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We welcome all suggestions for reprints. Please mail or e-mail your reprint suggestions directly to:

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**EMERGENCY PROCUREMENT FLEXIBILITIES: A
FRAMEWORK FOR RESPONSIVE CONTRACTING &
GUIDELINES FOR USING SIMPLIFIED ACQUISITION
PROCEDURES**

Office of Federal Procurement Policy*

EXECUTIVE SUMMARY. The ongoing war on terrorism has intensified the need for responsive, results-based contracting. The Office of Federal Procurement Policy (OFPP) has developed this guidance to assist agencies in meeting this challenge. The guidance is divided into two parts. The first part of the guidance addresses general considerations for agile contracting support. It describes both current flexibilities and new flexibilities authorized by the Homeland Security Act of 2002 (HSA), P.L. 107-296, to meet the demands associated with protecting our homeland. The second part of the guidance lays out considerations for using simplified acquisition procedures, one of the tools available to agencies when doing business in the marketplace. The HSA significantly expands application of simplified acquisition procedures and requires OFPP to issue guidance on their application to purchases over \$5 million.

A FRAMEWORK FOR RESPONSIVE CONTRACTING

The ongoing war on terrorism has placed new demands on the federal acquisition workforce for responsive and effective results from our acquisition processes. Agencies have numerous longstanding authorities and several new authorities at their disposal for meeting these critical demands. To ensure timely contracting support, agencies need to be aware of their options and apply the flexibility, or combination of flexibilities, that is most appropriate for meeting a given requirement.

** Reprinted from the Office of Federal Procurement Policy (www.whitehouse.gov/omb). Several modifications are made, including endnotes and exclusion of its Administrator's transmittal memorandum.*

Agencies should therefore consider the following points as they address needs related to the fight on terrorism.

Existing Flexibilities

The statutory and regulatory frameworks that currently govern executive branch purchasing provide agencies with a myriad of tools to gain effective and efficient access to the marketplace. These tools provide considerable flexibility, including authority to make purchases at will when conditions warrant -- particularly when there is unusual and compelling urgency or national security issues are at stake.

Examples of existing tools whose flexibility may prove to be particularly beneficial for emergency procurements include the following.¹

Simplified Open Market Competitions for Commercial Items

Agencies are authorized to use simplified procedures, on a test basis through the end of calendar year 2003, for the acquisition of commercial items in amounts above the simplified acquisition threshold (SAT) -- i.e., \$100,000 with certain exceptions -- but not exceeding \$5 million. Contracting officers may use any simplified source selection procedure provided in Part 13 of the Federal Acquisition Regulation (FAR), subject to specific dollar limitations applicable to the particular procedure selected. This means, among other things, that agencies:

- are exempt from the competition requirements in FAR Part 6;
- are not required to establish a formal evaluation plan or competitive range, conduct discussions with vendors, or score quotations from offerors; and
- are permitted to limit documentation required in justifying contract award decisions.

Competition Among Pre-Qualified Sources

Multiple award schedule (MAS) contracts and multiple award task and delivery order contracts each offer mechanisms for efficiently applying competitive pressures to a small number of capable contractors before placing orders. When used as designed, these vehicles can facilitate timely acquisitions of the latest innovations offered in the marketplace. See FAR Subpart 8.4 (on MAS contracts), FAR 16.504 (on

multiple award contracts), and FAR 16.505 (on ordering procedures for multiple award contracts).

The fair opportunity process, described at FAR 16.505(b), governs the placement of orders under multiple award task and delivery order contracts awarded pursuant to FAR Subpart 16.5. This process can accommodate situations where the effort required to respond to a potential order may be more resource intensive (e.g., because requirements are complex or need continued development). For these circumstances, FAR 16.505(b) (5) (ii) describes a multi-phased approach that an agency might use to quickly focus the competition on the contract holders most likely to submit the highest value solutions.

