

be revised to eliminate the second redundant step.

DoD Response: Do not concur. The two-step process is consistent with 10 U.S.C. 2410n(b), which clearly establishes an "if-then" situation, *i.e.*, if DoD makes a noncomparability determination, then competitive procedures must be used.

8. *Comment:* The rule should emphasize the two-step nature of the procedures, add a definition of "comparable" to 208.601-70, and clarify that DoD purchasers may request waiver if an FPI product has been determined to be comparable.

DoD Response: The rule is clear with regard to the two-step nature of the procedures. A definition of "comparable" is unnecessary, as this term is already used throughout the FAR and DFARS with its common dictionary meaning. If an FPI product is determined to be comparable to a private sector product, the rule requires use of the procedures in FAR subpart 8.6, which addresses clearance/waiver provisions. It is unnecessary to repeat these provisions in the DFARS.

9. *Comment:* The requirement for a written comparability determination takes discretion away from the contracting officer and should be eliminated.

DoD Response: Do not concur. It is common business practice to document the decision-making process.

10. *Comment:* The "unilateral decision" language at 208.602(a) should be removed. It does not provide any guidance to contracting officers in exercising their discretion.

DoD Response: Do not concur. This language clarifies the contracting officer's role in the determination process and is consistent with the provisions of 10 U.S.C. 2410n(d).

11. *Comment:* The rule should include language requiring FPI to adhere to its contractual obligations to the same extent as any other DoD contractor.

DoD Response: Concur that FPI should be held accountable for its performance. In accordance with FAR 8.607, the Government may collect past performance information for use in supporting a clearance request for future purchases. However, it is unnecessary to address this issue in this DFARS rule.

12. *Comment:* The rule overlooks the statutory requirement to give NIB second priority, behind FPI, for sales of products to the Government. The language at 208.602(a)(iv) should be revised to state that in the event that FPI is found to be non-comparable, JWOD products would be given first priority; if the product is not on the JWOD

Procurement List, then competitive procedures may be used.

DoD Response: Do not concur. In accordance with 41 U.S.C. 48, NIB is given priority only if the required supplies or services are not available from FPI. If FPI can fulfill the requirement, even though it is determined to be noncomparable, 10 U.S.C. 2410n requires use of competitive procedures that include FPI.

13. *Comment:* The requirement in 208.602(a)(iv)(C)(1), to "Establish and communicate to FPI the requirements and evaluation factors that will be used as the basis for selecting a source, so that an offer from FPI can be evaluated on the same basis as the schedule holder" is too solicitous of FPI, exceeds the requirements of the law, and should be removed.

DoD Response: Do not concur. Since a formal solicitation will not be issued for purchases made using multiple award schedules, there must be a means of communicating this information to enable FPI to compete in accordance with 10 U.S.C. 2410n.

14. *Comment:* The language at 208.602(a)(iv) should specify how FPI will be notified of a solicitation.

DoD Response: Do not concur. This level of detail is more appropriately left to the discretion of the contracting officer.

15. *Comment:* The FPI Board of Directors adopted a resolution that directs FPI to grant waivers in all cases where the private sector provides a lower price for a comparable product that FPI does not meet. The rule should clarify that, because of sections 811 and 819, DoD contracting officers are exempt from this resolution and are therefore not required to obtain a waiver from FPI.

DoD Response: Section 208.606 of the rule provides a blanket exception from FPI clearance requirements, to apply when a contracting officer determines that an FPI product is not comparable to private sector products and the procedures at 208.602(a)(iv) are used. A specific exemption from the Board of Directors resolution is unnecessary.

16. *Comment:* The initial regulatory flexibility analysis concluded that the rule could benefit small business concerns that offer products comparable to FPI. The analysis should also consider and include the impact on FPI and the small business concerns that support FPI.

DoD Response: Concur. The final regulatory flexibility analysis addresses FPI and the small business concerns that provide supplies and services to FPI.

This rule was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

This rule may 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 the rule will permit small entities to compete with FPI for DoD contract awards under certain conditions. A final regulatory flexibility analysis has been prepared and is summarized as follows:

This rule amends DoD policy pertaining to the acquisition of products from FPI. The rule implements 10 U.S.C. 2410n. The net effect of the rule is unknown at this time. The rule is expected to benefit small business concerns that offer products comparable to those listed in the FPI catalog, by permitting those concerns to compete for DoD contract awards. The rule could also have a negative impact on small business concerns that provide supplies or services to FPI in support of its products. There are no known significant alternatives to the rule that would meet the requirements of 10 U.S.C. 2410n.

A copy of the analysis may be obtained from the point of contact specified herein.

C. 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.*

List of Subjects in 48 CFR Parts 208, 210, 219, and 252

Government procurement.

Michele P. Peterson,
Executive Editor, Defense Acquisition Regulations Council.

■ Accordingly, the interim rule amending 48 CFR parts 208 and 210 which was published at 67 FR 20687 on April 26, 2002, is adopted as a final rule with the following changes:

■ 1. The authority citation for 48 CFR parts 208, 210, 219, and 252 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR chapter 1.

PART 208—REQUIRED SOURCES OF SUPPLIES AND SERVICES

■ 2. Section 208.601-70 is added to read as follows: