and authorized by the contracting officer,''.

PART 16—TYPES OF CONTRACTS

■ 4. Amend section 16.103 by revising the second sentence of paragraph (d)(1) introductory text to read as follows:

16.103 Negotiating contract type.

* * * * *

(d) * * *

(1) * * * This shall be documented in the acquisition plan, or in the contract file if a written acquisition plan is not required by agency procedures.

* * * * *

16.301–2 [Amended]

■ 5. Amend section 16.301–2 by removing the second sentence from paragraph (b).

■ 6. Amend section 16.301–3 by—

■ a. Removing from paragraph (a)(3) ''contract;'' and adding ''contract or order;'' in its place; and

■ b. Revising paragraph (a)(4).

The revised text reads as follows:

16.301–3 Limitations.

(a) * * *

(4) Prior to award of the contract or order, adequate Government resources are available to award and manage a contract other that firm-fixed-priced (see 7.104(e)). This includes appropriate Government surveillance during performance in accordance with 1.602–2, to provide reasonable assurance that efficient methods and effective cost controls are used.

* * * * *

[FR Doc. 2012–4481 Filed 3–1–12; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 5, 8, 16, 18, and 38

[FAC 2005–56; FAR Case 2007–012; Item III; Docket 2011–0081, Sequence 1]

RIN 9000–AL93

Federal Acquisition Regulation: Requirements for Acquisitions Pursuant to Multiple-Award Contracts

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA have adopted as final, with changes, an interim rule amending the Federal Acquisition Regulation (FAR) to implement a section of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 to enhance competition in the purchase of supplies and services by all executive agencies under multiple-award contracts.

DATES: *Effective Date:* April 2, 2012.

FOR FURTHER INFORMATION CONTACT: Mr. William Clark, Procurement Analyst, at 202–219–1813 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755. Please cite FAC 2005–56, FAR Case 2007–012.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 76 FR 14548 on March 16, 2011, to implement section 863 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417), enacted on October 14, 2008. Section 863 mandated the development and publication of regulations in the FAR to enhance competition for the award of orders placed under multiple-award contracts. Section 863 specified enhancements that include—

- Strengthening competition rules for placing orders under the Federal Supply Schedules (FSS) program and other multiple-award contracts to ensure both the provision of fair notice to contract holders and the opportunity for contract holders to respond (similar to the procedures implemented for section 803 of the National Defense Authorization Act for Fiscal Year 2002 (Pub. L. 107–107)); and
- Providing notice in FedBizOpps of certain orders placed under multiple-award contracts, including FSS.

For each individual purchase of supplies or services in excess of the simplified acquisition threshold (SAT) that is made under a multiple-award contract, section 863 requires the provision of fair notice of intent to make a purchase (including a description of the work to be performed and the basis on which the selection will be made) to all contractors offering such supplies or services under the multiple-award contract. In addition, the statute requires that all contractors responding to the notice be afforded a fair opportunity to make an offer and have that offer fairly considered by the purchasing official. A notice may be provided to fewer than all contractors offering such supplies or services under a multiple-award contract if the notice is provided to as many contractors as practicable. When notice is provided to fewer than all the contractors, a purchase cannot be made unless—

- Offers were received from at least three qualified contractors; or
- A contracting officer determines in writing that no additional qualified contractors were able to be identified despite reasonable efforts to do so.

These requirements may be waived on the basis of a justification, including a written determination identifying the statutory basis for an exception to fair opportunity, that is prepared and approved at the levels specified in the FAR.

In considering the regulatory changes to strengthen the use of competition in task and delivery-order contracts, DoD, GSA, and NASA made changes consistent with the general competition principles addressed in the President's March 4, 2009, Memorandum on Government Contracting (available at *http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government*), while still preserving the efficiencies of these contract vehicles. For this reason, the rule addressed several issues that were not expressly addressed in section 863, such as competition for the establishment and placement of orders under FSS blanket purchase agreements (BPAs).

The FAR changes are applicable to task and delivery orders placed against multiple-award contracts including FSS and BPAs awarded under FSS pursuant to FAR subpart 8.4, and indefinite-delivery/indefinite-quantity contracts awarded pursuant to subpart 16.5. They do not apply to BPAs awarded pursuant to part 13.

