

limitations on an inmate worker's access to information and on use of FPI as a subcontractor.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before July 14, 2003, to be considered in the formation of the final rule.

ADDRESSES: Respondents may submit comments directly on the World Wide Web at <http://emissary.acq.osd.mil/dar/dfars.nsf/pubcomm>. As an alternative, respondents may e-mail comments to: dfars@acq.osd.mil. Please cite DFARS Case 2002–D003 in the subject line of e-mailed comments.

Respondents that cannot submit comments using either of the above methods may submit comments to: Defense Acquisition Regulations Council, Attn: Ms. Susan Schneider, OUSD (AT&L) DPAP (DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062; facsimile (703) 602–0350. Please cite DFARS Case 2002–D003.

At the end of the comment period, interested parties may view public comments on the World Wide Web at <http://emissary.acq.osd.mil/dar/dfars.nsf>.

FOR FURTHER INFORMATION CONTACT: Ms. Susan Schneider, (703) 602–0326.

SUPPLEMENTARY INFORMATION:

A. Background

Section 811 of the National Defense Authorization Act for Fiscal Year 2002 (Pub. L. 107–107) added 10 U.S.C. 2410n, providing that (1) before purchasing a product listed in the FPI catalog, DoD must conduct market research to determine whether the FPI product is comparable in price, quality, and time of delivery to products available from the private sector; (2) if the FPI product is not comparable in price, quality, and time of delivery, DoD must use competitive procedures to acquire the product; and (3) in conducting such a competition, DoD must consider a timely offer from FPI for award in accordance with the specifications and evaluation factors in the solicitation.

On April 26, 2002, DoD published an interim rule at 67 FR 20687 to implement Section 811 of Public Law 107–107. In addition, DoD conducted a public meeting on June 2, 2002, to hear the views of interested parties. Approximately 60 persons attended the public meeting, and 43 sources submitted written comments in response to the interim rule.

On December 2, 2002, Section 819 of the National Defense Authorization Act for Fiscal Year 2003 (Public Law 107–314) amended 10 U.S.C. 2410n to (1)

clarify requirements for conducting market research before purchasing a product listed in the FPI catalog; (2) specify requirements for use of competitive procedures or for making a purchase under a multiple award contract if an FPI product is found to be noncomparable to products available from the private sector; (3) specify that a contracting officer's determination, regarding the comparability of an FPI product to products available from the private sector, is not subject to the arbitration provisions of 18 U.S.C. 4124(b); (4) specify that a DoD contractor may not be required to use FPI as a subcontractor; and (5) prohibit the award of a contract to FPI that would allow an inmate worker access to classified or sensitive information.

This proposed rule further implements the requirements of Section 811 of Public Law 107–107 and implements Section 819 of Public Law 107–314. DoD considered comments received in response to the interim rule published on April 26, 2002, in developing this proposed rule. A discussion of the comments, grouped by subject area, is provided below:

1. Small Business Issues

Comment: DoD should provide guidance on the role of FPI participation in small business set-aside competitions. Some respondents want DoD to restrict FPI participation to those acquisitions that have not been set aside for competition among small businesses. Those respondents indicate that, prior to the issuance of the first interim rule, FPI had been defined as an “other than small” business and, therefore, is not eligible to compete for small business set-aside awards. Other respondents commented that FPI participation in small business set-asides will have a positive effect on FPI.

DoD Response: Section 811 of Public Law 107–107 was silent on FPI's relationship to small business set-asides. However, Section 819 of Public Law 107–314 added a definition of “competitive procedures” as it applies to 10 U.S.C. 2410n. This definition is the one at 10 U.S.C. 2302(2), which includes, in subsection (2)(D), “procurements conducted in furtherance of section 15 of the Small Business Act (15 U.S.C. 644) * * *”. Therefore, this proposed rule adds text at 208.601–70, 208.602(a)(iv)(B), subpart 219.5, and Part 252 to provide for the inclusion of FPI in procurements conducted using small business set-aside procedures.

Comment: The Initial Regulatory Flexibility Analysis is correct in stating that the rule will have a positive effect

on small business concerns, because the rule permits small businesses to participate in procurements for supplies that were previously allocated to FPI on a priority basis.

DoD Response: DoD expects this rule to have a positive impact on small businesses. If an FPI product is determined to be noncomparable, small businesses will have the opportunity to compete. The rule further provides small businesses an opportunity to compete with FPI as their sole competitor.

2. Micro-Purchase Exclusion

Comment: DoD should exempt micro-purchases (\$2,500 and under) from the requirements of the rule. The procedures of the rule are far too burdensome for micro-purchases.

Comment: The requirements of Section 811 and FPI's statute apply regardless of whether the purchase is below the micro-purchase threshold.

DoD Response: 10 U.S.C. 2410n does not authorize DoD to provide an exemption for micro-purchases. However, FPI's Board of Directors recently adopted a resolution exempting purchases at or below \$2,500 from FPI clearance requirements. This change is being processed under a separate FAR case. When the FAR is amended to reflect this exemption, the text at DFARS 208.606(1) will become obsolete and will be removed. Therefore, this proposed rule excludes the text at DFARS 208.606(1).

3. Competitive Procedures

Comment: DoD should provide examples of “competitive procedures.”

DoD Response: Section 819 of Public Law 107–314 added a definition of “competitive procedures” as it applies to 10 U.S.C. 2410n. The definition in the proposed rule at 208.601–70 reflects the statutory definition, and also includes competition conducted using simplified acquisition procedures in accordance with FAR Part 13.

4. GSA Multiple Award Schedules

Comment: It is questionable whether the use of GSA multiple award schedules constitutes “competitive procedures” as contemplated in Section 811. Confusion arises because orders on GSA schedules do not require issuance of a solicitation or establishment of evaluation factors.

DoD Response: Section 811 of Public Law 107–107 was silent on FPI's relationship to the GSA multiple award schedule program. However, the definition of “competitive procedures” added by Section 819 of Public Law 107–314 includes “the procedures