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Proposed Rule Would Favor Veteran-Owned Small Businesses in Some Procurements

The Department of Veterans Affairs proposed a rule Aug. 20 that would allow a contracting officer to restrict competition for or award sole-source contracts to service-disabled veteran-owned small businesses (SDVOSBs) and veteran-owned small businesses (VOSBs) under certain conditions.

According to VA, the proposed rule would amend the VA Acquisition Regulation to allow COs to:

- under certain conditions, permit non-competitive sourcing under the simplified acquisition threshold with SDVOSBs or VOSBs;
- require set-asides for SDVOSBs or VOSBs above the simplified acquisition threshold when the CO reasonably expects that two or more eligible SDVOSBs or VOSBs will submit offers and that the award can be made at a fair and reasonable price;

- under certain conditions, permit non-competitive sourcing for SDVOSBs or VOSBs above the simplified acquisition threshold when the CO determines that a fair and reasonable price will be obtained as a result of negotiations for requirements not to exceed $5 million;
- include evaluation factors in negotiated acquisitions that give preference to SDVOSBs and VOSBs, as well as preference to offerors who propose to include such businesses as subcontractors;
- require offerors who propose to use SDVOSBs or VOSBs as subcontractors to use eligible businesses; and
- require VOSBs participating in VA acquisitions to register in VetBiz.gov's Vendor Information Pages database and verify that the business meets eligibility requirements.

The proposed rule would implement portions of the Veterans Benefits, Health Care, and Information Technology Act of 2006 (Pub. L. No. 109-461) and Executive Order 13360, Providing Opportunities for Service-Disabled Veteran Businesses to Increase Their Federal Contracting and Subcontracting. The law and executive order authorize VA to establish special methods for contracting with SDVOSBs and VOSBs.

In addition, the proposed rule would allow COs to encourage prime contractors and mentors to help SDVOSBs and VOSBs obtain bonds; recommend debarment of any business that willfully misrepresents ownership and control of the business for purposes of registering in a federal database; and, under certain conditions, acquire supplies and services from SDVOSBs and VOSBs in lieu of Federal Prison Industries (FPI) and the Government Printing Office (GPO). The proposed rule also would establish a VA mentoring program and give large businesses that participate in the program a preference in the award of VA prime contracts.

Finally, the proposed rule would revise the eligibility definition for "service-disabled veteran-owned small business concerns" to include, for a period of 10 years, a spouse who obtains ownership rights upon the death of a 100 percent service-disabled veteran or a veteran who died as a direct result of a service-connected injury, unless the spouse remarries or sells the interest in the business.

Comments on the proposed rule may be submitted by Oct. 20, 2008. Comments should indicate that they are submitted in response to "RIN 2900-AM92--VA Acquisition Regulation: Supporting Veteran-Owned and Service-Disabled Veteran-Owned Small Businesses." *Comments on the proposed rule are due 10/20/08 (73 Fed. Reg. 49,141, 8/20/08). For more information, contact Derek Underwood in the Acquisition Policy Division of VA's Office of Acquisition and Logistics at (202) 461-6865 or Derek.Underwood@va.gov.*

FAC Includes Rule Implementing Enhanced Competition for TO/DO Contract Requirements

An interim rule with request for comments issued by the Federal Acquisition Regulation councils Sept. 17 implements a statutory mandate requiring enhanced competition for task and delivery order contracts. The rule, which implements Section 843 of the fiscal year 2008 defense authorization act (Pub. L. No. 110-181), was included in a Federal Acquisition Circular (FAC 2005-27), a package of rules amending the FAR drafted by the Civilian Agency Acquisition Council and Defense Acquisition Regulations Council.

