

Acquisition Policy
DOT DASH
2010-07

Date: March 30, 2010
To: Chief of the Contracting Office (COCO)
Acquisition Personnel
From: Office of the Senior Procurement Executive
Subject: Federal Acquisition Circular 2005-39

Summary: Federal Acquisition Circular 2005-39, which makes changes to the Federal Acquisition Regulation, was published in the March 23, 2010 issue of the Federal Register. A summary of the changes are attached.

This DASH and its attachment will be available online at the following website:
<http://www.dot.gov/ost/m60>, under Breaking News or Quick Picks, Policy DASHES.

Questions concerning this policy DASH should be directed to Lenita Ahmadi at (202) 366-4974 or lenita.ahmadi@dot.gov.



Cassandra Wells, Associate Director,
Acquisition Policy, Oversight and Business Strategies Division
Office of the Senior Procurement Executive

Attachment

ATTACHMENT (1)

Federal Acquisition Regulation Circular (FAC) 2005-38 amends the Federal Acquisition Regulation (FAR) as specified below:

List of Rules in FAC 2005-39

- I. Extend Use of Simplified Acquisition Procedures for Certain Commercial Items
- II. Clarification of Submission of Cost or Pricing Data on Non-Commercial Modifications of Commercial Items
- III. Use of Standard Form 26 – Award/Contract
- IV. Enhanced Competition for Task and Delivery Order Contracts—Section 843 of the Fiscal Year 2008 National Defense Authorization Act
- V. Trade Agreements—Costa Rica, Oman, and Peru
- VI. Payments Under Fixed-Price Architecture and Engineering Contracts
- VII. Technical Amendment

SUPPLEMENTARY INFORMATION: Summaries for each FAR rule follow.

Item I—Extend Use of Simplified Acquisition Procedures for Certain Commercial Items (FAR Case 2009-035)

This final rule amends the FAR to implement section 816 of the National Defense Authorization Act for Fiscal Year 2010. The rule extends for two more years the commercial items test program in subpart 13.5. The program was to expire January 1, 2010.

Item II—Clarification of Submission of Cost or Pricing Data on Non-Commercial Modifications of Commercial Items (FAR Case 2008-012)

This final rule adopts, with minor changes, the interim rule published in the Federal Register at 74 FR 11826 on March 19, 2009. The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are issuing a final rule amending the FAR to harmonize the thresholds for cost or pricing data on non-commercial modifications of commercial items to reflect the Truth In Negotiation Act (TINA) threshold for cost and pricing data. The Councils are hereby implementing a requirement of the National Defense Authorization Act (NDAA) for FY 2008. Specifically, section 814 of the NDAA requires the harmonization of the threshold for cost or pricing data on non-commercial modifications of commercial items with the TINA threshold for cost and pricing data. By linking the threshold for cost or pricing data on non-commercial modifications of commercial items with the TINA threshold at FAR

15.403-4, whenever the TINA threshold is adjusted the threshold for cost or pricing data on non-commercial modifications of commercial items will be automatically adjusted as well.

Item III—Use of Standard Form 26 – Award/Contract (FAR Case 2008-040)

This final rule modifies the instructions for use of the Standard Form 26, Award/Contract, at FAR subparts 15.5 and 53.2 to clarify that block 18 of the form should not be used to award a negotiated procurement. No change is made to existing policy or procedures.

Item IV—Enhanced Competition for Task and Delivery Order Contracts—Section 843 of the Fiscal Year 2008 National Defense Authorization Act (FAR Case 2008-006)

This final rule adopts, with changes, the interim rule published in the Federal Register at 73 FR 54008 on September 17, 2008. The FAR subpart 16.5 is amended to implement section 843 of the Fiscal Year 2008 National Defense Authorization Act (Pub. L. 110-181). The provisions of section 843 include (1) Limitation on single award task- or delivery-order contracts greater than \$100 million; (2) Enhanced competition for task and delivery orders in excess of \$5 million; and (3) Protest on orders on the grounds that the order increases the scope, period, maximum value of the contract under which the order is issued; or valued in excess of \$10 million. Several changes are made to the FAR as result of public comments on the interim rule. FAR 16.503 is amended to clarify that a requirements contract is awarded to one contractor. FAR 16.504(c)(1)(ii)(D)(3)(ii) is amended to clarify that the head of the agency determination to award a single-source architect-engineer task- or delivery-order contract over \$100 million is not required. The Councils also revised FAR 16.504(c)(1)(ii)(D)(3) to read that the requirement for a determination for a single award contract greater than \$100 million is in addition to any applicable requirements of FAR subpart 6.3. This change is made to clarify that the determination for a single award task or delivery-order contract greater than \$100 million is required in addition to the Justification and Approval (J&A) required by FAR subpart 6.3 when a procurement will be conducted as other than full and open competition.

Item V—Trade Agreements—Costa Rica, Oman, and Peru (FAR Case 2008-036)

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) have adopted as final, without change, an interim rule amending the Federal Acquisition Regulation (FAR) to implement the Dominican Republic—Central America—United States Free Trade Agreement with respect to Costa Rica, the United States-Oman Free Trade Agreement, and the United States-Peru Trade Promotion Agreement. This final rule allows contracting officers to purchase the goods and services of Costa Rica, Oman, and Peru without application of the Buy American Act if the acquisition is subject to the applicable trade agreements. The threshold for supplies and services is \$67,826 for the CAFTA-DR (Costa Rica) and

\$194,000 for the Oman and Peru free trade agreements (FTAs). The threshold for construction is \$7,443,000 for the CAFTA-DR and the Peru FTA and \$8,817,449 for the Oman FTA. This rule converts the interim rule to a final rule without change.

Item VI—Payments Under Fixed-Price Architecture and Engineering Contracts (FAR Case 2008-015)

This rule amends the clause at FAR 52.232-10 Payments Under Fixed-Price Architect-Engineer Contracts, to revise and clarify the retainage requirements. The contracting officer can withhold up to 10 percent of the payment due in any billing period when the contracting officer determines that such a withholding is necessary to protect the Government's interest and ensure satisfactory completion of the contract. However, withholding the entire 10 percent is not required, and no withholding is required if the contractor's performance has been satisfactory. The changes clarify that retainage is optional and any amounts retained should not be held over beyond the satisfactory completion of the instant contract.

Item VII—Technical Amendment

Editorial change made at FAR 14.202-4(a)(3).