

TASK-ORDER AND DELIVERY-ORDER OMBUDSMAN (AUG 2010)

GSA has designated a Task-Order and Delivery-Order Ombudsman who will review complaints from contractors and ensure that they are afforded a fair opportunity for consideration in the award of task or delivery orders under Indefinite Delivery/Indefinite Quantity (ID/IQ) contracts, consistent with the procedures in the contract. Written complaints shall be submitted to the Ombudsman, with a copy to the Contracting Officer.

In the case that the contractor is not satisfied with the resolution of the complaint by the GSA Task-Order and Delivery-Order Ombudsman, the contractor may follow the procedures outlined in subpart 33.1.

The GSA Ombudsman is the Director, Office of Acquisition Integrity located at: General Services Administration (GSA), Office of Governmentwide Policy (OGP), Office of Acquisition Policy (MV), Acquisition Integrity Division (MVA), 1800 F Street, NW., Room 4014, Washington, D.C. 20405, Telephone: (202) 219-3454, Fax: (202) 219-3615, E-mail: joseph.neurauter@gsa.gov.
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DEPARTMENT OF HOMELAND SECURITY

48 CFR Parts 3002, 3007, 3009, 3016, 3034, 3035, and 3052

[Docket No. DHS-2009-0006]

RIN 1601-AA49

Homeland Security Acquisition Regulation; Lead System Integrators [HSAR Case 2009-003]

AGENCY: Office of the Chief Procurement Officer, DHS.

ACTION: Interim rule with request for comments.

SUMMARY: The Department of Homeland Security (DHS) is issuing an interim rule amending the Homeland Security Acquisition Regulation (HSAR) to implement section 6405 of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007. This section of the Act and these implementing regulations restrict contractors from acting as lead system integrators in the acquisition of DHS major systems if they have direct financial interests in the development or construction of any individual system or element of any system of systems they integrate subject to stated exceptions.

DATES: *Effective Date:* This rule is effective July 15, 2010.

Comments Due Date: Comments must reach the Department of Homeland Security, Office of the Chief Procurement Officer, Acquisition Policy and Legislation, on or before August 16, 2010.

ADDRESSES: Please submit written comments, identified by agency name and docket number DHS-2009-0006, by one of the following methods:

(1) *Federal eRulemaking Portal:* <http://www.regulations.gov>. To submit comments, follow instructions on www.regulations.gov and use docket number DHS-2009-0006.

(2) By mail to the Department of Homeland Security, Office of the Chief Procurement Officer, Acquisition Policy and Legislation, ATTN: Timothy J. Frank, 245 Murray Drive SW., STOP 0415, Washington, DC 20528-0415.

FOR FURTHER INFORMATION CONTACT: Timothy J. Frank, Senior Procurement Analyst, at (202) 447-5252 for clarification of content. Please cite HSAR Case 2009-003.

SUPPLEMENTARY INFORMATION:

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- A. Executive Order 12866 Assessment
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I. Request for Comments

Interested persons are invited to participate in this rulemaking by submitting written comments, views, or arguments on all or any aspect of this rule. Comments must be received by August 16, 2010. Comments should be organized by Homeland Security Acquisition Regulation (HSAR) Part, and address the specific section that is being commented on. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. See **ADDRESSES** above for information on how to submit comments. If you submit comments by mail, please submit them in an unbound format, on 8½-by-11-inch paper, suitable for copying and optical character recognition. If you would like DHS to acknowledge receipt of comments submitted by mail, please enclose a self-addressed stamped post card or envelope. DHS will consider all comments and material received during the comment period. Access to the docket, including background documents and comments received, can be obtained at <http://www.regulations.gov> which contains relevant

instructions under the FAQs tab on the home page.

II. Background

The U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Public Law 110-28, section 6405, 121 Stat. 112, 176 (2007) (codified as 6 U.S.C. 396; hereinafter "Section 396"), limits firms that can serve as lead system integrators on DHS acquisitions of major systems. Such contractors may have no direct financial interest in the development or construction of any individual system or element of any system of systems they would integrate, unless one of the stated exceptions has been satisfied.

