

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 10, 44, and 52**

[FAC 2005–42; FAR Case 2008–007; Item V; Docket 2010–0086, Sequence 1]

RIN 9000–AL50

**Federal Acquisition Regulation; FAR
Case 2008–007, Additional
Requirements for Market Research****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 Section 826 of the National Defense Authorization Act for Fiscal Year 2008 (FY08 NDAA). Section 826 established additional requirements in subsection (c) of 10 U.S.C. 2377. As a matter of policy, these requirements are extended to all executive agencies. Specifically, the head of the agency must conduct market research before issuing an indefinite-delivery indefinite-quantity (ID/IQ) task or delivery order for a noncommercial item in excess of the simplified acquisition threshold. In addition, a prime contractor with a contract in excess of \$5 million for the procurement of items other than commercial items is required to conduct market research before making purchases that exceed the simplified acquisition threshold for or on behalf of the Government.

DATES: *Effective Date:* June 16, 2010.*Applicability Date:* The rule applies to any solicitations issued and contracts (to include any subcontracts issued under such contracts) awarded on or after the effective date.*Comment Date:* Interested parties should submit written comments to the Regulatory Secretariat on or before August 16, 2010 to be considered in the formulation of a final rule.**ADDRESSES:** Submit comments identified by FAC 2005–42, FAR Case 2008–007, by any of the following methods:* Regulations.gov: <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2008–007” under the heading “Enter Keyword or ID” and selecting “Search”. Select the link “Submit a Comment” that corresponds with “FAR Case 2008–007”. Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company name (if any), and “FAR Case 2008–007” on your attached document.

* Fax: 202–501–4067.

* Mail: General Services Administration, Regulatory Secretariat (MVCB), 1800 F Street, NW., Room 4041, ATTN: Hada Flowers, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005–42, FAR Case 2008–007, 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. Warren Blankenship, Procurement Analyst, at (202) 501–1900 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–42, FAR Case 2008–007.**SUPPLEMENTARY INFORMATION:****A. Background**

Section 826 of Pub. L. 110–181, the National Defense Authorization Act for Fiscal Year 2008 (FY08 NDAA), amended 10 U.S.C. 2377(c), “Preliminary Market Research”, to require the head of an agency to conduct market research appropriate to the circumstances before awarding a task or delivery order in excess of the simplified acquisition threshold. Head of the agency for purposes of section 826 (10 U.S.C. 2377) is defined in 10 U.S.C. 2376 and means the Secretary of Defense, the Secretary of Homeland Security, and the Administrator of the National Aeronautics and Space Administration. In addition, section 826 requires the head of an agency to take appropriate steps to ensure that any contractor of a contract in an amount in excess of \$5 million for the procurement of items other than commercial items engages in such market research as may be necessary to carry out the requirements of 10 U.S.C. 2377(b)(2) before making purchases for or on behalf of the DoD. The statute also imposes a requirement on the Secretary of Defense to develop training and market research tools to assist contracting officers and contractors in performing appropriate market research.

Two continuous learning modules, CLC 030, “Essentials of Interagency Acquisition/Fair Opportunity,” and CLC 004, “Market Research,” are available at <http://www.dau.mil>; these provide training on the conduct of market research and identify market research tools.

The Councils agree that section 826 should apply in the FAR to all executive agencies, consistent with Governmentwide applications being sought in other competition matters by the Office of Federal Procurement Policy (OFPP). The Councils have determined that the rule will be applicable to solicitations and contracts (to include any subcontracts issued under such contracts) awarded on or after the effective date of this rule.

The requirement for agencies to perform market research is addressed by adding FAR 10.001(a)(2)(v). This change is captured by inserting language to direct the contracting officer to conduct market research before awarding an ID/IQ task or delivery order for noncommercial items in excess of the simplified acquisition threshold. FAR 10.001(a)(2)(vi) is amended to delete the beginning text (“Agencies shall conduct market research”) to bring parallel structure to all the items outlined under FAR 10.001(a)(2). FAR 10.001(d) is added to direct the contracting officer to the requirement in FAR 44.402(a)(2) and FAR clause 52.244–6 (Alternate I) when requiring that a contractor perform market research in contracts in excess of \$5 million for the procurement of items other than commercial items. FAR 10.002(b)(1) is amended to clarify that the contracting officer may use market research conducted within 18 months prior to the award of the ID/IQ contract or the award of any task or delivery order if the information is still current, accurate, and relevant. FAR subpart 44.3 is amended to require the review of market research efforts during Contractors’ Purchasing Systems Reviews to determine that market research is being accomplished. FAR 44.400, Scope of subpart, is revised to reflect the addition of “Section 826 of Public Law 110–181,” which governs the changes to FAR 44.402(a)(2) and FAR clause 52.244–6 (Alternate I). FAR 44.402(a)(2) and FAR clause 52.244–6 (Alternate I) are amended to satisfy 10 U.S.C. 2377(b)(2) as well as to reflect the requirement in 10 U.S.C. 2377(c)(4) that a contractor must perform market research when the contractor is acting as a purchasing agent for the Government with respect to a purchase that exceeds the simplified acquisition threshold under a contract in excess of \$5 million for the procurement of other than

commercial items. FAR 44.403, Contract clause, is revised to renumber the original paragraph as (a) and insert a new paragraph (b) to instruct contracting officers when to use FAR 52.244-6 (Alternate I).