Section 843 includes provisions that limit the single award of TO/DO contracts valued at greater than $100 million; enhance competition for task and delivery orders valued at more than $5 million; and provide a mechanism to protest task and delivery orders valued at more than $10 million. With respect to the limitation on single award TO/DO contracts valued at more than $100 million, the rule said Section 843 states that no such contract may be awarded to a single source unless the agency head determines in writing that:

- The task or delivery orders expected under the contract are so integrally related that only a single source can reasonably perform the work;
- The contract provides only for firm-fixed price task or delivery orders;
- Only one source is qualified and capable of performing the work at a reasonable price to the government; or
- It is in the public's interest to award the contract to a single source due to exceptional circumstances.

"Competition of orders leads to improved contractor performance, stimulation of technological solutions, and reduction of costs over time," the rule writers said. "The tenets of this provision strike at the core of enhancing competition and ensuring competition continues to exist even after award of the initial contract vehicles."

The rule imposes requirements for increased competition for task and deliver orders valued at more than $5 million placed against multiple award contracts by requiring all awardees to be given a fair opportunity to be considered for each order. All awardees are to be provided, at a minimum, a reasonable notice of the order with a clear statement of requirements, a reasonable response period, disclosure of the significant evaluation factors and subfactors, and, where the award is made on a best value basis, a statement documenting the basis for award and the relative importance of quality and price or cost factors.

In addition, the rule said offerors are to be provided an opportunity for a post award debriefing. Further, the rule gives the Government Accountability Office exclusive jurisdiction over protests of orders awarded against TO/DO contracts. The rule authorizes protests alleging that the order increases the scope, period, or maximum value of the contract under which the order is issued. Protests also are authorized as a matter of right for orders valued in excess of $10 million.

"This provision provides for greater accountability, oversight and discipline within the Federal acquisition framework, when coupled with the requirement of post award debriefings," it said. While the rule is governmentwide, the Defense Department issued guidance implementing the statutory requirements under the provisions in May.

The FAR councils also issued a final rule to improve contract debt controls and procedures to ensure consistency within the regulations. The rule is the product of the FAR councils' evaluation of recommendations contained in a May 2005 DOD report on existing contract debt controls and procedures. The DOD working group that produced the report reviewed whether contract debts were being identified and recovered in a timely manner and properly accounted for in department books and records, the rule said.

The FAR councils, as a result of their evaluations and after considering public input, reorganized FAR 32.6 "to add clarity and provide a logical sequence," the rule said. The rule further makes several revisions to the FAR, such as incorporating clear language stating that: the contracting officer has primary responsibility for identifying and demanding payment of contract debts except those resulting from errors made by the payment office; if the contracting officer has any indication that a contractor owes money to the government under a contract, the contracting officer shall determine promptly whether an actual debt is due and the amount; and, generally, a contracting officer shall issue a demand for payment as soon as it is determined that an actual contract debt is due.

The FAR councils also issued an interim rule to revise the contract clauses related to the administration of the Cost Accounting Standards to maintain consistency between the FAR and CAS. The rule writers explained that the rule revises the FAR to reflect CAS clauses included in a final rule, issued June 14, 2007, that amended the CAS applicability threshold to be the same as the threshold for compliance with the Truth in Negotiations Act, as required by Section 822 of the FY 2006 defense authorization act (Pub. L. No. 109-163) (72 Fed. Reg. 32,809). Separately, the FAR councils issued a final rule to implement revisions to the regulations related to the CAS as they pertain to contracts with foreign concerns, including the United Kingdom.

The FAC also includes final rules to:

