Subpart 225.77 - ACQUISITIONS IN SUPPORT OF OPERATIONS IN AFGHANISTAN

Parent topic: Part 225 - FOREIGN ACQUISITION

225.7700 Scope.

This subpart implements—

(a) Section 892 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181);

(b) Section 886 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181), as amended by section 842 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239);

(c) Section 826 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239); and

(d) The determinations by the Deputy Secretary of Defense regarding participation of the countries of the South Caucasus or Central and South Asia in acquisitions in support of operations in Afghanistan.

(e) Section 1216 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328).

225.7701 Definitions.

As used in this subpart—

“Product from Afghanistan” means a product that is mined, produced, or manufactured in Afghanistan.

“Service from Afghanistan” means a service including construction that is performed in Afghanistan predominantly by citizens or permanent resident aliens of Afghanistan.

“Small arms” means pistols and other weapons less than 0.50 caliber.

“Source from Afghanistan” means a source that—

(1) Is located in Afghanistan; and

(2) Offers products or services from Afghanistan.

“Textile component” is defined in the clause at 252.225-7029 , Acquisition of Uniform Components for Afghan Military or Afghan National Police.

225.7702 Acquisitions not subject to the enhanced authority to acquire products or services from Afghanistan.

225.7702-1 Acquisition of small arms.

(a) Except as provided in paragraph (b) of this section, when acquiring small arms for assistance to the Army of Afghanistan, the Afghani Police Forces, or other Afghani security organizations—

(1) Use full and open competition to the maximum extent practicable, consistent with the provisions of 10 U.S.C. 3201;

(2) If use of other than full and open competition is justified in accordance with FAR Subpart 6.3, ensure that—

(i) No responsible U.S. manufacturer is excluded from competing for the acquisition; and

(ii) Products manufactured in the United States are not excluded from the competition; and

(3) If the exception at FAR 6.302-2 (unusual and compelling urgency) applies, do not exclude responsible U.S. manufacturers or products manufactured in the United States from the competition for the purpose of administrative expediency. However, such an offer may be rejected if it does not meet delivery schedule requirements.

(b) Paragraph (a)(2) of this section does not apply when—

(1) The exception at FAR 6.302-1 (only one or a limited number of responsible sources) applies, and the only responsible source or sources are not U.S. manufacturers or are not offering products manufactured in the United States; or

(2) The exception at FAR 6.302-4 (international agreement) applies, and United States manufacturers or products manufactured in the United States are not the source(s) specified in the written directions of the foreign government reimbursing the agency for the cost of the acquisition of the property or services for such government.

225.7702-2 Acquisition of uniform components for the Afghan military or the Afghan police.

Any textile components supplied by DoD to the Afghan National Army or the Afghan National Police for purpose of production of uniforms shall be produced in the United States.

225.7703 Enhanced authority to acquire products or services from Afghanistan.

225.7703-1 Acquisition procedures.

(a) Subject to the requirements of 225.7703-2, except as provided in 225.7702, a product or service (including construction), in support of operations in Afghanistan, may be acquired by—

(1) Providing a preference for products or services from Afghanistan in accordance with the evaluation procedures at 225.7703-3 ;

(2) Limiting competition to products or services from Afghanistan; or

(3) Using procedures other than competitive procedures to award a contract to a particular source or sources from Afghanistan. When other than competitive procedures are used, the contracting officer shall document the contract file with the rationale for selecting the particular source(s).

(b) For acquisitions conducted using a procedure specified in paragraph (a) of this subsection, the justification and approval addressed in FAR Subpart 6.3 is not required.

(c) When issuing solicitations and contracts for performance in Afghanistan, follow the procedures at PGI 225.7703-1 (c).

225.7703-2 Determination requirements.

Before use of a procedure specified in 225.7703-1 (a), a written determination must be prepared and executed as follows:

(a) For products or services to be used only by the military forces, police, or other security personnel of Afghanistan, the contracting officer shall—

(1) Determine in writing that the product or service is to be used only by the military forces, police, or other security personnel of Afghanistan; and

(2) Include the written determination in the contract file.

(b) For products or services not limited to use by the military forces, police, or other security personnel of Afghanistan, the following requirements apply:

(1) The appropriate official specified in paragraph (b)(2) of this subsection must determine in writing that it is in the national security interest of the United States to use a procedure specified in 225.7703-1 (a), because—

(i) The procedure is necessary to provide a stable source of jobs in Afghanistan; and

(ii) Use of the procedure will not adversely affect—

(A) Operations in Afghanistan (including security, transition, reconstruction, and humanitarian relief activities); or

(B) The U.S. industrial base. The authorizing official generally may presume that there will not be an adverse effect on the U.S. industrial base. However, when in doubt, the authorizing official should coordinate with the applicable subject matter expert specified in PGI 225.7703-2 (b).