The MAS is designed for inter-agency contracting. In addition, many multiple award contracts are available for inter-agency use. These contracts are generally known as multi-agency contracts and are subject to the Economy Act. Some of the inter-agency contracts for information technology are operated by executive agents designated by OMB pursuant to § 5112(e) of the Clinger-Cohen Act. These vehicles are referred to as government-wide acquisition contracts (GWACs). The infrastructure for an online contract directory of inter-agency contracts has been developed and will be populated over the coming months with general information about multi-agency contracts, GWACs, and blanket purchase agreements (BPAs) under MAS contracts. (BPAs are "accounts" agencies may establish with MAS contractors that provide a simplified method of filling anticipated repetitive needs.) The directory will be operational as a market research tool later this year (See <http://www.contractdirectory.gov>).

HUBZone Small Business Contracts

The Historically Underutilized Business Zone (HUBZone) program authorizes agencies to acquire goods and services from qualified program participants on a sole-source basis up to certain thresholds. This authority enables agencies to rapidly identify and enter into contracts with capable small business sources. See FAR Subpart 19.13.

Oral Solicitations

FAR 15.203(f) authorizes the use of oral solicitations when processing a written solicitation would delay the acquisition of supplies

and services to the detriment of the government and a synopsis is not required (e.g., in order to support emergency situations).

Letter Contracts

FAR 16.603 authorizes agencies to enter into "letter" contracts (i.e., a written preliminary contractual instrument) when the government's interests demand that work on a requirement start immediately and negotiating a definitive contract is not possible in sufficient time to meet this demand. The letter contract would need to include a definitization schedule.

Limited Source Selections

FAR Part 6 allows source selections to be limited for various reasons, such as when: (1) there is only one responsible source, (2) unusual and compelling urgency exists, (3) disclosure of the agency's needs would compromise the national security, or (4) full and open competition is not in the public interest. Section 856(a) of the HSA calls for agencies to use these authorities when appropriate.

Innovative Contracting

Agencies are fully authorized to innovate and use sound business judgment that is otherwise consistent with law and within the limits of their authority. Agencies should not assume that a new approach is prohibited simply because the FAR does not specifically recognize it. As FAR 1.102-4(e) states, the fact that the FAR does not endorse a particular strategy or practice does not necessarily mean that it is prohibited by law, executive order, or other regulation.

New Flexibilities

The HSA provides a temporary set of emergency procurement authorities to help agencies address new challenges related to the ongoing war against terrorism. These authorities are set forth in Title VIII, Subtitle F, of the HSA.² Section 852 provides that the authorities may be used for "the procurement of property or services by or for an executive agency that, as determined by the head of the executive agency, are to be used to facilitate defense against or recovery from terrorism or nuclear, biological, chemical, or radiological attack."

The HSA authorities largely augment existing flexibilities. In particular, they permit agencies to:

- make expansive use of simplified acquisition procedures (see § 855(b));
- waive certain accounting, compliance, and other statutory requirements when purchasing non-commercial items (i.e., treating non-commercial items as commercial item purchases for purposes of these laws) (see § 855(a));
- apply micro-purchase flexibilities to actions up to \$7,500 -- e.g., which would allow agencies to authorize use of purchase cards, following appropriate managerial actions, for buys over the current limit of \$2,500, provided the purchase does not exceed \$7,500 (see § 854);³
- apply flexibilities generally available only under the simplified acquisition threshold (i.e., \$100,000), while simultaneously expanding application of the small business reservation, to contracts in support of a humanitarian, peacekeeping, or contingency operation in values up to --
 - \$200,000 if the contract is awarded and performed inside the United States, and
 - \$300,000 if the contract is awarded and performed outside the United States (see § 853);⁴ and
- make awards to 8(a) and HUBZone small businesses on a sole-source basis in any amount when an agency elects to use the following exceptions to full and open competition: (i) only one responsible source, (ii) unusual and compelling urgency, (iii) ensuring national security is not compromised, or (iv) full and open competition not in the public interest (see § 856(b)).

The HSA's authorities apply to procurements where solicitations have been issued on or after January 24, 2003, but not later than November 24, 2003. An interim FAR rule to implement these authorities was published in the Federal Register on January 27, 2003 (68 Fed. Reg. 4047). See Table 1 for a summary of procurement flexibilities with augmented application to emergency procurements.

