



August 16, 2010

Federal Acquisition Regulations System  
General Services Administration  
Regulatory Secretariat (MVCB)  
Attn: Ms. Hada Flowers  
1800 F. Street, N.W.  
Room 4041  
Washington, D.C. 20405

Re: FAR Case 2008-007, Additional Requirements for Market Research

Dear Ms. Flowers:

The Aerospace Industries Association (AIA) on behalf of its more than 300 companies is pleased to respond to your request for comments and recommendations on the interim rule "Additional Requirements for Market Research" (FAR Case 2008-007), which implements Section 826 of the National Defense Authorization Act for Fiscal Year 2008. The interim rule was effective as of June 16, 2010.

AIA member companies embody every high-technology manufacturing segment of the U.S. aerospace and defense industry from commercial aviation and avionics, to manned and unmanned defense systems, to space technologies and satellite communications.

Section 826 supplemented existing requirements in 10 U.S.C. 2377, Preference for Acquisition of Commercial Items, in two distinct ways. The first change required that all executive agencies perform preliminary market research tasks before awarding task and delivery orders over the simplified acquisition threshold (SAT)<sup>1</sup> under IDIQ contracts. The second change essentially added a new statutory requirement that executive agencies take steps to ensure that prime contractors of a contract (or task order or delivery order) in excess of \$5,000,000 conduct market research on purchases over the SAT threshold. The stated purpose of 10 U.S.C. 2377 (b)(2) is to ensure that market research leads to the incorporation of commercial items or non-developmental items (NDI) at all levels of contract performance. In practice, this means that even where commercial products or services do not wholly exist to fulfill the instant requirements, the Government is required to tailor those instant requirements to utilize existing commercial technology to accomplish the agency's mission and to take advantage of the economy afforded by the use of commercial items. Aside from those requirements, Section 826 also requires that DoD develop appropriate training in the art of conducting market research.

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<sup>1</sup> The SAT threshold is currently \$100,000, but proposed to increase to \$150,000 in FAR Case 2008-024, Inflation Adjustment of Acquisition-Related Thresholds published February 4, 2010

In most respects, the interim FAR rule closely follows the legislative mandate in Section 826 and we applaud the FAR Council for implementing rules expanding market research requirements that attempt to increase the visibility of, and enforce the now longstanding preference for, the use of commercial items and services articulated in the Federal Acquisition Streamlining Act of 1994 (FASA) and other relevant statutes. However, there are several industry concerns regarding implementation of the rule at the subcontract level in FAR Part 44 that require clarity and/or some changes, as set forth below.

### Specific Comments and Concerns with the Interim Rule

First, AIA notes that while FAR Part 10 contains scant detail on market research, there are existing market research techniques and information embedded in Chapter 2 of both the current and revised draft versions of the DoD Commercial Item (CI) Handbook that might be instructive for executive agencies to use as part of any training requirements.<sup>2</sup> Those DoD resources emphasize the significance of market research to the task of incorporating commercial products and services into the drafting of Government requirements. To the extent that DoD is currently pursuing an affordability initiative aimed at achieving 2-3 percent savings from the procurement budget, and that civilian agencies have been likewise directed by OMB to achieve increased savings in their acquisitions, increasing market research capability within the Government is a desirable objective.

Second, the interim rule confuses the prime contractor's role in procuring supplies and services to support its deliverable to the government ("subcontracting"), and the unique and completely distinct role of a prime contractor with a contract to operate a government facility and act in the place of the USG in procuring supplies and services solely to support the activities at the government facilities (acting as an "agent" of the government). The role of "agent" is a unique one and has a legal significance well beyond that of purchasing or subcontracting. We believe the interim rule incorrectly confuses these two roles.

Third, with regard to the requirement to perform market research, we see no reason to make any distinction between a contractor "subcontracting" for "other than commercial items" and a contractor acting as a government "agent" to procure items in support of a government facility. In addition, by mixing the discussion of the "subcontracting" and "government agent" roles, the interim rule seems to be creating a lower standard for "agents." As written, the language seems to require contractors to perform the necessary market research whenever they are procuring "other than commercial items," but "purchasing agents are only required to perform market research when procuring "other than commercial items" with a value that will exceed the simplified acquisition threshold." The rationale and the need for this distinction are unclear and unnecessary.

Fourth, the interim rule (44.402 (b)) requires the contractor to perform market research "to the maximum extent practicable..." However, Section 826 requires market research "as may be necessary..." There is a significant difference between these two requirements. If a contractor has significant and long-standing work in a particular type of product or service and has a subcontracting/purchasing organization that is specifically focused on those products, they are likely to have tremendous expertise in that market and the need for additional market

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<sup>2</sup> See <http://www.acq.osd.mil/dpap/Docs/cihandbook.pdf> for existing CI Handbook. The revised draft CI Handbook has not been published yet, but is scheduled to be published late in calendar year 2010.

research would not be as great as a contractor procuring other than commercial items for a new line of products or technologies. Contractors should have the ability to tailor their market research “as necessary” to reflect their knowledge and experience of the supplies and services being procured. We strongly recommend the Council use the requirement as stated in Section 826.

Fifth, the interim rule inserts language in 44.402 (b) regarding the purpose of conducting market research. This language is duplicative and unnecessary. The language in 44.403 (b) and 52.244-6 (Alternate I) repeats exactly the language that appears in 10.001(a)(3). The FAR guidance for conducting market research is clearly described in Part 10 and there is no need to repeat that same language elsewhere in the FAR.

Sixth, the interim rule inserts in 44.4 the Section 826 requirement for contractors with contracts exceeding \$5M to perform market research for “other than commercial items.” We believe this is misplaced. The title of Subpart 44.4 is “Subcontracts for Commercial items and Commercial Components.” Incorporating a requirement in 44.4 that pertains to “other than commercial items” would be incorrect, and not serve the intended purpose.

Finally, the purpose of clause 52.244-6 is to limit the clauses that a Part 15 prime contractor is required to flow down to a subcontractor selling commercial items. It is unclear why it is necessary for the interim rule to add a new Alternate I that is focused on the role of a contractor as a government “purchasing agent,” why that language restates the existing Part 10 market research language, and why this added language regarding procuring “commercial items” is necessary to implement Section 826, when Section 826 is focused on procurement of “other than commercial items.”

#### Recommendations:

1. The Section 826 requirement to perform market research for other than commercial items should be placed in 44.303. CPSRs are focused on “other than commercial items”...precisely the types of procurements contemplated by Section 826. We recommend that 44.303 be revised as follows: (a) The results of market research. For contracts that exceed \$5M, the contractor shall conduct market research, as necessary, (see 10.002) when procuring other than commercial items in accordance with Section 826 of Public Law 110-181 (10 U.S.C. 2377 (c)).”
2. 44.400 states “This subpart prescribes the policies limiting the contract clauses a contractor may be required to apply to any subcontractor that is furnishing commercial items or commercial component in accordance with...Section 826 of Public law 110-181.” As noted above, this is incorrect. FAR 44.400 is entirely focused on subcontracts for “commercial items;” Section 826 is entirely focused on subcontracts for “other than commercial items.” In addition, in restating the preamble to 44.400, the word “prime” is left out of the phrase “...the contract clauses a prime contractor may be required to apply...”
  - a. Recommend revise 44.400 to delete “and Section 826 of Public Law 110-181 (10 U.S.C. 2377 (c))”
  - b. Recommend reinsert “prime” before the word “contractor.”
3. 44.402. As noted above, this discussion of a contractor procuring “other than commercial items” is completely misplaced in 44.402. The discussion of a contractor “acting as a purchasing agent for the government...” is also misplaced and unnecessary. The description of the purpose of market research in 44.402 (b) is

duplicative of the language in 10.002. We recommend that 44.402 be revised to delete the new paragraph (b) in its entirety.

4. 52.244-6. The interim rule adds a new Alternate I specifically to address the requirement for market research when procuring "other than commercial items." Given that the entire focus of 52.244-6 is the procurement of "commercial items," it is unclear why the discussion of "other than commercial items" would be appropriate to be inserted here. As noted above, the proper place for such language is in the 44.303 requirements for CPSRs. We recommend deletion of 52.244-6 Alternate I in its entirety. Return 52.244-6 to the earlier (Dec 09) version.

#### Conclusion

While the interim rule moves towards achieving fuller integration of commercial products and services in the Government's acquisition process by increasing the level of market research requirements conducted by Government personnel and within the subcontracting environment, the changes described above are needed to improve the final rulemaking. On behalf of its member companies, AIA thanks you for the opportunity to provide these comments and welcomes an opportunity to discuss them further with you. If you have any questions or need any additional information, please contact Susan Tonner at 703-358-1087 or [susan.tonner@aia-aerospace.org](mailto:susan.tonner@aia-aerospace.org).

Sincerely,



Richard K. Sylvester  
Vice President, Acquisition Policy