Dated: March 15, 2010.

Al Matera,

Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 15 and 53 as set forth below:

■ 1. The authority citation for 48 CFR parts 15 and 53 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).

PART 15—CONTRACTING BY NEGOTIATION

15.509 [Amended]

■ 2. Amend section 15.509 by removing from the first sentence "appropriate." and adding "appropriate. Note however, if using the SF 26 for a negotiated procurement, block 18 is not to be used." in its place.

PART 53—FORMS

53.214 [Amended]

■ 3. Amend section 53.214 by removing from the second sentence in paragraph (a) the phrase "Pending issuance of a new edition of the form, the reference in "block 1" should be amended to read "15 CFR 700."" and adding "Block 18 may only be used for sealed-bid procurements." in its place.

53.215–1 [Amended]

■ 4. Amend section 53.215–1 by removing from paragraph (a) "15.509." and adding "15.509. Block 18 may not be used for negotiated procurements." in its place.

[FR Doc. 2010–5987 Filed 3–18–10; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 16

[FAC 2005–39; FAR Case 2008–006; Item IV; Docket 2008–0001, Sequence 25]

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: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have adopted as final with changes the interim rule amending the Federal Acquisition Regulation (FAR) to implement Section 843, Enhanced Competition for Task and Delivery Order Contracts, of the National Defense Authorization Act (NDAA) for Fiscal Year 2008 (FY08) (Pub. L. 110–181). Section 843 of the FY08 NDAA stipulates several requirements regarding enhancing competition within Federal contracting.

DATES: *Effective Date*: April 19, 2010.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. William Clark, Procurement Analyst, at (202) 219–1813. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–39, FAR case 2008–006.

SUPPLEMENTARY INFORMATION:

A. Background

Section 843, Enhanced Competition for Task and Delivery Order Contracts, of the FY08 NDAA 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) Restriction on protests in connection with issuance or proposed issuance of a task- or delivery-order except for a protest on the grounds that the order increases the scope, period, or maximum value of the contract under which the order is issued, or a protest of an order valued in excess of $10 million.

The interim rule was published in the **Federal Register** at 73 FR 54008 on September 17, 2008. The majority of the amendments to the FAR were made at publication of the interim rule. The Councils believe that, as a result of the interim rule, contracting offices will need more time to: carefully consider single versus multiple awards for task- or delivery-order contracts valued in excess of $100 million; perform debriefings for orders over $5 million; and respond to and defend against additional protests for orders over $10 million. The public comments received resulted in several changes to the interim rule.

Requirements contracts. The Councils amended the language at FAR 16.503(a) to clarify that a requirements contract is awarded to one contractor. This change is made to dispel the implication at FAR 16.503(b)(2) that a requirements contract may be awarded to multiple sources.

IDIQ contracts. The Councils also added language at FAR 16.504(c)(1)(ii)(D)(*3*)(*i*) to read that the requirement for a determination for a single-award IDIQ contract greater than $100 million is in addition to any applicable requirements of FAR subpart 6.3. This change is made to clarify that the determination for a single-award task- or delivery-order contract greater than $100 million is required in addition to the justification and approval (J&A) required by FAR subpart 6.3 when a procurement will be conducted as other than full and open competition. The language in the interim rule appears to suggest that a J&A pursuant to FAR subpart 6.3 is required whenever you have a single award greater than $100 million, which is not true when the procurement provides for full and open competition. This change is not considered significant but merely a clarification of the interim rule.

Architect-engineer contracts. Lastly, the Councils added language at FAR 16.504(c)(1)(ii)(D)(*3*)(*ii*) to clarify that the agency-head determination does not apply to architect-engineer task- or delivery-order contracts awarded pursuant to FAR subpart 36.6.

Eight respondents submitted comments on the interim rule. The comments are summarized below, with the corresponding responses.

Comment 1. "Architect-Engineer Services Exception."FAR 16.500(d) states that the statutory multiple-award preference is not applicable to the procurement of architect-engineer (A-E) services when such services are procured in accordance with the procedures of FAR subpart 36.6. The FAR subpart 36.6 procedures will result in a single award to the most highly qualified firm and it seems moot to obtain the head of agency determination when procuring A-E services. The commenter requests revision of FAR 16.504(c)(1)(ii)(D)(*1*) to add procurement of an A-E contract pursuant to FAR subpart 36.3 as a fifth reason for an agency-head determination to award a single-award contract that exceeds $100 million.

Response: The Councils do not agree that a fifth reason should be added to FAR 16.504(c)(1)(ii)(D)(*1*), as the list of conditions is statutory. However, the Councils added language at FAR 16.504(c)(1)(ii)(D)(*3*)(*ii*) to clarify that

the requirement for an agency-head determination to award a single-award task- or delivery-order contract over $100 million does not apply to A-E task- or delivery-order contracts awarded in accordance with FAR subpart 36.6.

Comment 2. "Delegation of Determination." FAR 16.504(c)(1)(ii)(D)(*1*) requires the head of the agency to execute a written determination for an award to a single source for a task- or delivery-order contract in an amount estimated to exceed $100 million. The commenter suggests that requiring the head of the agency to make the determination, without allowing for any designee to perform the function, is too high a level of approval than is necessary.

Response: The statute does not prohibit the delegation of this authority. In accordance with FAR 1.108(b), delegation of authority, each authority is delegable unless specifically stated otherwise. Each agency can determine whether to establish an internal policy to delegate the head of agency authority.

Comment 3. "Competitive but only One Offer Received." One commenter expresses concern that solicitations, which were issued using competitive procedures where only one offer or one acceptable offer is received, will also have to obtain a determination by the head of the agency before award can be made. According to the commenter, if there is no allowance for a designee to the agency-head approval, the respondent recommends that the agency-head approval be required before issuing solicitations for which the Government intends to make a single award over $100 million.

Another commenter recommends another possible exception under FAR 16.504(c)(1)(ii)(D) would be when the competitive process, even though conducted allowing for multiple awards, results in only one offer or when a FAR part 15 style best value acquisition process results in only one offeror remaining in the competitive range after discussions or negotiations are concluded and/or when there is an indisputable best-value winner as the result of an effective competitive process.

Response: The law requires 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 there is a written determination by the head of the agency. The agency-head determination is required when the single-source contract estimated to exceed $100 million will be awarded under competitive or non-competitive procedures. As such, the Councils do not agree with the recommendation to add another possible exception under FAR 16.504(c)(1)(ii)(D) for when the competitive process results in only one offer or offeror. Further, the rule neither prohibits the delegation of the agency determination nor does it preclude the agency from making the determination before issuing the solicitation.

Comment 4. "Congressional Notification." According to one commenter, getting the agency-head approval early in the process (and dealing with associated congressional concerns early in the process) is highly preferable to going through the time and expense of soliciting offers, evaluating proposal(s), and then possibly having approval withheld. The commenter states that refusing to make award to a vendor who submits an acceptable proposal after it has put significant expense into preparing a proposal may open up the Government to litigation and additional bid and proposal costs, as well. Additionally, the commenter states that requiring congressional notification (see FAR 16.504(c)(l)(ii)(D)(*2*)) under such conditions seems to be excessive for a circumstance in which multiple awards were contemplated, but only one award can be made.

Response: It is the agency's responsibility to determine when to obtain the determination. Congressional notification is only required within 30 days after the determination when citing public interest due to exceptional circumstances as the reason for awarding a single-source task- or delivery-order contract estimated to exceed $100 million. Timely congressional notification should be included in agency approval procedures under these circumstances.

Comment 5. "Unusual and Compelling Urgency." In the event of a FAR subpart 6.3 exception for a single contract award over $100 million including an unusual and compelling urgency exception, the commenter expresses concern about the time required and the burden to get the head of agency determination.

Response: The agency-head determination for a single-award task- or delivery-order contract over $100 million is required by law. In instances where such a contract will be made using one of the exceptions to full and open competition at FAR subpart 6.3, both the applicable J&A and the agency-head determination are required. In certain situations, an agency may consider establishing procedures to process the J&A and the determination together.

