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May 16, 2011

General Services Administration
Regulatory Secretariat (MVCB)
Attn: Hada Flowers
1275 First Street, NE, 7th Floor
Washington, DC 20417

Re FAC 2005 - 50, Item II—Requirements for Acquisitions Pursuant to Multiple-Award Contracts (FAR Case 2007–012)

Dear Ms. Flowers,

On behalf of The Coalition for Government Procurement, the following comments are provided on the interim rule amending the Federal Acquisition Regulation (FAR) to implement provisions regarding the Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year 2009 Requirements for Acquisitions Pursuant to Multiple-Award Contracts. The proposed rule was published in the Federal Register on March 16, 2011.

The Coalition for Government Procurement is a non-profit association of approximately 300 firms selling commercial services and products to the Federal Government. Our members collectively account for approximately 70% of the sales generated through the GSA Multiple-award Schedules (MAS) program and about half of the commercial item solutions purchased annually by the Federal Government. Many of our members also are information technology contractors on most, if not all, of the Governmentwide Acquisition Contracts. In addition, our members are contractors on many agency-wide multiple-award contracts as well as multi-agency contracts. Coalition members include small, medium and large business concerns. The Coalition is proud to have worked with government officials over the past 30 years towards the mutual goal of common sense acquisition.

INTRODUCTION

The interim FAR rule implements Section 863 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Section 863). As such, it is of particular interest to the Coalition's

members. The Coalition appreciates the opportunity to provide our comments on the interim rule. The Coalition supports the interim rule's implementation of the Section 863 competition requirements for orders under the Federal Supply Schedule (FSS) program. It is consistent with the statutory framework.

However, the Coalition believes that the interim rule includes unduly restrictive procedures for the establishment and use of Blanket Purchase Agreements (BPAs) under the FSS program. These new BPA procedures were not mandated by the statute and appear to be in response to a September 2009 Government Accountability Office (GAO) report entitled "Agencies Are Not Maximizing Opportunities for Competition or Savings under Blanket Purchase Agreements despite Significant Increase in Usage."

Although intended to foster competition, these new procedures will unduly limit the flexibility, versatility and utility of BPAs under the FSS program. For example, the interim rule places significant limits on the use of single-award BPAs and establishes additional procedural requirements for orders under multiple-award BPAs that further limit flexibility. As a result, agencies will find it increasingly difficult to craft cost effective single-award or multiple award FSS BPA solutions that address recurring requirements. This will reduce the overall cost effectiveness and utility of the FSS program, lead to unnecessary contract duplication and ultimately remove a key procurement tool for leveraging and competing government requirements.

Significantly, the new BPA regulations will likely have a direct and negative impact on the Administration's Federal Strategic Sourcing Initiatives (FSSI) as well as a host of other vital procurement programs that rely on BPAs to leverage requirements and achieve cost savings. These programs include, but are not limited to, the General Services Administration Global Supply program, the Department of Defense Enterprise Software Initiative (ESI), the SmartBuy program, the Department of Veterans Affairs (VA) use of national BPAs to standardize and compete hospital supplies and the VA's use of incentive BPAs to achieve discounted pricing for pharmaceuticals—a program that achieves savings on pharmaceutical costs that benefit VA hospitals, the TRICARE program and, ultimately, our Veterans and service personnel.

1. The Interim Rule Should Be Revised To Provide Parity For Single-Award and Multiple-Award BPAs

In an effort to promote competition, the interim rule establishes significant procedural barriers for the establishment of single-award BPAs. FAR 8.405-3(a)(3)(i) directs that the contracting officer shall, to the maximum extent practicable, give preference to establishing multiple-award BPAs. FAR 8.405-3(a)(3)(ii) provides that no single-award BPA exceeding $103 million, including options, may be awarded unless the head of the agency executes a written determination justifying the use of the single-award BPA.[1] Single-award BPAs must be structured with one base year with up to four one-year options. *See* FAR 8.405-3(d)(2). Further, FAR 8.405-3(e)(3) requires that the competition advocate must approve the exercise of any option year under a single-award BPA.

In contrast, FAR 8.405-3 does not limit multiple-award BPAs to a one-year base and up to four one-year options. Nor does it require approval of the competition advocate to extend a multiple-award BPA. The new FAR regulations have elevated form over substance in creating such a strong preference for multiple-award BPAs. The business decision to use a single-award BPA or a multiple-award BPA should be driven by the agency's procurement and program requirements rather than an unduly restrictive process favoring multiple-award BPAs.

