



DEPARTMENT OF HOMELAND SECURITY

48 CFR Parts 3002, 3007, 3009, 3016, 3034, 3035, and 3052

[Docket No. DHS-2009-0006]

RIN 1601-AA49

Homeland Security Acquisition Regulation; Lead System Integrators [HSAR Case 2009-003]

AGENCY: Office of the Chief Procurement Officer, DHS

ACTION: Final rule.

SUMMARY: This final rule implements statutory restrictions on contractors acting as lead system integrators in the acquisition of DHS major systems, if they have direct financial interests in the development or construction of the system.

DATES: *Effective Date:* This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Nancy Harvey, Senior Procurement Analyst, at (202) 447-0956 for clarification of content. Please cite HSAR Case 2009-003.

SUPPLEMENTARY INFORMATION:

- I. Background
- II. Discussion of Comments
- III. Discussion of Final Rule

IV. Regulatory Analyses

A. Executive Order 12866 Assessment

B. Regulatory Flexibility Act

C. Paperwork Reduction Act

D. National Environmental Policy Act

I. Background

DHS published an interim rule at 75 FR 41097 on July 15, 2010 to implement section 6405 of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Pub. L. No. 110-28, 121 Stat. 112, 176 (2007) (codified as 6 U.S.C. 396; hereinafter "Section 396"). Section 396 places limits on firms that can serve as lead system integrators on DHS acquisitions of major systems. Such contractors may have no direct financial interest in the development or construction of any individual system or element of any system of systems they would integrate, unless one of the exceptions stated in the rule has been satisfied.

This final rule adopts the interim rule with minor changes to the authorities to conform to Public Law 111-350, the recodification of title 41 of the United States Code, and to remove references to DHS's internal delegation of authorities that do not directly affect the HSAR.

II. Discussion of Comments

One source submitted comments on the interim rule. A discussion of the comments is provided below.

1. Comment: One comment supported the rule, but recommended that, for purposes of consistency throughout the Department when executing the policy, the final rule be clarified to ensure that the purchase of Lead System Integrator services for DHS from Government-wide Agency Contracts, Federal Supply Schedules, Multiple Award Contracts, or Interagency Acquisition, also be included in the rule.

DHS Response: DHS notes the support and recommendation but believes that clarification in the regulatory text is unnecessary. The rule prohibits, with limited exceptions, any entity performing lead system integrator functions in the acquisition of a major system by DHS from having any direct financial interest in the development or construction of the system or any element of it. The rule applies without regard to the contract type, contracting method, or contract instrument. Therefore, acquisitions of supplies and services under Government-wide Agency Contracts, Federal Supply Schedules, Multiple Award Contracts, or by means of Interagency Acquisition, are already covered under the rule.

2. *Comment:* The commenter also asked two questions on the implementation of the interim rule. The commenter asked whether it would be appropriate to include the clause at 48 CFR 3052.209-75, Prohibited Financial Interests for Lead System Integrators, by reference or whether the clause should be included as full text. The commenter also wrote that the provision at 3052.209-74 reads as a representation and certification provision, and suggested that the provision should be included in Section K, *Representations and Certifications*, under the Uniform Contract Format, or possibly Section L, *Instructions to Offerors*.

DHS Response: DHS notes that these comments are not requests for changes to the regulatory text, but, rather, are questions on the implementation of the rule. The DHS HSAR Provision and Clause Matrix, available both on the DHS.gov website at <http://www.dhs.gov/acquisition-policies-regulations> and on the FARSite website at <http://farsite.hill.af.mil>, provide answers to both questions. DHS will also respond to the questions in the below paragraphs.

Both the provision at 48 CFR 3052.209-74 and the clause at 48 CFR 3052.209-75 should be used in full text. Given that the provision and the clause would be used infrequently, that is, only in solicitations and resulting

contracts for the acquisition of major systems when the acquisition strategy envisions the use of a lead system integrator, inclusion of the provision and clause in full text will ensure that the potential offerors are fully aware of the restrictions on the use of lead system integrators.

DHS concurs that the provision is a representation and certification provision and should be used in Section K, which incorporates representations, certifications and other statements of offerors.

III. Discussion of Final Rule

Accordingly, the interim HSAR rule published in the Federal Register at 75 FR 41097 is adopted as a final rule with minor changes to the authorities.

IV. Regulatory Analyses.

A. Executive Order 12866 Assessment.

This is not a significant regulatory action under Section 6 of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993, as amended by Executive Order 13563, dated January 21, 2011. The Office of Management and Budget (OMB) has not reviewed it under that Order. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act.

DHS certifies that this final rule amending (HSAR) 48 CFR 3009.5 will not 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. The factual basis for certification is presented in the following analysis of the effects of this rule. Application of the rule is limited to offerors or contractors providing services as lead system integrators or considering the provision of such services. Lead system integrators are limited to contracts for the development or production of major systems, and often involve the contractor performing functions closely associated with inherently governmental functions.

Under this final rule, an entity that receives a contract as a lead system integrator cannot have any direct financial interest in the development or construction of any individual system or element of any system of systems while performing lead system integrator functions in the acquisition of a major system by DHS under this contract. Lead system integrator contracts usually extend several years, and we estimate that a limited number of such contracts are in effect within DHS at any one time. Very

few contracts of this character are awarded in any given year.

The limitations on entities (both large and small) apply only to contractors who choose to perform work for DHS as a lead system integrator. Such an entity could still choose to propose as a subcontractor under the prime contract, thereby mitigating the effect of this rule.

In addition, DHS received no public comments on the interim rule suggesting this rule was a significant economic impact on a substantial number of small entities. Furthermore, this rule is not discretionary and is issued in accordance with the requirements of section 6405 of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Pub. L. No. 110-28, 121 Stat. 112, 176 (2007) (codified as 6 U.S.C. 396; hereinafter "Section 396"), which requires DHS to address these matters in its acquisition regulation.

C. Paperwork Reduction Act.

The rule does not impose any information collection requirements that require the approval of the OMB under 44 U.S.C. 3501, et seq.

D. National Environmental Policy Act.

We have analyzed this rule under DHS Directive 023-01, Environmental Planning Program, which guides the Department

in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321-4370f), and have concluded that this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule, which does not involve any extraordinary circumstances, is categorically excluded under paragraphs A3(b) and A3(d) in Table I of Appendix A of Directive 023-01 because it implements legislation by amending acquisition regulations without changing the regulation's environmental effect.

**List of Subjects in 48 CFR Parts 3002, 3007, 3009, 3016,
3034, 3035, and 3052**

Government procurement.

David R. Dasher,

Acting Deputy Chief Procurement Officer.

Accordingly, DHS adopts as a final rule the interim HSAR rule published in the Federal Register at 75 FR 41097 on July 15, 2010, with the following changes:

PARTS 3002, 3007, 3009, 3016, 3034, 3035, and 3052—

[AMENDED]

1. The authority citation for parts 3002, 3007, 3009, 3016, 3034, 3035, and 3052 is revised to read as follows:

Authority: 5 U.S.C. 301-302, 41 U.S.C. 1707, 41 U.S.C. 1702, and 48 CFR part 1 and subpart 1.3.

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