Comment 6. "Agency-Head Approval before Solicitation Issuance." Furthermore, if the determination is not delegable, the commenter recommends that agency-head approval be required before issuing a solicitation for which the Government intends to make a single award over $100 million. The commenter states that early approval is preferable prior to issuing the solicitation, thus saving significant expense for bid and proposal costs and possible litigation if an award is not made from the solicitation because the head of agency does not approve a single-source award.

Response: The law requires that the head of the agency must make a determination before award. It is the agency's responsibility to determine at which stage prior to award this determination should be accomplished.

Comment 7. "Court of Federal Claims Override." One commenter states that "The rule should provide clear notice that the Government Accountability Office (GAO) has sole jurisdiction over any bid protest of task and delivery orders valued at more than $10 million under multiple award indefinite-delivery indefinite-quantity (IDIQ) contracts and that the bid protest limitations applicable to these orders extend to agency decisions to invoke exceptions under the Competition in Contract Act's (CICA) mandatory stay provisions (sometimes referred to as a 'CICA override') in connection with the award of a task- or delivery-order." The commenter expresses concern that, regardless of the section 843 provision giving the Comptroller General of the United States exclusive jurisdiction over orders in excess of $10 million, the Court of Federal Claims (COFC) may conclude that it has jurisdiction.

Response: The Councils do not have authority to circumscribe the jurisdiction of the COFC. The rule does provide a notice that protest of an order in excess of $10 million may only be filed with GAO in accordance with the procedures at FAR 33.104.

Comment 8. "Rule of Two for Small Business." Two commenters request a clarification of this rule against the recent GAO decision in Delex Systems, Inc. The commenters believe that the GAO decision is based on a misinterpretation of the FAR and fails to adequately consider that neither Congress nor the FAR Council provided any indication in the detailed task- and delivery-order rules and procedures that the rule of two for small business set-asides applies to task and delivery orders. The commenters request a revision to FAR 16.505 to state explicitly that awards of task and

delivery orders under multiple-award IDIQ contracts are not subject to the rule of two set out at FAR 19.502–2(b).

Response: The issue regarding the "Rule of Two" is considered to be outside the scope of this case.

Comment 9. "Part 16 Should Not Be Subject to Part 15 Standards." One commenter states that "The rule should state explicitly that task- and delivery-orders issued under IDIQ contracts are subject only to FAR 16.505 standards and procedures and not to FAR Part 15 standards." The commenter requests a revision to clarify that the ordering processes under FAR 16.505, as amended by the interim rule, are intended to be streamlined and subject only to the procedures in that section. Also, the commenter wants the FAR revised to explicitly state that evaluations must satisfy those standards set out in FAR 16.505 and that FAR part 15 standards do not apply. The commenter suggests that these clarifications will prevent the use of the bid protest process to conduct end runs around the clear regulatory intent of FAR subpart 16.5.

Response: The Councils do not agree. Where it is appropriate and avoids repetition, references to the applicable FAR part 15 are stated in FAR 16.505. Also, the Councils do not believe it is necessary to revise FAR 16.505 to explicitly state that FAR part 15 standards do not apply, as the statement at FAR 16.505(b)(1)(ii) that the competition requirements in FAR subpart 15.3 do not apply to the ordering process is sufficient.

Comment 10. "Greater Flexibility and Exceptions Needed for Single-Award IDIQ." Two commenters recommend that the rule's one-size-fits-all approach should be revised to provide greater flexibility for agencies to use single-award IDIQ contracts when appropriate. IDIQ contracts are used for system-of-system efforts, performance-based acquisitions, and other similar acquisitions because they provide flexibility to fund the contracts incrementally or on a per-order basis, as the performance term proceeds and/or to account for inclusion of progressively more detailed technical requirements in the prospective order's statement of work as the technology matures or the term progresses.

Response: The law provides the conditions for awarding a single-source task- or delivery-order contract in an amount estimated to exceed $100 million. FAR 16.504(c)(1)(ii)(D) implements these statutory conditions.

Comment 11. "Eliminate 6.3 Procedures - Sole Source Justification." Two commenters recommend that the interim rule should be amended to delete FAR 16.504(c)(1)(ii)(D)(*3*) because the reference to FAR subpart 6.3 does not explain why it is necessary in the rule.