One exception applies when the contractor is selected by a subcontractor as a lower-tier subcontractor, through a process over which the contractor had no control, to develop or construct an individual system or element of any system of systems the contractor would integrate. The other exception applies where the lead system integrator was selected using competitive procedures, DHS takes appropriate steps to prevent any organizational conflicts of interest in the selection process, and the Secretary of Homeland Security certifies these facts to various committees in Congress.

Section 396 also requires DHS to update its acquisition regulations and to include a definition of "lead system integrators" modeled after that used by the Department of Defense and a specification of various types of contracts and fee structures that are appropriate for use with lead system integrators. This rule implements Section 396.

This rule is issued by DHS's Chief Procurement Officer, who is the Senior Procurement Executive (SPE), see 41 U.S.C. 414 and DHS Delegation Number 0700, under authority of 5 U.S.C. 301-302, the Office of Federal Procurement Policy Act, Public Law 93-400, 88 Stat. 796 (1974), including sections 22 and 25, 41 U.S.C. 418b and 421, and FAR 48 CFR part 1, subpart 1.3.

III. Discussion of Interim Rule

The interim rule revises (HSAR) 48 CFR 3002.101, 3007.106, 3009.5, 3016.1, 3034.004, 3035.008, 3052.209-74 and 3052.209-75 to implement Public Law 110-28, Title VI, Section 6405.

This rule changes the HSAR as follows:

- Amends the definition of "Major system" in (HSAR) 48 CFR 3002.101 and removes the reference to the obsolete Management Directive (MD) 1400, Investment Review Process. The

definition of “Major system” for DHS has been revised in accordance with OMB Circular A–109, Major System Acquisitions, and FAR 2.101.

- Removes the “Reserved” identification from (HSAR) 48 CFR 3007 and adds a reference to the newly-revised (HSAR) 48 CFR 3009.570 in new (HSAR) 48 CFR 3007.106–70 to address limitations on the use of certain contractors as lead system integrators.

- Amends (HSAR) 48 CFR 3009 to add new section 3009.570 which describes the limitations on the use of lead system integrators and provides prescriptions for a new provision and clause found at (HSAR) 48 CFR 3052.209–74 and 3052.209–75, respectively, for use in certain solicitations and contracts.

- Amends (HSAR) 48 CFR 3016 to add subpart 3016.1 to address selection of the most appropriate contract type and fee structure.

- Removes the (HSAR) 48 CFR 3034 “Reserved” identification and adds a reference in new section 3034.004 pointing to 3009.570 for the policy applicable to acquisition strategies in the use of lead system integrators.

- Amends (HSAR) 48 CFR 3035 to add section 3035.008, which refers to 3009.570 describing limitations on the use of certain contractors as lead system integrators.

- Adds the new provision at (HSAR) 48 CFR 3052.209–74, Limitations on Contractors Acting as Lead System Integrators.

- Adds the new clause at (HSAR) 48 CFR 3052.209–75, Prohibited Financial Interests for Lead System Integrators.

IV. Regulatory Analyses.

A. Executive Order 12866 Assessment

This is a not a significant regulatory action under Section 6 of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. The Office of Management and Budget has not reviewed it under that Order. This rule is not a major rule under 5 U.S.C. 804. This rule helps to avoid organizational conflicts of interest in the award and performance of contracts awarded by the Department of Homeland Security that involve the use of lead system integrators. Additionally, it encourages the use of a larger number of contractors by establishing limitations on the extent of work that can be performed by lead system integrators.

B. Determination To Issue an Interim Rule

DHS has determined that urgent and compelling reasons exist to promulgate

this interim rule without prior opportunity for public comment. This action is necessary because it implements 6 U.S.C. 396, which specifies that the section applies to contracts entered into after July 1, 2007, and that DHS shall update the HSAR prior to that date. Nevertheless, pursuant to 41 U.S.C. 418(b) and FAR 1.501, DHS will consider public comments received in response to this interim rule with request for comment in the formation of a final rule.

