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**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 212, 213, 219, 237, and 252**

**[Docket DARS-2016-0034]**

**RIN 0750-AJ06**

**Defense Federal Acquisition Regulation Supplement: Competition for Religious-Related Services Contracts (DFARS Case 2016-D015)**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Proposed rule.

**SUMMARY:** DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act that provides the competition requirements for religious-related services contracts on a U.S. military installation.

**DATES:** Comments on the proposed rule should be submitted in writing to the address shown below on or before **[Insert date 60 days after date of publication in the FEDERAL REGISTER]**, to be considered in the formation of a final rule.

**ADDRESSES:** Submit comments identified by DFARS Case 2016-D015, using any of the following methods:

- o Federal eRulemaking Portal: <http://www.regulations.gov>.

Search for "DFARS Case 2015-D015." Select "Comment Now" and

follow the instructions provided to submit a comment. Please include "DFARS Case 2015-D015" on any attached documents.

- o Email: osd.dfars@mail.mil. Include DFARS Case 2016-D015 in the subject line of the message.

- o Fax: 571-372-6094.

- o Mail: Defense Acquisition Regulations System, Attn: Ms. Lee Renna, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check [www.regulations.gov](http://www.regulations.gov), approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

**FOR FURTHER INFORMATION CONTACT:** Ms. Lee Renna, telephone 571-372-6095.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD is proposing to revise the DFARS to implement section 898 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2016 (Pub. L. 114-92). Section 898 requires that DoD not preclude a nonprofit organization from competing for a contract for religious-related services on a U.S. military installation. Religious-related services typically performed on U.S. military

installations range from choir and pastoral services, to counseling of service members and their families to help them deal with the unique pressures and stresses associated with military service. The latter includes, but is not limited to, suicide prevention; coping with post-traumatic stress, depression, and sexual assault; providing marriage and family counseling; and providing religious and moral guidance. The Senate Committee Report 114-49 associated with the NDAA for FY 2016 made the following statement regarding the recommendation for a provision to ensure non-profit organizations can compete on contracts for such religious-related services:

"It has come to the committee's attention that the Department of Defense has at times restricted competition for religious services contracts on U.S. military installations to for-profit firms. The committee believes certain non-profit entities such as religious organizations can provide valuable competition and are well-qualified to participate in this particular category of services and should not be precluded from competing for these types of contracts."

## **II. Discussion and Analysis**

The following changes to the DFARS are proposed to implement section 898 in a manner that minimizes the impact on small businesses:

- A new DFARS subpart 237.7X, Competition for Religious-Related Services, is proposed to implement the requirements of section 898 for the covered services. Specifically, this subpart establishes that a nonprofit organization may not be precluded from competing for contracts for religious-related services on a U.S. military installation. A cross-reference to DFARS 219.270 is also provided to direct contracting officers to guidance on the treatment of set-asides for small business concerns.

- A new DFARS section 219.270, Religious-Related Services—Inclusion of Nonprofit Organizations, is proposed to clarify that when acquiring religious-related services on a U.S. military installation, nonprofit organizations may not be precluded from competing, even when a small business set-aside is used, and that none of the exceptions for other than full and open competition at FAR 6.302-5(b)(4) through (7) may be used for such procurements. These changes are necessary to ensure that contracting officers issue solicitations for the covered services on a competitive basis and are aware that set-asides may still be used, though offers from nonprofit organizations may be considered for award. In addition, this section clarifies that if an apparently successful offeror has not represented in its offer that it is a small business concern of a type that meets set-aside requirements of the solicitation,

then the contracting officer shall verify that the offeror is registered in the System for Award Management (SAM) database as a nonprofit organization.

- A new provision is proposed at DFARS 252.219-70XX, Competition for Religious-Related Services, which is prescribed at DFARS 219.270 for use in solicitations for the acquisition of religious-related services on a U.S. military installation that will be set-aside for one of the small business programs identified at FAR 19.000(a)(3). The solicitation not only provides notice to potential offerors that a nonprofit will not be precluded from competing for award, but also advises nonprofit organizations that the contracting officer will verify that it is registered as a nonprofit organization in SAM before considering it for award. Conforming changes are made to DFARS 212.301(f)(vii) to ensure the provision is also used in commercial acquisitions.

- Similar to the changes proposed at DFARS 219.270, a new paragraph (b) is proposed to be added to DFARS 213.7001 to direct contracting officers not to use the sole source authority at FAR 6.302-5(b)(4) and not to exclude a nonprofit organizations from participating in competitive procurements under the 8(a) program.

- A definition of “nonprofit organization” is also provided where the term is used in the rule. The definition proposed in the rule is the same as the definition provided in FAR subpart 26.4 and the clause at 52.226-6, Promoting Excess Food Donations to Nonprofit Organizations. The definition also aligns with the description of a nonprofit organization provided in the SAM database.

### **III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items**

This rule implements section 898 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2016 (Pub. L. 114-92). Section 898 requires that DoD may not preclude a nonprofit organization from competing for a contract for religious-related services on a U.S. military installation. The rule creates one new provision, DFARS 252.219-70XX, Competition for Religious-Related Services.