Response: The Councils do not agree to delete FAR 16.504(c)(1)(ii)(D)(*3*). If a single-source task- or delivery-order contract estimated to exceed $100 million will be awarded using other than full and open competition, the contracting officer must comply with FAR subpart 6.3 and FAR 16.504(c)(1)(ii)(D). FAR 16.504(c)(1)(ii)(D)(*3*) is amended to read that the requirement for a determination for a single-award contract greater than $100 million is in addition to any applicable requirements of FAR subpart 6.3. This change is made to clarify that the determination for a single-award task- or-delivery order contract greater than $100 million is required in addition to the J&A required by FAR subpart 6.3 when a procurement will be conducted as other than full and open competition. The language in the interim rule could have been read to require that a J&A pursuant to FAR subpart 6.3 is needed whenever there is a single-award greater than $100 million, which is not true when the procurement provides for full and open competition.

Comment 12. "Eliminate Limitation on Single-Award Requirements Contract." One commenter states that the rule should be revised to eliminate the limitation on single-award requirements contracts because this restriction is not mandated by section 843 and is inconsistent with requirements contracts.

Response: The Councils do not agree that requirements contracts should be excluded from the rule. Section 843 of FY08 NDAA applies to task- or delivery-order contracts in an amount estimated to exceed $100 million (including all options). FAR 16.501–2(a) states: "Pursuant to 10 U.S.C. 2304d and section 303K of the Federal Property and Administrative Services Act of 1949, requirements contracts and indefinite-quantity contracts are also known as delivery order contracts or task order contracts." Per FAR 16.501–2(a), the Councils applied the section 843 provisions to requirements contracts.

Comment 13. "Use of Single-Award Approach when in Government's Best Interest." The commenter recommends the use of a single-award IDIQ whenever it would be in the Government's best interests. According to the commenter, there are situations in which, although a second contractor may be nominally capable of performing the task- and delivery-orders under the IDIQ contract, the Government determines that one contractor is superior both in technical merit and cost/price in all areas under the anticipated scope of work. In those situations, it does not make sense in terms of costs and efficiency to require the contracting officer to issue two contracts when there will be no actual competition for the task- and delivery-orders. The commenter states that the contracting officer may be forced to make multiple awards because the situation does not fit within any of the exceptions in FAR 16.504(c)(1)(ii)(D)(*1*).

Response: The condition at FAR 16.504(c)(1)(ii)(D)(*1*)(*iv*) allowing the head of the agency to award a single-source contract estimated to exceed $100 million because it is "in the public interest" due to exceptional circumstances equates to the "Government's best interests". Similar to the authority at FAR 6.302–7, public interest may be cited when none of the other conditions at FAR 16.504(c)(1)(ii)(D)(*1*) applies. Congress wants to be informed when this exception is used. The conditions in FAR 16.504(c)(1)(ii)(D)(*1*) do not prevent an agency from making a single award. If the agency cannot cite FAR 16.504(c)(1)(ii)(D)(*1*)(*iii*) where only one source is qualified and capable of performing the work at a reasonable price to the Government, then nothing prevents the Government from making the determination to award the contract pursuant to FAR 16.504 (c)(1)(ii)(D)(*1*)(*iv*), provided Congress is subsequently notified. However, the commenter is not describing a situation where the second contractor has an unreasonable price, but a situation where the second contractor has a price higher than the first contractor. Because the situation is not a firm-fixed-price situation (or FAR 16.504 (c)(1)(ii)(D)(*1*)(*ii*) would be used) the second contractor's prices on a particular order could be lower than the first contractor's prices; also the presence of the second contractor will encourage the first contractor to keep its prices lower.

Comment 14. "Clarify Requirements Clause." The commenter states that, without additional implementation language, it is assumed that without a determination under FAR 16.504(c)(1)(ii)(D), it will be a violation of FAR to issue requirements contracts over $100 million. The commenter further states that it is assumed that all contracts over $100 million will be multiple-award IDIQ contracts under FAR 16.504(c)(1)(ii)(D). If the assumptions are correct, the commenter requests additional clarifying language

in FAR 16.503 to state that requirements contracts are not authorized over $100 million unless a determination is granted. In addition, if the intent is to allow multiple-award "requirements" contracts, the commenter requests that an alternate to FAR 52.216–21 be added to the ruling that defines how a multiple-award requirements contract will be implemented.

