

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS

2111 Wilson Boulevard, Suite 400
Arlington, VA 22201
www.codsia.org
(703) 247-9490

May 6, 2002
CODSIA Case No. 2-02

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

Re: DFARS Case 2001-D017, "Competition Requirements for Purchases of Services Under Multiple Award Contracts"

Dear Ms. Schneider:

The undersigned members of the Council of Defense and Space Industry Associations (CODSIA) appreciate the opportunity to comment on the proposed DFARS rule implementing Section 803 of the Fiscal Year 2002 Defense Authorization Act, as published in the *Federal Register* on April 1, 2002 (67 Fed. Reg. 15351). For the reasons outlined below, it is recommended that this rule be substantially revised before being adopted.

Formed in 1964 by industry associations with common interests in defense and space fields, CODSIA is currently comprised of seven associations representing over 4000 member companies across the nation. Participation in CODSIA projects is strictly voluntary; a decision by any member association to abstain from participating in a particular activity is not necessarily an indication of dissent.

Section 803 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. We are concerned about the way the DAR Council has addressed the statutory requirements in the rule. In addition, we are also concerned that the Council has not adequately addressed key areas of the statute or provided sufficient guidance to the defense acquisition community to assist in properly implementing the statute.

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 included in 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. That latter category includes modifications to contracts, establishing basic ordering agreements and ancillary purchases in support of commercial items. The rule would be stronger if it defined those routine contracting functions covered by the rule and examples of functions that are not covered by the rule. By including these terms, we do not intend or desire to limit the latitude or flexibility of the contracting officer to execute the actions necessary to fulfill the agency's needs or to comply with the statute.

2. In addition, the rule should be more explicit that any purchase that meets the standard of the law that "a statute expressly authorizes or requires that a purchase be made from a specific source" is also exempt from coverage and the contracting officer should "automatically" use the waiver authority. Thus, for example, the rule should specifically exclude architect-engineering or other services acquired under the Brooks A-E Act, or any other specialized acquisition that meet the standards of Section 803.

ACQUISITION PLANNING

We believe the rule would benefit from minimal additional coverage on the importance of acquisition planning. Contracting officers should be able to utilize market research and other acquisition planning techniques to help identify the universe of qualified contractors offering services capable of competing for the agency's need. 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." The August 23, 2001, proposed FAR rule entitled "Task Order and Delivery Order Contracts" provides that orders placed under Federal Supply Schedule (FSS) contracts and certain multiple award contracts are subject to the acquisition planning requirements of the FAR. That August proposed FAR guidance should be incorporated into this DFARS rule.

DFARS 208.404-70

1. With respect to 208.404-70(b)(1), the statute provides waiver authority from the application of the rule if one of four circumstances described in 10 U.S.C. 2304c(b) applies to the individual purchase. 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. We recommend revising the phrase "through (iii)" to read "through (iv)".

2. Where the contracting officer finds that one of the circumstances exists to justify a waiver of the provisions, the contracting officer must make a simple 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 elements of the written determination required to support the waiver decision, beyond those already described in the proposed rule.

3. In subsection (c)(1)(i), we recommend the addition of explanatory material to describe in greater detail the phrase "offering such services" as that phrase is used in the law and in the proposed regulation. 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. 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 notice requirements of the statute. Further, we believe it appropriate to add coverage to the effect that defense agencies using FedBizOpps or similar notification procedures to provide notice of opportunities are presumptively construed to have provided "notice" to all, provided that the notice provides a reasonable period of time for interested parties to respond to the notice and the agency provides a fair consideration of all offers submitted.

4. Subparagraph (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."

5. The rule should provide the DoD acquisition community with 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, or the 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 minimal guidance on them will help the government team use their flexibility and business judgment to meet the agency's purchasing needs in a timely manner.

6. We believe a fair reading of the term "as many as practicable" needs to take 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 its mission, resources and the timetable for the needed services to be acquired

7. 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 notice a fair opportunity to submit an offer and have that offer fairly considered". Each of the three separate elements to the "fairness" standard under the statute must be appropriately addressed in the final rule.

8. Further, subparagraph (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. In our view, the documentation to support such determination would be sufficient if it included information developed 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 to find qualified contractors.

9. 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.

10. We strongly oppose the provision in subparagraph (d)(2)(i) that a single Blanket Purchase Agreement (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 FSS guidance for such orders. 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."

DFARS 216.505-70

1. With respect to the addition of new DFARS 216.505-70, in subparagraph (a)(2), we recommend that the lead-in phrase provide that it "applies to each order".

2. In subparagraph (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 on a 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.

3. 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. We further recommend revising (d)(3)(ii) to add after the phrase "given to all awardees" the phrase "offering such services".

Ms. Susan L. Schneider

May 6, 2002

Page 5

4. In subparagraph (e), we support the provision that the contracting officer 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 appropriate here, as well.

PROPOSED FAR RULE ON "E-POSTING"

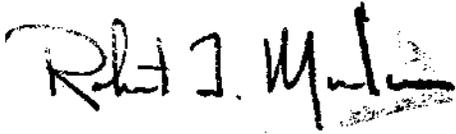
On February 15, 2002, the FAR Council published a proposed rule entitled "Electronic Listing of Acquisition Vehicles Available for Use by More Than One Agency." We strongly recommend that the FAR Council take final action on that government-wide rule in sufficient time for the DAR Council to be able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

Once again, thank you for the opportunity to provide our comments. If there are any questions, or if we can be of assistance, please contact Alan Chvotkin, the CODSIA Project Officer for this case, at (703) 875-8059.

Sincerely,

(SEE ATTACHED CODSIA SIGNATORIES)

Sincerely,



Robert T. Marlow
Vice President, Government Division
Aerospace Industries Association



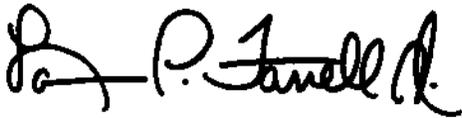
Lorraine M. Lavet
Chief Operating Officer
American Electronics Association



Gary D. Engebretson
President
Contract Services Association



Dan C. Heinemeier
President, GEIA
Electronic Industries Alliance



Lt. Gen. Lawrence P. Farrell, Jr., USAF (Ret.)
President and CEO
National Defense Industrial Association



Alan Chvotkin
Senior Vice President
Professional Services Council