



**COMPANIES CREATING
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KNOWLEDGE**

May 6, 2002

Ms. Susan Schneider
OUSD (AT&L)DP(DAR)
IMD 3C132
3062 Pentagon
Washington, D.C. 20301-3062

Re: DFARS Case 2001-D-017 "Competition Requirements for Purchases of Services Under Multiple **Award** Contracts"

Dear **Ms.** Schneider:

The Professional Services Council (**PSC**) is the nation's principal trade association of government professional **and** technical services providers. It represents the full **range** of information technology, research **and** development, engineering, **high** end consulting, **and** other for-profit **firms** supporting the federal government's **many** missions in virtually every federal agency. PSC has been **a** leading voice for **the** industry regarding the federal government's acquisition policies for services.

On behalf of **the** Professional **Services** Council, I **am** pleased to **submit these comments in response to** the April 1, 2002 Federal Register notice inviting public comment on the **rule** implementing Section 803 of the Fiscal Year 2002 Defense Authorization Act. The Act requires the **Secretary** of Defense **to issue DFARS** regulations requiring "competition" in the individual purchase of services in **excess** of \$100,000 that is made under a multiple **award** contract unless certain exceptions are met. **In our** view, the proposed rule needs substantial revision before it is adopted in final **form**. We are concerned about the **way** the DAR Council has addressed the statutory requirements in **the** rule; we **are** also concerned that the DAR Council **has** failed to **address** key **areas** of the **statute** or provided meaningful guidance to **the** defense acquisition community to assist in properly **implementing** the statute. **Our** detailed comments are below.

However, we compliment the DAR Council on two initiatives related **to this** rule. The first is the public meeting held on April 29. It may have been valuable for the **DAR** Council members and staff to address issues **and question** commentators on the issues identified in **the** Federal Register notice, **as well as** to read the final submitted written comments. **In** addition, we **strongly** support the public posting of comments on **the web**; it was through that mechanism **that** we found **a** number of **concerns that** we **had** not focused **as** significantly on, while others we disagreed **with**. Nevertheless, each of the comments was worth reading. We hope the **DAR** Council will continue with this posting process; maybe in the future, without **a** statutory **deadline**, there will be more time for the **submission** of initial comments **and then** time **for** a round of "support or rebuttal" submissions before the Council concludes its rulemaking.

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I. DEFINITIONS

1. **Although** not **every** section of the proposed rule provides it, we believe that coverage would be improved **with** the inclusion **of a** “definition” section **for** each part of the **rule, and** expanding on the coverage already included **in 216.501-1**. There **are key** terms defined in the law that would aid the acquisition community if they were included **and** explained in the rule. For example, Section 803 (c)(1) of the Act **defines the term** “individual purchase” **as a** “task order, delivery order or other purchase.” By implication, there are “purchases” covered **by the statute, and** activities that do not **amount to** “purchases” covered by the **statute. In our view, that** latter category includes modifications to contracts **and** establishing basic ordering agreements **and** BPAs. The rule would be **stronger** if it defined those routine contracting functions that are covered by the rule **and** examples of functions that are not covered by the rule.

11. ACQUISITION PLANNING

2. We believe the **rule** would benefit from minimal additional coverage on the importance of acquisition planning, particularly for anticipated purchases of significant dollar amounts to be made under the GSA Schedules. If notice **is** not provided **to** “all” of the GSA Schedule holders “offering **(such) services**” that meet **the defense agency’s** needs, the contracting officer must receive offers **from** three qualified contractors or make a written determination that additional qualified contractors could not be identified despite reasonable efforts to do **so. Thus,** contracting officers should be able to utilize market research **and** other acquisition planning techniques to help identify the universe of qualified contractors offering (such) services capable of competing for the **agency’s need**.

3, Having done such planning in advance of the **purchase** action, **and using** such **information** in providing the appropriate notice, the contracting officer **will be in the** best possible position to document for **the** contract file either the receipt of offers **from at least three qualified** contractors or the reason why no additional **qualified** contractors could **be** identified “despite reasonable efforts to do **so.**” In fact, the August 23, 2001 proposed **FAR** rule entitled “Task Order and Delivery Order Contracts” provides **that** orders placed under FSS schedule contracts and certain multiple award contracts **are** subject to **the** acquisition planning requirements of the **FAR**. That August proposed FAR guidance **is** wholly appropriate **and** we recommend that **the** language from the proposed **FAR** rule be incorporated into **this DFARS rule**.

III. DFAR 208.404-70

With respect to the addition **of new DFAR 208.404-70, we** have several comments.

