

**12.503 Applicability of certain laws to Executive agency contracts for the acquisition of commercial items.**

(a) \* \* \*

(7) Section 806(a)(3) of Pub. L. 102-190, as amended by Sections 2091 and 8105 of Pub. L. 103-355, Payment Protections for Subcontractors and Suppliers (see 28.106-6).

■ 3. Amend section 12.504 by adding paragraph (a)(13) to read as follows:

**12.504 Applicability of certain laws to subcontracts for the acquisition of commercial items.**

(a) \* \* \*

(13) Section 806(a)(3) of Pub. L. 102-190, as amended by Sections 2091 and 8105 of Pub. L. 103-355, Payment Protections for Subcontractors and Suppliers (see 28.106-6).

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**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Part 13**

[FAC 2005-27; FAR Case 2008-002; Item VIII; Docket 2008-0001; Sequence 11]

RIN 9000-AL02

**Federal Acquisition Regulation; FAR Case 2008-002, Extension of Authority for Use of Simplified Acquisition Procedures for Certain Commercial Items**

**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 implement Section 822 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181).

**DATES:** *Effective Date:* September 17, 2008.

**FOR FURTHER INFORMATION CONTACT** Mr. Michael Jackson, Procurement Analyst, at (202) 208-4949 for clarification of content. For information pertaining to status or publication schedules, contact

the FAR Secretariat at (202) 501-4755. Please cite FAC 2005-27, FAR case 2008-002.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

This final rule amends the FAR to implement Section 822 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181). Section 822 amends Section 4202(e) of the Clinger-Cohen Act of 1996 (division D of Pub. L. 104-106; 110 Stat. 652; 10 U.S.C. 2304 note) by extending until January 1, 2010, the timeframe in which an agency may use simplified procedures to purchase commercial items in amounts greater than the simplified acquisition threshold, but not exceeding \$5,500,000 (\$11 million for acquisitions as described in 13.500(e)).

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 Pub. L. 98-577, and publication for public comments is not required. However, the Councils will consider comments from small entities concerning the affected FAR Part 13 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 2005-27, FAR case 2008-002), in all 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 13**

Government procurement.

Dated: September 9, 2008.

**Al Matera,**

*Director, Office of Acquisition Policy.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 13 as set forth below:

**PART 13—SIMPLIFIED ACQUISITION PROCEDURES**

■ 1. The authority citation for 48 CFR part 13 continues to read as follows:

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

**13.500 [Amended]**

■ 2. Amend section 13.500 by removing from paragraph (d) “January 1, 2008” and adding “January 1, 2010” in its place.

[FR Doc. E8-21380 Filed 9-16-08; 8:45 am]

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**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Part 16**

[FAC 2005-27; FAR Case 2008-006; Item IX; Docket 2008-01, Sequence 5]

RIN 9000-AL05

**Federal Acquisition Regulation; FAR Case 2008-006, Enhanced Competition for Task and Delivery Order Contracts—Section 843 of the Fiscal Year 2008 National Defense Authorization Act**

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

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement the Fiscal Year 2008 National Defense Authorization Act, Section 843 “Enhanced Competition for Task and Delivery Order Contracts” (FY08 NDAA). Section 843 of the FY08 NDAA stipulates several requirements regarding enhancing competition within Federal contracting.

**DATES:** *Effective Date:* September 17, 2008.

*Applicability date:* FAR 16.503 and 16.504, as amended by this rule, are applicable to single award task or delivery order contracts awarded on or after May 27, 2008. FAR 16.505, as amended by this rule, is applicable to orders awarded on or after May 27, 2008 on existing contracts as well as new contracts.

*Comment Date:* Interested parties should submit written comments to the FAR Secretariat on or before November 17, 2008 to be considered in the formulation of a final rule.

**ADDRESSES:** Submit comments identified by FAC 2005–27, FAR case 2008–006, by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2008–006” under the heading “Comment or Submission”. Select the link “Send a Comment or Submission” that corresponds with FAR Case 2008–006. Follow the instructions provided to complete the “Public Comment and Submission Form”. Please include your name, company name (if any), and “FAR Case 2008–006” on your attached document.

- Fax: 202–501–4067.

- Mail: General Services

Administration, Regulatory Secretariat (VPR), 1800 F Street, NW, Room 4041, ATTN: Laurieann Duarte, Washington, DC 20405.