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 Councils do not expect this interim 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 contract dollar threshold for the application of the rule is in excess of \$5 million. The number of small businesses receiving such contract awards is estimated to be statistically insignificant. Based on FY07 and FY08 data in the Federal Procurement Data system (FPDS) for task and delivery orders where the base and all options are over \$5 million, the total number of awards to small businesses in FY07 was 2,024 and in FY08 was 2,399. Additionally, the number of small businesses serving as subcontractors is also very low. Based on FY07 and FY08 data in the FPDS for task or delivery orders where the base and all options fell below \$5 million, the total number of awards to small businesses was 684,658 in FY07 and 697,029 in FY08. Since the FPDS does not track subcontractor data, reasonable estimates of the total figures were established. Therefore, of the total FY07 and FY08 figures, it is estimated that only 20 percent of each will apply to subcontractors. That is representative of 136,932 for FY07 and 139,406 for FY08.

Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

The Councils will also consider comments from small entities concerning the existing regulations in parts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAC 2005-42, FAR Case 2008-007) 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. chapter 35, *et seq.*

D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator of the National Aeronautics and Space Administration that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the provisions of section 826 went into effect upon enactment on January 28, 2008. Additionally, it will reduce the number of questionable decisions made due to insufficient market research on contracts in excess of \$5 million dollars and reduce dollars spent unnecessarily due to the lack of market research information obtained, thereby further eliminating violations of the statute. This interim rule is applicable to solicitations issued and contracts (to include any subcontracts issued under such contracts) awarded on or after the effective date of this rule. The Councils believe that the interim rule in the FAR will provide contracting officers and affected prime contractors the relevant regulatory guidance needed when addressing the statutory requirements outlined in this interim rule. However, pursuant to Pub. L. 98-577 and FAR 1.501-3(b), 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 Parts 10, 44, and 52

Government procurement.

Dated: June 2, 2010.

Edward Loeb,

Acting Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 10, 44, and 52 as set forth below:

1. The authority citation for 48 CFR parts 10, 44, and 52 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 10—MARKET RESEARCH

- 2. Amend section 10.001 by—
- a. Removing from paragraph (a)(2)(iv) “and”
- b. Redesignating paragraph (a)(2)(v) as paragraph (a)(2)(vi) and adding a new paragraph (a)(2)(v);
- c. Revising newly redesignated paragraph (a)(2)(vi); and

d. Adding a new paragraph (d).

The revised and added text to read as follows:

10.001 Policy.

- (a) * * *
- (2) * * *

(v) Before awarding a task or delivery order under an indefinite-delivery-indefinite-quantity (ID/IQ) contract (e.g., GWACs, MACs) for a noncommercial item in excess of the simplified acquisition threshold (10 U.S.C. 2377(c)); and

(vi) On an ongoing basis, take advantage (to the maximum extent practicable) of commercially available market research methods in order to effectively identify the capabilities of small businesses and new entrants into Federal contracting that are available in the marketplace for meeting the requirements of the agency in furtherance of—

(A) A contingency operation or defense against or recovery from nuclear, biological, chemical, or radiological attack; and

(B) Disaster relief to include debris removal, distribution of supplies, reconstruction, and other disaster or emergency relief activities. (See 26.205).

* * * * *

(d) See 44.402(a)(2) and 52.244-6 (Alternate I) for the requirement for a prime contractor to perform market research in contracts in excess of \$5 million for the procurement of items other than commercial items.

3. Amend section 10.002 by revising paragraph (b)(1) introductory text to read as follows:

10.002 Procedures.

* * * * *

- (b) * * *

(1) The extent of market research will vary, depending on such factors as urgency, estimated dollar value, complexity, and past experience. The contracting officer may use market research conducted within 18 months before the award of any task or delivery order if the information is still current, accurate, and relevant. Market research involves obtaining information specific to the item being acquired and should include—

* * * * *

PART 44—SUBCONTRACTING POLICIES AND PROCEDURES

4. Amend section 44.303 by redesignating paragraphs (a) through (i) as paragraphs (b) through (j), respectively, and adding a new paragraph (a) to read as follows:

44.303 Extent of review.

* * * * *

(a) The results of market research accomplished;

* * * * *

■ 5. Revise section 44.400 to read as follows:

44.400 Scope of subpart.

This subpart prescribes the policies limiting the contract clauses a contractor may be required to apply to any subcontractors that are furnishing commercial items or commercial components in accordance with Section 8002(b)(2) of Public Law 103-355 and Section 826 of Public Law 110-181 (10 U.S.C. 2377(c)).