FSS multiple-award and single-award BPAs are both valuable acquisition tools that should be available to contracting officers. Indeed, there are many situations where multiple-award BPAs are not the best fit given an agency's requirements, especially where an agency has well-defined requirements for a specific recurring need. In such circumstances, a single-award BPA likely will provide a more cost-effective solution to meet the agency's needs. However, the interim rule creates an analytical framework that unnecessarily favors multiple-award BPAs over single-award BPAs. The requirements should drive the decision to use a single-award BPA, not the process.

Indeed, the new rule will hamper effective purchasing programs that are built on competitively established single-award

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[1] FAR 8.405-3(a)(3)(ii) also establishes specific criteria that must be met in order to establish a single-award BPA exceeding $103 million.

BPAs. In particular, GSA's Global Supply Program effectively uses single-award BPAs for its logistics support of the Department of Defense and other Federal Agencies. The VA utilizes competed single-award BPAs for standardization of medical supplies for its health care network. Both of these programs have effectively used single-award BPAs for years which are now threatened by the interim rule. These are just two examples of many. Despite the GAO's report, throughout Government there are contracting agencies that have made effective use of single-award BPAs. However, the interim rule's apparent focus on misuse results in a rule that restricts the use of single-award BPAs to a point that it negatively impacts those who have fostered competition and achieved best value through single-award BPAs. [2]

As such, FAR 8.405-3(a) of the interim rule should be revised to place single-award BPAs on par with multiple-award BPAs. Further, the regulation should be revised to provide that the decision to use a single-award BPA versus a multiple-award BPA be documented and addressed in the acquisition plan for the BPA with the factors to be considered. Importantly, FAR 8.404(c) already provides that orders placed under the FSS program are not exempt from the development of acquisition plans. This approach, parity between the types of BPAs combined with the requirement to document the acquisition plan, provides the accountability and the flexibility for agencies to structure BPAs (single or multiple) to effectively meet their needs.

2. In Order To Achieve Cost Savings The Interim Rule Should Provide Greater Flexibility When Establishing Multiple-Award BPAs

The interim rule establishes new competition requirements for the establishment of BPAs exceeding the simplified acquisition threshold. The interim rule essentially applies the Section 863 competition requirements to the establishment of BPAs.[3] *See* FAR 8.405-3(b). In addition, where multiple-award BPAs have been

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[2] Given the restrictions on single-award BPAs agencies may have no choice but to turn to stand alone contracts to meet their needs. This will dilute the government's purchasing power through duplicative contracts. Such an approach would also increase overhead, bid and proposal as well as other contract administration costs for government and contractors.

[3] As noted in the preamble to the interim rule, Section 863 does not address the treatment of BPAs under the FSS program.

established, FAR 8.405-3(c)(2) establishes competition requirements for task or delivery orders issued under the BPAs. For example, for orders exceeding the simplified acquisition threshold, the contracting officer must provide a Request for Quotes (RFQ), including a description of the work to be performed, to all the BPA holders and consider all responses to the RFQ in accordance with the selection procedures. *See* FAR 8.405-3(c)(2)(iii). In essence, the new rule establishes two levels of RFQ requirements that may not make business and competitive sense for all government programs using the FSS.

As with the preference for single-award BPAs, the rule's additional competition requirements for BPAs undermines current, highly effective acquisition strategies that utilize BPAs to achieve cost savings and provide best value for customer agencies. Customer agencies have spent years developing acquisition processes based on FSS BPAs that are tailored to unique program requirements and the corresponding commercial markets. For example, under DoD's ESI a series of BPAs have been established through direct negotiations with commercial software publishers considering factors such as current installed base and/or historical purchasing levels by DoD. The BPAs are not established through a "competitive" RFQ process and resulting best value award. However, the direct negotiations do result in a series of BPAs with significant discounts off FSS contract pricing. Subsequently, at the order level, unless an exception applies, the DoD contracting officer competes the delivery order among the applicable BPA holders. Although ESI has saved millions, if not billions of dollars, utilizing the above approach under the interim rule, it is unlikely that the current ESI acquisition procedures would be allowed.