Authorization to expand application of certain flexibilities (e.g., micro-purchases, simplified purchases under SAT) does not automatically increase an individual's purchasing authority. These decisions must be made by individual agencies on either a case-by-case or blanket basis as appropriate. In this regard, new flexibilities, like existing ones, must be applied in ways that secure cost-effective, quality, and timely results from contractors. Agencies must remain vigilant to avoid practices that focus solely on administrative ease, ignore adequate and necessary oversight, or otherwise fail to effectively consider value to the taxpayer. For example, agencies planning to use purchase cards for emergency procurements over \$2,500 need to accelerate their efforts to implement remedial action plans to prevent abuse and waste. These steps will help ensure that cards are used more strategically to make effective investment of taxpayer dollars in support of critical activities.

TABLE 1
Procurement Flexibilities with Augmented Application for
Emergency Procurements

Authority	General Application	Application for Emergency Procurements by or for any Executive Agency (for solicitations issued before 11/24/03)	Application for Emergency Procurements by or for DOD (with funds DOD obligates by 9/30/03)*
Simplified acquisition procedures	<ul style="list-style-type: none"> • Any acquisition under \$100,000. • Acquisitions of commercial items up to \$ 5 million. 	<ul style="list-style-type: none"> • Any product or service; any amount. See § 855(b) of HSA; FAR Subpart 13.5. 	<ul style="list-style-type: none"> • Same as general application.
Waiver of certain accounting, compliance & other laws	<ul style="list-style-type: none"> • Acquisitions of commercial items in any amount. 	<ul style="list-style-type: none"> • Any product or service in any amount. See § 855(a) of HSA; FAR 12.102(f)(1). 	<ul style="list-style-type: none"> • Same as general application but also includes all buys for biotechnology & biotechnology services. See § 836(a)(2) of FY 02 Defense Authorization At; FAR 12.102()(2) tcf

TABLE 1 (Continued)

Micro-purchase authority -- e.g., for open market purchase card transactions**	• Purchases up to \$2,500.	• Purchases up to \$7,500. See § 854 of HSA; FAR 2.101, 13.201, 19.502-1.	• Purchases up to \$15,000. See § 836(a)(1)(A) of FY 02 Defense Authorization At; FAR 2.101, 13.201, 19.502-1 tc
Simplified Acquisition Threshold for contingency, humanitarian, peacekeeping operations	• Purchases up to \$200,000 awarded & performed outside U.S.	• Purchases up to \$200,000 if awarded & performed in U.S. • Purchases up to \$300,000 if awarded & performed outside U.S. See § 853 of HSA; FAR 2.101, 19.502-2(a).	• Procurements up to \$250,000 if awarded & performed in U.S. • Purchase up to \$500,000 if awarded & performed outside U.S. See § 836(a)(1)(B) of FY 02 Defense Authorization At; FAR 2.101. tc
Sole-source HUBZone contracting	• Purchases up to \$5 million for manufacturing. • Purchases up to \$3 million for everything other than manufacturing.	• Purchases in any amount if conducted pursuant to 10 U.S.C. 2304(c)(1), (2), (6), & (7) or 41 U.S.C. 253(c)(1), (2), (6), or (7). See § 856(b) of HSA. FAR 19.1306.	• Same as general application.

*Congress is considering extension of these authorities.

**The Buy American Act clause at 52.225-1 is inapplicable to micro-purchases. Small business set-aside requirements are also inapplicable. However, agencies should consider qualified small businesses for micro-purchases.

Market Research

The more insight an agency has into marketplace capabilities, the better equipped the agency will be to effectively apply a given flexibility. Section 858 of the HSA requires executive agencies to research the market on an ongoing basis to identify marketplace capabilities, including the capabilities of small businesses and new entrants into federal contracting. A wide range of resources exists, including

commercial databases that may be used to facilitate agency research of the marketplace.

Management Review

Agencies are strongly encouraged to evaluate the internal structures currently used to manage acquisitions made with the flexibilities that the HSA augments (e.g., simplified acquisition procedures, sole-source HUBZone contracting, purchase card transactions). Agencies should make adjustments as necessary to accommodate the significantly higher dollar, and in some cases broader range, of buys that they may conduct using these authorities. Timely and effective review will be important to the success of emergency procurement actions.

USE OF SIMPLIFIED ACQUISITION PROCEDURES

Section 855(b) of the HSA authorizes agencies to use simplified acquisition procedures for procurements that are undertaken to fight or recover from terrorism and certain other threats. This section provides guidance on use of these procedures, including acquisitions over \$5 million, as required by section 855(b)(2) of the HSA.