- Change the name of the Defense Department's "Office of Small and Disadvantaged Business Utilization" to the "Office of Small Business Programs";
- Implement amendments to the Robert T. Stafford Disaster Relief and Emergency Assistance Act by authorizing set-asides for major disaster or emergency assistance acquisitions to businesses that reside or primarily do business in the geographic area affected by the emergency or disaster, and to enact requirements for transitioning work under existing contracts;
- Increase the blanket waiver threshold for small dollar-value purchases from Federal Prison Industries by agencies from $2,500 to $3,000, and change the name of the Javits-Wagner-O'Day (JWOD) Program to the AbilityOne Program;
- Require that annual reviews by agency competition advocates be provided in writing to agency senior procurement executives and chief acquisition officers, and that the reports specifically address the quality of planning, executing, and managing of task and delivery orders valued at more than $1 million;
- Clarify that FAR 52.228-12, "Prospective Subcontractor Requests for Bonds"--which specifies that, upon the request of a prospective subcontractor offering to furnish labor or material for the performance of a construction contract for which a payment bond has been furnished to the government pursuant to the Miller Act, the contractor shall promptly provide a copy of such payment to the requestor--does not apply to commercial items; and
- Extend agency authority for the use of simplified acquisition procedures for commercial items in amounts greater than the $100,000 simplified acquisition threshold, but not exceeding $5.5 million, or $11 million for certain commercial items described at FAR Subpart 13.500(e).

Senate Passes FY '09 DOD Authorization Bill With Contractor Accountability Provisions

The Senate Sept. 17 voted 88-8 to pass a fiscal year 2009 defense authorization bill (S. 3001) that contains a host of provisions to strengthen contractor accountability and oversight, including the creation of a database on contractor integrity and performance.

Governmentwide contracting accountability and contingency contracting corps legislation sponsored by Sens. Joseph Lieberman (I/D-Conn.) and Susan Collins (R-Maine), offered as amendments to the defense bill, were not included in the bill passed by the Senate. The contracting amendments were part of a large managers' package that could not be cleared by both parties, Senate Armed Services Committee Chairman Carl Levin (D-Mich.) said, speaking on the floor of the Senate. The package of amendments is said to have comprised some 100 amendments.

Also included in the managers' package but not attached to the bill passed by the Senate was an amendment sponsored by Sen. Christopher Dodd (D-Conn.) that would have prohibited U.S. or foreign companies from entering into federal contracts for goods and services if the firm was subject to sanctions under the 1996 Iran Sanctions Act. The Senate DOD authorization bill will now move to conference committee where differences between it and the House version of the bill (H.R. 5658) passed in May will be resolved.

Congressional and industry sources believe that governmentwide contracting language included in the House bill is similar enough to contracting provisions omitted from the Senate bill for conferees to reach an agreement. Similarities include limiting the length of or minimizing the use of noncompetitive contracts, and increasing the size and expertise of the acquisition workforce.

Among the relatively few amendments adopted by the Senate during its consideration of the DOD authorization bill was an amendment sponsored by Senate Judiciary Committee Chairman Patrick Leahy (D-Vt.) that would allow more time for the government to prosecute cases of wartime contracting fraud, including contracting fraud alleged in connection with U.S. operations in Iraq and Afghanistan. The Leahy amendment, cosponsored by Sens. Robert Byrd (D-W.Va.) and Charles Grassley (R-Iowa), is identical to the "Wartime Enforcement of Fraud Act" (S. 2892) that Leahy introduced in April.

Leahy's amendment would modify the Wartime Suspension of Limitations Act of 1942, which allows the government to investigate and prosecute contracting fraud for up to three years after the end of a war, but only applies when the United States is in a declared war. The Leahy amendment would expand the coverage of the 1942 law to include situations in which Congress specifically authorizes the use of military force. It also would extend the current law's three-year statute of limitations for wartime contracting fraud offenses to permit prosecution for five years from the end of the conflict. "For more than five years, America has been fighting wars in Iraq and Afghanistan, yet efforts to investigate contracting fraud during these wars continue to lag, in part because it is difficult to uncover fraud while these conflicts continue," Leahy said in a statement. "I am pleased the Senate has adopted this common-sense amendment. We have an obligation to protect the public interest and taxpayer dollars during times of war. Congress had done just that in past wars, and Iraq and Afghanistan should be no different."

