

Headquarters Policy Flash

FLASH 2000-22

DATE: August 25, 2000
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, MA-51
Office of Procurement and Assistance Management

SUBJECT: Federal Acquisition Circular (FAC) 97-19
(URGENT - SEE ITEM 4 IMMEDIATELY!)

This Policy Flash summarizes the ten items included in FAC 97-19, which was published in the Federal Register on July 26, 2000, at 65 FR 46052. The FAC is available via the Internet at <http://www.arnet.gov/far> . Contracting personnel should review the details of each item in the full text of the FAC.

***Please note:** The effective date for each item is noted below in the summary. Each rule is applicable to solicitations issued on or after the rule's effective date.*

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1. **Contract Bundling**

Effective Date: July 26, 2000

This final rule converts the interim rule published as Item III of FAC 97-15 to a final rule with minor changes. The rule amends the FAR to implement Sections 411-417 of the Small Business Reauthorization Act of 1997. Sections 411-417 amend Title 15 of the United States Code to define “contract bundling,” and to require agencies to avoid unnecessary bundling that precludes small business participation in the performance of Federal contracts.

This rule affects all contracting officers that may combine requirements that were previously awarded to a small business or requirements for which a small business could have competed. Specifically, agencies and contracting officers must -

- ▶ Perform market research when bundled requirements are anticipated;
- ▶ Justify bundling in acquisition strategies;
- ▶ Meet specific estimated benefit thresholds before bundling requirements;
- ▶ Assess the impact of bundling on small businesses;
- ▶ Submit solicitations containing bundled requirements to the Small Business Administration (SBA) procurement center representatives for review; and
- ▶ Include, in negotiated competitions for bundled requirements, a source selection factor for the offerors' proposed use of small businesses as subcontractors and their past performance in meeting subcontracting goals.

The only change of substance made in the conversion of the interim rule to the final rule is resolution of the inconsistency in the definition of “measuring substantial benefits.” FAR 7.107(b)(2) has been altered to reflect that for bundled contracts in excess of \$75 million, the savings must be \$7.5 million or 5 percent of the contract value, whichever is greater.

Note: In Acquisition Letter 2000-02 dated April 20, 2000, additional guidance was provided to contracting activities to avoid, to the maximum extent practical, requirements' consolidation that could result in contract “bundling” adverse to small business interests. The Office of Procurement and Assistance Management also issued a memorandum on June 27, 2000, which clarified that the analytical requirements of FAC 97-15 must be performed for all DOE bundled requirements, regardless of the type of vehicle used, such as Federal Supply Schedules, Governmentwide Agency Contracts, or interagency agreements.

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2. North American Industry Classification System (NAICS) (Interim)
Effective Date: October 1, 2000

This interim rule revises the FAR to convert size standards and other programs in the FAR that are currently based on the Standard Industrial Classification (SIC) system to the North American Industry Classification System (NAICS). NAICS is a new system that classifies establishments according to how they conduct their economic activity. It is a significant improvement over the SIC because it more accurately identifies industries. Beginning October 1, 2000, NAICS will be used to establish the size standards for acquisitions. In addition, the interim rule converts the designated industry groups in FAR 19.1005 to NAICS and requires agencies to report contract actions using the NAICS code rather than the SIC code.

3. Liquidated Damages
Effective Date: September 25, 2000

This final rule clarifies coverage on liquidated damages. This rule will make it easier for contracting officers to understand the policy for administering liquidated damages. The only substantive change is at FAR 11.501(d). The authority to approve reductions in or waivers to liquidated damages was changed from the Comptroller General to the Commissioner, Financial Management Service.

4. Service Contract Act, Commercial Item Subcontracts
Effective Date: August 25, 2000

This final rule deletes the Service Contract Act (SCA) of 1965 from the list of laws inapplicable to subcontracts for commercial items in FAR 12.504(a). However, the Department of Labor (DOL) is simultaneously issuing two rules that affect the applicability of the SCA to contracts and subcontracts for commercial items. In a Final Rule (65 FR 45903) published on the same date as this FAC, DOL is issuing a temporary exemption from SCA coverage for certain subcontracts for commercial services. In a separate Notice of Proposed Rulemaking (NPRM) (65 FR 45943), DOL is proposing a permanent exemption for certain prime contracts and subcontracts.

What impact does this have on prime contract solicitations issued on or after August 25, 2000?

- ▶ Until this FAC, FAR clause 52.212-5, *Contract Terms and Conditions Required to Implement Statutes or Executive Orders - Commercial Items*, did not include the SCA clause at FAR 52.222-41 in paragraph (e) as one of

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- ▶ the clauses that flow down to commercial subcontractors. The present FAR change results in the SCA requirement being made applicable across the board to subcontracts for commercial items.
- ▶ However, on July 26, 2000 (65 FR 45903), the Department of Labor (DOL) issued a final rule that authorizes exclusions to the broad application of the SCA for certain commercial services subcontracts.
- ▶ The Civilian Agency Acquisition Council (CAAC) issued CAAC Letter 2000-01 on August 22, 2000 which authorizes agencies to issue a class deviation that would provide for the immediate application of the exclusions published by DOL.
- ▶ The Secretary of Energy is required by the FY 98 and FY 99 Energy and Water Development Appropriation Acts to approve all FAR deviations. Accordingly, we are processing a class deviation that will, when approved by the Secretary, provide for the exemptions consistent with the DOL final rule. (The DOL final rule is attached for your information.)
- ▶ We are processing the class deviation as quickly as possible and expect that authority to use the DOL exemptions will be provided soon. In the interim, if you are issuing a solicitation for commercial items on or after August 25, 2000, please contact Kevin Smith at 202-586-8189 for additional guidance.

5. Small Business Competitiveness Demonstration Program

Effective Date: July 26, 2000

This final rule converts the interim rule published as Item I of FAC 97-16 to a final rule without change. The rule amends FAR Part 19 to clarify language pertaining to the Competitiveness Demonstration Program, consistent with revisions to the Program that were required by the OFPP and SBA joint final policy directive dated May 25, 1999. The rule revises FAR Subpart 19.10 to -

1. Advise the contracting officer to consider the 8(a) Program and HUBZone Program when there is not a reasonable expectation that offers will be received from two or more emerging small businesses; and
2. Add a new section 19.1006, Exclusions, to reflect the exclusions of orders under the Federal Supply Schedule Program and contract awards to educational and nonprofit institutions or governmental entities.

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6. Construction Industry Payment Protection Act of 1999

Effective Date: July 26, 2000

This final rule amends FAR 28.102-2 and the clauses at 52.228-13, 52.228-15, and 52.228-16 to implement the Construction Industry Payment Protection (CIPP) Act of 1999. The CIPP Act amends the Miller Act to provide that the amount of a payment bond must equal the total amount payable by the terms of the contract, unless the contracting officer determines that a payment bond in that amount is impractical. The final rule also provides enhanced payment protection for Government contracts not subject to the Miller Act. The contracting officer must determine the appropriate amount of payment protection in each construction contract that exceeds \$25,000, and in any other contract that requires a performance bond in accordance with FAR 28.103-2.

7. Deferred Research and Development (R&D) Costs

Effective Date: September 25, 2000

This final rule amends the FAR by clarifying and simplifying the “deferred research and development costs” cost principle at FAR 31.205-48. The rule will only affect contracting officers that price contracts using cost analysis, or that are required by a contract clause to use cost principles for the determination, negotiation, or allowance of contractor costs.

8. Time-and-Materials or Labor Hours

Effective Date: September 25, 2000

This final rule clarifies the requirements regarding changes to time-and-materials and labor-hour contracts. The rule changes the clause at FAR 52.243-3, Changes--Time-and-Materials or Labor-Hours, to be consistent with Alternate II of the clause at FAR 52.243-1, Changes--Fixed-Price. Alternate II is used in service contracts and most of the work performed under time-and-materials or labor-hour contracts also involves services.

9. Repeal of Reporting Requirements under Public Law 85-804

Effective Date: September 25, 2000

This final rule amends the FAR to implement paragraph 901(r)(1) of the Federal Reports Elimination Act of 1998 (Pub. L. 105-362). Paragraph 901(r)(1) repealed section 4 of Public Law 85-804 (50 U.S.C. 1434). Section 4 required each department

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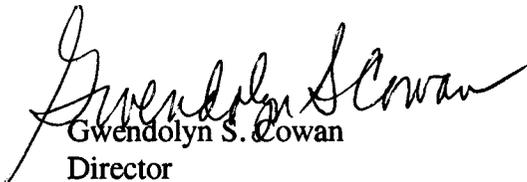
and agency to report annually to Congress any contract action in excess of \$50,000 issued under the authority of this law. The rule revises FAR 50.000 to update the reference to Public Law 85-804 and eliminates the reporting requirements at FAR Part 50.104. Agencies are no longer required to submit to Congress annually a report of actions taken on requests for relief under the authority of Public Law 85-804.

Pursuant to this FAR change, the DEAR will be amended to remove section 950.104 - Reports.

10. Technical Amendments

Effective Date: July 26, 2000

These amendments update references and make editorial changes at sections 4.803 and 22.400.


Gwendolyn S. Cowan
Director

Attachment

cc: PPAG Members