4. With respect **to subparagraph (b)(1), the** statute provides waiver **authority** from the application of the rule if **one** of four circumstances described in 10U.S.C. 2304c(b) applies to the individual



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purchase. Those four statutory circumstances **are properly** addressed in **FAR 16.505(b)(2)**, clauses (i) through (iv). However, in **this** subparagraph, **only** three of the **four** statutory waiver provisions are recognized. All **four** statutory “circumstances” must be included in the final 208.404-70 rule for DoD orders from the Federal Supply Schedule. **Thus**, we recommend revising **the** phrase “**through (iii)**” to read “**through (iv)**”. The proposed rule properly recognizes all **four** of these statutory “circumstances” when addressing multiple **award** contracts under new DFARS 216.505(b)(1).

5. Where the contracting officer finds that **one** of the **statutory** circumstances exists to justify a waiver of the **provisions**, she/he must **make a** Written determination to that effect. Both the General Accounting Office **and** the DoD Inspector **General** cited the absence of **any** waiver justification documentation in the contract files **as** one of the Department’s **major** deficiencies in using multiple award contracts, including the **GSA** Schedules. Therefore, we recommend that the rule add coverage on the essential, but minimal, elements of **the written determination required to support the waiver** decision, beyond those called out by the addition of DFARS 208.404(b)(7).

6. In **subsection (c)(1)(i)**, we recommend the addition of clarifying explanatory material to describe in **greater detail the phrase “offering such services”** as that phrase is used in **the law and** in these regulations. It is **clear that Congress recognized that** multiple award Schedules have very broad scope of **work** statements, **and** that not every awardee on the Schedules has **the** skills or capabilities to meet every requirement **the agency** orders from **the** Schedules. **As** such, in Section 803, **Congress** permitted the Department to provide notice to “**all** contractors offering such services” under the Schedules **and to** “**fewer than all**” contractors under the Schedules provided that notice was provided to “**as many as practicable**” of the vendors **who** provide the services.

7. Thus, even a short description of **the phrase “offering such services”** would help guide the acquisition community in assessing, for purposes of subsequent notice, who **are** “**all**” of the Schedule holders or who **are** “**as many as practicable**” of the Schedule holders. **For** example, for purchases under **the** GSA Schedule, the **use** of a **special** item number (SIN) descriptor may be a sufficient category **of** “**such services**” to meet **the** requirements of the statute.

8. Further in subsection (c)(1)(i), we believe it appropriate to add coverage **in the final rule to** the effect that a **defense** agency **using** FedBizOpps or other **similar** broad-based notification system is deemed to have provided “**notice**” to all, provided that **such** notice also meets **the** other elements **of the statute and permits interested offerors** a reasonable (**minimum**) period of time to respond and the agency provides **a fair consideration of all offers submitted**.

9. Subsection (c)(2) **addresses** provisions **when notice** is not provided to all contractors offering **such** services under **the** GSA schedule. We recommend adding after the **phrase “to as many as practicable”** the phrase “**offering such services** under the multiple award schedule.” It is

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axiomatic that if the notice cannot be to all awardees offering the services to meet the **agency's** need, then notice should **at least be provided** to **"as many as practicable" who are offering the** services.

10. Furthermore, the proposed rule fails **to provide the DoD** acquisition community with needed guidance on the implementation of several **key** terms used **in the** statute. For example, there is no elaboration on the meaning or expectations for implementing the provisions in 208.404-70(c)(2) requiring notice to **"as many contractors as practicable,"** or the provisions in (c)(2)(ii) regarding the documentation standards for the contracting **officer's** written determination (beyond FAR 8.404(b)(7)) or **any** interpretation **of** the phrase **"no additional qualified contractors could be identified despite reasonable efforts to do so."** These are critical provisions of **the** law, **and** while it is unnecessary to include **detailed** instructions, minimal guidance interpreting these terms will determine whether the compliance with **the** law **and** the implementing regulations becomes a significant added **burden** on the workforce.

11. **In this** regard, we acknowledge the April 11, 2002, **written** comments to the **DAR** Council Director by the Director of Defense Procurement (DDP) **urging** additional regulatory guidance. As to the -70(c)(2) clause, she is right in her rationale that the intent of this section of the law and the rule is for the agency **to receive at least three offers**, "not for the contracting officer to perform **an** exhaustive search that wastes **industry** and government resources." However, we do not believe **the** DDP's suggested language adequately **addresses the statute** or meaningfully assists contracting officers since **she** recommends additional guidance emphasizing that the term "practicable" means notice to **as many** "to reasonable ensure that, in the Government's judgment, that (sic) **at least three offers** will be received from qualified contractors." **One the one hand, this** language establishes a meaningless **standard for knowing how** to plan the acquisition or provide the notice since the **standard** in the law is **actual** receipt **of** three offers, not a "judgment" that three offers will be (but may not be) received; **on the other hand,** it ignores the existence of the statutory alternative when three offers are not received of **making a** determination that no additional qualified contractors were able to be identified despite reasonable **efforts** to do so.