Seven respondents submitted comments on the interim rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the comments in the development of the final rule. Respondents submitted comments covering the following nine categories: (1) Conformance with the Small Business Jobs Act; (2) The $103 million threshold reference; (3) Posting requirements; (4) Eliminate distinctions between single-award and multiple-award BPAs; (5) Competition requirements for establishing BPAs and allowing flexibility in establishing BPA ordering procedures; (6) BPA requirements and health-care programs; (7) Competition above the SAT is a

burden; (8) Seeking price reduction is inconsistent with competition; and (9) Modify FSS contracts to change the Maximum Order Threshold (MOT) to the SAT. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Summary of Significant Changes

- FAR 8.405–3(a)(7)(v) was modified to correct an inadvertent error regarding the threshold amount. The amount should have read $103 million in the interim rule. The amount has been corrected to read $103 million in the final rule to reflect inflation.
- FAR 8.405–3(c)(3) has been revised to add at the end of paragraph (3) ''The ordering activity is responsible for considering the level of effort and the mix of labor proposed to perform a specific task being ordered, and for determining that the total price is reasonable through appropriate analysis techniques, and documenting the file accordingly.'' This was added to ensure the price of an order requiring a statement of work is being evaluated when placed under a BPA with hourly rate services. This language is also consistent with the evaluation of orders requiring a statement of work in FAR 8.405–2(d).
- FAR 8.405–3(e) has been revised to remove paragraph (3), ''If a single-award BPA is established, the ordering activity contracting officer's annual determination must be approved by the ordering activity's competition advocate prior to the exercise of an option to extend the term of the BPA.'' This was determined to be too stringent a requirement for the exercise of an option, which is generally within a contracting officer's authority.

B. Analysis of Public Comments

1. Conformance With the Small Business Jobs Act

Comment: One respondent asked how the interim rule reconciles with the requirements of the Small Business Jobs Act of 2010, part III, section 1331 (Reservation of Prime Contracts for Small Businesses).

Response: This rule is not impacted by the requirements of section 1331 of the Small Business Jobs Act of 2010.

2. The $103 Million Threshold

Comment: Two respondents made reference to the $100 million threshold at FAR 8.405–3(a)(7)(v). They stated that it should be $103 million to be consistent with FAR 8.405–3(a)(3)(ii).

Response: The threshold should be $103 million in all places. The correction has been made to the FAR text.

3. Posting Requirements

Comment: Two respondents submitted comments on the posting requirements. One of the respondents asked what purpose is served by posting fair opportunity exemptions to the FedBizOpps Web site. The respondent noted that fair opportunity exemptions are posted after orders are placed and will be viewed by many parties that do not hold contracts under the relevant multiple-award acquisitions. The respondent suggested that this practice may result in needless challenges and litigation by parties that do not have standing to challenge the exemptions. The other respondent stated that it seemed that the posting requirements provided at FAR 5.301(d) are exactly the same as those provided at FAR 5.406. The respondent suggested that it seemed unnecessary to list the requirement in two different places in the FAR. As such, the respondent recommended removing FAR 5.406.

Response: The requirement to post exceptions to fair opportunity to FedBizOpps is required by section 863 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417). Further, regarding the duplicative posting requirements at FAR 5.301(d) and FAR 5.406, the Councils concluded that the multiple references would provide for clarity in implementation. The Councils also concluded that posting the justifications for exceptions to the competition requirements provides transparency into agency purchases.

4. Eliminate Distinctions Between Single-Award and Multiple-Award BPAs

Comment: One respondent stated that FAR 8.405–3(a) of the interim rule should be revised to place single-award BPAs on par with multiple-award BPAs. The respondent indicated that FAR 8.405–3 does not limit multiple-award BPAs to a one-year base and up to four one-year options, as required for single-award BPAs, nor does it require approval of the competition advocate to extend a multiple-award BPA. The respondent further stated the regulation should be revised to provide that the decision to use a single-award BPA versus a multiple-award BPA be documented and addressed in the acquisition plan for the BPA with the factors to be considered.

Response: The rule includes a preference for multiple-award BPAs, but does not prohibit the establishment of a single-award BPA. A single-award BPA is appropriate in certain circumstances. The multiple-award preference is intended to facilitate and enhance competition involving orders placed under FSS BPAs. The Councils concluded that the limit on the duration for single-award BPAs supports the preference for multiple-award BPAs and competition. However, the requirement for competition advocate approval at the annual review of a single-award BPA has been removed for the final rule. The contracting officer's determination whether to establish a single-award BPA or multiple-award BPAs must be documented in the file in accordance with FAR 8.405–3(a)(7).

5. Competition Requirements for Establishing BPAs and Allowing Flexibility in Establishing BPA Ordering Procedures

Comment: One respondent recommended that the interim rule be revised to provide greater flexibility in the establishment of multiple-award BPAs and the placement of orders under BPAs. The respondent noted that the rules previously allowed the agency establishing a BPA to establish its own BPA ordering procedures, and that this allowed agencies such as the Department of Veterans Affairs and the Department of Defense Enterprise Software Initiative to craft flexible ordering procedures that made good business sense under their unique circumstances.

