is capable of responding due to the unique or specialized nature of the work;

(2) 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 must not have been previously issued under sole source or limited source procedures;

(3) The item is peculiar to one manufacturer. A brand name item, whether available on one or more schedule contracts, is an item peculiar to one manufacturer; or

(4) An urgent and compelling need exists, and following the ordering procedures would result in unacceptable delays.

(c) When an ordering activity restricts consideration of schedule contractors to fewer than that required in 8.405–1 or 8.405–2, the ordering activity shall procure such requirements under this subpart only if the need to do so is justified in writing and approved at the levels specified in paragraphs (d) and (f) of this subsection.

(d) *Orders exceeding the micro-purchase threshold, but not exceeding the simplified acquisition threshold as defined in 2.101.* For proposed orders exceeding the micro-purchase threshold, but not exceeding the simplified acquisition threshold, the ordering activity contracting officer shall document the circumstances when restricting consideration of schedule contractors to fewer than required in 8.405–1 or 8.405–2.

(e) *Orders exceeding the simplified acquisition threshold.* (1) For proposed orders 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) As 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 Source 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) Identification of the justification rationale (see 8.405–6(b)) 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 preclude the agency from meeting the requirements of 8.405–1 and 8.405–2 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.

(f) *Justification approvals.* (1) For proposed orders exceeding the simplified acquisition threshold, but not exceeding $500,000, 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 $500,000, but not exceeding $10 million, the justification must be approved by the competition advocate of the activity placing the order, or by an official named in paragraph (f)(3) or (f)(4) of this subsection. This authority is not delegable.

(3) For a proposed order exceeding $10 million, but not exceeding $50 million (or, for DoD, NASA, and the Coast Guard, not exceeding $75 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 (f)(4) of this subsection.

(4) For a proposed order exceeding $50 million (or, for DoD, NASA, and the Coast Guard, over $75 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.

8.405–7 [Removed]

■ 7. Remove section 8.405–7.

8.405–8 [Redesignated as 8.405–7]

■ 8. Redesignate section 8.405–8 as 8.405–7.

[FR Doc. 05–14667 Filed 7–26–05; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 14, 32, and 52

[FAC 2005–05; FAR Case 2004–003; Item III]

RIN 9000–AJ94

Federal Acquisition Regulation; Payment Withholding

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) by removing the mandatory requirement that a contracting officer withhold 5 percent of the payments due under a time-and-materials contract, unless it is necessary to withhold payment to protect the Government's interest or otherwise prescribed in the contract schedule. The final rule also amends FAR guidance that requires the use of a contract modification to withhold payment and to state that the withhold is to be made by the contractor.

DATES: *Effective Date*: August 26, 2005.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Jeremy Olson, at (202) 501–3221. Please cite FAC 2005–05, FAR case 2004–003.

SUPPLEMENTARY INFORMATION:

A. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 69 FR 29838, May 25, 2004, with request for public comments. The proposed rule would permit contracting officers to use their judgment regarding whether to withhold payments under time-and-materials and labor-hour contracts so that the withhold would be applied only when necessary to protect the Government's interests. The proposed rule also made it clear that normally there should not be a need to withhold payments when dealing with contractual release requirements in a timely manner. Six respondents submitted comments on the proposed FAR rule. Three of the six respondents supported the proposed rule, two of the six respondents supported it but with certain additional changes that would align it with the Defense Federal Acquisition Regulations Supplement (DFARS) rule that was published in the **Federal Register** at 68 FR 69631, December 15, 2003, and one of the six respondents requested clarification. A discussion of the comments is provided below. The Councils considered all comments and concluded that the proposed rule should be converted to a final rule with changes to the proposed rule. Differences between the proposed rule and final rule are discussed in Comments 1 and 2, below.

Align With DFARS

1. *Comment*: While five respondents supported the proposed rule, two stated that it is not consistent with the changes to relax the requirements included in the DFARS rule published in the **Federal Register** at 68 FR 69631, December 15, 2003. That rule stated that, if it was necessary to withhold payment to protect the Government's interest, the contracting officer would issue a modification requiring the contractor to withhold 5 percent of the amount due, up to a maximum of $50,000. One of the respondents stated the DFARS guidance should be applicable Governmentwide ''because requiring withholds to protect the interests of the Government is a serious matter, necessitating, in our opinion, the execution of a formal contract modification.'' In addition, the same respondent believes that, in most situations, it would be more efficient and less costly for both contractors and the Government if contractors take the withhold prior to submission of their invoices.

Councils' response: Concur. The Councils believes that, based on the analysis performed for the DFARS rule, it would be more efficient and less costly for both contractors and the Government if contractors take the withhold prior to the submission of their vouchers. In addition, in order to make it clear that the Government is exercising its right to a payment withhold to protect its interests, a contract modification should be issued requiring the withhold of payment under time-and-materials and labor-hour contracts. Therefore, the Councils have revised the guidance at FAR 32.111(a)(7)(iii) and the clause at FAR 52.232–7(a)(2) to require the use of a modification to withhold payment and to allow for the withhold to be made by the contractor instead of by the Government payment office. The Councils note that this clause does not preclude the Government from withholding other amounts due to non-performance, delivery of non-conforming goods, or other failure(s) to comply with contract requirements.

Task Order Versus Entire Contract

2. *Comment*: A respondent stated that the proposed rule is unclear as to whether the $50,000 ceiling on withholding applies to an individual task or to an entire contract. It recommended the proposed rule be clarified to identify the basis for application of the ceiling. The respondent added that it had previously recommended in an audit report that the $50,000 ceiling be applied to each order where orders are closed separately. The respondent's recommendation is based on the belief that the clarification will assist contracting officers in performing their jobs.

Councils' response: The Councils agree that it would assist both contractors and the Government if the proposed rule were clarified as to whether the withhold ceiling applies to an entire contract or to individual orders. Such a clarification would reduce any possible confusion by either party as to the applicability of the ceiling and thus remove the potential for disagreements. The Councils agree that the withhold ceiling applies to the entire contract. Therefore, the Councils have revised the guidance at FAR 32.111(a)(7)(iii) and the clause at FAR 52.232–7(a)(2) to clarify that the withhold ceiling applies to the total contract.

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 Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration 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 the rule applies only to time-and-materials and labor-hour contracts. Time-and-