Response: The Councils do not believe a change to FAR 52.216–21 is required as a result of this rule. The FAR does not preclude single-award task- or delivery-order requirements contracts over $100 million, it just requires a written determination by the head of the agency. FAR 16.503(b)(2) already states that requirements contracts are not authorized over $100 million unless a determination is granted. The Councils amended the language at FAR 16.503(a) to clarify that requirements contracts are awarded to one contractor. This change is made to dispel the implication at FAR 16.503(b)(2) that a multiple-award requirements contract may be awarded. See also response to Comment 12.

Comment 15. "Expand Coverage to all Indefinite-Delivery Contracts." The commenter states that task- or delivery-order contracts include all types of indefinite-delivery contracts (See FAR 16.501–1 and FAR 16.501–2(a)). Therefore, the commenter recommends the rule apply to all three types of indefinite-delivery contracts.

Response: FAR 16.501–1 defines a "delivery order contract" and "task order contract" as one that does not procure or specify a firm quantity of supplies or services, respectively. FAR 16.501–2(a) specifies that requirements and indefinite-quantity contracts are also known as task or delivery order contracts. IDIQ contracts are not included. Accordingly, the rule is applied only to requirements and indefinite-quantity contracts.

Comment 16. "Change Terminology." The commenter states that it appears the intent of the law is to require the determination to use a single source on an indefinite-delivery contract as part of the initial acquisition planning. To avoid confusion concerning when the determination is required, the reference to "task or delivery order contract" could be changed to either "indefinite delivery contract", or "basic indefinite delivery contract".

Response: The Councils do not concur. The rule implements section 843 of Pub. L. 110–181, which applies to task- or delivery-order contracts in an amount estimated to exceed $100 million (including all options). The changes to FAR 16.503 and 16.504 do not apply to the task- or delivery-orders issued under such contracts.

Comment 17. "Clarify Grammar as a Result of Use of Semicolons." The commenter requests that FAR 16.504(a)(1)(ii)(D)(*1*) be clarified by inserting either "and" or "or" after each semicolon. Several interpretations exist because of the semicolons. One contracting activity believes one of four exceptions must be met, while other contracting activities require some combination of the exceptions to be met.

Response: The listing of the subparagraphs at FAR 16.504(a)(1)(ii)(D)(*1*) uses a semicolon with an "or" before the last subparagraph, which is consistent with FAR drafting conventions. Either one or a combination of the items can be cited in the agency-head determination.

Comment 18. "Fair Opportunity Clarification." The commenter recommends inserting "the requirements in 16.505(b)(1)(ii), and" in 16.505(b)(1)(iii) between "shall include," and "at a minimum ...." to ensure that the user does not ignore the mandatory policy for orders exceeding $3,000.

Response: The requirements at FAR 16.505(b)(1)(iii) cover actions above $5 million. The procedures at 16.505(b)(1)(iii) build on the requirements at 16.505(b)(1)(ii) and are not mutually exclusive.

Comment 19. "Clarify Applicability to Cost-Type Contracts." The commenter asks whether FAR 16.504(c)(1)(ii)(D)(*1*)(*ii*) means that single-award cost-type task- or delivery-order contracts over $100 million are abolished.

Response: Cost-type single-award task- or delivery-order contracts over $100 million are not abolished by this rule, but must be supported by an agency-head determination in accordance with FAR 16.504(c)(1)(ii)(D)(*1*)(*i*), 16.504(c)(1)(ii)(D)(*1*)(*iii*), or 16.504(c)(1)(ii)(D)(*1*)(*iv*).

Comment 20. "Agency-Head Exception Process." One commenter states that this agency-head exception process is not needed because there is already an existing regulatory process for deciding on the efficacy of multiple awards and because this added process bears no relationship to any problem identified with task-order competitions. According to the commenter, the interim rule only adds to the confusion in agencies over the task-order competition process, including blurring the authority of the contracting officer as a gatekeeper to decide what acquisitions should not be multiple awards at the outset.