Response: This rule provides flexibility in the establishment of FSS BPAs and the placement of orders under FSS BPAs. The rule includes the flexibility to justify an exception to the competition requirements at either the FSS BPA or order level. The procedures provided in the rule for the establishment of FSS BPAs and placement of the orders thereunder are intended to enhance competition. This is consistent with section 863 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417) and the general competition principles addressed in the President's March 4, 2009, Memorandum on Government Contracting, while still preserving the efficiencies provided by these contract vehicles.

6. BPA Requirements and Health-Care Programs

Comment: One respondent recommended that Schedules covering drugs and medical supplies be excluded from the rule.

Response: The statute does not allow for an exclusion of FSS covering drugs and medical supplies.

7. Competition Above the SAT Is a Burden

Comment: Two respondents thought that competition above the SAT level is too burdensome. One respondent recommended that the threshold at which formal competition procedures are triggered should be the greater of the MOT or SAT. The respondent also suggested that this rule will increase administrative burden and cost to both the Government and FSS holders. Another respondent noted that multiple-award contracts are designed to offer agencies a streamlined mechanism for acquiring services and supplies. The respondent stated that the procedures set forth in the interim rule would significantly increase the time required for placing orders in situations where a valid reason exists to utilize an exception to the fair opportunity requirement. According to the respondent, it is not clear that adding these requirements will have the intended effect of meaningfully increasing competition under multiple-award contracts.

Response: The use of the SAT as the threshold is required by statute (section 863 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417)).

8. Seeking Price Reduction Is Inconsistent With Competition

Comment: One respondent stated that the requirement that contracting officers seek a price reduction when placing an order over the SAT is inconsistent with the requirement that purchase orders over the SAT be competed. The FAR is built, in part, on the concept that competition drives a fair and reasonable price. As such, it is unclear, from the respondent's perspective, why contracting officers should be required to seek a further price reduction after a competitive procurement is awarded because the successful contractor has already provided its best price in order to win the procurement. The respondent argued that this requirement will likely result in contractors preparing their original price list in anticipation of multiple layers of price negotiation during the competitive procurement process and thereafter.

Response: Pursuant to the Government Accountability Office (GAO) report number GAO–09–792 entitled ''Agencies are not Maximizing Opportunities for Competition or Savings Under BPAs Despite Significant Increase in Usage,'' requesting a price reduction is not inconsistent with competition. A contracting officer can meet this requirement at any time via a solicitation, or anytime thereafter. This rule does not require the contractor to reduce its prices when asked to do so by the Government.

9. Modify FSS Contracts To Change the MOT to the SAT

Comment: One respondent stated that the old FAR subpart 8.4 ordering procedures and the price reduction clause (PRC) reflected the balance between competition and price reductions above the MOT versus compliance with the PRC. The PRC recognized that the PRC remedies were not necessary above the MOT, where competition and requests for price reductions were required by the old FAR subpart 8.4. According to the respondent, the new FAR subpart 8.4 ordering procedures have replaced the MOT with the simplified acquisition threshold and, as such, there should be a corresponding change in the contracts.

Response: The respondent's suggestion is out of the scope of this rule. The suggestion has been forwarded to the GSA Federal Acquisition Service for consideration.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

The Department of Defense (DoD), the General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA) 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 this rule does not revise or change existing regulations pertaining specifically to small business concerns seeking Government contracts. DoD, GSA, and NASA believe the final rule should benefit small entities by encouraging and enhancing competition.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 5, 8, 16, 18, and 38

Government procurement.

Dated: February 21, 2012.

Laura Auletta,

Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

Interim Rule Adopted As Final With Changes

Accordingly, the interim rule amending 48 CFR parts 5, 8, 16, 18, and 38 which was published in the **Federal Register** at 76 FR 14548 on March 16, 2011, is adopted as final with the following changes:

PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

■ 1. The authority citation for 48 CFR part 8 continues to read as follows:

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

■ 2. Amend section 8.405–3 by removing from paragraph (a)(7)(v) ''$100 million'' and adding ''$103 million'' in its place; adding a new sentence to the end of paragraph (c)(3); and removing paragraph (e)(3). The added text reads as follows:

8.405–3 Blanket purchase agreements (BPAs).

* * * * *

(c) * * *

(3) * * * The ordering activity is responsible for considering the level of effort and the mix of labor proposed to perform a specific task being ordered, and for determining that the total price is reasonable through appropriate analysis techniques, and documenting the file accordingly.

* * * * *

[FR Doc. 2012–4485 Filed 3–1–12; 8:45 am]

BILLING CODE 6820–EP–P