C. Regulatory Flexibility Act

The Department of Homeland Security certifies that the interim rule amending (HSAR) 48 CFR 3002.101, 3007.106, 3009.5, 3016.1, 3034.004, 3035.008, 3052.209–74 and 3052.209–75, 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.* The factual basis for certification is presented in the following analysis of the effects of this rule. Application of the rule is limited to offerors or contractors providing services as lead system integrators or considering the provision of such services. Lead system integrators are limited to contracts for the development or production of major systems, and often involve the contractor performing functions closely associated with inherently governmental functions.

Under this interim rule, an entity that receives a contract as a lead system integrator cannot have any direct financial interest in the development or construction of any individual system or element of any system of systems while performing lead system integrator functions in the acquisition of a major system by the Department of Homeland Security under this contract. Lead system integrator contracts usually extend several years, and we estimate that a limited number of such contracts are in effect within DHS at any one time. Very few contracts of this character are awarded in any given year.

The limitations on entities (both large and small) apply only to contractors who choose to perform work for the Department of Homeland Security as a lead system integrator. If an entity does believe that participating in the particular contract as lead system integrator would impose a significant economic impact on their operation, the entity would make a business decision whether the revenue generated by doing business with the Department of Homeland Security as a lead system integrator would provide a financial return sufficient to justify the restriction of not having a direct financial interest

in the development or construction of any individual system or element of any system of systems while performing lead system integrator functions.

Presumably, entities which do not receive the desired return on revenue to justify participating as lead system integrator would choose not to propose on the particular contract. Such an entity could still choose to propose as a subcontractor under the prime contract, thereby mitigating the effect even further.

In addition, this rule is not discretionary; a statute requires that DHS address these matters in its acquisition regulation.

D. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

E. National Environmental Policy Act

We have analyzed this rule under Department of Homeland Security Directive 023–01, which guides the Department in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule, which does not involve any extraordinary circumstances, is categorically excluded under paragraphs A3(b) and A3(d) in Table I of Appendix A of Directive 023–01 because it implements legislation by amending acquisition regulations without changing the regulation’s environmental effect.

List of Subjects in 48 CFR Parts 3002, 3007, 3009, 3016, 3034, 3035, and 3052

Government procurement.

Dated: June 30, 2010.

Richard K. Gunderson,

*Acting Chief Procurement Officer,
Department of Homeland Security.*

■ Accordingly, DHS amends 48 CFR parts 3002, 3007, 3009, 3016, 3034, 3035, and 3052 as follows:

■ 1. Revise the authority citation for 48 CFR parts 3002, 3007, 3009, 3016, 3034, 3035, and 3052 to read as follows:

Authority: 5 U.S.C. 301–302, 41 U.S.C. 418b(a) and (b), 41 U.S.C. 414, 48 CFR part 1, subpart 1.3, and DHS Delegation Number 0700.

PART 3002—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 3002.101 by revising the definition of “major system” to read as follows:

3002.101 Definitions.

Major system means, for DHS, that combination of elements that will function together to produce the capabilities required to fulfill a mission need, including hardware, equipment, software, or any combination thereof, but excluding construction or other improvements to real property. A DHS major system is one where the total lifecycle costs for the system are estimated to equal or exceed \$300M (in constant 2009 dollars), or if the Deputy Secretary has designated a program or project as a major system. This corresponds to a DHS Level 1 or 2 capital investment acquisition.

* * * * *

■ 3. Add new part 3007 to read as follows:

PART 3007—ACQUISITION PLANNING**Subpart 3007.1—Acquisition Plans**

Sec.

3007.106 Additional Requirements for Major Systems.

3007.106–70 Limitations on Lead System Integrators.

Subpart 3007.1—Acquisition Plans**3007.106 Additional Requirements for Major Systems.****3007.106–70 Limitations on Lead System Integrators.**

See (HSAR) 48 CFR 3009.570 for policy applicable to acquisition strategies that consider the use of lead system integrators.