#### **A. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT)**

41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the SAT. It is intended to limit the applicability of laws to such contracts or subcontracts. 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the Federal

Acquisition Regulation (FAR) Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Director, Defense Procurement and Acquisition Policy (DPAP), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations.

B. Applicability to Contracts for the Acquisition of Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

41 U.S.C. 1906 governs the applicability of laws to contracts for the acquisition of commercial items, and is intended to limit the applicability of laws to contracts for the acquisition of commercial items. 41 U.S.C. 1906 provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for the acquisition of commercial items. Likewise, 41 U.S.C. 1907 governs the applicability of laws to COTS items, with the Administrator for Federal Procurement Policy the decision authority to determine that it is in the best interest of the Government to apply a provision of law to acquisitions of COTS

items in the FAR. The Director, DPAP, is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations.

C. Determination

DoD is proposing to apply the requirements of section 898 to contracts at or below the SAT and contracts for the acquisition of commercial items, not including COTS items. Section 898 addresses competitive acquisitions for religious-related services to be performed on a U.S. military installation. It is in the best interest of the Federal Government to apply the rule to acquisitions not greater than the SAT and those for the acquisition of commercial items (excluding COTS items), because a portion of DoD's acquisitions for these types of services will result in the award of contracts at or below the SAT or for commercial items. An exception for contracts not greater than the SAT or for the acquisition of commercial items, would exclude contracts intended to be covered by the law, thereby undermining the overarching public policy purpose of the law. Since section 898 of the NDAA for FY 2016 specifically focuses on the competitive acquisition of a service requirement, the changes contemplated by this rule are not applicable to contracts for COTS items. DoD will make the final determination with regard to application to acquisitions below the SAT and to

those for commercial items after receipt and analysis of public comments.

#### **IV. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

#### **V. Regulatory Flexibility Act**

DoD expects that this rule may 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. Therefore, an initial regulatory flexibility analysis has been prepared and is summarized as follows:

The purpose of this proposed rule is to revise the Defense Federal Acquisition Regulation Supplement to implement policies and procedures to ensure that DoD does not preclude a nonprofit

organization from competing for a contract for religious-related services on a U.S. military installation.

This rule is necessary to implement section 898 of the National Defense Authorization Act for Fiscal Year (FY) 2016, which is the legal basis for the rule.

This rule may have a significant economic impact on a substantial number of small businesses that typically compete for contracts for the covered services, since most of the contracts awarded for religious-related services fall within the dollar range reserved exclusively for small business participation (over \$3,500, but no more than \$150,000). The rule may also have a significant economic impact on nonprofit organizations, since these entities are normally precluded from competing for such acquisitions that are reserved for small business concerns.

According to data obtained from the Federal Procurement Data System (FPDS) for FY 2015, DoD awarded 290 contracts to 232 unique businesses for religious-related services under the Product Services Code (PSC) for Chaplain Services (G002), the majority of which (95 percent) are valued below the simplified acquisition threshold (SAT) of \$150,000. Of those 290 contracts, approximately 160 contracts were awarded to 130 unique small business concerns (56 percent). The FPDS data further indicates that of the 160 contracts awarded to small

business, 137 of the contracts were awarded on the basis of a total small business set-aside, including one total set-aside to women-owned small business concerns. In addition, in order to carry out the Congressional mandate of section 898, this rule restricts the use of the sole source authorities at FAR 6.302-5(b)(4) through (7) when contracting for religious-related services on U.S. military installations; as a result, such solicitations would have to be competed in a manner that allows nonprofit organizations to participate. Analysis of FPDS data for FY 2015 reveals that four contracts were awarded to a HUBZone small business concern on a sole source basis.

Additional FPDS data was obtained for FY 2016, which showed DoD awarded 256 contracts to 212 unique businesses for religious-related services under PSC G002, of which the majority (91 percent) were valued below the SAT. Of those 256 contracts, 158 contracts (62 percent) were awarded to 130 unique small business concerns (63 percent). 116 contracts were solicited using a total small business set-aside. Again, as a result of this rule, such solicitations could not preclude a nonprofit organization from submitting an offer and being considered for award. Six contracts were awarded on a sole source basis under the Small Business Act 8(a) Business Development Program (8(a) Program); however, this rule restricts DoD contracting officers from using the sole source authority at FAR 6.302-5(b)(4) for

the 8(a) Program to procure religious-related services to be performed on a U.S. military installation. In order to comply with section 898, any requirements currently in the 8(a) program would be required, upon renewal, to be solicited in a manner that does not preclude a nonprofit organization from the competition.

There are no reporting, recordkeeping, or other compliance requirements associated with this rule. The rule does not duplicate, overlap, or conflict with any other Federal rule.

There are no significant alternative approaches to the proposed rule that would minimize the impact on small entities and meet the stated objectives of the statute.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities. DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2016-D015), in correspondence.

## **VI. Paperwork Reduction Act**

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

**List of Subjects in 48 CFR Parts 212, 213, 219, 237, and 252**

Government procurement.

**Jennifer L. Hawes,**

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212, 213, 219, 237, and 252 are proposed to be amended as follows:

1. The authority citation for 48 CFR parts 212, 213, 219, 237, and 252 continues to read as follows:

**Authority:** 41 U.S.C. 1303 and 48 CFR chapter 1.

**PART 212—ACQUISITION OF COMMERCIAL ITEMS**

2. Amend section 212.301 by adding new paragraph (f)(vii)(D) to read as follows:

**212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.**

\* \* \* \* \*

(f) \* \* \*

(vii) \* \* \*

(D) Use the provision at 252.219-70XX, Competition for Religious-Related Services, as prescribed in 219.270-3.

\* \* \* \* \*

**PART 213—SIMPLIFIED ACQUISITION PROCEDURES**

3. Amend section 213.7001 by—

a. Redesignating paragraphs (a)(1) and (2) as paragraphs (a)(1)(i) and (ii), respectively;

- b. Redesignating the introductory text as paragraph (a) (1);
- c. Redesignating paragraph (b) as paragraph (a) (2); and
- d. Adding a new paragraph (b).

The addition reads as follows:

**213.7001 Procedures.**

\* \* \* \* \*

(b) To comply with section 898 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114-92), contracting officers shall not use the sole source authority at FAR 6.302-5(b) (4) to purchase religious-related services to be performed on a U.S. military installation. For competitive purchases under the 8(a) program, contracting officers shall not exclude a nonprofit organization from the competition. See 219.270 for additional procedures.

**PART 219—SMALL BUSINESS PROGRAMS**

4. Add sections 219.270, 219.270-1, 219.270-2, and 219.270-3 to subpart 219.2 to read as follows:

**219.270 Religious-related services—inclusion of nonprofit organizations.**

**219.270-1 Definition.**

Nonprofit organization, as used in this section, means any organization that is—

- (1) Described in section 501(c) of the Internal Revenue Code of 1986; and

(2) Exempt from tax under section 501(a) of that Code.

**219.270-2 Procedures.**

(a) To comply with section 898 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114-92), when acquiring religious-related services to be performed on a U.S. military installation—

(1) Do not preclude a nonprofit organization from competing, even when the acquisition is set aside for small businesses as identified in FAR 19.000(a)(3); and

(2) Do not use any of the sole source exceptions at FAR 6.302-5(b)(4) through (7) for such acquisitions.

(b) If the apparently successful offeror has not represented in its quotation or offer that it is one of the small business concerns identified in FAR 19.000(a)(3), the contracting officer shall verify that the offeror is registered in the System for Award Management database as a nonprofit organization.

**219.270-3 Solicitation provision.**

Use the provision 252.219-70XX, Competition for Religious-Related Services, in solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial items, for the acquisition of religious-related services to be performed on U.S. military installations, when the acquisition is set aside for any of the small business concerns identified in FAR 19.000(a)(3).

**Part 237–Service Contracting**

5. Add new subpart 237.7X to read as follows:

**SUBPART 237.7X–COMPETITION FOR RELIGIOUS-RELATED SERVICES**

Sec.

237.7X00 Scope of subpart.

237.7X01 Definition.

237.7X02 Policy.

**SUBPART 237.7X–COMPETITION FOR RELIGIOUS-RELATED SERVICES**

**237.7X00 Scope of subpart.**

This subpart provides policy and guidance for the acquisition of religious-related services to be performed on a U.S. military installation in accordance with section 898 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114-92).

**237.7X01 Definition.** As used in this subpart–

Nonprofit organization means any organization that is–

(1) Described in section 501(c) of the Internal Revenue Code of 1986; and

(2) Exempt from tax under section 501(a) of that Code.

**237.7X02 Policy.**

(a) A nonprofit organization shall not be precluded from competing for a contract for religious-related services to be performed on a U.S. military installation.

(b) See 219.270 when an acquisition for religious-related services to be performed on a U.S. military installation is set

aside for any of the small business concerns identified in FAR 19.000(a)(3).

**PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

6. Add section 252.219-70XX to read as follows:

**252.219-70XX Competition for Religious-Related Services.**

As prescribed in 219.270-3, use the following provision:

COMPETITION FOR RELIGIOUS-RELATED SERVICES (DATE)

(a) Definition. As used in this provision—

Nonprofit organization means any organization that is—

(1) Described in section 501(c) of the Internal Revenue Code of 1986; and

(2) Exempt from tax under section 501(a) of that Code.

(b) A nonprofit organization is not precluded from competing for a contract for religious-related services to be performed on a U.S. military installation notwithstanding that a nonprofit organization is not a small business concern as identified in FAR 19.000(a)(3).

(c) If the apparently successful offeror has not represented in its offer or quotation that it is a small business concern identified in FAR 19.000(a)(3), as appropriate to the solicitation, the Contracting Officer will verify that the offeror is registered in the System for Award Management (SAM) database as a nonprofit organization.

(End of provision)

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