

established by the Administrator of General Services for the multiple award schedule program * * * (10 U.S.C. 2302(2)(C)). The definition of "competitive procedures" in the proposed rule at 208.601-70 includes the use of GSA multiple award schedules (as one of the procedures in FAR 6.102). The proposed rule provides further clarification, at 208.602(a)(iv)(C), regarding competitive procedures involving multiple award schedules.

Comment: Contracting officers should be authorized to acquire the product off the Federal Supply Schedule, eliminating further competition if Federal Supply Schedule published prices are lower than FPI catalog prices.

DoD Response: Do not concur. This would violate 10 U.S.C. 2410n, which requires market research to determine if the FPI product is comparable. If the FPI product is determined to be noncomparable, competitive procedures must be used to acquire the product.

5. Comparability

Comment: The meaning of "comparable price, quality, and time of delivery" is questionable with respect to FPI products compared to private sector competition. Recognizing that it may not be feasible to produce a single general methodology that applies to every product, the rule should require disclosure of specific guidelines and the methodology used. Several respondents believed it was clear from both the statute and the interim rule that, to be found comparable to a product from the private sector, the FPI product must meet all three criteria of price, quality, and time of delivery. The inability to meet any one of the criteria should result in an automatic failure to find FPI comparable. Several other respondents stated exactly the opposite, *i.e.*, that for the FPI product to be considered comparable, it need only be comparable in one of the three areas. Several respondents requested that the final rule contain procedures for making the noncomparability determination.

DoD Response: Section 819(b) of Public Law 107-314 clarifies that DoD may determine an FPI product to be noncomparable based on price, quality, or time of delivery. The proposed rule clarifies this point at 208.602(a)(iv). The comparability determination must be fair, but it is not practicable to set the criteria that will apply to all circumstances. The contracting officer must retain flexibility. The word "comparable" is already used throughout the FAR with its common dictionary meaning ("having sufficient features in common with something else to afford comparison"). To support the

comparability determination, a requirement for a written document has been included in the proposed rule at 208.602(a)(ii). This document will include an assessment of the three factors, based on the results of market research that compares FPI products to those available from the private sector.

Comment: Eliminate the requirement to allow FPI to compete if, based on market research, it is determined noncomparable to the private sector. The private sector does not receive two chances, so FPI should not either.

DoD Response: Do not concur. The recommended change does not comply with 10 U.S.C. 2410n, which requires that an offer from FPI be considered if made in a timely fashion.

Comment: Section 811 is not appropriate for build-to-print items (spares) that support older weapons systems. It is more appropriate for commercial-type items, where it is easier to conduct market surveys for comparison purposes. In some cases, the organization uses the Government's depot cost to fabricate, as a basis of comparison. The use of the term "private sector" invalidates that comparison and requires a further comparison before award to FPI.

DoD Response: It appears that 10 U.S.C. 2410n was tailored more for commercial-type items than build-to-print items. However, DoD organizations must comply with its requirements.

Comment: The rule does not address buys of military-unique items, because those items do not have catalog prices. Each requirement is built to customer specification and must be individually quoted. There are no catalogs to consult for pricing and delivery, from either FPI or commercial sources. Section 811 would require following manual procedures, outside of automated procurement systems, and cause additional unnecessary lead time. In these situations, is it permissible to solicit commercial sources and FPI simultaneously and have the competitive offers and subsequent award decision serve as the basis for making the determination of whether the FPI product is comparable?

DoD Response: Although 10 U.S.C. 2410n does not prohibit this method of conducting comparability determinations, the statute clearly establishes an "if-then" situation, *i.e.*, if the Secretary makes a noncomparability determination, then he uses competitive procedures. Therefore, section 208.602 of the proposed rule addresses the market research and resulting comparability determination as a step separate from the solicitation process, to

adhere to the "if-then" approach established in 10 U.S.C. 2410n.

6. The Resolution Process

Comment: Does the arbitration panel affect the resolution of protests? In enacting Section 811, Congress was silent regarding the arbitration panel's authority or whether a clearance or waiver from FPI is required if the market research indicates that FPI's products are not comparable to those available from the private sector.

DoD Response: Although Section 811 was silent on this matter, Section 819 of Public Law 107-314 provides that the contracting officer's determination, regarding the comparability of FPI products or services to those available from the private sector that best meet DoD's needs in terms of price, quality, and time of delivery, is not subject to 18 U.S.C. 4124(b). 18 U.S.C. 4124(b) addresses the arbitration board process as it relates to disputes as to price, quality, character, or suitability of FPI products. The proposed rule amends the text at DFARS 208.602(a)(i) to clarify that the arbitration board process does not apply to a contracting officer's comparability determination.

7. Delegation of Authority

Comment: Will the determination to award to other than FPI be delegated down to the contracting officer level, as opposed to being kept at the department or agency level as stated in 208.602?

DoD Response: The proposed rule amends DFARS 208.602(a) to provide contracting officers the authority to make comparability determinations with regard to FPI products. This amendment is consistent with the language in Section 819(c)(1) of Public Law 107-314.

8. Unilateral Decision at 208.602(a)

Comment: It is inappropriate for the rule to state that the comparability determination is "a unilateral decision made solely at the discretion of the department or agency." This sentence should either be stricken or clarified. The provisions of the rule may conflict with other statutes or lead to possible misapplication of applicable law. DoD should be afforded discretion in making its decision, however, there must be guidance setting forth the criteria so the decisions are not arbitrary or capricious.

DoD Response: Do not concur. The comparability determination is clearly and solely a DoD determination.

9. Terminology

Comment: The words "FPI Schedule", in the first sentence of 208.602(a),