Several contracting provisions are part of the Senate defense authorization bill passed by the Senate, as agreed to by the Senate Armed Services Committee earlier this year. These include provisions that would require:

- the creation of a database regarding the integrity and performance of DOD contractors awarded contracts over $500,000;
- the secretaries of the military departments to establish configuration steering boards to stem major defense acquisition program cost growth that often results from requirements changes;
- DOD contracts or task and delivery orders for the performance of acquisition functions closely associated with inherently governmental functions and valued at more than $500,000 to include a contract clause addressing potential conflicts of interests of contractor employees who will perform inherently governmental functions;
- the revision of DOD regulations to ensure that private security contractors are not authorized to perform inherently governmental functions in an area of combat operations;
- contractor reporting of allegations of covered offenses, including sexual abuse; and
- balanced competition between U.S. and foreign-owned firms by ensuring that, in competitions for defense contracts in excess of $10 million, offerors cannot submit lower-priced proposals as the result of not having to pay payroll taxes.

COFC Denies Recruiting Services Contractor Injunctive Relief in GSA e-Buy Protest

The U.S. Court of Federal Claims Sept. 9 found that an awardee's proposal was timely and the Army National Guard's evaluation was reasonable (*Career Training Concepts Inc. v. United States,* Fed. Cl., No. 08-450C, 9/9/08).

Career Training Concepts Inc. (CTC) protested the award of a General Services Administration contract for recruiting services to Management Training Consultants Inc. (MTCI) pursuant to a request for proposals sent to potential offerors via the GSA e-Buy website. The solicitation was issued by the Army National Guard Bureau for the Education Liaison Program, which provides recruiting services at high school and colleges.

CTC sought preliminary and permanent injunctive relief against the award on several bases, but Judge Marian Blank Horn rejected CTC's arguments. CTC first argued that MTCI submitted its proposal four days late and should not have been considered by the agency. However, the court explained that the day before proposals originally were due, the agency sent an e-mail to all offerors extending the closing date.

CTC claimed that this e-mail was ineffective because it was not a formal solicitation amendment. But the court reasoned that the e-mail notices for the proposal extension "were not designed to be a formal amendment of the solicitation, but additional courtesy notices sent to the offerors. CTC agrees that it received a copy of the notice. All offerors, including CTC, had access to the website." Further, the exhibits CTC submitted revealed that federal buyers may submit online modifications on the e-Buy website. Therefore, the court concluded that the proposal deadline was extended properly and MTCI's proposal was timely.

CTC next argued that because the solicitation stated that "[t]his will be a GSA Schedule award," and thus MTCI was ineligible for the award because MTCI did not have the required Education Liaison labor category in the Federal Supply Schedules (FSS). The court, however, found that the evaluation of CTC's proposal did not contain the exact words "Education Liaison," and that both parties had labor categories with descriptions sufficiently close to the Education Liaison labor category to be compliant with the solicitation.

With regard to the agency's evaluation of proposals, CTC received a "major weakness" on the requirement to conduct a minimum number of recruiting presentations per week. CTC argued that the solicitation provided that if an offeror did not indicate reservations, it would be assumed that the offeror agreed to meet requirements. Yet, the court said that "CTC has not demonstrated that

the evaluation of this subfactor by the agency was unreasonable, or that 'assuming' CTC would meet the very basic requirements and no more would have had a material impact and changed the result of the competition."

The court also ruled that the agency's evaluation with regard to hiring personnel, the consideration of "extra-proposal" information, past performance, deliverables, and retention of personnel were reasonable, and rejected CTC's argument that MTCI should be disqualified for improperly using CTC's proprietary data.

GSA IG Cites Contract Oversight Failures Within Office of Chief Acquisition Officer

The General Services Administration Office of the Chief Acquisition Officer (OCAO) did not adequately oversee contracts for the collection of certain GSA acquisition workforce data and information, the GSA Office of Inspector General said in a recently released report.

As a result, the IG recommended that GSA strengthen contracting oversight and management controls, and take other steps to ensure the government receives the best value for its money. The IG review, launched as the result of a hotline complaint, identified contracting policies and procedures that OCAO did not adhere to for the award and administration of three contracts. The contracts were for the Acquisition Workforce Study program, the Applied Learning Center system, and the Acquisition Career Management Information System.

"In particular, we noted that contract oversight was lacking, contract files did not include all required documents, and [contract] information was incomplete," the IG said in the report dated July 30. GSA paid vendors without adequate documentation, and the agency did not receive deliverables in accordance with contract terms, the IG found. Other issues uncovered by the IG involved the improper use of "intra-agency agreements" and fiscal year funds, as well as the timeliness of contract modifications. "[D]ecisions made in the management of these contracts adversely impacted the validity and usefulness of the end products," the IG said. As a result, according to the report, the government may not have received the best return on its investment for the products and services obtained.

The IG also expressed concerns about the existence of a contracting policy group--the since-disbanded OCAO Operations Contracting Staff--that solicited contracts in support of OCAO initiatives, including the three contracts the IG reviewed in the report. "This raised the issue of independence and whether a policy organization should award contracts," the IG said. "Further, we had

additional concerns that an organization responsible for providing acquisition policy and procedures for the General Services Administration's acquisition workforce awarded and administered contracts that in many cases ignored policies and procedures."

The IG that said in June 2007 it raised these concerns with GSA's chief acquisition officer. Subsequently, in October 2007, GSA issued an order abolishing the OCAO Operations Contracting Staff and its functions related to contracting for GSA management and administration and transferred those contracting responsibilities to GSA's recently established Office of Management Services, contracting division. The IG made four recommendations to the GSA CAO:

- Strengthen contracting oversight and management controls, and ensure contract personnel adhere to the Federal Acquisition Regulation and GSA Acquisition Manual;
- Ensure that appropriated funds are obligated and used in accordance with the FAR;
- Determine the status of "Intra-agency Agreement Funding" arrangements reviewed by the IG pertaining to Federal Acquisition Institute operations; and
- Reassess controls on the disbursement of Intra-agency Agreement funds, and strengthen controls where necessary to ensure that funds are properly distributed.

T*he GSA IG report, "Hotline Complaint--Acquisitions with the Office of the Chief Acquisition Officer" (Report Number A070046/O/A/F08011; 7/30/08), is available at: http://oig.gsa.gov/A070046_1.pdf.*

SBA IG Report: Two ANCs Violated Participation Agreements for 8(a) Program

Two companies owned by Alaska Native Corporations repeatedly violated their "participation agreements" under the Small Business Administration's 8(a) program and thus should be suspended from the program immediately, SBA's inspector general said in a report released Aug. 12. The IG also said SBA should begin termination proceedings for the two companies, and more closely review other participants' financial statements and business agreements to identify relationships that could affect eligibility for the 8(a) program.

The two ANC firms--APM LLC, owned by Cape Fox Corp., and Goldbelt Raven LLC, owned by Goldbelt Inc.--violated their 8(a) participation agreements by not submitting management agreements and other agreements associated with their 8(a) contracts to SBA for approval, the SBA IG said. APM and Goldbelt entered into unapproved agreements that resulted in millions of dollars in 8(a) revenues being paid to companies owned by their two managers, the report continued.

"Neither APM nor Goldbelt obtained SBA's required approval of these agreements, preventing the agency from determining whether there were affiliation issues that would jeopardize their program eligibility," the IG said. SBA was not able to determine the true size of AMP because the company misrepresented its ownership structure and APM's relationship with separate businesses owned by non-native Alaskan managers, the IG said. According to the report, APM also failed to inform its SBA servicing office of an "ongoing contract dispute about its size, and provided the agency with a false document to support a $1.9 million loan from the non-native manager."

Goldbelt, the IG said, did not disclose an agreement with a parent company owner that also obscured the actual size of the ANC. Goldbelt "also repeatedly failed to comply with" requests by SBA for Goldbelt to fully disclose business ownership changes, the report said. "Violating any one clause in the participation agreement, such as failing to obtain pre-approval of business agreements or submitting false information, is cause for termination from the 8(a) program," the IG said.

The IG also said APM and Goldbelt did not seek SBA approval of agreements with companies owned by non-native individuals after being admitted into the SBA's 8(a) program, which is intended to increase socially and economically-disadvantaged small business participation in the federal procurement market. Agencies can award sole-source contracts to companies eligible to participate in the 8(a) program--generally sole-source awards valued at less than $5.5 million for goods and services associated with manufacturing, and $3.5 million for all other contracts, the IG said. However, ANCs under the 8(a) program can receive contracts of any value.

Between fiscal years 2003 and 2006, APM and Goldbelt, under agreements that were not approved by SBA, "paid or were obligated to pay more than $23 million of 8(a) revenues" to companies owned by non-native individuals, the IG said. Companies owned by APM's non-native manager were paid $7.5 million and promised a percentage of future 8(a) revenues, the IG said, while Goldbelt paid companies owned by its non-native manager more than $16 million in subcontracting fees.

Goldbelt also promised payment of future 8(a) revenues. "This compensation included a percentage of the firms' 8(a) contract billings and certain profits, and income earned from a preferred subcontracting arrangement," the IG said. Additionally, the IG warned that "Because these relationships may still be in effect, any additional 8(a) contracts that were awarded to the participants since October 1, 2006, may also be subject to the terms of these unapproved agreements." But in Aug. 5 comments on a draft of the IG report, SBA told the IG that, acting on the IG's recommendation, it had initiated actions to terminate and suspend APM and Goldbelt from the 8(a) program.

The IG said it identified the unapproved agreements involving the two ANCs via reviews of audited financial statements, income tax returns, and other business documents. However, "the financial statements and income tax returns were submitted to [SBA] as part of annual reports filed by the ANC-owned firms," the IG said. "As a result, SBA should have detected and requested copies of these agreements to determine how they impacted the participants' continued eligibility in the 8(a) program and eligibility for contract awards."

The IG said SBA needs to: "(1) strengthen its reviews of participants' financial statements, (2) ensure that eligibility can be properly determined, and (3) prevent abuses that could result in termination from the program. The IG also said that "as the majority owners of the 8(a) companies, parent ANCs have a responsibility to ensure that their participants are complying with 8(a) program requirements." Notably, the IG said the issues involving APM and Goldbelt were uncovered as part of an ongoing audit of SBA's oversight of ANC-owned firms participating in the 8(a) program, based on concerns raised by the Government Accountability.

The SBA IG report, "Non-Native Managers Secured Millions of Dollars From 8(a) Firms Owned by Alaska Native Corporations Through Unapproved Agreements that Jeopardized the Firms' Program Eligibility Project" (No. 8-14, 8/7/08), is available at: http://www.sba.gov/ig/8-14.pdf.

SBA Publishes Plan to Assess Economic Benefits of HUBZone Program

The Small Business Administration recently outlined the method it plans to use to measure the economic impact of the Historically Underutilized Business Zone (HUBZone) program. Development of a way to assess the economic benefits of the HUBZone program was one of a number of recommendations in a recent Government Accountability Office report questioning whether assistance under the program is reaching targeted locations and businesses. SBA agreed with the recommendation and published a notice in the Aug. 11 *Federal Register* seeking public input on its proposal for assessing the program's impact in economic terms.

SBA in its notice attributed the "complexity" of such an assessment to a number of factors, such as using three government agencies to reach five categories of HUBZones. "In addition, the required data for this assessment will be derived from four different databases," SBA said, which "increases the difficulty of correctly identifying the assessment's relevant data elements." The four different databases are the HUBZone Certification Tracking System, the Central Contractor Registration, the Federal Procurement Data System, and Census 2000 data. SBA's notice referred to reports, including the one by GAO, that the various databases provide inconsistent data on HUBZone firms and HUBZone areas, which it said "can lead to misidentification of the contract dollar-flows to HUBZone areas." SBA said its planned methodology "assumes that data inconsistencies will be addressed."