Response: Section 843 of the FY08 NDAA establishes the requirement for the head of the agency to make a written determination when awarding a single-source contract greater than $100 million. This rule implements the law. Individual agency regulations or procedures may delegate this authority. The law did not change the contracting officer's determination during acquisition planning as to whether multiple awards are appropriate. Therefore, the Councils did not make such a change in the rule.

Comment 21. "Use of Exception Terms." One commenter states that the interim rule is unclear because the existing exception terms of art are inconsistent with the new exceptions. According to the commenter, it is instructive that the exception factors listed in 16.504(c)(1)(ii)(B) for contracting officer planning purposes and those listed under 16.504(c)(1)(ii)(D) for head of the contracting activity (HCA) purposes at the award stage are not identical. In the interests of clarity, the Government should consolidate the terms of art used for exceptions at different stages of the acquisition and create a definitional section for consistency and to explain those terms of art.

Response: The Councils do not concur with the commenter's recommendation to "consolidate the terms of art" in FAR 16.504(c)(1)(ii)(B) and FAR 16.504(c)(1)(ii)(D). Each of the terms used in FAR 16.504(c)(1)(ii)(B) represents the unique character of the actions required by the contracting officer in determining whether multiple awards are appropriate based on criteria established in the regulatory implementation of the Federal Acquisition Streamlining Act (see 41 U.S.C. 253h(d)(3)(B) and 10 U.S.C. 2304a(d)(3)(B)). The terms used in FAR 16.504(c)(1)(ii)(D) list the criteria for the head of the agency to make a determination in accordance with section 843 of the FY08 NDAA. Congress could have used the terms in FAR 16.504(c)(1)(ii)(B) to mirror the terms in section 843, but it chose not to do so. Instead, the Congress tailored selected criteria in FAR 16.504(c)(1)(ii)(B) to include in section 843.

Comment 22. "Regulatory Flexibility Analysis." The interim rule states that a Regulatory Flexibility Analysis (RFA) "is unnecessary because the rule does not change any existing regulations affecting small businesses." One respondent disagrees with this assessment. According to the commenter, since it is reasonable to conclude that many small businesses

will be impacted by this rule, especially insofar as the bid protest and debriefing rights are concerned, it appears careless to ignore the requirements of the RFA. Among other things, an RFA requires an analysis of alternatives and a discussion of overlapping and duplicative rules. Given that there are already a number of rules governing the fair opportunity to compete for task- and delivery-orders on multiple-award contracts in the FAR and other agency FAR supplements, the commenter believes that "it would make sense to conduct due diligence on those existing regulations if only to eliminate those that may no longer be required and to shed light on the need for the prohibition of a single award of a task order contract over $100 million in the first place."

Response: The interim rule did not ignore the requirements of the Regulatory Flexibility Act (RFA). The Councils obtained review of the statements under the RFA by the Small Business Administration Office of Advocacy. The rule is not expected to have a significant economic impact on a substantial number of small entities. The rule encourages and enhances competition equally for both small and other than small businesses. Insofar as the bid protests are concerned, the GAO did not change its Bid Protest Regulations (See **Federal Register** at 73 FR 32427 published on June 9, 2008) as a result of section 843; the Councils have not modified the protest procedures in FAR part 33 to impact small businesses either way. The debriefing procedures cited to follow at FAR 15.506 for orders exceeding $5 million provide information to offerors so they may improve its future offers, which is a benefit for both small and large businesses. Further, the Councils sought comments from small businesses on the affected FAR part 16. Only this comment was received.

Comment 23. "Sunset Provision." One commenter believes that, because the single-award prohibition may not add continuing value to the acquisition process over time, a sunset provision that parallels the protest sunset (three years) should be inserted to account for the possibility that, in the future, either no single-award exceptions are being processed or, conversely, too many single-award exceptions are being processed. Factually and legally, that would indicate that the single-award prohibition is either unnecessary because none are being processed, or conversely, that it is too restrictive and/or being applied too broadly by agency personnel leading to a proliferation of agency-head determinations to make a single task-order contract award. In either case, the commenter believes that it would only serve to emphasize that prohibiting single awards does not address any of the goals of the interim rule and thus should be sunset.