PART 3009—CONTRACTOR QUALIFICATIONS

■ 4. Add sections 3009.570 through 3009.570–4 to Subpart 3009.5 to read as follows:

Subpart 3009.5—Organizational and Consultant Conflicts of Interest

Sec.

3009.570 Limitations on contractors acting as lead system integrators.

3009.570–1 Definitions.

3009.570–2 Policy.

3009.570–3 Procedures.

3009.570–4 Solicitation provision and contract clause.

Subpart 3009.5—Organizational and Consultant Conflicts of Interest**3009.570 Limitations on contractors acting as lead system integrators.****3009.570–1 Definitions.**

“Direct Financial Interest,” as used in this section, is defined in the clause at HSAR 48 CFR 3052.209–75, Prohibited Financial Interests for Lead System Integrators.

“Lead system integrator,” as used in this section, is defined in the clause at (HSAR) 48 CFR 3052.209–75, Prohibited Financial Interests for Lead System Integrators.

3009.570–2 Policy.

(a) Except as provided in paragraph (b) of this subsection, under 6 U.S.C. 396, no entity performing lead system integrator functions in the acquisition of a major system (See (HSAR) 48 CFR 3002.101) by DHS may have any direct financial interest in the development or construction of any individual system or element of any system of systems under the program in which the entity is performing lead system integrator functions.

(b) The prohibition in paragraph (a) of this subsection does not apply if—

(1) The Secretary of Homeland Security certifies to the Committees on Appropriations of the Senate and the House of Representatives, the Committee on Homeland Security of the House of Representatives, the Committee on Transportation and Infrastructure of the House of Representatives, the Committee on Homeland Security and Governmental Affairs of the Senate, and the Committee on Commerce, Science and Transportation of the Senate that—

(i) The entity was selected by DHS as a contractor to develop or construct the system or element concerned through the use of competitive procedures, and

(ii) DHS took appropriate steps to prevent any organizational conflict of interest in the selection process; or

(2) The entity was selected by a subcontractor to serve as a lower-tier subcontractor, through a process over which the entity exercised no control.

(c) CONSTRUCTION—Nothing in this section 3009.570 shall be construed to preclude an entity described in paragraph (a) of this subsection from performing work necessary to integrate two or more individual systems or elements of a system of systems with each other.

3009.570–3 Procedures.

In making a responsibility determination before awarding a

contract for the acquisition of a major system, the contracting officer shall—

(a) Determine whether the prospective contractor meets the definition of “lead system integrator”;

(b) Consider all information regarding the prospective contractor’s direct financial interests in view of the prohibition at (HSAR) 48 CFR 3009.570–2(a); and

(c) Apply the following procedures:

(1) After assessing the offeror’s direct financial interests in the development or construction of any individual system or element of any system of systems, if the offeror—

(i) Has no direct financial interest in such systems, the contracting officer shall document the contract file to that effect and may then further consider the offeror for award of the contract;

(ii) Has a direct financial interest in such systems, but the exception in (HSAR) 3009.570–2(b)(2) applies, the contracting officer shall document the contract file to that effect and may then further consider the offeror for award of the contract;

(iii) Has a direct financial interest in such systems and the exception in (HSAR) 3009.570–2(b)(2) does not apply, but the conditions in (HSAR) 3009.570–2(b)(1)(i) and (ii) do apply, the contracting officer—

(A) Shall document the contract file to that effect;

(B) May, in coordination with program officials, request an exception for the offeror from the Secretary of Homeland Security, in accordance with Homeland Security Acquisition Manual section 3009.570; and

(C) Shall not award to the offeror unless the Secretary of Homeland Security grants the exception and provides the required certification to Congress; or

(iv) Has a direct financial interest in such systems and the exceptions in (HSAR) 3009.570–2(b)(1) and (2) do not apply, the contracting officer shall not award to the offeror.

3009.570–4 Solicitation provision and contract clause.

