"Thornton, Karen HQ02" <Karen.Thornton@HQ02.USACE.ARMY.MIL> on
11/13/2001 02:48:38 PM

To: "'dfars@acq.osd.mil'" cc: "Petersen, David L HQ02", "Adams, Michael J HQ02"
Subject: DFARS Case 2000-D020

Dear Sir or Madam,

The following comments are offered in response to the request for comments in the September 11, 2001 Federal Register, regarding a proposed DFARS rule to add policy for application of the Balance of Payments Program to construction contracts that would replace the existing FAR policy for DOD. These comments come from the U.S. Army Corps of Engineers Pacific Ocean Division.

(a) DFARS 225.7501 (a) (2) (ii) does not indicate who makes the determination that an item is by its nature or as a practical matter best acquired in the specific geographic area concerned. Previously, the authority to make this determination was reserved to the HCA. In contrast, DFARS 225.7501 (a) (5) (iv) allows the contracting officer to determine use of a particular domestic construction material is impracticable. These determinations appear to be related in the sense that one is a determination of practicality and the other is of impracticability. It would appear reasonable to revise (a) (2) (ii) to allow the contracting officer to make the (a) (2) (ii) determination for the particular requirement under consideration. I assume that would be the case by default anyway, but clarification on this point would be helpful.

(b) DFARS 225.7501 (a) (1) provides for a determination before solicitation that the estimated cost of the acquisition or the value of a particular construction material is at or below the simplified acquisition threshold, yet the clause at DFARS 252.225.70XX provides that "(b) . . . "The Contractor shall use only domestic construction material in performing this contract, except for - (1) Construction material valued at or below the simplified acquisition threshold in part 2 of the Federal Acquisition Regulation; or (2) The construction materials or components listed by the Government as follows: [Contracting Officer to list applicable excepted materials or indicate "none."] If before solicitation, the Government has determined in accordance with 225.7501 (a) (1) that the value of certain construction material is at or below the SAP threshold, such material will be listed under (b) (2) of the clause, yet (b) (1) would allow the bidder to determine that a construction material otherwise determined by the contracting officer to be estimated at above the SAP threshold is nonetheless excepted out of IBOP because the bidder has determined the actual cost is less than the SAP. The difficulty here is that the contracting officer would not know the bidder has made this determination. This fact would become known only during the submittal process. I would anticipate many debates over the definition of "construction material" for the purpose of estimating costs versus the definition used by the contractor in preparing its bid. This potential contract administration problem can be eliminated by deleting (b) (2) and making the contracting officer's pre-solicitation determination on SAP threshold exceptions controlling in all cases despite actual cost.

(c) In regard to the proposed elimination of IBOP, we continue to support our original view that elimination is preferable to reform. Although the proposed DFARS revision would be helpful, the fundamental issues remain. IBOP drives up the costs of local projects, slows down project execution due to long lead-time delivery of construction materials from the United States, increases life cycle maintenance costs for U.S. materials delivered under construction contracts, and requires burdensome, imprecise, and at times unrealistic assumptions in the cost estimating process.