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DEPARTMENT OF DEFENSE

48 CFR Parts 208, 210, 219, and 252

[DFARS Case 2002-D003]

Defense Federal Acquisition Regulation Supplement; Competition Requirements for Purchases From a Required Source

AGENCY: Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 811 of the National Defense Authorization Act for Fiscal Year 2002 and section 819 of the National Defense Authorization Act for Fiscal Year 2003. Sections 811 and 819 address requirements for conducting market research before purchasing a product listed in the Federal Prison Industries (FPI) catalog, and for use of competitive procedures if an FPI product is found to be noncomparable to products available from the private sector. Section 819 also addresses limitations on an inmate worker's access to information and on use of FPI as a subcontractor.

EFFECTIVE DATE: December 15, 2003.

FOR FURTHER INFORMATION CONTACT: Ms. Michele Peterson, Defense Acquisition Regulations Council, OUSD(AT&L)DPAP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062. Telephone (703) 602-0311; facsimile (703) 602-0350. Please cite DFARS Case 2002-D003.

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.

DoD published an interim rule at 67 FR 20687 on April 26, 2002, to implement section 811 of Public Law 107-107. On December 2, 2002, section 819 of the National Defense Authorization Act for Fiscal Year 2003 (Pub. L. 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.

DoD published a proposed rule at 68 FR 26265 on May 15, 2003, to further implement the requirements of section 811 of Public Law 107-107, to implement section 819 of Public Law 107-314, and to address public comments received in response to the interim rule published on April 26, 2002. A discussion of the comments received in response to the proposed rule published on May 15, 2003, is provided below. DoD has adopted the proposed rule as a final rule without change.

1. *Comment:* FPI is not a small business concern and should not be permitted to participate in small business set-asides.

DoD Response: Concur that FPI is not a small business concern. The small business set-aside procedures in the rule apply only when an FPI product is found to be noncomparable to private sector products. In these situations, competitive procedures *must* be used and FPI *must* be given an opportunity to compete. Because the definition of competitive procedures in 10 U.S.C. 2410n includes procurements conducted in furtherance of the Small Business Act, the DFARS rule permits restriction of the competition to FPI and small business concerns.

2. *Comment:* The rule should prohibit a Federal contractor from being required to specify FPI products in the designs, specifications, or standards it develops for DoD.

DoD Response: Concur. Section 208.670 of the rule prohibits such an action.

3. *Comment:* The rule should clarify that DoD contracts, particularly architect-engineer contracts, should specify that FPI goods must be used to supply DoD unless excepted by 208.602. For example, DoD would not be permitted by law to procure office furniture as part of a consolidated or prime contract for the construction or renovation of a building if such a contracting method is used to preclude the necessity for a comparability determination or competitive procedures under sections 811 and 819.

DoD Response: Concur that consolidation of requirements merely to avoid a comparability determination or competitive procedures would be improper, as would any other action taken to circumvent statutory or regulatory requirements. However, consolidation where appropriate appears to be consistent with 10 U.S.C. 2410(e), which addresses the issue of subcontracting and specifically prohibits DoD from requiring a contractor to use FPI as a subcontractor or supplier. The provisions of 10 U.S.C. 2410(e) are reflected in the rule at 208.670.

4. *Comment:* A paragraph should be added to 208.670 to state that nothing in that section prohibits FPI from voluntarily entering into a subcontract with, or from being accepted as a subcontractor by, any prime contractor doing business with a DoD component.

DoD Response: Nothing in the rule precludes FPI from acting as a subcontractor. Specific mention of this subject in the rule is unnecessary.

5. *Comment:* The rule should clarify that use of multiple award schedule contracts is a legitimate competitive procedure.

DoD Response: This point is clear from the definition of "competitive procedures" at 208.601-70, which permits use of the procedures in FAR 6.102, to include the use of multiple award schedule contracts.

6. *Comment:* The first sentence of 208.602(a)(i) should make it clear that it is mandatory for contracting officers to conduct market research before purchasing a product listed in the FPI Schedule.

DoD Response: The first sentence of 208.602(a)(i) is an imperative statement and is clearly mandatory.

7. *Comment:* The way the rule is written, if FPI's product is found to be noncomparable in price, quality, and delivery time, FPI is given a second chance to meet these criteria through the competition phase. The rule should