(a) Use the provision at (HSAR) 48 CFR 3052.209–74, Limitations on Contractors Acting as Lead System Integrators, in solicitations for the acquisition of a major system when the acquisition strategy envisions the use of a lead system integrator.

(b) Use the clause at (HSAR) 48 CFR 3052.209–75, Prohibited Financial Interests for Lead System Integrators—

(1) In solicitations that include the provision at (HSAR) 48 CFR 3052.209–74; and

(2) In contracts when the contractor will fill the role of a lead system

integrator for the acquisition of a major system.

PART 3016—TYPES OF CONTRACTS

■ 5. Add subpart 3016.1 to read as follows:

Subpart 3016.1—Selecting Contract Types

Sec.

3016.170 Contracts with Lead System Integrators.

Subpart 3016.1—Selecting Contract Types

3016.170 Contracts with Lead System Integrators.

The contracting officer should negotiate the most appropriate contract type and fee structure based on risks inherent in the work to be performed, in accordance with (FAR) 48 CFR 16.103(a). Contract type and fee structure should be commensurate with the work to be performed and the risks assumed. Worthwhile existing guidance on contract type selection, pricing, and fee structures, such as exists in Vol. I, Ch. 4 of the Contract Reference Pricing Guides [http://www.acq.osd.mil/dpap/cpf/docs/contract_pricing_finance_guide/vol4_ch1.pdf] can be consulted to determine the appropriate contract type and fee structure for use in varied contracts with lead system integrators in the production, fielding and sustainment of complex systems.

■ 6. Add part 3034 to read as follows:

PART 3034—MAJOR SYSTEM ACQUISITION

Subpart 3034.0—General

Sec.

3034.004 Acquisition strategy.

3034.0 General

3034.004 Acquisition strategy.

See (HSAR) 48 CFR 3009.570 for policy applicable to acquisition strategies that consider the use of lead system integrators.

PART 3035—RESEARCH AND DEVELOPMENT CONTRACTING

■ 7. Add section 3035.008 to read as follows:

3035.008 Evaluation for award.

See (HSAR) 48 CFR 3009.570 for limitations on the award of contracts to contractors acting as lead system integrators.

PART 3052—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 8. Sections 3052.209–74 and 3052.209–75 are added to read as follows:

3052.209–74 Limitations on Contractors Acting as Lead System Integrators.

As prescribed in (HSAR) 48 CFR 3009.570–4(a), use the following provision:

LIMITATIONS ON CONTRACTORS ACTING AS LEAD SYSTEM INTEGRATORS (JUL 2010)

(a) *Definitions.* “Direct financial interest,” “lead system integrator,” “lead system integrator with system responsibility,” and “lead system integrator without system responsibility,” as used in this provision, have the meanings given in the clause of this solicitation entitled “Prohibited Financial Interests for Lead System Integrators” ((HSAR) 48 CFR 3052.209–75).

(b) *General.* Unless an exception is granted, no contractor performing lead system integrator functions in the acquisition of a major system by the Department of Homeland Security may have any direct financial interest in the development or construction of any individual system or element of any system of systems.

(c) *Representations.* (1) The offeror represents that it does [] does not [] propose to perform this contract as a lead system integrator with system responsibility.

(2) The offeror represents that it does [] does not [] propose to perform this contract as a lead system integrator without system responsibility.

(3) If the offeror answered in the affirmative in paragraph (c)(1) or (2) of this provision, the offeror represents that it does [] does not [] have any direct financial interest in the development or construction of any system(s), subsystem(s), system of systems, element of any system of systems, or services it proposes or intends to seek to satisfy this solicitation.

(d) If the offeror answered in the affirmative in paragraph (c)(3) of this provision, the offeror should contact the Contracting Officer for guidance on whether an exception may apply and what responsibilities the offeror may have in qualifying for an exception.