Background

As discussed above, agencies using simplified acquisition procedures are exempt from the competition requirements of FAR Part 6, are not required to establish a formal evaluation plan or competitive range, conduct discussions with vendors, or score quotations from offerors. Agencies are permitted to limit documentation required in justifying contract award decisions. Simplified acquisition procedures have traditionally been made available to acquisitions under the SAT (generally \$100,000). Section 4202 of the Clinger-Cohen Act authorized expanded application of these authorities in 1996, on a test basis, to acquisitions of commercial items up to \$5 million. The test authority is implemented in FAR Subpart 13.5.

Section 855 of the HSA further expands application of simplified procedures to the procurement of any product or services that is:

- to be used to facilitate the defense against or recovery from terrorism or nuclear, biological, chemical, or radiological attack; and

- made pursuant to a solicitation that is issued on or after January 24, 2003 but not later than November 24, 2003.

Thus, section 855 expands FAR Subpart 13.5 authorities in two ways. First, section 855 allows agencies to use simplified procedures without dollar limit. Second, section 855 permits agencies to apply Subpart 13.5 to purchases that do not meet the definition of a commercial item at FAR 2.101 -- i.e., allowing procurements of non-commercial items to be treated as if they were commercial items for purposes of applying simplified procedures. Section 855 also allows non-commercial items to be treated as commercial items with respect to certain other provisions of law, such as section 34 of the Office of Federal Procurement Policy Act (41 U.S.C. § 430), which addresses the inapplicability of certain laws to commercial item contracts and subcontracts. Section 34 is implemented at FAR Subpart 12.5.

Guidelines

The following guidelines are intended to help agencies manage the broadened application of simplified procedures to federal emergency procurements. These guidelines focus on the various stages leading to contract award: (1) acquisition planning and market research, (2) solicitation and evaluation, (3) contract pricing, (4) competition, and (5) documentation. The guidelines also briefly discuss the acquisition of non-commercial items.

While geared primarily to acquisitions over \$5 million, agencies should benefit from reviewing these guidelines for purchases below this amount, especially for purchases of non-commercial products or services that are being treated as commercial items based on the authority of section 855. In most instances, the guidelines are simply reminders. In all instances, they are meant to supplement, not supplant, existing agency guidance.

Acquisition Stages

Acquisition Planning and Market Research

Acquisition planning allows the key disciplines that drive acquisitions to develop an integrated agency strategy. Market research allows agency stakeholders to gain insight into the marketplace, including commercial terms and conditions, factors likely to affect

contract price, and the range of contractor capabilities. The extent of market research will vary, depending on factors such as urgency, estimated dollar value, complexity, and past experience.

Anticipate needs for emergency situations whenever possible.

Many requirements to prepare the nation for emergency situations will be known or can be anticipated sufficiently in advance of when a contract action must be executed -- i.e., many actions will not need to be undertaken under emergency conditions. In these cases, agencies must seek to ensure that adequate acquisition planning and market research are performed, as envisioned in FAR Parts 7 and 10, respectively.

Consider the abilities of small businesses and new entrants.

Concerted efforts to identify the capabilities of small businesses and new entrants may reveal important untapped sources for technological innovations. Use of simplified acquisition procedures should make it easier for agencies to do business with these sources, especially small businesses, which otherwise might experience difficulty competing in more formal settings where participation costs are higher.

Mitigate risk when circumstances limit or preclude planning and market research

Although streamlined source selection processes can facilitate rapid customer response, they cannot make up in speed for the potential loss in value (e.g., less favorable pricing and terms and conditions) that is likely to result when front-end analysis is not undertaken. Therefore, in situations where time does not permit adequate planning and market research, an agency should carefully consider limiting the value and length of the contract to address only the most immediate emergency. This approach will permit the agency to plan the award of a contract that can support its ongoing requirements in a more strategic manner.

Solicitation and Evaluation

The challenges associated with protecting our homeland impose new demands on agencies. To effectively engage private sector sources, solicitations should identify the problem the agency seeks to address, establish goals to be achieved, or otherwise provide a reasonable

description of needs in performance terms. Contractors then can decide if they wish to compete and how to structure their offers.