SBA said the methodology is based on an economic model that will provide estimates of:

- the economic impact directly attributable to the HUBZone program;
- the economic impact of the Non-HUBZone SBA programs on HUBZone areas; and
- the economic impact of other related federal procurement programs affecting HUBZone areas.

Economic impact will be measured by the estimated growth in median household income and employment or a reduction in unemployment in a specific HUBZone area, according to the notice. The HUBZone program is designed to assist small firms in economically distressed areas by providing contracting preferences to such firms. There is a 3 percent governmentwide contracting goal for the program, but, according to GAO, awards under the program in fiscal year 2006 fell short of that goal by about one-third.

GAO also said in its report on the HUBZone program, which was released last June, that federal agencies awarded contracts valued at about $8 billion to HUBZone firms in FY 2007, that there are more than 14,000 HUBZone areas, and that almost 13,000 firms were participating in the program as of last February.

New Rule Implements Statutory Changes In Competition Mandates for FPI Purchases

An interim rule issued Aug. 12 revises the Defense Federal Acquisition Regulation Supplement to implement new competition requirements that apply to procurements of products in which the Federal Prison Industries has a significant market share.

The competition mandates, set out in Section 827 of the fiscal year 2008 defense authorization act (Pub. L. No. 110-181), require competitive bidding for products in which FPI has a significant share of the DOD market. They relieve DOD from having to conduct market research beforehand to determine whether products available from the private sector are comparable to those offered by FPI and can be obtained at a better value.

Section 827 defines a significant market share as more than 5 percent. DOD has determined that there are eight product categories, also referred to as Federal Supply Codes (FSCs), in which the FPI meets this threshold. These FSCs are:

- laundry and dry cleaning equipment;
- miscellaneous hardware;
- electrical connectors;
- electrical hardware and supplies;
- cable, cord, wire assemblies--communications equipment;
- electrical wire and cable;
- office furniture; and
- household furnishings.

These FSCs will be updated as necessary in subsequent policy memos, according to a March 28 advisory from Shay Assad, director of defense procurement, acquisition policy, and strategic sourcing. Because FPI's share of the DOD market for these product categories exceeds 5 percent, competitive or fair opportunity procedures must be applied to solicitations and the contracts or orders that follow, Assad said in his memo. In conducting such competitive

procedures, contracting officers must consider timely offers from FPI in accordance with Federal Acquisition Regulation 8.602(a)(4).

The interim rule took effect Aug. 12. Concerns that the changes could result in a significant reduction in inmate jobs under the FPI program were raised at a May 6 hearing of the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security.

When FPI does not have a significant market share for a particular product, DOD contracting officers are required to follow the process outlined in FAR Subpart 8.602 and conduct market research to determine whether the product is comparable to private sector products in terms of price, quality, and time of delivery. Comparability determinations "are made at the discretion of the contracting officer," Assad said.

If the FPI product is not comparable to private sector products, DOD must use competitive procedures for the procurement or make a purchase under a multiple award contract in accordance with the competition requirements of those contracts. Under Section 827, contracting officers conducting such a competition "shall include FPI in the solicitation process and consider a timely offer from FPI," Assad said in his memo.

"Likewise, if the procurement is made using a multiple award schedule, then FAR 8.602(a)(4)(iii) requires contracting officers to communicate the item description or specifications and evaluation criteria directly to FPI, 'so that an offer from FPI can be evaluated on the same basis as the contract or schedule holder.' A timely offer from FPI must then be considered," Assad said.

Comments on the interim rule are due Oct. 14, 2008 (73 Fed. Reg. 46,816, 8/12/08).