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Articles

March 2010

Interim Rule to Increase Competition in Major Defense Acquisition Programs and Impact DoD Acquisition Strategies for Technical Data Packages

The Department of Defense (DoD) recently issued an interim rule under DFARS Case 2009-D014 requiring acquisition plans for each major defense acquisition program (MDAP) to include measures to ensure competition, or the option of competition, at both prime and subcontract levels throughout the program life cycle. See 75 FR 8272-73. The interim rule is effective as of February 24, 2010, the date it was published, and adds a new paragraph (S-72) to DFARS 207.106. Greater DoD insistence on acquiring complete technical data packages, among other pro-competition measures, will likely result from implementation of this interim rule.

Background: The interim rule implements Section 202 of The Weapon Systems Acquisition Reform Act (the Act), Pub. L. 111-23. In May 2009, Congress enacted the Act to improve the organization and procedures for DoD contracts to develop major weapons systems. Section 202 of the Act directs the Secretary of Defense to ensure that MDAPs include measures:

- To ensure competition at prime and subcontract levels throughout the MDAP life cycle, as a means of increasing contractor performance;
- To require adequate documentation of the rationale for selection of subcontractor tier or tiers and documentation of the measures that will be used to ensure competition, or the option of competition;
- To ensure fair and objective "make-buy" decisions by prime contractors on MDAPs; and
- To ensure that MDAP source-of-repair awards are awarded on the basis of full and open competition to the maximum extent practicable.

The interim rule implements the Act by requiring that all MDAP programs include measures to ensure competition, or the option of competition, at prime and subcontract levels. The rule also requires that acquisition plans for MDAPs include measures that document the rationale: 1) for the selection of subcontractor tier or tiers; and 2) measures that will be used to ensure competition, or the option of competition.

The interim rule provides that measures to ensure competition, or the option of competition, include such specific items as competitive prototyping, dual-sourcing, unbundling of contracts, funding of next-generation prototype systems or subsystems, use of open architecture to facilitate upgrades, use of build-to-print approaches, acquisition of complete technical data packages, periodic competitions for subsystem upgrades, licensing of additional suppliers, and periodic system or program reviews addressing the competitive effects of program decisions.

To ensure fair and objective "make-buy" decisions by prime contractors, the interim rule requires contractors to give "full and fair consideration" to outside sources for the development of subsystems and components of major weapons systems. Furthermore, the rule requires that solicitations and contracts must provide for government surveillance and assessment of the process under and the extent to which prime contractors gave "full and fair consideration" to all potential sources in making their "make-buy" decisions.

Finally, the rule requires that source-of-repair awards for maintenance and sustainment services on major weapons systems be made on a competitive basis to the maximum extent practicable.

Comments to this interim rule should be submitted in writing by April 26, 2010.

Practitioner's Tips: Defense contractors involved in the development of major weapons systems will feel the impact of this interim rule primarily in the MDAP competitive landscape:

- The number and availability of MDAP-related prime and subcontracts awarded on sole source or limited competition basis is likely to decrease, triggering increased overall competition among contractors;
- DoD will increase its use of methods and strategies that increase competition, such as unbundling of contracts, use of open architecture, and dual-sourcing.
- DoD will also increase competition by requiring delivery of complete technical data packages. MDAP contractors may find it increasingly difficult to withhold proprietary data or unduly restrict the DoD's rights to data delivered under MDAP contracts; and
- Contractors will feel an increased burden to document and justify noncompetitive "make-buy" decisions that seem self-serving, such as a contractor's decision not to source work to outside entities.

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