Response: The Councils do not concur with adding such a sunset provision. The commenter's recommendation goes beyond the provisions as enacted by section 843 of the FY08 NDAA.

Comment 24. "Override." The commenter requests that the final rule clarify that a protest of a solicitation for, or award of, a task- or delivery-order timely filed in accordance with the Competition in Contracting Act, 31 U.S.C. 3551 *et seq.*; should trigger an automatic stay of performance.

Response: This rule implements section 843. Section 843 did not address "stay of performance" under the Competition in Contracting Act, 31 U.S.C. 3551 *et seq.*

Comment 25. "Monetary Threshold for Protests." The commenter states that "section 843 does not provide any express guidance on how the parties should value task or delivery orders when determining whether an order exceeds the threshold value for purposes of protest jurisdiction. This lack of clarity could lead to challenges to GAO's authority to hear a protest." The commenter requests that the final rule clarify how the monetary threshold for a task- or delivery-order protest will be calculated. The commenter offers that the Councils could consider clarifying the rule to indicate the $10 million threshold is based upon the offers received by the agency so that agencies cannot avoid protest jurisdiction by valuing a solicitation slightly under the statutory threshold and so that protest jurisdiction is not affected by adjustments made to offers during the course of the evaluation.

Response: The Councils believe GAO will handle issues concerning its jurisdiction.

Comment 26. "Section 843 Restricts Use of Single-Award IDIQ." The commenter states that, in anticipation of the issuance of the interim rules pursuant to guidance from the Office of the Secretary of Defense in May 2008, several Department of Defense commands had already stated informally (and anecdotally had begun to act on their belief) that section 843 (in the form of FAR 16.504) effectively prohibits them from concluding either during the planning process or at time of award that a single-award task- or delivery-order contract estimated over $100 million dollars would ever be justifiable, preemptively cutting off any thoughtful analysis of the facts and foreclosing any exceptions at the planning stages, in effect pushing the decisions upstream to the HCA at time of award where acquisition law and regulation may not be as well known as at the contracting officer level and where the timing of any such decision will become less of an acquisition decision and more of a political one.

Response: The contracting officer determination, at the acquisition-planning stage, on whether multiple awards are appropriate is required by statute. This determination is separate from the determination by the agency head to award a task- or delivery-order single contract over $100 million, which is required by a different statute. Each agency is responsible for ensuring it meets the requirements of both determinations when applicable. As such, questions or concerns regarding agency implementation of section 843 should be directed to that agency.

Comment 27. "Determination to Use Multiple-Award Contracts." This contract-type "gap" is recognized in the existing regulation, and the FAR currently has a regime where the contracting officer is required to examine the efficacy of multiple awards as part of a stepped planning process. There are several process points at which conditions or exceptions to multiple awards can be applied per the contracting officer's discretion.

Response: It is incumbent upon the contracting officer, as required by FAR 16.504, to determine the feasibility of establishing single- or multiple-award contracts. In the instance where a single-award task- or delivery-order contract over $100 million will be made, the requirements of FAR 16.504(c)(1)(ii)(D) must be addressed.

Comment 28. "Use of Mandatory Exceptions for Multiple-Award Contracts." This list of mandatory exceptions appears to cover just about any contingency affecting the requirements and, at one time, is both comprehensive and broad enough to allow a contracting officer great flexibility to judge the merits of making multiple awards. The commenter states that a contracting officer may determine that a class of acquisitions is not appropriate for multiple awards, but that exception appears to be rarely, if ever, used. In fact, according to the commenter, there is scant data on the use of any of the contracting officer multiple-award contract exception processes whatsoever, so it is difficult to determine whether the contracting officers actually perform such a decisional function. Conversely, though there has been no report that those authorities have been abused one way or

the other, the interim rule would render moot any planning-stage decision the contracting officer would make if the award were over $100 million.

Response: The acquisition planning team (*e.g.*, contracting officer, program office, customers) is tasked to define the exact strategy to support the acquisition requirement. The rule does not render moot the contracting officer's decision in the acquisition-planning process. The contracting officer is still required by FAR 16.504 to determine the feasibility of establishing single- or multiple-award contracts.