■ 6. Amend section 44.402 by redesignating paragraphs (b) and (c) as paragraphs (c) and (d), respectively, and adding a new paragraph (b) to read as follows:

44.402 Policy requirements.

* * * * *

(b) Under a contract that is over \$5 million for the procurement of items other than commercial items, and under which the contractor is acting as a purchasing agent for the Government with respect to a purchase that exceeds the simplified acquisition threshold, the contractor shall, to the maximum extent practicable, conduct market research to determine—

(1) If commercial items or, to the extent commercial items suitable to meet the agency's needs are not available, nondevelopmental items are available that—

(i) Meet the agency's requirements;

(ii) Could be modified to meet the agency's requirements; or

(iii) Could meet the agency's requirements if those requirements were modified to a reasonable extent; and

(2) The extent to which commercial items or nondevelopmental items could be incorporated at the component level.

* * * * *

■ 7. Revise section 44.403 to read as follows:

44.403 Contract clause.

(a) The contracting officer shall insert the clause at 52.244-6, Subcontracts for Commercial Items, in solicitations and contracts other than those for commercial items.

(b) The contracting officer shall use the clause with its Alternate I when the acquisition value is in excess of \$5 million.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 8. Amend section 52.244-6 by revising the introductory text and adding Alternate I to read as follows:

52.244-6 Subcontracts for Commercial Items.

As prescribed in 44.403(a), insert the following clause:

* * * * *

Alternate I (JUN 2010). As prescribed in 44.403(b), the Contracting Officer shall substitute the following paragraph (d) for paragraph (d) of the base clause, and add the following paragraph (e):

(d) The Contractor shall include the terms of this clause, including this paragraph (d), but not including paragraph (e), in subcontracts awarded under this contract.

(e) To the maximum extent practicable, when the Contractor acts as a purchasing agent for the Government with respect to a purchase that exceeds the simplified acquisition threshold, the Contractor shall conduct market research (10 U.S.C. 2377(c)) to—

(i) Determine if commercial items or, to the extent commercial items suitable to meet the agency's needs are not available, nondevelopmental items are available that—

(A) Meet the agency's requirements;

(B) Could be modified to meet the agency's requirements; or

(C) Could meet the agency's requirements if those requirements were modified to a reasonable extent; and

(ii) Determine the extent to which commercial items or nondevelopmental items could be incorporated at the component level.

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DEPARTMENT OF DEFENSE**GENERAL SERVICES ADMINISTRATION****NATIONAL AERONAUTICS AND SPACE ADMINISTRATION****48 CFR Parts 12, 13, 14, 15, and 52**

[FAC 2005-42; FAR Case 2009-011; Item VI; Docket 2009-0012, Sequence 1]

RIN 9000-AL20

Federal Acquisition Regulation; FAR Case 2009-011, American Recovery and Reinvestment Act of 2009 (Recovery Act)—GAO/IG Access

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 (the Councils) have adopted as final, with changes, the interim rule amending the Federal Acquisition Regulation (FAR) to implement the American Recovery and Reinvestment Act of 2009 (Recovery Act) with respect to sections 902, 1514, and 1515.

DATES: *Effective Date:* July 16, 2010.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Edward N. Chambers, Procurement Analyst, at (202) 501-3221. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755. Please cite FAC 2005-42, FAR Case 2009-011.

SUPPLEMENTARY INFORMATION:**A. Background**

The Councils published an interim rule in the **Federal Register** at 74 FR 14646 on March 31, 2009, to implement the Recovery Act with respect to sections 902, 1514, and 1515. Technical amendments to the interim rule were published in the **Federal Register** at 74 FR 22810 on May 14, 2009. The interim rule added alternate clauses to FAR 52.214-26 "Audit and Records—Sealed Bidding", FAR 52.212-5 "Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items", and FAR 52.215-2 "Audit and Records—Negotiation".

Further, the interim rule amended FAR 12.504(a)(7) for contracts using Recovery Act funds to apply 41 U.S.C. 254d(c) and 10 U.S.C. 2313(c), Examination of Records of Contractor, to commercial item subcontracts which are otherwise exempt when subcontractors are not required to provide cost or pricing data.

Comments were received from 5 respondents. The Councils considered the comments received and concluded that the interim rule, as revised by the technical amendments, should be converted to a final rule with minor changes to the clause prescriptions.

The comments received are addressed as follows:

1. Scope of records that can be examined.

Comment: A respondent states that the language in FAR 52.212-5(d)(i) and FAR 52.212-5(d)(ii) is unnecessarily broad by not limiting the scope of records that can be examined by the