12. We believe a fair reading of **the** term "as **many as practicable**" **also takes** into account both the number of offerors capable of performing **the work and the number** of offers the agency is reasonably able to evaluate, consistent **with** the agency's **mission,** resources **and** the timetable for the needed services to be acquired. **In that regard,** while we have elsewhere questioned the appropriateness of **the** standard of "efficient competition" under FAR 15.306(c)(2), **the** April 24, 2002, comment **submitted** on this rule by Mr. Meyer of TACOM **on this point, when used in the** context **of this rule, has merit.**

13. Also with respect to (c)(2), **we** recommend adding to the lead-in **text** after the **phrase** **"contractors as practicable"** a comma **and** the phrase "affords all contractors responding to the

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notice a fair opportunity to submit an offer and have that offer fairly considered. -- There are three separate elements to the "fairness" standard under the statute: fair notice to "all" offering such services, fair opportunity for all to submit an offer, and the opportunity to have any offer that is submitted fairly considered by the agency; each must be appropriately addressed in the rule, including in this subsection where alternative procedures are specifically authorized for orders under the GSA Schedules.

14. Further, paragraph (c)(2)(ii) requires, if offers are not received from three qualified contractors, that there be a written determination that no additional qualified contractors could be identified despite reasonable efforts to do so. The April 11, 2002, comments from the Director of Defense Procurement properly recommend the inclusion of guidance to describe what type of documentation is required, including taking into account the dollar value and complexity of the requirement. We agree that the determination must be more than the bald statement: "I think we did an adequate job." In our view, beyond new proposed DFARS 208.04(b)(7), the documentation would be sufficient if it included information developed by the acquisition team during the acquisition planning phase, coupled with the requirements assessment and the evaluation of offers received, including specialized contractor skills, successful experience performing the same or similar work, and the record of past performance. Even a "no bid" response, while not a "qualified offer", can be used to demonstrate the efforts used to find qualified contractors.

15. It would be important to also include in this section guidance that no additional action (such as re-solicitation) is required by the contracting officer after the initial receipt of proposals, even if less than three offers are received. In such a case, the written determination should be prepared.

16. We strongly oppose the provision in subparagraph (d)(2)(i) that a single BPA must establish a "firm fixed-price" for "tasks or services" identified in the statement of work. There is no statutory requirement, and no policy justification, to limit single award BPAs to a "firm fixed price" proposal. This formulation is inappropriately and unnecessarily contrary to the existing Federal Supply Schedule guidance for such orders. The clause is also confusing by using the word "tasks" and the phrase "tasks or services". Since the limitation in the statute and the rest of the regulation is about the ordering of services in excess of \$100,000, we recommend revising subparagraph (d)(2)(i) in its entirety to state:

"For a single BPA, describes the work the contractor must perform and the price for the services identified in the statement of work."

Alternatively, we support the re-formulation of this subparagraph (d)(2)(i) included in paragraph (3) of the April 11, 2002, memo from the Director of Defense Procurement providing her comments on the proposed rule to the DAR Council Director.



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IV. DFARS 216.505-70

With respect to the addition of new DFARS 216.505-70, we also have several comments.

17. In subsection (a)(2), we recommend that the lead-in phrase **provide** that it “Applies to each order”.

18. In subsection (c)(1), we recommend the addition of clarifying **explanatory material to describe** in greater detail the phrase “offering **such services**” as that phrase is used in the law and in these regulations. It is clear that Congress recognized that multiple award **contracts may** have a large scope of work statement, **and** that **not every** awardee of the multiple award contract has the **skills** or capabilities to meet every requirement the agency may purchase through **the** contract. The guidance in **216-505(d)**, **and in particular (d)(3)**, **provides** appropriate protections to avoid arbitrary **segmentation** or allocations.

20. In subparagraph (d), we applaud the **provisions that** encourage **the** contracting officer to keep submission requirements **to the minimum** and reinforce their **authority to use** streamlined procedures, including **oral presentations**. We recommend **revising (d)(3)(ii)** to **add after the phrase “would not result in fair”** the phrase “notice or fair”. Since there are **three** separate elements to the “fairness” standard **under the statute -- fair notice** to all offering such services, fair opportunity to submit **an** offer, **and the opportunity to have any offer** submitted **fairly** considered by the **agency -- each must** be appropriately **addressed**. Subparagraph (d)(3)(ii) should properly reference the **two** of the **three** elements that are **within the government’s** control,

21. We further recommend revising (d)(3)(ii) **to add after the phrase “given to all awardees”** the phrase “offering **such services**”; **as** noted above, the statute **does** not require, **and the rule** should not require, that every **awardee receive notice of every** task opportunity, unless **they are** “offering such services” under the instant multiple **award** contract.

22. **Finally**, since **the ordering** requirement for multiple award **contracts** (other **than** Schedules) is not changed by Section 803, **we** recommend adding to the end of this subsection a new subparagraph **(4) that states**: “The contracting officer should follow the ordering provisions in 16.505(a)(1) through (5).” [Note: **We have** intentionally excluded **paragraph (6)** of **existing FAR 16.505(a)**.]

23. In subsection (e), we also support the provision that **the** contracting office take into account past performance **on earlier** orders, **including quality**, timeliness **and cost control**. **To the extent applicable, these** procedures should also be added **to the coverage for purchases under GSA schedules provided for in Part 208** of the proposed rule. While **these** provisions replicate **those** found at FAR 16.505(b)(1)(iii), **they are still appropriate here. However, the inclusion of these**



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provisions raises **questions as to why other** appropriate provisions in **FAR 16.505 are not included or** cross-referenced **in** this DFAR rule.

V. GENERAL

Timing

24. With respect to the rule **as a whole**, we recommend that the final rule provide explicit **guidance on the timing** of its applicability. Section 803(d) of the statute provides **an** effective date of the **regulations as not later than 180 days after its enactment and** the rule then applies to all individual **purchases over \$100,000 made on or after the effective date** of the rule, without regard to the date of the award of the multiple **award** contract.

Ordering Clauses

25. **Further, this rule does not** propose **any** contract clauses to **be included in new** DoD-awarded **multiple award contracts**. We believe that a contract clause governing the ordering requirements **and the “fair opportunity”** to submit **an offer** should be developed and applied when purchases under those contracts are made **by** a defense agency. A variation of **the FAR 52.216-27** clause may be **sufficient**.

26. There are **special** actions **that will need to** be taken **to** deal with new “individual purchases” by a defense agency made from **an** existing multiple award contract – whether that contract was originated by **DoD or another federal agency**; contracting officers should also be given **guidance** on language **to** be included in **those** orders.

Small Business Set-asides

27. **Several of our member** companies have asked whether **Section 803 permits Defense agencies to** continue **with their** acquisition **strategies** to set-aside **a portion of the work** under multiple-**award** contracts **exclusively** for **small** business participation. In **our** view, **these** set-asides **cannot** continue because of the explicit statutory requirement for a “fair opportunity **for** all contractors offering **such** services” to submit **an offer** and have it **fairly** considered by the **agency**. However, where **the** multiple **award** contract **already provides** segmentation **for small** business such **that a** portion of the total award **has** been set-aside for small business (or other category of awardee), then the agency **is** free to implement its acquisition strategy **and to provide** notice to “all” **who** provide that **service** within the segmentation **that has** already **been** established.

28. **In our view**, defense agencies **may** continue **with** its **set-asides for 8(a) firms or HUBZone businesses** or other specific set-aside **programs for** purchases made under either **the GSA** Schedule or the **multiple award contract** if the set-aside program meets the standard of the law



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that "a statute expressly authorizes or requires that a purchase be made from a specific source." For this **same** reason, the rule should exclude architect-engineering or other services acquired under the **Brooks A-E Act**, and should highlight **any** other specialized acquisition **that** qualifies.

VI. PROPOSED FAR RULE ON "E-POSTING"

On February 15, 2002, the **FAR** Council published a proposed rule entitled "Electronic Listing of Acquisition Vehicles **Available** for Use **by** More **Than** One Agency." We **strongly** recommend that the FAR Council **take final** action on that government-wide rule in sufficient time for the DAR Council to be able to **incorporate** appropriate provisions into this final rule. Alternatively, appropriate language should be imported **from** that proposed rule into the **DFARS**.

VII. CONCLUSXON

The proposed rule needs significant improvement before it **is** finalized. As written, it fails to provide the **full** implementation of the statute and **fails to** provide meaningful guidance to the contracting community. In addition, the **final** rule needs to **take** into account the impact of implementation on **the** defense agency **making** the purchase, **any** agency administering a multiple award contract, and the contracting community that is **among** the beneficiaries of this rule. Among the specific impacts **are** the timing of purchases, the **training** requirements, and the impact on staffing for both the defense agency **and** the contractors.

As the leading trade association representing the professional **and** technical services companies, PSC would be pleased to join with the Department **in the** development and delivery of appropriate training on **this** law **and** the final rule for **both** government program **and** contracting officials **and** the contractor community. The training will need to **use a variety** of media, and several PSC member companies have extensive experience in delivering **training** to the acquisition **community that** should be **taken** into account. In addition, the training **and training** material should **be** available **as** quickly **as** possible in order to meet the statutory effective date.

Thank **you** for **your attention to these** comments. If **you** have **any** questions, or **if you** need **any** additional information, please do not hesitate to call me **at** (703) **875-8148** or **by** e-mail at chvotkin@pscouncil.org.

Sincerely,

Alan Chvotkin, Esq.
Senior Vice President