Be sure the market can respond to the agency's requirements.

Because agencies may be faced with having to prepare solicitations for new types of needs within highly compressed timeframes and with limited knowledge, they may find particular benefit in refining requirements during the selection process as their understanding of the marketplace and its capabilities evolves. These refinements may help ensure that the resulting contract reflects the best possible fit between contractor capabilities and agency needs which, in turn, will put the government and the contractor in a better position to manage performance and cost risks.

Give a reasonable indication of what evaluation factors matter to the agency.

While not required by Part 13, agencies should consider the value of advising offerors of the relative importance of all cost or price evaluation factors in comparison to all non-cost or price factors for purchases over \$5 million. This general indicator will help interested sources develop proposals that align with program priorities. Equally important, agencies should be able to incorporate this basic concept of competitive negotiation policy, as reflected in FAR Part 15, into a streamlined acquisition without having to invoke the formalities generally associated with Part 15.

Contract Pricing

Agencies must take steps to secure fair and reasonable contract prices. FAR 13-106-3(a)(1) anticipates that this responsibility will be met, whenever possible, by obtaining competitive quotes or offers. In this regard, agencies are generally required to use competition to the maximum extent practicable for actions over \$25,000 that are conducted under Part 13 (see ¶ d., below).

Think about how best to ensure fair and reasonable pricing when competition cannot be used.

While competition remains the government's best prescription for lowering costs and improving program performance, adequate price competition may not be available in many situations where emergency procurements are conducted. Therefore, agencies must be prepared to apply other techniques to protect taxpayer interests. For example, if only one offer is received, the contracting officer should perform price analysis supported by market research. Specifically:

- Agencies might compare the proposed price with prices found reasonable on previous purchases, prices for similar items in a related industry, or an independent government cost estimate.
- Agencies should remember that an offered price is not necessarily fair and reasonable just because the price appears in a catalog or advertisement, or on a price list.

Use firm-fixed price contracts and fixed-price contracts with economic price adjustments to the maximum extent practicable.

As a general matter, an agency buyer will gain some level of protection by entering into a firm-fixed price (FFP) contract or fixed-price with economic price adjustment (FP/EPA) contract to the maximum extent practicable. These contract types tie payment to tangible results -- e.g., a completed and delivered product. Section 8002(d) of the Federal Acquisition Streamlining Act (FASA), 41 U.S.C. 264 note, requires use of these two contract types to the maximum extent practicable when acquiring commercial items. Section 8002(d) also prohibits agencies from using cost-type contracts when purchasing commercial items.

Competition

The benefits of competition are just as significant for a simplified acquisition -- especially one in a significant dollar amount -- as for any other acquisition, in terms of lower taxpayer costs and improved program performance to citizens. A report by the General Accounting Office (no. GAO-01-517, April 2000) on the use of FAR Subpart 13.5 authorities includes examples of how agencies have used competition to secure fair and reasonable pricing while enjoying the efficiencies of streamlined source selection. The report also describes how the unjustified absence of competition unnecessarily increases program costs.

Synopsise actions and provide already access to solicitations through FedBizOpps, unless an exception applies.

As a general matter, Part 13 requires that actions over \$25,000 be synopsized through the government's one-stop point of access on the Internet to procurement opportunities, at <http://www.fedbizopps.gov> (FedBizOpps). Notice need not be provided where an exception enumerated at FAR 5.202 applies. For example, synopsis is not required if unusual and compelling urgency precludes competition to the maximum extent practicable, and the government will be seriously injured if the agency complies with the required wait periods stated in FAR 5.203.

For procurements that are synopsized, FAR 5.102 requires that agencies also make available, through FedBizOpps, solicitations and other information pertinent to the acquisition. However, this requirement does not apply where disclosure would compromise the national security, the nature of the file does not make it cost-effective or practicable for contracting officers to provide access through FedBizOpps, or the agency's senior procurement executive makes a written determination that access through FedBizOpps is not in the government's interest.

Justify and obtain necessary management approvals for sole source procurements.

As stated at FAR 13.501(a), justifications and approvals (J&As) are required if an acquisition is conducted on a sole-source basis (i.e., where the agency solicits and negotiates with only one source). J&As are not required in other circumstances. For instance, if an agency limits competition due to unusual and compelling urgency but is still able to negotiate with more than one source before awarding a contract, a J&A is not be required. However, all acquisitions need to be documented (see ¶ e., below) and appropriate reviews should be made in accordance with applicable agency procedures.

FAR 13.501(a)(2) has been amended in light of section 855 to identify the officials who must approve sole-source acquisitions over \$5 million made under FAR Subpart 13.5. As described in Table 2, below, these officials are the same as those who would provide approval of actions of similar size for needs not subject to Subpart 13.5.

TABLE 2
Approving Officials for Sole-Source Contracts

Value of Sole-Source Contract	Approving Official
Over \$100,000 but not exceeding \$500,000	Contracting officer unless a higher approval level is established in accordance with agency procedures. See FAR 6.304(a)(1) and 13.501(a)(2)(i)
Over \$500,000 but not exceeding \$10 million	Competition advocate for the procuring activity designated pursuant to FAR 6.501 or an official described in FAR 6.304(a)(3) or (a)(4). This authority is non-delegable.
Over \$10 million but not exceeding \$50 million	The head of the procuring activity or the official described in FAR 6.304(a)(3). This authority is non-delegable.
Over \$50 million	The official described in FAR 6.304(a)(4). This authority is non-delegable except as provided in FAR 6.304(a)(4).

Documentation

Keeping a record of actions taken is important, but need not be a highly burdensome exercise. The FAR seeks to achieve an appropriate balance between benefit and effort. FAR 13.501(b) states that the contract file for simplified acquisitions must include: (a) a brief written description of the procedures used in awarding the contract, (b) the number of offers received, and (c) an explanation, tailored to the size and complexity of the acquisition, of the basis for the contract award decision.

Be concise, but clear, in documenting actions taken.

The length of explanation is less important than the cogency of the rationale for actions taken. This insight may be particularly useful in planning future competitions (or limited source selections, when necessary) for similar needs within short timeframes.

Make sure documentation captures any unusual difficulties experienced with sole source acquisitions.

In some situations where a purchase must be made on a sole-source basis, the agency may face difficulties in determining whether a price is fair and reasonable. Documentation should reflect these situations. For example, if price analysis and review of uncertified cost data prove ineffective, but the agency moves forward because foregoing or delaying the procurement is not in the government's best interest, this business decision should be described in the contract file. This information will enable subsequent buyers to understand the circumstances surrounding the prices paid and help the agency take steps to prevent being in the same unfavorable situation should future acquisitions be required for the same need.

Additional Considerations for Non-Commercial Items

As explained above, section 855 allows agencies to treat procurements of non-commercial items under Subpart 13.5 as if they were commercial items for purposes of certain laws. For instance, non-commercial item buys falling within the scope of section 855 are not subject to the Truth in Negotiations Act and Cost Accounting Standards. For examples of other laws that are inapplicable to non-commercial items deemed commercial under section 855, see FAR Subpart 12.5.

Recognize the benefits -- and challenges -- of buying non-commercial items within a commercial items framework.

As a general matter, application of fewer statutory requirements can ease an agency's ability to foster new relationships with non-traditional government contractors who are willing to develop cutting edge technologies for the federal sector. However, the lack of market testing or commercial analogs for these items and the potential absence of competition may present significant challenges.

If the agency determines, after making reasonable attempts, that it cannot structure a contract that will ensure that the government receives the value for which it bargained, the agency should consider conducting the procurement using other flexibilities. Such action will help mitigate unnecessary risk to program performance.

NOTES

1. As discussed later in this section, several of these authorities have been augmented for emergency procurements.

2. This document does not address procurement flexibilities provided expressly to Department of Homeland Security under Subtitle D of the HSA.
3. For acquisitions made by or for the Department of Defense (DOD), the threshold is \$15,000 if the award is made and funds are obligated on or before September 30, 2003. See § 836 of the FY 2002 Defense Authorization Act, P.L. 107-107.
4. For acquisitions made by or for DOD in support of a contingency operation, if award is made and funds are obligated on or before September 30, 2003, these values may go up to: (a) \$250,000 for actions inside the United States and (b) \$500,000 for actions outside the United States. See § 836 of the FY 2002 Defense Authorization Act.