Clearly, one size does not fit all. Competition as required by Section 863 should be applied to BPAs when it makes good business sense for the taxpayer. That will not be each and every situation. As described in Section 3 below, like DoD's ESI, the VA has also developed acquisition strategies that differ from the interim rule's BPA requirements. However, like the ESI, the VA's processes effectively respond to the unique nature of its mission. In the case of the VA it is healthcare for veterans and contracting with the industries that provide medical supplies and pharmaceuticals in furtherance of that mission. As such, the Coalition recommends the interim rule be revised to provide greater flexibility in the establishment of BPAs and the placement of orders under BPAs.

The approaches used by ESI and VA should be authorized under a revised rule.

Further, the prior rules allowed the agency establishing BPAs to include the procedures for ordering in the BPAs---this would allow the VA and DOD's ESI to craft flexible ordering procedures that make good business sense under their unique circumstances. For example, under such an approach an agency could establish a series of BPAs that include a higher dollar threshold for subsequent task or delivery order "competitions" under multiple-award BPAs.

3. The Interim Rule BPA Regulations Lack Necessary Flexibility To Meet The Needs of Certain Health Care Programs Who Rely On FSS BPAs To Achieve Savings

The interim rule is inflexible and inappropriate for certain purchasing strategies followed in the health care marketplace, and thus defeats the use of BPAs as a means to achieve better prices based on competition for market share and increased volume through purchase incentives for customer agencies. The VA, in particular, would be adversely affected if it could no longer enter into single source BPAs instead of using national requirements contracts, or multiple-award BPAs.

First, FSS contractors who are manufacturers of pharmaceuticals and medical supplies are motivated to give better pricing based on large volume or market share. Many of the BPA offers the VA receives from these contractors are single-sources incentive agreements that offer terms intended to encourage facilities to purchase a contractor's products over competing products in the same class of commodity for a period of time. The VA may have a series of such BPAs in place where the ordering activity can compare the pricing and incentive terms and then place an order. Typically, the agency must earn the incentive discount through its buying practices. The consideration for the BPA price based on the agency's achievement of performance goals (purchases) during a fixed period. Therefore, it makes no business sense for a contractor to offer an incentive pricing agreement when the interim rule's requirement to compete individual orders above $150,000. The interim rule negates the motivation for a contractor

to offer incentive pricing and the agency's ability to attain the desired performance goals unlikely.

Second, running a competition for the initial series of BPAs followed by secondary competitions for each order exceeding $150,000 for the same supply requirements is administratively burdensome. For an agency like the VA, in which its individual treatment facilities purchase high volume supplies repeatedly, many of which can exceed the simplified acquisition threshold, it is rather impractical to compete BPAs on an order by order basis. These supplies are often urgently needed to treat patients, and imposing competition requirements at the order level would unnecessarily hinder accessing critical items. To avoid delay, ordering facilities would likely resort to purchasing under the FSS without the price concessions available through a BPA, or to purchasing through multiple smaller orders under the threshold to avoid the trigger. Moreover, as noted, the ordering facilities are less likely to get as deep a discount on individual orders of $150,000, than they would get based on market share or cumulative sales volume.

Third, given the strong preference for multiple-award BPAs in the rule in lieu of single-award BPAs, the VA's ability to standardize supplies on high-quality competitive lower-priced items would be undermined as structured in the interim rule. There are many advantages to standardization in addition to acquisition cost. For example, fewer items in inventory means more streamlined inventory management. Competitive, single-award BPAs have been a very effective tool in reducing the number of items in inventory at individual facilities. Moreover, a single source FSS BPA achieves the same standardization goals as a requirements contract but is more flexible and easier to administer.

For similar reasons, the interim rule would have negative effects on DoD's Uniform Formulary class competitions. DoD maintains a formulary of drugs that is available to TRICARE beneficiaries. In addition, a subset of these formulary drugs must be stocked at its Medical Treatment Facilities. For each therapeutic class of drugs, DoD relies on competition for placement on Tier 2 of the Uniform Formulary and on the Basic Core Formulary to obtain better prices than available on the FSS. Formulary status ensures a certain level of DoD purchasing. Accordingly, DoD solicits competitive BPAs when it is reviewing a class. The winners retain

their formulary status until the next time the class is reviewed. If DoD must again compete each order for a drug within that therapeutic class placed by an Military Treatment Facility above $150,000, this process would be counterproductive.

It also raises many questions. As formulary status is the consideration for the BPA price, must contractors excluded from the Basic Core Formulary (as a result of losing the class competition) be allowed to compete for those orders? Such a rule would undermine the value of the formulary status. And if a contractor in Tier 3 of the Uniform Formulary offered a better price for a particular facility's order, would that affect the product's formulary status? More importantly, as a practical matter, it takes time to run a competition and if a facility cannot order medically necessary drugs in amounts exceeding the threshold under an established BPA without further competition, it is likely that the facility will have to forego the additional discount.

In sum, applying the BPA rule to FSS contracts for drugs and medical supplies will not enhance competition and foster better pricing. Instead, because the rule does not take into consideration the different purchasing model in the marketplace for commercial health care supplies, it denies the VA and DoD an important tool for obtaining lower supply costs. We urge that schedules covering drugs and medical supplies be excluded from the rule.

4. FSS Contracts Should Be Modified To Lower The MOT To The Simplified Acquisition Threshold Of $150,000

Consistent with the new competition requirements, FAR 8.405-4, Price Reductions, has been revised to require the contracting officer to seek a price reduction for orders or BPAs exceeding $150,000. In essence, the new FAR 8.405-4 lowers the current Maximum Order Threshold (MOT) in each contract to $150,000. Under the old FAR 8.405-4, FAR 8.405-1(d) and FAR 8.405-2(c)(3)(ii), contracting officers were required to seek price reductions for orders exceeding the MOT. The MOT is identified in each schedule contract and can vary. For example, some FSS contracts currently have a MOT of $500,000 while other contracts currently have a MOT of $1 million. As explained below, since the new rule establishes enhanced competition requirements while lowering the threshold for seeking price reductions, FSS contracts

should be modified to provide that the MOT is the simplified acquisition threshold. This step would maintain the necessary consistency between FAR 8.4 and the FSS contracts.

The FAR 8.4 ordering procedures govern the placement of orders from FSS contractors. Through the years FAR 8.4 and the FSS contract clauses have been crafted to ensure a sound, comprehensive and uniform approach to placement of orders and the compliance requirements of the Price Reduction Clause (PRC). In particular, over the last 15 or so years, the FAR 8.4 ordering procedures have, at a minimum, directed contracting officers to conduct additional market research/review of contracts and seek price reductions for orders exceeding the MOT. Correspondingly, the PRC has specifically provided that there shall be no price reductions for sales "[t]o commercial customers under firm, fixed price definite quantity contracts with specified delivery in excess of the maximum order threshold specified in this contract. . . " *See* GSAR 552.238-75(d)(1). The PRC includes the "exception" for commercial contracts exceeding the MOT precisely because the FAR 8.4 ordering procedures, until now, required government contracting activities to seek price reductions and take additional competitive steps for FSS orders exceeding the MOT.

The old FAR 8.4 ordering procedures and the PRC reflected the balance between competition and price reductions above the MOT versus compliance with the PRC. The PRC recognized that the PRC remedies were not necessary above the MOT, where competition and requests for price reductions were required by the old FAR 8.4. The new FAR 8.4 ordering procedures have replaced the MOT with the simplified acquisition threshold. There should be a corresponding change in the contracts.

In addition to achieving consistency, this change would foster fairness and reduce costs. Contractors across the FSS program negotiated pricing based in part on the critical balance between the MOT and the PRC. At the same time, FSS contractors across the program have spent and continue to spend millions of dollars in compliance costs associated with the PRC. In particular, these compliance infrastructure costs have a significant impact on small business FSS contractors.[4]

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[4] Under the PRC, contractors also have significant disincentives from offering discounts to commercial customers. Non-government commercial price reductions can create PRC violations or otherwise lead to FSS contract price

The enhanced competition requirements for orders exceeding the simplified acquisition threshold including the requirement that ordering activities seek price reductions, make reform of the PRC, including lowering the MOT, a matter of maintaining contract balance in the FSS program. Moreover, such an approach is consistent with the Administration's commitment to reducing burdensome and unnecessary regulations.

The Coalition appreciates the opportunity to submit comments on this interim rule. If you have any questions please contact me at (202) 331-0975 or rwaldron@thecgp.org.

Regards,

Roger Waldron
President

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reductions that may last up to 20 years. As a result, the PRC can and does essentially limit competition, opportunity and growth in the commercial marketplace.