

New Department of Homeland Security Procurement Regulations Create New Responsibilities and Opportunities for Contractors

On December 4, 2003, the Department of Homeland Security (DHS) issued an interim rule (68 Fed. Reg. 67868) establishing the DHS Acquisition Regulation (HSAR) (published at 48 C.F.R. Parts 3001 through 3053). In so doing, DHS took a major step towards unifying the procurement policies and procedures of the twenty-two separate agencies under its authority into a single set of contracting rules. With certain exceptions for the Transportation Security Administration (TSA) and the Coast Guard, the HSAR will now control all acquisition activities within the DHS.

The Federal Register notice states that the HSAR is "intended as regulatory guidance." Generally, the HSAR establishes the procurement infrastructure of DHS and supplements the Federal Acquisition Regulation (FAR) in a variety of areas. The most significant provisions of the HSAR implement numerous unique requirements created in DHS's implementing statute, the Homeland Security Act of 2002 (Pub. L. No. 107-296) (the Act). The HSAR also establishes and encourages participation in the DHS Mentor-Protégé Program.

Although this is only an interim rule (DHS is accepting comments on the interim rule until January 5, 2004), the HSAR includes several requirements of note, which are discussed below.

▶ Stringent Conflict of Interest Rules

The organizational conflict of interest (COI) provisions in HSAR Subpart 3009.5 are not mandatory bars on contractors with actual or potential conflicts. Like the FAR provisions, the HSAR seeks to identify any COI and then gives the contracting officer the discretion to decide whether the COI is disqualifying or whether it is in the interests of the government to manage the COI through mitigation or other avoidance measures. The scope and detail of the disclosure requirements, however, are quite broad and will require a substantial data collection by prospective prime contractors.

When the HSAR Disclosure of Conflicts of Interest clause (HSAR 3052.209-72) is used in a solicitation, it will mandate disclosure by offerors of any conflicting interests (organizational, financial, contractual or otherwise) related to the solicitation going back one year from the date of the technical proposal. This includes the interests of not just the proposer and its affiliates and proposed consultants, but also proposed subcontractors with more than 20% of the work, and key personnel of

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the prime contractor and those subcontractors. For purposes of this rule, key personnel includes anyone owning at least 20% of the company, corporate officers, senior managers and anyone responsible for making decisions under the contract that can have an economic impact on the interests of the organization.

▶ **Ban on Contracting with Educational Institutions That Prohibit ROTC and Military Recruiting on Campus**

HSAR Subpart 3009.4 prohibits DHS from awarding contracts or grants to educational institutions that do not permit military recruiting on campus, as well as to those institutions that prevent the establishment of or enrollment in ROTC. In addition, any educational institution that prevents military recruiters from accessing student information regarding recruitment (including: name, address, telephone number, date and place of birth, educational level and major, as well as schools attended and degrees received) is also ineligible from receiving DHS funds.

▶ **Prohibition on Contracting With Expatriated Companies**

Implementing Section 835(b) of the Act, HSAR Subpart 3009.104-70 prohibits DHS from entering into contracts with corporate expatriates (i.e., U.S. companies that have reincorporated outside the United States so as to avoid paying U.S. taxes). The DHS Secretary, however, does retain discretion to waive this ban if it is determined that waiver is in the interest of homeland security, will prevent the loss of jobs in the U.S., or will prevent the government from incurring any additional costs that otherwise would not occur.

▶ **Security Requirements Regarding Unclassified Information**

When the contractor has access to DHS information technology (IT) networks, HSAR 3052.204-70, Security Requirements for Unclassified Information-Technology Resources, imposes on the contractor responsibility for security of any IT system connected to a DHS network or operated by the contractor for DHS. The clause requires the contractor to provide, implement, and maintain an IT security plan which conforms to numerous federal laws, such as the Computer Security Act of 1987 and the Government Information Security Reform Act of 2000. The security requirements include how the DHS's sensitive information is to be handled and protected at the contractor's site, the background investigation and clearance of employees, and the facility security required.

▶ **Contractor Employee Requirements**

HSAR Subpart 3037.1 imposes obligations on contractors regarding their personnel. Contractor personnel who require recurring access to DHS facilities as part of contract performance must complete HSIF Form 3237 (Contractor Personnel Access Application) before starting work on the contract. Contractor personnel who require access to sensitive, but unclassified, information are required to complete HSIF Form 4024 (Sensitive Information Nondisclosure Agreement) before starting work under the contract.

HSAR 3052.237-70, Qualifications of Contractor Employees, is required in services contracts which require contract employees to have recurring access to Government facilities, sensitive information, or resources. This clause requires each contractor employee to be a U.S. citizen or a lawful permanent resident alien and authorizes the use of background checks and other security tools to investigate employee

backgrounds when appropriate. This clause must be flowed down to all subcontractors at any tier where the subcontractor may have the same kind of access described for the prime contractor.

If the contract at issue concerns information technology, then HSAR 3052.237-71, Information Technology Systems Access for Contractors, imposes additional measures concerning employees. For example, no contractor personnel may begin working on the contract until they have: (1) been approved for access to the IT systems, (2) received a security briefing about IT security, and (3) signed a non-disclosure agreement form. HSAR 3052.237-72, Contractor Personnel Screening for Unclassified Information Technology Access, authorizes DHS access to the contractor's and subcontractors' facilities, installations, operations, documentation, databases, and personnel used in the performance of the contract for inspection, investigation, and audit to safeguard against threats to DHS data and information systems.

▶ **Special Streamlined Acquisition Authority**

HSAR Subpart 3013.70 implements Section 833 of the Act regarding DHS's special streamlined acquisition authority, which applies to any procurement made between November 25, 2002 and September 30, 2007. Under the rule, the department's micro-purchase authority is capped at \$7,500, significantly higher than the \$2,500 generally permitted in the FAR. Similarly, the threshold for DHS's simplified acquisition authority is set at \$200,000 for contracts awarded or performed in the United States and at \$300,000 for those contracts awarded or performed outside the United States. Finally, the rule authorizes DHS to deem any item or service to be a "commercial item" for purposes of the test program provided at FAR Subpart 13.5, and increases the contract limitation to \$7.5 million -- a fifty percent increase over the FAR's \$5 million limitation.

▶ **Unsolicited Proposals**

HSAR Subpart 3015.6, which implements Section 834 of the Act, addresses unsolicited proposals. Each agency contracting activity has delegated authority to establish its own procedures for receiving and evaluating unsolicited proposals within certain parameters. The agency contact point shall make an initial review determination within seven calendar days of receiving a proposal. If the proposal meets the requirements of FAR 15.606-1(a), the agency is required to acknowledge receipt within three calendar days of making the initial review determination, advising the offeror of the general timeframe of completing the evaluation. If the proposal does not meet the above-mentioned FAR requirements, then the agency shall return the proposal within three calendar days after the determination is made, along with a written explanation of the reasons for rejection. Comprehensive evaluations will be completed within 60 calendar days of making the initial review determination.

▶ **Personal Service Contracts**

Implementing Section 832 of the Act, HSAR 3037.104 authorizes DHS to acquire the personal services of experts and consultants. In addition, if the services are necessary due to an urgent homeland security need, this authority allows for the use of such personal service contracts without regard to the pay limitation of 5 U.S.C. § 3109. In order to utilize these contracts, a formal determination must be made that the duties sought will not exceed one year, that there are no DHS personnel with the necessary skills available, that an excepted appointment can not be made, and that

a non-personal services contract is not practicable.

▶ **Disputes and Appeals**

HSAR Subpart 3033.2 establishes the Department of Transportation Board of Contract Appeals (DOTBCA) as the venue for appeals of contract disputes. This requirement does not apply to appeals of TSA contracts (other than those pertaining to requirements of the Contract Disputes Act), as TSA has its own rules governing disputes. The rule does authorize alternative dispute resolution (ADR) in accordance with DOTBCA ADR procedures by mutual consent of the parties.

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