

will not likely result in (1) An annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

#### *D. Executive Order 13132*

OFCCP has reviewed the rule in accordance with Executive Order 13132 regarding federalism, and has determined that it does not have "federalism implications." The rule does not "have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

#### *E. Unfunded Mandates Reform*

Executive Order 12875—This rule will not create an unfunded Federal mandate upon any State, local, or tribal government.

Unfunded Mandates Reform Act of 1995—This rule will not include any Federal mandate that may result in increased expenditures by State, local, and tribal governments, in the aggregate, of \$100 million or more, or increased expenditures by the private sector of \$100 million or more.

#### **List of Subjects in 41 CFR Part 60–2**

Civil rights, Discrimination in employment, Employment, Equal employment opportunity, Government contracts, and Labor.

Signed at Washington, DC, this 1st day of September, 2006.

**Victoria A. Lipnic,**

*Assistant Secretary for Employment Standards.*

**Charles E. James, Sr.,**

*Deputy Assistant Secretary for Federal Contract Compliance.*

#### **Text of Rule**

■ In consideration of the foregoing the Office of Federal Contract Compliance Programs, Employment Standards Administration, Department of Labor, amends part 60–2 of Title 41 of the Code of Federal Regulations as follows:

#### **PART 60–2—AFFIRMATIVE ACTION PROGRAMS**

■ 1. The authority citation for part 60–2 continues to read as follows:

**Authority:** E.O. 11246, 30 FR 12319, and E.O. 11375, 32 FR 14303, as amended by E.O. 12086, 43 FR 46501.

#### **§ 60–2.18 [Removed and Reserved]**

■ 2. Remove and reserve § 60–2.18.

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**BILLING CODE 4510–CM–P**

### **DEPARTMENT OF DEFENSE**

#### **Defense Acquisition Regulations System**

#### **48 CFR Parts 202, 210, 213, 215, and 219**

**RIN 0750–AF36**

#### **Defense Federal Acquisition Regulation Supplement; Limitations on Tiered Evaluation of Offers (DFARS Case 2006–D009)**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Interim rule with request for comments.

**SUMMARY:** DoD has issued an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 816 of the National Defense Authorization Act for Fiscal Year 2006. Section 816 requires DoD to prescribe guidance on the use of tiered evaluation of offers for contracts and for task or delivery orders under contracts.

**DATES:** *Effective date:* September 8, 2006.

*Comment date:* Comments on the interim rule should be submitted in writing to the address shown below on or before November 7, 2006, to be considered in the formation of the final rule.

**ADDRESSES:** You may submit comments, identified by DFARS Case 2006–D009, using any of the following methods:

○ *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

○ *E-mail:* [dfars@osd.mil](mailto:dfars@osd.mil). Include DFARS Case 2006–D009 in the subject line of the message.

○ *Fax:* (703) 602–0350.

○ *Mail:* Defense Acquisition Regulations System, Attn: Ms. Deborah Tronic, OUSD(AT&L)DPAP(DARS), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062.

○ *Hand Delivery/Courier:* Defense Acquisition Regulations System, Crystal Square 4, Suite 200A, 241 18th Street, Arlington, VA 22202–3402.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided.

[www.regulations.gov](http://www.regulations.gov), including any personal information provided.

**FOR FURTHER INFORMATION CONTACT:** Ms. Deborah Tronic, (703) 602–0289.

#### **SUPPLEMENTARY INFORMATION:**

##### **A. Background**

This interim rule adds DFARS policy to implement Section 816 of the National Defense Authorization Act for Fiscal Year 2006 (Pub. L. 109–163). Section 816 requires DoD to prescribe guidance on the use of tiered evaluation of offers for contracts and for task or delivery orders under contracts. The guidance must include a prohibition on the use of tiered evaluation of offers unless the contracting officer (1) has conducted market research in accordance with Part 10 of the Federal Acquisition Regulation; (2) is unable, after conducting market research, to determine whether or not a sufficient number of qualified small businesses are available to justify limiting competition for the contract or order; and (3) includes in the contract file a written explanation of why the contracting officer was unable to make the determination.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

##### **B. Regulatory Flexibility Act**

DoD does not expect this rule to 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 relates to market research and documentation requirements performed by the Government. Therefore, DoD has not performed an initial regulatory flexibility analysis. DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2006–D009.

##### **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.*

##### **D. Determination to Issue an Interim Rule**

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist

to publish an interim rule prior to affording the public an opportunity to comment. This interim rule implements Section 816 of the National Defense Authorization Act for Fiscal Year 2006 (Pub. L. 109–163). Section 816 requires DoD to prescribe guidance prohibiting the use of tiered evaluation of offers unless the contracting officer has complied with certain market research and documentation requirements. Comments received in response to this interim rule will be considered in the formation of the final rule.

#### List of Subjects in 48 CFR Parts 202, 210, 213, 215, and 219

Government procurement.

**Michele P. Peterson,**

*Editor, Defense Acquisition Regulations System.*

■ Therefore, 48 CFR parts 202, 210, 213, 215, and 219 are amended as follows:

■ 1. The authority citation for 48 CFR parts 202, 210, 213, 215, and 219 continues to read as follows:

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

#### PART 202—DEFINITIONS

■ 2. Section 202.101 is amended by adding a definition of “Tiered evaluation of offers” to read as follows:

##### 202.101 Definitions.

\* \* \* \* \*

*Tiered evaluation of offers*, also known as *cascading evaluation of offers*, means a procedure used in negotiated acquisitions, when market research is inconclusive for justifying limiting competition to small business concerns, whereby the contracting officer—

(1) Solicits and receives offers from both small and other than small business concerns;

(2) Establishes a tiered or cascading order of precedence for evaluating offers that is specified in the solicitation; and

(3) If no award can be made at the first tier, evaluates offers at the next lower tier, until award can be made.

#### PART 210—MARKET RESEARCH

■ 3. Section 210.001 is revised to read as follows:

##### 210.001 Policy.

(a) In addition to the requirements of FAR 10.001(a), agencies shall—

(i) Conduct market research appropriate to the circumstances before—

(A) Soliciting offers for acquisitions that could lead to a consolidation of contract requirements as defined in 207.170–2; or

(B) Issuing a solicitation with tiered evaluation of offers (Section 816 of Public Law 109–163); and

(ii) Use the results of market research to determine—

(A) Whether consolidation of contract requirements is necessary and justified in accordance with § 207.170–3; or

(B) Whether the criteria in FAR part 19 are met for setting aside the acquisition for small business or, for a task or delivery order, whether there are a sufficient number of qualified small business concerns available to justify limiting competition under the terms of the contract. If the contracting officer cannot determine whether the criteria are met, the contracting officer shall include a written explanation in the contract file as to why such a determination could not be made (Section 816 of Public Law 109–163).

#### PART 213—SIMPLIFIED ACQUISITION PROCEDURES

■ 4. Section 213.106–1–70 is added to read as follows:

##### 213.106–1–70 Soliciting competition—tiered evaluation of offers.

(a) The tiered or cascading order of precedence used for tiered evaluation of offers shall be consistent with FAR part 19.

(b) Consideration shall be given to the tiers of small businesses (e.g., 8(a), HUBZone small business, service-disabled veteran-owned small business, small business) before evaluating offers from other than small business concerns.

(c) Before issuing a solicitation with a tiered evaluation of offers—(1) The contracting officer shall conduct market research, in accordance with FAR part 10 and part 210, to determine—

(i) Whether the criteria in FAR part 19 are met for setting aside the acquisition for small business; or

(ii) For a task or delivery order, whether there are a sufficient number of qualified small business concerns available to justify limiting competition under the terms of the contract; and

(2) If the contracting officer cannot determine whether the criteria in paragraph (c)(1) of this section are met, the contracting officer shall include a written explanation in the contract file as to why such a determination could not be made (Section 816 of Public Law 109–163).

#### PART 215—CONTRACTING BY NEGOTIATION

■ 5. Subpart 215.2 is added to read as follows:

#### Subpart 215.2—Solicitation and Receipt of Proposals and Information.

##### 215.203–70 Requests for proposals—tiered evaluation of offers.

(a) The tiered or cascading order of precedence used for tiered evaluation of offers shall be consistent with FAR part 19.

(b) Consideration shall be given to the tiers of small businesses (e.g., 8(a), HUBZone small business, service-disabled veteran-owned small business, small business) before evaluating offers from other than small business concerns.

(c) Before issuing a solicitation with a tiered evaluation of offers—

(1) The contracting officer shall conduct market research, in accordance with FAR part 10 and part 210, to determine—

(i) Whether the criteria in FAR part 19 are met for setting aside the acquisition for small business; or

(ii) For a task or delivery order, whether there are a sufficient number of qualified small business concerns available to justify limiting competition under the terms of the contract; and

(2) If the contracting officer cannot determine whether the criteria in paragraph (c)(1) of this section are met, the contracting officer shall include a written explanation in the contract file as to why such a determination could not be made (Section 816 of Public Law 109–163).

#### PART 219—SMALL BUSINESS PROGRAMS

■ 6. Section 219.1102 is amended by adding paragraph (c) to read as follows:

##### 219.1102 Applicability.

\* \* \* \* \*

(c) Also, do not use the price evaluation adjustment in acquisitions that use tiered evaluation of offers, until a tier is reached that considers offers from other than small business concerns.

■ 7. Subpart 219.13 is added to read as follows:

##### Subpart 219.13—Historically Underutilized Business Zone (HUBZone) Program

##### 219.1307 Price evaluation preference for HUBZone small business concerns.

(a) Also, do not use the price evaluation preference in acquisitions that use tiered evaluation of offers, until a tier is reached that considers offers from other than small business concerns.

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