



September 22, 2017

TO: Heads of Contracting Activity

FROM: Andrea Brandon, Deputy Assistant Secretary for Office of Grants and Acquisition Policy and Accountability and Senior Procurement Executive

SUBJECT: Federal Acquisition Class Deviation – (Number 17-02) Implementing Revised Statutory Conditions for the Exercise of Special Emergency Procurement Authorities (FAR Parts 2, 10, 12, 13, 18 and 26)

PURPOSE: This class deviation expands conditions under which the Assistant Secretary for Financial Resources (ASFR) may increase the acquisition thresholds in certain emergencies.

BACKGROUND: On December 23, 2016, the President signed into law the National Defense Authorization Act (NDAA) for FY-2017. Section 816 of that Act expanded the permissible uses of special emergency procurement authorities to include facilitating international disaster assistance and supporting domestic emergency or natural disaster relief efforts as defined by the Robert T. Stafford Disaster Relief and Emergency Assistance Act. In addition, Section 1641 of that same National Defense Authorization Act made special emergency procurement authorities applicable to defense against or recovery from a cyber-attack. The NDAA was effective when enacted and was not contingent upon any implementing regulation. This deviation is needed because HHS cannot predict when the statutory requirements will be implemented in the FAR.

EFFECTIVE DATES: This class deviation is effective upon signature and remains in effect until it is incorporated in the FAR or is otherwise rescinded.

CAAC Consultation: The attached memorandum from the Chairman of the Civilian Agency Acquisition Council constitutes the consultation required by FAR 1.404 for class deviations.

REQUIREMENTS: Upon the determination of the ASFR to increase acquisition thresholds or apply other FAR Part 18 acquisition flexibilities, HHS contracting officers may apply the FAR as revised by this deviation as shown in Attachment 1.

APPLICABILITY: This class deviation applies to all contract actions where the special emergency procurement triggers listed in 41 U.S.C. §1903(a) are in effect as determined by the Senior Procurement Executive or designee.

Point of Contact: Any questions regarding the content of this memorandum may be directed to Lori Sakalos, Senior Procurement Analyst, Office of Acquisition Policy, by phone at 202-751-5294 or by email at lori.sakalos@hhs.gov.

Deviations are shown by highlighted [bracketed bold additions] and ~~strikeouts~~.

1. In FAR 2.101, add new definitions for "emergency" and "major disaster" and revise the existing definitions for "micro-purchase threshold" and "simplified acquisition threshold" as follows:

FAR 2.101

("Emergency" as used in 6.208, 13.201, 13.500, 18.001, 18.202, 18.203 and subpart 26.2 means an occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States (42 U.S.C. 5122).

"Major disaster" as used in 6.208, 13.201, 13.500, 18.001, 18.202, 18.203 and subpart 26.2 means any natural catastrophe (including any hurricane, tornado, storm, high water, wind driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or regardless of cause, any fire, flood, or explosion, in any part of the United States, which, in the determination of the President, causes damage of sufficient severity and magnitude to warrant major disaster assistance under the Stafford Act to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby (42 U.S.C. 5122).]

"Micro-purchase threshold" means \$3,500, except it means-

- (1). For acquisitions of construction subject to 40 U.S. C. chapter 31, subchapter IV, Wage Rate Requirements (Construction), \$2,000;
- (2). For acquisitions of services subject to 41 U. S. C. chapter 67, Service Contract Labor Standards, \$2,500; and
- (3). For acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a contingency operation or to facilitate defense against or recovery from [cyber,] nuclear, biological, chemical or radiological attack[; international disaster assistance (22 U.S.C.2292 et seq.); or an emergency or major disaster (42 U.S.C. 5122),] as described in 13.201(g)(1), except for construction subject to 40 U.S.C. chapter 31, subchapter IV, Wage Rate Requirements (Construction) (41 U.S. C. 1903)-
 - (i) \$20,000 in the case of any contract to be awarded and performed, or purchase to be made, inside the United States; and
 - (ii) \$30,000 in the case of any contract to be awarded and performed, or purchase to be made, outside the United States.

"Simplified acquisition threshold" means \$150,000 (41 U.S.C. 134), except for-

- (1) Acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a contingency operation or to facilitate defense against or recovery from [cyber,] nuclear, biological, chemical, or radiological attack [; international disaster assistance (22 U.S.C. 2292 et seq.); or an emergency or major disaster (42 U.S.C. 5122),] (41 U.S.C. 1903), the term means-
 - (i) \$750,000 for any contract to be awarded and performed, or purchase to be

made, inside the United States; and

(ii) \$1.5 million for any contract to be awarded and performed, or purchase to be made, outside the United States; and

(2) Acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a humanitarian or peacekeeping operation (10 U.S.C.2302), the term means \$300,000 for any contract to be awarded and performed, or purchase to be made, outside the United States.

2. In FAR 10.001. add the word "cyber" as follows:

10.001 Policy.

(a) Agencies shall-

(1) Ensure that legitimate needs are identified and trade-offs evaluated to acquire items that meet those needs;

(2) Conduct market research appropriate to the circumstances-

(i) Before developing new requirements documents for an acquisition by that agency;

(ii) Before soliciting offers for acquisitions with an estimated value in excess of the simplified acquisition threshold;

(iii) Before soliciting offers for acquisitions with an estimated value less than the simplified acquisition threshold when adequate information is not available and the circumstances justify its cost;

(iv) Before soliciting offers for acquisitions that could lead to consolidation or bundling (15 U.S.C.644 (e) (2) (A) and 15 U.S.C. 657q);

(v) Before awarding a task or delivery order under an indefinite- delivery/indefinite-quantity (1D/IQ) contract (e.g., GWACs, MACs) for a noncommercial item in excess of the simplified acquisition threshold (10 U.S.C. 2377(c)); and

(vi) On an ongoing basis, take advantage (to the maximum extent practicable) of commercially available market research methods in order to effectively identify the capabilities of small businesses and new entrants into Federal contracting that are available in the marketplace for meeting the requirements of the agency in furtherance of-

(A) A contingency operation or defense against or recovery from [cyber,] nuclear, biological, chemical, or radiological attack; and

(B) Disaster relief to include debris removal, distribution of supplies, reconstruction, and other disaster or emergency relief activities (see 26.205); and

(3) Use the results of market research to-

(i) Determine if sources capable of satisfying the agency's requirements exist;

(ii) Determine if commercial items or, to the extent commercial items suitable to meet the agency's needs are not available, nondevelopmental items are available that-

(A) Meet the agency's requirements;

(B) Could be modified to meet the agency's requirements; or

(C) Could meet the agency's requirements if those requirements were modified to a reasonable extent;

(iii) Determine the extent to which commercial items or nondevelopmental items could be incorporated at the component level;

(iv) Determine the practices of firms engaged in producing, distributing, and supporting commercial items, such as type of contract, terms for warranties, buyer financing, maintenance and packaging, and marking;

(v) Ensure maximum practicable use of recovered materials (see Subpart 23.4) and promote energy conservation and efficiency;

(vi) Determine whether consolidation is necessary and justified (see 7.107-2) (1. §u.s.c. 657g);

(vii) Determine whether bundling is necessary and justified (see 7.107-3) (15 U.S.C. 644(e)(2)(A)).

(viii) Assess the availability of electronic and information technology that meets all or part of the applicable accessibility standards issued by the Architectural and Transportation Barriers Compliance Board at 36 CFR Part 1194 (see Subpart 39.2).

3. In FAR 12. 102(f), add the word "cyber" as follows:

12.102 Applicability.

(f)(1) Contracting officers may treat any acquisition of supplies or services that, as determined by the head of the agency, are to be used to facilitate defense against or recovery from [cyber,] nuclear, biological, chemical, or radiological attack as an acquisition of commercial items.(2) A contract in an amount greater than \$19 million that is awarded on a sole source basis for an item or service treated as a commercial item under paragraph (f)(1) of this section but does not meet the definition of a commercial item as defined at FAR 2.101 shall not be exempt from-

(i) Cost accounting standards (see subpart 30.2); or

(ii) Certified cost or pricing data requirements (see 15.403).

4. In FAR 13. 201. revise 13. 201(g) to read as follows:

FAR 13.201 General.

(g)(1) For acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a contingency operation or to facilitate defense against or recovery from [cyber,] nuclear, biological, chemical, or radiological attack, [; international disaster assistance; an emergency or major disaster,] the micro- purchase threshold is -

(i) \$20,000 in the case of any contract to be awarded and performed, or purchase to be made, inside the United States; and

(ii) \$30,000 in the case of any contract to be awarded and performed, or purchase to be made, outside the United States.

(2) Purchases using this authority must have a clear and direct relationship to the support of a contingency operation or the defense against or recovery from [cyber,] nuclear, biological, chemical, or radiological attack [; international disaster assistance; or an emergency or major disaster].

5. In FAR 13.500. revise FAR 13.5009(c) to read as follows: FAR 13.500 General.

(c) Under 41 U.S.C. 1903, the simplified acquisition procedures authorized in this subpart may be used for acquisitions that do not exceed \$13 million when-

- (1) The acquisition is for commercial items that, as determined by the head of the agency, are to be used in support of a contingency operation or to facilitate the defense against or recovery from [cyber,] nuclear, biological, chemical, or radiological attack[; international disaster assistance; or an emergency or major disaster,];or
- (2) The acquisition will be treated as an acquisition of commercial items in accordance with 12.102(f)(1).

6. In FAR 18.001. revise the definition of "emergency acquisition flexibilities" to read as follows:

18.001 Definition.

"Emergency acquisition flexibilities", as used in this part, means flexibilities provided with respect to any acquisition of supplies or services by or for an executive agency that, as determined by the head of an executive agency, may be used-

- (a) In support of a contingency operation as defined in 2.101;
- (b) To facilitate the defense against or recovery from [cyber,] nuclear, biological, chemical, or radiological attack against the United States; et=
- [(c) In support of a request from the Secretary of State or the Administrator of the United States Agency for International Development to facilitate the provision of international disaster assistance; or]
- (e)[d]) When the President issues an emergency declaration or a major disaster declaration.

7. In FAR 18.202. revise the text to read as follows:

18.202 Defense or recovery from certain ~~attacks~~ [events].

(a) *Micro-purchase threshold.* The threshold increases when the head of the agency determines the supplies or services are to be used to facilitate defense against or recovery from [cyber,] nuclear, biological, chemical, or radiological attack [; International disaster assistance; or an emergency or major disaster]. (See 2.101.)

(b) *Simplified acquisition threshold.* The threshold increases when the head of the agency determines the supplies or services are to be used to facilitate defense against or recovery from [cyber,] nuclear, biological, chemical, or radiological attack[; international disaster assistance; or an emergency or major disaster].(See 2.101.)

(c) Commercial items to facilitate defense and recovery. Contracting officers may treat any acquisition of supplies or services as an acquisition of commercial items if the head of the agency determines the acquisition is to be used to facilitate the defense against or recovery from [cyber,] nuclear, biological, chemical, or radiological attack. (See 12.102(f)(1) and 13.500(c)[2].)

(d) *Simplified procedures for certain commercial items.* The threshold limits authorized for use of this authority may be increased when it is determined the acquisition is to facilitate defense against or recovery from [cyber,] nuclear, biological, chemical, or radiological attack [; international disaster assistance; or an emergency or major disaster].(See 13.500(c).)

8. In FAR 26.202. revise the text to read as follows:

26.202 Local area preference.

[(a)] When awarding emergency response contracts during the term of a major disaster or emergency declaration by the President of the United States under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U. S. C. 5121, et seq.), preference shall be given, to the extent feasible and practicable, to local firms. Preference may be given through a local area set-aside or an evaluation preference.

[(b)] When using the authority under the Stafford Act, see 2.101 for the authority to increase the micro-purchase and simplified acquisition thresholds.]