(e) If the offeror does have a direct financial interest, the offeror shall be prohibited from receiving an award under this solicitation, unless:

(1) The offeror submits to the Contracting Officer appropriate evidence that the offeror was selected by a subcontractor to serve as a lower-tier subcontractor through a process over which the offeror exercised no control; or

(2) the conditions described in (HSAR) 48 CFR 3009.570–2(b)(1)(i) and (ii) exist, after an opportunity is afforded to the offeror to provide information or commitments as may be necessary to meet (HSAR) 48 CFR 3009.570–2(b)(1)(ii), assuming any such

information or commitment will allow DHS to meet that standard.

(f) This provision implements the requirements of 6 U.S.C. 396, as added by Section 6405 of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, And Iraq Accountability Appropriations Act, 2007 (Pub. L. 110–28).

(End of provision)

3052.209–75 Prohibited Financial Interests for Lead System Integrators.

As prescribed in (HSAR) 48 CFR 3009.570–4(b), use the following clause:

PROHIBITED FINANCIAL INTERESTS FOR LEAD SYSTEM INTEGRATORS (JUL 2010)

(a) *Definitions.* As used in this clause—

(1) “Direct financial interest,” for the purpose of this clause and contract, and subject to exceptions set forth 6 U.S.C. 396(b) as implemented, means:

(i) Developing or constructing any individual system or element of any system of systems for which the Contractor is the lead system integrator;

(ii) Owning or being in a position to exert corporate control over a subcontractor at any level under the prime contract;

(iii) Owning, or being in a position to exert corporate control over an entity that either—

(A) Is a subcontractor at any level under the prime contract, or

(B) Owns or is in a position to control another entity that is a subcontractor at any level under the prime contract; and

(iv) Participating or sharing in the profits of another firm's development or construction of any individual system or element of any system of systems for which the Contractor is the lead system integrator or agreeing to participate in the profits of the firm from such development or construction.

(2) “Lead system integrator” includes “lead system integrator with system responsibility” and “lead system integrator without system responsibility.”

(3) “Lead system integrator with system responsibility” means a prime contractor for the development or production of a major system, if the prime contractor is not expected at the time of award to perform a substantial portion of the work on the system and the major subsystems.

(4) “Lead system integrator without system responsibility” means a prime contractor under a contract for the procurement of services, the primary purpose of which is to perform acquisition functions closely associated with inherently governmental functions (see section 7.503(d) of the Federal Acquisition Regulation) with regard to the development or production of a major system.

(5) The phrase “substantial portion of the work,” as used in the definition of “lead system integrator with system responsibility,” may relate to the dollar value of the effort or to the criticality of the effort performed.

(b) *Limitations.* The Contracting Officer has determined that the Contractor meets the definition of lead system integrator with [] without [] system responsibility. Unless an exception is granted, the Contractor shall not

have any direct financial interest in the development or construction of any individual system or element of any system of systems while performing lead system integrator functions in the acquisition of a major system by the Department of Homeland Security under this contract.

(c) *Agreement.* The Contractor agrees that during performance of this contract it will not acquire any direct financial interest as described in paragraph (b) of this clause, or, if it does acquire or plan to acquire such interest, it will immediately notify the Contracting Officer. The Contractor further agrees to provide to the Contracting Officer all relevant information regarding the change in financial interests so that the Contracting

Officer can determine whether an exception applies or whether the Contractor will be allowed to continue performance on this contract. If an organizational conflict of interest in the performance of this contract that is attributable to the Contractor's direct financial interest cannot be avoided, eliminated, or mitigated to the Contracting Officer's satisfaction, the Contracting Officer may terminate this contract for default or may take other remedial measures as appropriate in the Contracting Officer's sole discretion.

(d) Notwithstanding any other clause of this contract, if the Contracting Officer determines that the Contractor misrepresented its financial interests at the

time of award or has violated the agreement in paragraph (c) of this clause, the Government may terminate this contract for default or may take other remedial measures as appropriate in the Contracting Officer's sole discretion.

(e) This clause implements the requirements of 6 U.S.C. 396, as added by Section 6405 of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, And Iraq Accountability Appropriations Act, 2007 (Pub. L. 110-28).

(End of clause)

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