

Dated: March 1, 2004.

Jo Lynn Traub,

Acting Regional Administrator, Region 5.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 36

Federal Acquisition Regulation; Application of the Brooks Act to Mapping Services

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Request for comments.

SUMMARY: The Federal Acquisition Regulatory Council (FAR Council) is considering whether guidance in the Federal Acquisition Regulation (FAR) addressing the application of the Brooks Act to mapping services should be amended. The FAR currently requires application of the Brooks Act's qualifications based selection process to certain types of mapping services while precluding application in other instances. The FAR Council requests that interested parties provide comments.

DATES: Interested parties should submit comments in writing to the FAR Secretariat at the address shown below on or before May 24, 2004.

ADDRESSES: Submit written comments to—General Services Administration, FAR Secretariat (MVA), 1800 F Street, NW., Room 4035, ATTN: Laurie Duarte, Washington, DC 20405.

Submit electronic comments via the Internet to—MappingNotice@gsa.gov.

Please submit comments only and cite “mapping notice” in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, at (202) 501-4755 for information pertaining to status or publication schedules. The TTY Federal Relay Number for further information is 1-800-877-8973. For clarification of content, contact Ms. Cecelia Davis, Procurement Analyst, at (202) 219-0202. Please cite “mapping notice.”

SUPPLEMENTARY INFORMATION:

Background

The selection procedures currently prescribed by the FAR for the acquisition of mapping vary depending on the nature of the mapping service. In particular, FAR 36.601-4(a)(4) states that mapping associated with the research, planning, development, design, construction, or alteration of real property is considered to be an architectural and engineering (A&E) service and must be procured using the processes at FAR 36.601, which implements Public Law 92-582, as amended, also known as the “Brooks Architect-Engineers Act.” Under the Act, which is codified in chapter 11 of title 40 of the United States Code, contracts are negotiated based on the demonstrated competence and qualifications of prospective contractors to perform the services at a fair and reasonable price.

FAR 36.601-4(a)(4) further states that mapping services that are not connected to traditionally understood or accepted A&E activities are not incidental to such A&E activities or have not, in themselves, traditionally been considered A&E services, shall be procured pursuant to provisions in FAR parts 13, 14, and 15. These FAR parts, used for the procurement of most goods and services, allow agencies to employ sealed bids or competitive negotiations (using streamlined procedures in certain instances) through either the consideration of only price or cost or both price/cost and non-cost factors, including the tradeoff of cost and non-cost factors.

The policy set forth in FAR 36.601-4(a)(4) for the handling of mapping services has been in effect since 1991. This policy is based, in large part, on the 1988 statutory changes to the Brooks Act.

FAR 36.601-4(a)(4) was most recently modified in 1999 to implement section 8101 of the Department of Defense Appropriations Act, 1999 (Public Law 105-262). Section 8101 stated that the National Imagery and Mapping Agency (NIMA), with limited exception, must use the procedures in FAR subpart 36.6 when using fiscal year 1999 funds to award contracts for mapping, charting, and geodesy activities, rather than the provisions in FAR parts 13, 14, and 15. The FAR coverage in effect at the time section 8101 was enacted made specific reference to NIMA as exemplifying the type of mapping services that must not be procured pursuant to FAR subpart 36.6. Consistent with section 8101, the Civilian Agency Acquisition Council (CAAC) and the Defense Acquisition Regulations Council (DARC) amended

FAR 36.601-4(a)(4) to remove the reference to NIMA. See FAR case 98-023; Item V (64 FR 32746, June 17, 1999). Because the FAR rule only removed the reference to NIMA, as an example, and did not change the FAR policies relating to application of the Brooks Act to mapping, the CAAC and DARC determined that the rule did not constitute a significant FAR revision within the meaning of FAR 1.501 and Public Law 98-577 and, therefore, publication for public comment was not required prior to issuing a final rule.

After the amendment to FAR 36.601-4(a)(4) was published in the **Federal Register**, the Office of Federal Procurement Policy received a series of letters from interested parties. In particular, some mapping industry representatives stated that the revision created confusion for the Federal procurement community. They considered the rule to be a major narrowing of the application of the Brooks Act.

At least one commenter stated that Congress intended to apply the Brooks Act to a wide scope of mapping services and cited to House Report 105-746, which called upon the FAR drafters to:

* * * define “Surveying and mapping” [subject to Brooks Act's qualifications based selection process] in such a manner as to include contracts and subcontracts for services for Federal agencies for collecting, storing, retrieving, or disseminating graphical or digital data depicting natural or man made physical features, phenomena and boundaries of the earth and any information related thereto including but not limited to surveys, maps, charts, remote sensing data and images and aerial photographic services.

The commenter requested that FAR 36.601-4(a)(4) be amended to apply the Brooks Act to a broader range of mapping services. At a minimum, the commenter asked that the public be given an opportunity to comment on the issue.

The FAR Council does not consider the removal of the reference to NIMA in the 1999 FAR amendments to constitute a shift in longstanding policy regarding the application of the Brooks Act to mapping services. However, the FAR Council has decided to seek public comment on the mapping policies articulated in FAR 36.601-4(a)(4) so it, the CAAC, and the DARC may review the effectiveness of current policy in selecting quality firms to perform mapping services and consider if a FAR change should be pursued.

Accordingly, respondents are encouraged to discuss advantages and drawbacks of the current regulatory coverage in FAR 36.601-4(a)(4) as it pertains to the acquisition of mapping

and suggest alternative new provisions, if any, that they believe would be more appropriate. Any suggested FAR revisions should be accompanied by a rationale that explains the potential benefit of the revision for customers and taxpayers.

Dated: March 17, 2004.

Ralph de Stefano,

Acting Director, Acquisition Policy Division.

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DEPARTMENT OF DEFENSE

48 CFR Parts 207, 212, 225, and 252

[DFARS Case 2003-D087]

Defense Federal Acquisition Regulation Supplement; Contractors Accompanying a Force Deployed

AGENCY: Department of Defense (DoD).

ACTION: Proposed rule with request for comments.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to address issues related to contract performance outside the United States. The proposed rule contains a clause for use in contracts that require contractor employees to accompany a force engaged in contingency, humanitarian, peacekeeping, or combat operations.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before May 24, 2004, to be considered in the formation of the final rule.

ADDRESSES: Respondents may submit comments directly via the Internet at <http://emissary.acq.osd.mil/dar/dfars.nsf/pubcomm>. As an alternative, respondents may e-mail comments to: dfars@osd.mil. Please cite DFARS Case 2003-D087 in the subject line of e-mailed comments.

Respondents that cannot submit comments using either of the above methods may submit comments to: Defense Acquisition Regulations Council, Attn: Ms. Amy Williams, OUSD(AT&L)DPAP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062; facsimile (703) 602-0350. Please cite DFARS Case 2003-D087.

At the end of the comment period, interested parties may view public comments on the Internet at <http://emissary.acq.osd.mil/dar/dfars.nsf>.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, (703) 602-0328.

SUPPLEMENTARY INFORMATION:

A. Background

This rule proposes amendments to the DFARS to add policy relating to contracts that require contractor employees to accompany a force engaged in contingency, humanitarian, peacekeeping, or combat operations outside the United States. The proposed changes will enable the uniform treatment of contractors that accompany a deployed force, and will enable combatant commanders to rapidly adjust contract requirements in response to changing conditions on the battlefield.

In addition, as a result of the DFARS Transformation initiative, this rule proposes to move text from DFARS 225.802-70 to the new DFARS companion resource, Procedures, Guidance, and Information (PGI). A proposed rule describing the purpose and structure of PGI was published at 69 FR 8145 on February 23, 2004. Additional information on the DFARS Transformation initiative is available at <http://www.acq.osd.mil/dpap/dfars/transf.htm>. A draft version of the PGI text referenced in this proposed rule is available at <http://www.acq.osd.mil/dpap/dfars/changes.htm>.

DoD particularly seeks comment on the following aspects of the proposed rule:

- Paragraphs (p) and (q) of the proposed clause, which permit the Combatant Commander to provide direction to the contractor.
- The authority and liability of the Government for providing support services, such as medical or legal services, to contractor personnel (section 225.7402-1 of the proposed rule).

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 applies only to contracts that require contractor employees to accompany a force engaged in contingency, humanitarian, peacekeeping, or combat operations outside the United States. 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 2003-D087.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the rule does not impose any new information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.* Although the proposed clause requires contractors to maintain (1) a current plan on file showing how the contractor would replace employees who are unavailable for deployment or who need to be replaced during deployment, and (2) a current list of all employees in the area of operations in support of the military force, DoD believes that these requirements are usual and customary and do not exceed what a contractor would maintain in the normal course of business. DoD invites comment on whether these requirements constitute an information collection requirement that imposes a burden as defined at 5 CFR 1320.3(b).

List of Subjects in 48 CFR Parts 207, 212, 225, and 252

Government procurement.

Michele P. Peterson,

Executive Editor, Defense Acquisition Regulations Council.

Therefore, DoD proposes to amend 48 CFR Parts 207, 212, 225, and 252 as follows:

1. The authority citation for 48 CFR Parts 207, 212, 225, and 252 continues to read as follows:

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

PART 207—ACQUISITION PLANNING

2. Section 207.105 is amended by adding paragraph (b)(19)(E) to read as follows:

207.105 Contents of written acquisition plans.

* * * * *

(b) * * *

(19) * * *

(E) Ensure that the requirements of DoD Instruction 3020.37, Continuation of Essential DoD Contractor Services During Crises, are addressed.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

3. Section 212.301 is amended by adding paragraph (f)(vii) to read as follows: