



Federal Register

**Thursday,
August 23, 2001**

Part IV

Department of Defense General Services Administration

National Aeronautics and Space Administration

**48 CFR Parts 2, 7, 8, 16, and 17
Federal Acquisition Regulation; Task-
Order and Delivery-Order Contracts;
Proposed Rule**

**DEPARTMENT OF DEFENSE
GENERAL SERVICES
ADMINISTRATION
NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION**

48 CFR Parts 2, 7, 8, 16, and 17

[FAR Case 1999–303]

RIN 9000–A172

Federal Acquisition Regulation; Task-Order and Delivery-Order Contracts

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

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to further implement Subsections 804(a) and (b) of the National Defense Authorization Act for Fiscal Year 2000. These subsections focus primarily on appropriate use of task-order and delivery-order contracts and specific steps agencies should take when placing orders under task-order and delivery-order contracts established by another agency. The proposed amendment also clarifies that written acquisition plans may be required for orders as determined by the agency head.

DATES: Interested parties should submit comments in writing on or before October 22, 2001 to be considered in the formulation of a final rule.

ADDRESSES: Submit written comments to: General Services Administration, FAR Secretariat (MVR), 1800 F Street, NW, Room 4035, ATTN: Laurie Duarte, Washington, DC 20405.

Submit electronic comments via the Internet to: farcase.1999–303@gsa.gov

Please submit comments only and cite FAR case 1999–303 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Julia Wise, Procurement Analyst, at (202) 208–1168. Please cite FAR case 1999–303.

SUPPLEMENTARY INFORMATION:

A. Background

On April 25, 2000, the Councils published a final rule, FAR case 1999–014, Competition Under Multiple Award Contracts, in the **Federal Register** at 65 FR 24317, to clarify what

contracting officers should consider when planning for multiple awards of indefinite-delivery contracts, and clarify how orders should be placed against the resultant contracts. That rule implemented portions of Subsections 804(a) and (b) of the National Defense Authorization Act for Fiscal Year 2000. This rule proposes to further strengthen that policy and the implementation of Subsections 804(a) and (b) of the National Defense Authorization Act for Fiscal Year 2000 in several ways.

With respect to acquisition planning, the rule draws greater attention to the capital planning requirements of the Clinger-Cohen Act (40 U.S.C. 1422) and ensures more deliberation by agency acquisition planners before orders are placed under a Governmentwide acquisition contract, a task-order or delivery-order contract issued by another agency, or the multiple award schedules program. The Councils are continuing to review the agency acquisition planning practices of customers of inter-agency contracts to determine if additional guidance is needed to ensure strategic use of these vehicles.

With respect to the structuring of orders and the consideration given to contract holders prior to order placement, the rule (1) increases attention to modular contracting principles to help agencies avoid unnecessarily large and inadequately defined orders, (2) facilitates information exchange during the fair opportunity process so that contractors may develop and propose solutions that enable the Government to award performance-based orders, and (3) revises existing documentation requirements to address the issuance of sole-source orders as logical follow-ons to orders already issued under the 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 Councils do not expect this proposed rule to 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 merely clarifies existing language. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. We invite comments from small businesses and other interested

parties. The Councils will consider comments from small entities concerning the affected FAR Parts 2, 7, 8, 16, and 17 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.* (FAR case 1999–303), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed 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 parts 2, 7, 8, 16, and 17:

Government procurement.

Dated: August 20, 2001.

Gloria Sochon,

Acting Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA propose that 48 CFR parts 2, 7, 8, 16, and 17 be amended as set forth below:

1. The authority citation for 48 CFR parts 2, 7, 8, 16, and 17 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

2. Amend section 2.101 by adding, in alphabetical order, the definitions “Governmentwide acquisition contract” and “Multi-agency contract (MAC)” to read as follows:

2.101 Definitions.

* * * * *

Governmentwide acquisition contract means a task-order or delivery-order contract for information technology established by one agency for Governmentwide use that is operated—

(1) By an executive agent designated by the Office of Management and Budget pursuant to Section 5112(e) of the Clinger-Cohen Act, 40 U.S.C. 1412(e); or

(2) Under a delegation of procurement authority issued by the General Services Administration (GSA) prior to August 7, 1996, under authority granted GSA by the Brooks Act, 40 U.S.C. 759 (repealed by Pub. L. 104–106). The Economy Act does not apply to orders under a Governmentwide acquisition contract.

* * * * *

Multi-agency contract (MAC) means a task or delivery order contract established by one agency for use by Government agencies to obtain supplies and services, consistent with the Economy Act. Multi-agency contracts

include contracts for information technology established pursuant to section 5124(a)(2) of the Clinger-Cohen Act, 40 U.S.C. 1424(a)(2).