*Instructions:* Please submit comments only and cite FAC 2005–27, FAR case 2008–006, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

**FOR FURTHER INFORMATION CONTACT:** Mr. William Clark, Procurement Analyst, at (202) 219–1813 for clarification of content. Please cite FAC 2005–27, FAR case 2008–006. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

#### **SUPPLEMENTARY INFORMATION:**

##### **A. Background**

The Fiscal Year 2008 National Defense Authorization Act (Pub. L. 110–181), Section 843 “Enhanced Competition for Task and Delivery Order Contracts” includes several requirements regarding enhancing competition within the Federal contracting framework. The provisions of Section 843 include: (1) Limitation on single award task and delivery order contracts greater than \$100 million; (2) Enhanced competition for task and delivery orders in excess of \$5 million; and (3) Protest on orders on the grounds that the order increases the scope, period, maximum value of the contract under which the order is issued; or valued in excess of \$10 million.

The FAR changes are applicable to Indefinite-Delivery Requirements, and Indefinite-Quantity, type contracts where issuance of a task or delivery order is placed pursuant to FAR Subpart 16.5. The purpose of this statute is to improve opportunities for competition

through fair opportunity, transparency and accountability in contracting.

1. *Limitation on single award task or delivery order contracts greater than \$100 million.* Section 843 states that no task or delivery order contract in an amount estimated to exceed \$100 million (including all options) may be awarded to a single source unless the head of the agency determines in writing that—

a. The task or delivery orders expected under the contract are so integrally related that only a single source can reasonably perform the work;

b. The contract provides only for firm-fixed price task or delivery orders;

c. Only one source is qualified and capable of performing the work at a reasonable price to the Government; or

d. It is necessary in the public interest to award the contract to a single source due to exceptional circumstances.

The agency head must also notify Congress within 30 days after making the determination in the public interest. The objective of this provision is to place greater emphasis on awarding multiple award contracts and enhancing the fair opportunity provisions within FAR Subpart 16.5. Competition of orders leads to improved contractor performance, stimulation of technological solutions, and reduction of costs over time. The tenets of this provision strike at the core of enhancing competition and ensuring competition continues to exist even after award of the initial contract vehicles. Notwithstanding the limitation on single awards, there are occasions when a single award is necessary. For these occasions, Section 843 authorizes exceptions for awarding single award task or delivery order contracts that exceed \$100 million.

2. *Enhanced competition for orders in excess of \$5 million.* This Section 843 requirement emphasizes the importance of following certain specified procedures in the competitive placement of task or delivery orders with an expected value in excess of \$5 million (including options) placed against multiple award contracts. All awardees are to be given a fair opportunity to be considered for each order, at a minimum, a notice of the order with a clear statement of requirements, a reasonable response period, disclosure of the significant evaluation factors and subfactors, and where award is made on a best value basis, a statement documenting the basis for award and the relative importance of quality and price or cost factors. Section 843 also provides an opportunity for a vendor to request a debriefing on orders valued over \$5 million. The goal is to

improve the transparency and accountability of agency award decisions. The new requirements apply to orders on existing contracts, as well as on new contracts.

3. *Protest of orders greater than \$10 million.* This Section 843 requirement provides a mechanism to protest task or delivery orders valued in excess of \$10 million (including options) under multiple award contracts and states that the Comptroller General shall have exclusive jurisdiction over such protests. In particular, protests are authorized on the grounds that—

(a) The order increases the scope, period, or maximum value of the contract under which the order is issued; or

(b) As a matter of right for orders valued in excess of \$10 million. This provision provides for greater accountability, oversight and discipline within the Federal acquisition framework, when coupled with the requirement of post award debriefings. The existing requirement to protest orders under section 16.505(a)(9) and the newly added requirement for orders greater than \$10 million expire May 27, 2011, unless extended by a new statute. The protest authority applies to orders on existing contracts, as well as on new contracts.

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 interim rule is not expected 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 this rule does not revise or change existing regulations pertaining to small business concerns seeking Government contracts. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Part 16 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 2005–27, FAR case 2008–006), 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.*

**D. Determination to Issue an Interim Rule**

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because provisions of the Fiscal Year 2008 National Defense Authorization Act Section 843 go into effect on May 27, 2008. The Councils believe that the interim rule in the FAR will provide the contracting officer the relevant regulatory guidance needed when addressing requirements outlined in this notice. The rule will also benefit industry in regards to the requirements for strengthening competition among orders, and the ability to protest orders. However, pursuant to Pub. L. 98-577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

**List of Subjects in 48 CFR Part 16**

Government procurement.