(2) Determinations may be made for an individual acquisition or a class of acquisitions meeting the criteria in paragraph (b)(1) of this subsection as follows:

(i) The head of the contacting activity is authorized to make a determination that applies to an individual acquisition with a value of less than $150 million.

(ii) The Principal Director, Defense Pricing, Contracting, and Acquisition Policy, and the following officials, without power of redelegation, are authorized to make a determination that applies to an individual acquisition with a value of $150 million or more or to a class of acquisitions:

(A) Defense Logistics Agency Component Acquisition Executive.

(B) Army Acquisition Executive.

(C) Navy Acquisition Executive.

(D) Air Force Acquisition Executive.

(E) Commander of the United States Central Command Joint Theater Support Contracting Command (C–JTSCC).

(3) The contracting officer—

(i) Shall include the applicable written determination in the contract file; and

(ii) Shall ensure that each contract action taken pursuant to the authority of a class determination is within the scope of the class determination, and shall document the contract file for each action accordingly.

(c) See PGI 225.7703-2 (c) for formats for use in preparation of the determinations required by this subsection.

225.7703-3 Evaluating offers.

Evaluate offers submitted in response to solicitations that include the provision at 252.225-7023 , Preference for Products or Services from Afghanistan, as follows:

(a) If the low offer is an offer of a product or service from Afghanistan, award on that offer.

(b) If there are no offers of a product or service from Afghanistan, award on the low offer.

(c) Otherwise, apply the evaluation factor specified in the solicitation to the low offer.

(1) If the price of the low offer of a product or service from Afghanistan is less than the evaluated price of the low offer, award on the low offer of a product or service from Afghanistan.

(2) If the evaluated price of the low offer remains less than the low offer of a product or service from Afghanistan, award on the low offer.

225.7703-4 Solicitation provisions and contract clauses.

(a) Use the provision at 252.225-7023, Preference for Products or Services from Afghanistan, in solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial products and commercial services, that provide a preference for products or services from

Afghanistan in accordance with 225.7703-1(a)(1). The contracting officer may modify the 50 percent evaluation factor in accordance with contracting office procedures.

(b) Use the clause at 252.225-7024, Requirement for Products or Services from Afghanistan, in solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial products and commercial services, that include the provision at 252.225-7023, Preference for Products or Services from Afghanistan, and in the resulting contract.

(c) Use the clause at 252.225-7026, Acquisition Restricted to Products or Services from Afghanistan, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial products and commercial services, that -

(1) Are restricted to the acquisition of products or services from Afghanistan in accordance with 225.7703-1(a)(2); or

(2) Will be directed to a particular source or sources from Afghanistan in accordance with 225.7703-1(a)(3).

(d) Use the clause at 252.225-7029, Acquisition of Uniform Components for Afghan Military or Afghan National Police, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial products and commercial services, for the acquisition of any textile components that DoD intends to supply to the Afghan National Army or the Afghan National Police for purposes of production of uniforms.

(e) When the Trade Agreements Act applies to the acquisition, use the appropriate clause and provision as prescribed at 225.1101 (5) and (6).

(f) Do not use any of the following provisions or clauses in solicitations or contracts that include the provision at 252.225-7023, the clause at 252.225-7024, or the clause at 252.225-7026:

(1) 252.225-7000, Buy American - Balance of Payments Program Certificate.

(2) 252.225-7001, Buy American and Balance of Payments Program.

(3) 252.225-7002, Qualifying Country Sources as Subcontractors.

(4) 252.225-7035, Buy American - Free Trade Agreements - Balance of Payments Program Certificate.

(5) 252.225-7036, Buy American - Free Trade Agreements - Balance of Payments Program.

(6) 252.225-7044, Balance of Payments Program - Construction Material.

(7) 252.225-7045, Balance of Payments Program - Construction Material Under Trade Agreements.

(g) Do not use the following clause or provision in solicitations or contracts that include the clause at 252.225-7026:

(1) 252.225-7020, Trade Agreements Certificate.

(2) 252.225-7021, Trade Agreements.

225.7704 Acquisitions of products and services from South Caucasus/Central and South Asian (SC/CASA) state in support of operations in Afghanistan.

225.7704-1 Applicability of trade agreements.

As authorized by the United States Trade Representative, the Secretary of Defense has waived the prohibition in section 302(a) of the Trade Agreements Act (see subpart 225.4) for acquisitions by DoD, and by GSA on behalf of DoD, of products and services from SC/CASA states in direct support of operations in Afghanistan.

225.7704-2 Applicability of Balance of Payments Program.

The Deputy Secretary of Defense has determined, because of importance to national security, that it would be inconsistent with the public interest to apply the provisions of the Balance of Payments Program (see subpart 225.75) to offers of end products other than arms, ammunition, and war materials (i.e., end products listed in 225.401-70) and construction materials from the SC/CASA states that are being acquired by or on behalf of DoD in direct support of operations in Afghanistan.

225.7704-3 Solicitation provisions and contract clauses.

Appropriate solicitation provisions and contract clauses are prescribed as alternates to the Buy American-Trade Agreements-Balance of Payments Program solicitation provisions and contract clauses prescribed at 225.1101 and 225.7503 .

225.7705 Prohibition on use of funds for contracts of certain programs and projects in Afghanistan that cannot be safely accessed.

This section implements section 1216 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328).

225.7705-1 Prohibition.

The contracting officer shall not obligate or expend funds for a construction or other infrastructure program or project of the Department in Afghanistan if military or civilian personnel of the United States Government or their representatives, with authority to conduct oversight of such program or project, cannot safely access such program or project. In limited circumstances, this prohibition may be waived in accordance with section 225.7705-2 .

225.7705-2 Waiver of prohibition.

(a) The prohibition in 225.7705-1 may be waived upon issuance of a determination, approved in accordance with paragraph (b) of this section, that—

(1) The program or project clearly contributes to United States national interests or strategic objectives;

(2) The Government of Afghanistan has requested or expressed a need for the program or project;

(3) The program or project has been coordinated with the Government of Afghanistan, and with any other implementing agencies or international donors;

(4) Security conditions permit effective implementation and oversight of the program or project;

(5) Safeguards to detect, deter, and mitigate corruption and waste, fraud, and abuse of funds are in place;

(6) Adequate arrangements have been made for the sustainment of the program or project following its completion, including arrangements with respect to funding and technical capacity for sustainment; and

(7) Meaningful metrics have been established to measure the progress and effectiveness of the program or project in meeting its objectives.

(b) The following officials are authorized to approve the determination described in paragraph (a) of this section:

(1) In the case of a program or project with an estimated lifecycle cost of less than $1 million, by the contracting officer.

(2) In the case of a program or project with an estimated lifecycle cost of $1 million or more, but less than $20 million, by the senior U.S. officer in the Combined Security Transition Command-Afghanistan.

(3) In the case of a program or project with an estimated lifecycle cost of $20 million or more, but less than $40 million, by the Commander of United States Forces-Afghanistan.

(4) In the case of a program or project with an estimated lifecycle cost of $40 million or more, by the Secretary of Defense.

(c) Congressional notification is required within 15 days of issuance of a determination to waive the prohibition for programs or projects valued at $40 million or more in accordance with paragraph (b)(4) of this section.

225.7705-3 Procedures.

(a) The contracting officer shall not obligate or expend funds for contracts for a construction or other infrastructure program or project in Afghanistan, awarded after December 23, 2016, unless the requiring activity provides the following documentation:

(1) Written affirmation that military or civilian personnel of the United States Government or their representatives, with authority to conduct oversight of such program or project, can safely access such program or project; or

(2)(i) For programs or projects valued at less than $1 million, sufficient information upon which to base the determination described in 225.7705-2 (a); or

(ii)(A) For programs or projects valued at $1 million or more, a copy of the approved determination described in 225.7705-2 (a) and (b); and

(B) For programs or projects valued at $40 million or more, a copy of the Congressional notification described in 225.7705-2 (c).

(b) After contract award, the contracting officer shall review the requiring activity's progress reports (e.g., contracting officer's representative reports) that addresses whether access continues to be safe or security conditions continue to permit effective implementation and oversight of the contract. If the requiring activity does not affirm continued safe access or, if a determination to waive the prohibition has been approved, that security conditions continue to permit effective implementation and oversight of the contract, then the contracting officer shall consult with the requiring activity to take any appropriate actions.

225.7798 Enhanced authority to acquire products or services of Djibouti in support of DoD operations in Djibouti.

See Class Deviation 2016-O0005, dated February 4, 2016, implementing section 1263 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2015, Enhanced Authority to Acquire Goods and Services of Djibouti in Support of DoD Activities in the United States Africa Command Area of Responsibility, as amended by section 886(c) of the NDAA for FY 2016. Contracting officers shall limit competition to, or provide a preference for, products or services of Djibouti for procurements in support of DoD operations in the Republic of Djibouti (Djibouti).

225.7799 Authority to acquire products and services (including construction) from Afghanistan or from countries along a major route of supply to Afghanistan.

See Class Deviation 2016-O0004, dated December 29, 2015, implementing section 801 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2010, as most recently amended by sections 886 and 1214 of the NDAA for FY 2016 (Pub. L. 114-92) and section 886 of the NDAA for FY 2008, most recently amended by section 886 of the NDAA for FY 2016. Contracting officers are authorized to limit competition to, or provide a preference for products mined, produced, or manufactured in, or services from the Central Asian states, Pakistan, the South Caucasus, or Afghanistan, unless the products are in the AbilityOne Procurement Catalog and are available from a qualified nonprofit agency in a timely fashion to support mission requirements.