* * * * *

PART 7—ACQUISITION PLANNING

3. Amend section 7.101 by adding, in alphabetical order, the definition “Order” to read as follows:

7.101 Definitions.

* * * * *

Order means an order placed under a task-order contract or delivery-order contract awarded by another agency (*i.e.*, a Federal Supply Schedule contract, Governmentwide acquisition contract, or multi-agency contract).

* * * * *

4. In section 7.103—

a. Revise the introductory text and paragraphs (e) and (q);

b. Amend the second sentence of paragraph (r) by removing the word “contracts” and adding “contract types” in its place; and

c. Add paragraph (t) to read as follows:

7.103 Agency-head responsibilities.

The agency head must prescribe procedures for—

* * * * *

(e) Writing plans either on a systems basis, on an individual contract basis, or on an individual order basis, depending upon the acquisition.

* * * * *

(q) Ensuring that no purchase request is initiated or contract entered into that would result in the performance of an inherently governmental function by a contractor and that all contracts or orders are adequately managed so as to ensure effective official control over contract or order performance.

* * * * *

(t) Ensuring that agency planners on information technology acquisitions comply with the capital planning and investment control requirements in 40 U.S.C. 1422 and OMB Circular A–130.

5. Amend section 7.104 by revising the first sentence of paragraph (a); in the second sentence of paragraph (b) by adding “with” after the word “consult”; and by revising the second sentence of paragraph (c) to read as follows:

7.104 General procedures.

(a) Acquisition planning should begin as soon as the agency need is identified, preferably well in advance of the fiscal year in which contract award or order placement is necessary. * * *

* * * * *

(c) * * * If the plan proposes using other than full and open competition when awarding a contract, the plan shall also be coordinated with the cognizant competition advocate.

6. Amend section 7.105 in the first sentence of the introductory paragraph by removing “subparagraph” and adding “paragraph” in its place, and in the fifth sentence by adding “or orders” after the word “contracts”; and by revising paragraph (b)(4) to read as follows:

7.105 Contents of written acquisition plans.

* * * * *

(b) * * *

(4) *Acquisition considerations.* (i) For each contract contemplated, discuss contract type selection (see part 16); use of multiyear contracting, options, or other special contracting methods (see part 17); any special clauses, special solicitation provisions, or FAR deviations required (see subpart 1.4); whether sealed bidding or negotiation will be used and why; whether equipment will be acquired by lease or purchase (see subpart 7.4) and why; and any other contracting considerations.

(ii) For each order contemplated, discuss—

(A) For information technology acquisitions, how the capital planning and investment control requirements of 40 U.S.C. 1422 and OMB Circular A–130 will be met (see 7.103(s) and part 39); and

(B) Why this action benefits the Government, such as when—

(1) The agency can accomplish its mission more efficiently and effectively (*e.g.*, take advantage of the servicing agency’s specialized expertise; or gain access to contractors with needed expertise); or

(2) Ordering through one of these vehicles facilitates access to small business concerns, including small disadvantaged business concerns, 8(a) contractors, women-owned small business concerns, HUBZone small business concerns, veteran-owned small business concerns, or service-disabled veteran-owned small business concerns.

* * * * *

PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

8.001 through 8.003 [Redesignated as 8.002 through 8.004]

7. Redesignate sections 8.001 through 8.003 as 8.002 through 8.004, respectively; and add a new section 8.001;

a. In the newly designated section 8.002 remove “8.002” and “shall” and

add “8.003” and “must” in their places, respectively;

b. In the newly designated section 8.003, remove “shall” and add “must” in its place; and

b. Revise the newly designated section 8.004.

The revised text reads as follows:

8.001 General.

Regardless of the source of supplies or services to be acquired, information technology acquisitions must comply with capital planning and investment control requirements in 40 U.S.C. 1422 and OMB Circular A–130.

* * * * *

8.004 Contract clause.

Insert the clause at FAR 52.208–9, Contractor Use of Mandatory Sources of Supply, in solicitations and contracts that require a contractor to purchase supply items for Government use that are available from the Committee for Purchase from People Who Are Blind or Severely Disabled. The contracting officer must identify in the contract schedule the items that must be purchased from a mandatory source and the specific source.

8. Amend section 8.404 by revising paragraph (a) to read as follows:

8.404 Using schedules.

(a) *General.* (1) Parts 13 and 19 do not apply to orders placed against Federal Supply Schedules, except for the provision at 13.303–2(c)(3). Orders placed against a Multiple Award Schedule (MAS), using the procedures in this subpart, are considered to be issued using full and open competition (see 6.102(d)(3)).

(i) Ordering offices need not seek further competition, synopsise the requirement, make a separate determination of fair and reasonable pricing, or consider small business programs.

(ii) GSA has already determined the prices of items under schedule contracts to be fair and reasonable.

By placing an order against a schedule using the procedures in this section, the ordering office has concluded that the order represents the best value and results in the lowest overall cost alternative (considering price, special features, administrative costs, etc.), to meet the Government’s needs.

(2) Orders placed under a Federal Supply Schedule contract are not exempt from the development of acquisition plans (see subpart 7.1), and an information technology acquisition strategy (see part 39).

* * * * *

PART 16—TYPES OF CONTRACTS

9. Amend section 16.505 as follows:

- a. Revise paragraph (a)(2);
- b. Amend paragraph (a)(3) by adding “or order” after the word “contract”;
- c. Redesignate paragraphs (a)(4), (a)(5), and (a)(6) as (a)(5), (a)(6), and (a)(8), respectively, and add new paragraphs (a)(4) and (a)(7);
- d. Add paragraphs (b)(1)(iii)(A)(4) and (b)(1)(iii)(A)(5);
- e. Remove the word “as” from paragraph (b)(2)(iii) and add “because it is” in its place;
- f. Revise the introductory text of paragraph (b)(2);
- g. Revise paragraph (b)(4); and
- h. Revise the heading and the first sentence of paragraph (b)(5) to read as follows:

16.505 Ordering.

(a) * * *

(2) Individual orders must clearly describe all services to be performed or supplies to be delivered so the full cost or price for the performance of the work can be established when the order is placed. Orders must be within the scope, issued within the period of performance, and be within the maximum value of the contract.

* * * * *

(4) When acquiring information technology and related services, consider the use of modular contracting to reduce program risk (see 39.103(a)).

* * * * *

(7) Orders placed under a task-order contract or delivery-order contract awarded by another agency (*i.e.*, a Governmentwide acquisition contract, or multi-agency contract)—

- (i) Are not exempt from the development of acquisition plans (see subpart 7.1), and development of an information technology acquisition strategy (see part 39); and

- (ii) May not be used to circumvent conditions and limitations imposed on the use of funds (*e.g.*, 31 U.S.C. 1501(a)(1)).

* * * * *

- (b) * * *
- (1) * * *
- (iii) * * *
- (A) * * *

(4) The amount of time contractors need to make informed business decisions on whether to respond to potential orders.

(5) Whether contractors could be encouraged to respond to potential orders by outreach efforts to promote exchanges of information, such as—

- (i) Seeking comments from two or more contractors on draft statements of work;
- (ii) Using a multiphased approach when effort required to respond to a potential order may be resource intensive (*e.g.*, requirements are complex or need continued development), where all contractors are initially considered on price considerations (*e.g.*, rough estimates) and other considerations as appropriate (*e.g.*, proposed conceptual approach, past performance). The contractors most likely to submit the highest value solutions are then selected for one-on-one sessions with the Government to increase their understanding of the requirements, provide suggestions for refining requirements, and discuss risk reduction measures.

* * * * *

(2) *Exceptions to the fair opportunity process.* The contracting officer must give every awardee a fair opportunity to be considered for a delivery order or task order exceeding \$2,500 unless one of the following statutory exceptions applies:

* * * * *

(4) *Decision documentation for orders.* The contracting officer must document in the contract file the rationale for placement and price of each order, including the basis for award and the rationale for any tradeoffs among cost or price and non-cost considerations in making the award decision. This documentation need not quantify the tradeoffs that led to the decision. The contract file must also identify the basis for using an exception to the fair opportunity process. If the agency uses the logical follow-on exception, the rationale must describe why the relationship between the initial order and the follow-on is logical (*e.g.*, in terms of scope, period of performance, or value).

(5) *Task- and delivery-order ombudsman.* The head of the agency must designate a task- and delivery-order ombudsman. * * *

* * * * *

PART 17—SPECIAL CONTRACTING METHODS

10. In section 17.500, revise paragraph (b) to read as follows:

17.500 Scope of subpart.

* * * * *

- (b) The Economy Act applies when more specific statutory authority does not exist. Examples of interagency acquisitions to which the Economy Act does not apply include—

- (1) Acquisitions from required sources of supplies prescribed in part 8, which have separate statutory authority; and
- (2) Acquisitions using Governmentwide acquisition contracts.

[FR Doc. 01–21352 Filed 8–22–01; 8:45 am]

BILLING CODE 6820–EP–P