Dated: September 9, 2008.

**Al Matera,**

*Director, Office of Acquisition Policy.*

Therefore, DoD, GSA, and NASA amend 48 CFR part 16 as set forth below:

**PART 16—TYPES OF CONTRACTS**

1. The authority citation for 48 CFR part 16 continues 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 16.503 by revising paragraph (b) to read as follows:

**16.503 Requirements contracts.**

\* \* \* \* \*

(b) *Application.* (1) A requirements contract may be appropriate for acquiring any supplies or services when the Government anticipates recurring requirements but cannot predetermine the precise quantities of supplies or services that designated Government activities will need during a definite period.

(2) No requirements contract in an amount estimated to exceed \$100 million (including all options) may be awarded to a single source unless a determination is executed in accordance with 16.504(c)(1)(ii)(D).

\* \* \* \* \*

3. Amend section 16.504 by removing from paragraph (a)(4)(v) “16.505(b)(5)” and adding “16.505(b)(6)” in its place; and adding paragraph (c)(1)(ii)(D) to read as follows:

**16.504 Indefinite-quantity contracts.**

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

(ii) \* \* \*

(D)(1) No task or delivery order contract in an amount estimated to exceed \$100 million (including all options) may be awarded to a single source unless the head of the agency determines in writing that—

(i) The task or delivery orders expected under the contract are so integrally related that only a single source can reasonably perform the work;

(ii) The contract provides only for firm-fixed price (see 16.202) task or delivery orders for—

(A) Products for which unit prices are established in the contract; or

(B) Services for which prices are established in the contract for the specific tasks to be performed;

(iii) Only one source is qualified and capable of performing the work at a reasonable price to the Government; or

(iv) It is necessary in the public interest to award the contract to a single source due to exceptional circumstances.

(2) The head of the agency must notify Congress within 30 days after any determination under paragraph (c)(1)(ii)(D)(1)(iv) of this section.

(3) The requirement for a determination for a single award contract greater than \$100 million applies in addition to the requirements of Subpart 6.3.

\* \* \* \* \*

4. Amend section 16.505 by—

a. Revising paragraph (a)(9);

b. Adding to the end of the fourth sentence before the period of paragraph (b)(1)(ii) “and the order does not exceed \$5 million”;

c. Redesignating paragraph (b)(1)(iii) as (b)(1)(iv); and adding a new paragraph (b)(1)(iii); and

d. Redesignating paragraphs (b)(4) and (b)(5) as paragraphs (b)(5) and (b)(6); and adding a new paragraph (b)(4).

The revised text reads as follows:

**16.505 Ordering.**

(a) \* \* \*

(9)(i) No protest under Subpart 33.1 is authorized in connection with the issuance or proposed issuance of an order under a task-order contract or delivery-order contract, except for—

(A) A protest on the grounds that the order increases the scope, period, or maximum value of the contract; or

(B) A protest of an order valued in excess of \$10 million. Protests of orders in excess of \$10 million may only be filed with the Government Accountability Office, in accordance with the procedures at 33.104.

(ii) The authority to protest the placement of an order under this subpart expires on May 27, 2011. (10 U.S.C. 2304a(d) and 2304c(d), and 41 U.S.C. 253h(d) and 253j(d)).

(b) \* \* \*

(1) \* \* \*

(iii) *Orders exceeding \$5 million.* For task or delivery orders in excess of \$5 million, the requirement to provide all awardees a fair opportunity to be considered for each order shall include, at a minimum—

(A) A notice of the task or delivery order that includes a clear statement of the agency’s requirements;

(B) A reasonable response period;

(C) Disclosure of the significant factors and subfactors, including cost or price, that the agency expects to consider in evaluating proposals, and their relative importance;

(D) Where award is made on a best value basis, a written statement documenting the basis for award and the relative importance of quality and price or cost factors; and

(E) An opportunity for a postaward debriefing in accordance with paragraph (b)(4) of this section.

\* \* \* \* \*

(4) *Postaward Notices and Debriefing of Awardees for Orders Exceeding \$5 million.* The contracting officer shall notify unsuccessful awardees when the total price of a task or delivery order exceeds \$5 million.

(i) The procedures at 15.503(b)(1) shall be followed when providing postaward notification to unsuccessful awardees.

(ii) The procedures at 15.506 shall be followed when providing postaward debriefing to unsuccessful awardees.

(iii) A summary of the debriefing shall be included in the task or delivery order file.

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