Comment 29. "Head of Agency Override of Contracting Officer Determination." According to one commenter, although the interim rule may be designed to facilitate a proper level of quality assurance over certain Government actions designed to increase competition for task orders, and is not reflective of any failure by the private sector in its transactional conduct, it is wholly possible and very likely that an agency head could veto a single IDIQ award at time of award, presumably long after a contracting officer may have determined that multiple awards are not in the Government's best interest and for reasons that the head of the agency may not be held accountable to explain. The commenter suggests that one way to deal with that lack of transparency would be to allow any contracting officer's written determination that a multiple-award contract is not appropriate made at the acquisition planning stages to have great presumptive weight in any internal agency deliberations for the agency-head exception process or require that the agency-head determination be published if contrary to the contracting officer's initial determination.

Response: The Councils do not agree that the written determination by the head of the agency should be published when it differs from the contracting officer's initial determination to award a single IDIQ contract. This is not required by section 843. Further, the purpose of the rule is to encourage competition and to make the highest levels of the agency aware of the use of a single-award task- or delivery-order contract greater than $100 million. If a contracting officer's initial determination to award a single IDIQ contract is later overturned, this decision would need to be substantiated and justified and would be completely in line with the rule's goal of encouraging competition and the use of multiple awards under IDIQ contracts valued over $100 million. Whether these determinations are releasable to the public/private sector is determined by the Freedom of Information Act. Lastly, the approval authority to award a single-award task- or delivery-order contract greater than $100 million rests with the head of the agency per FAR 16.504(c)(1)(ii)(D) and, to the extent the head of the agency considers the acquisition-planning determination on whether multiple awards are appropriate by the contracting officer is within his or her discretion; however, the law does not require such consideration. Contracting officers should be fully engaged or involved in the decision-making process.

This is a significant regulatory action and, therefore, was 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 Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not 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 enhances competition for small and large business, and the information that will be provided in debriefings on procurements over $5 million will benefit firms by enabling them to improve future offers. In addition, the Councils sought comments from small businesses on the affected FAR part 16 at the publication of the interim rule in the **Federal Register** at 73 FR 54008 on September 17, 2008. One comment was received and is discussed at Comment 22.

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. chapter 35, *et seq.*

List of Subjects in 48 CFR Part 16

Government procurement.

Dated: March 15, 2010.

Al Matera,

Director, Acquisition Policy Division.

■ Accordingly, the interim rule published in the **Federal Register** at 73 FR 54008 on September 17, 2008, is adopted as a final rule with the following changes:

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).

16.501–1 [Amended]

■ 2. Amend section 16.501–1 by adding "-" between the words "Delivery" and "order" in the definition of "Delivery order contract" and between the words "Task" and "order" in the definition of "Task order contract".

16.501–2 [Amended]

■ 3. Amend section 16.501–2 in the last sentence of paragraph (a) by adding "-" between the words "delivery" and "order" and between the words "task" and "order".

16.503 [Amended]

■ 4. Amend section 16.503 by removing from paragraph (a) introductory text "period" and adding "period (from one contractor)" in its place.

■ 5. Amend section 16.504 by revising paragraph (c)(1)(ii)(D)(*3*) to read as follows:

16.504 Indefinite-quantity contracts.

* * * * *

(c) * * *

(1) * * *

(ii) * * *

(D) * * *

(*3*) The requirement for a determination for a single-award contract greater than $100 million:

(*i*) Is in addition to any applicable requirements of Subpart 6.3.

(*ii*) Is not applicable for architect-engineer services awarded pursuant to Subpart 36.6.

* * * * *

[FR Doc. 2010–5989 Filed 3–18–10; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 25 and 52

[FAC 2005–39; FAR Case 2008–036; Item V; Docket 2009–019, Sequence 1]

RIN 9000–AL23

Federal Acquisition Regulation; FAR Case 2008–036, Trade Agreements—Costa Rica, Oman, and Peru

AGENCIES: Department of Defense (DoD), General Services Administration (GSA),